Centre for
CONSTITUTIONAL
RIGHTS

HIDING BEHIND COOPERATIVE GOVERNANCE - *EQUAL EDUCATION AND AMATOLAVILLE PRIMARY SCHOOL V THE MINISTER OF BASIC EDUCATION AND OTHERS*

By Ms Christine Botha: Legal Officer, Centre for Constitutional Rights

In 2014, the unimaginable death of five-year-old Michael Komape, in a pit latrine at his Limpopo school, revealed the grim reality that South Africa's education system is failing in the most basic sense. Four years later, five-year-old Lumka Mketwa faced the same horrific death at her Eastern Cape school. These inconceivable deaths must be viewed in light of section 29(1) of the Constitution, which obliges the State unconditionally to ensure that every child has access to a school. Access to a school, confirmed by case law, presupposes access to educational resources and appropriate facilities. How then does one explain this disconnect between reality and the constitutional guarantee supported by a budget allocation proportionally higher than the United Kingdom or Germany?

One glaring obstacle in ensuring this constitutional guarantee boiled down to the proverbial passing-of-the-buck(et), made possible by vaguely defined regulations in terms the *South African Schools Act* (the Schools Act). The *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* (Norms and Standards) formed the basis of a constitutional challenge in the recent judgment of *Equal Education and Amatolaville Primary School v the Minister of Basic Education and Others* (the Equal Education judgment).

The Norms and Standards, made in terms of section 5A of the Schools Act, stipulate the minimum infrastructure conditions that public schools must meet within a certain time, relating to electricity, water, sanitation and even laboratories. These Norms and Standards were only promulgated by the Minister of Basic Education (the Minister) after the Bisho High Court ordered the Minister to do so in 2013 (2013 Order). The 2013 Order also required the Minister "to consult with stakeholders directly" before promulgating these Norms and Standards.

The Norms and Standards published, however, remained flawed in that they provided escape loopholes for the Department of Basic Education (the DBE). First, Regulation 4(5)(a) of the Norms and Standards provided that the implementation is "*subject to the resources and co-operation of other governmental agencies and entities responsible for infrastructure...*". In effect, the DBE could not be held responsible for infrastructure failures as the failure could simply be blamed on another State department's reluctance or inability to co-operate. Second, the wording of the Norms and Standards also vaguely provided that only schools "entirely" built of materials such as asbestos had to be "prioritised" within the three-year deadline, which excluded schools built only partly with such materials. Third, the Norms and Standards also provided that all schools with no access to water, electricity or sanitation had to be vaguely "prioritised" by the DBE within a three-year deadline. Fourthly, although progress plans relating to the implementation of these Norms and Standards had to be submitted to the Minister, no provision was made for them to be made public. Lastly,

the Norms and Standards also excluded schools for which upgrade plans existed before these regulations were promulgated.

The civil society organisation, Equal Education, after relentlessly campaigning for amendments to be made to the Norms and Standards, applied to the Bisho High Court for relief. In the Equal Education judgment, the Court agreed with Equal Education that Regulation 4(5)(a), which allows the implementation of the Norms and Standards to be subject to the co-operation of other State departments, offends the constitutional value of accountability, as it prevents the public to hold the Government accountable. The Schools Act requires these regulations to be legally binding and effective, but with Regulation 4(5)(a) no one is directly accountable, which consequently makes these regulations ineffective. Msizi AJ also pointed out that the Minister's argument that her hands are tied in terms of section 41 of the Constitution, which emphasises the principles of co-operative governance, ignores the fact that there is only one Government. Further, the 2013 Order required her to consult with other stakeholders before making these final regulations.

The Minister's peculiar argument that the matter does not concern the right to basic education and that the provision of school infrastructure only needs to be made "progressively available", was found by Msizi AJ to be in clear contrast with the State's unconditional duty relating to the right to basic education. Case law confirmed basic infrastructure to be integral to this right. The Minister's argument would amount to a limitation of this constitutional right, which could only survive scrutiny if the Minister could show on evidence it was a justifiable limitation, in terms of section 36 of the Constitution. The Court also held there was no rational connection for distinguishing between schools built entirely or partly from inappropriate materials. Further, no facts were provided supporting why schools which had pre-existing upgrade plans were excluded. The Minister also failed to explain what is meant by "prioritised" and the Court held in failing to make progress reports publicly available, parents and learners are prohibited from monitoring the State.

The Court consequently declared Regulation 4(5)(a) unconstitutional, and inconsistent with the Schools Act and the 2013 Order. The phrase "entirely" in the Norms and Standards was struck out and replaced with "classrooms built entirely or substantially" from such inappropriate material. The Court declared that all schools not having access to power, water supply or sanitation must comply with the deadline as prescribed, and that all progress reports had to be publicly available within a stipulated period. Lastly, the construction of all schools - regardless of pre-existing upgrade plans - had to comply with the Norms and Standards.

The Equal Education judgment was a victory, but it also highlighted State institutions' lack of understanding of their constitutional duties and the principles of co-operative governance. The Minister defended this application recklessly on the taxpayer's account, despite overwhelming evidence of unsafe schools that speak directly to the lack of an effective accountability model. This could have been addressed by proper co-operative budget

planning beforehand, recognising the DBE's constitutional duty, instead of simply passing the buck(et).