

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 7908/17

In the matter between:

THOZAMA ANGELA ADONISI & 5 OTHERS

Applicants

and

**MINISTER FOR TRANSPORT AND PUBLIC WORKS:
WESTERN CAPE & 11 OTHERS**

Respondents

EQUAL EDUCATION

Amicus Curiae

AMICUS CURIAE'S HEADS OF ARGUMENT

INTRODUCTION

1. Equal Education ('EE') was admitted as *amicus curiae* to these proceedings in an order of court made by the Judge President and by agreement between the parties.¹
2. Equal Education is a membership-based, democratic movement of learners, teachers, parents and community members. Its core objective is to work towards

¹ Granted on 5 February 2019: pp 5957-5958.

achieving quality and equality in South Africa's education system. Youth and learner development is also central to the work of Equal Education.²

3. Equal Education includes among its members approximately 5000 high school learners in 172 schools around the country. Of these, approximately 120 learners attend schools in central Cape Town.³
4. Equal Education's interest in this matter is to draw attention to how the City and the Province's failure to redress spatial apartheid and provide social housing in central Cape Town impacts detrimentally on learners' equal access to and enjoyment of the right to basic education, and in particular on black and coloured learners from working-class households.
5. Many of Equal Education's members are personally affected by the City's and the Province's failures to provide social housing in central Cape Town. They are forced to live in townships far away from, often, better-resourced, safer and better-performing schools in central Cape Town. They travel long, unsafe, exhausting and costly distances in an effort to attend these schools to obtain a better education.⁴
6. Equal Education supports the declaratory and structural relief in paragraphs 2 to 4 of the applicants' amended Notice of Motion.⁵ The applicants seek orders declaring that the Province and City have failed to comply with their

² Equal Education's founding affidavit ("EE's FA") p 1371 para 2.

³ EE's FA p 1371 para 3.

⁴ EE's FA p 1372 para 10.

⁵ EE's FA p 1376, para 18.

constitutional obligations (under sections 25(5), 26(1) and 26(2) of the Constitution) and their statutory obligations to redress spatial apartheid; directing these respondents to comply with their obligations; and obliging them to report to the Court on steps taken to give effect to the directory relief.

7. In supporting this relief, Equal Education highlights the impact that the local and Provincial Government's failure to implement a transformative housing policy in Cape Town has on learners' right to basic education, and related rights (including equality, freedom and security and children's rights). Equal Education seeks to draw attention to the need for Government, at all levels, to recognise the inter-related nature of socio-economic rights.
8. The Western Cape Government has seen fit to respond to Equal Education's intervention by extolling the work done by the Western Cape Education Department to promote access to basic education in Cape Town. But this does not address the fundamental problem that Equal Education has raised – namely, that the practices and policies of *other departments*, in particular the Western Cape Departments of Public Works and Transport and Human Settlements – are impeding the redress of inherited inequalities not only in housing, but also in education.
9. Equal Education also supports the review relief in prayers 6 to 10 of the Notice of Motion, which seek the setting aside of: (a) the Western Cape Provincial Government's decision to designate the properties in dispute ('**Tafelberg properties**') as '*surplus*' under GIAMA,⁶ (b) the Premier and Provincial

⁶ Government Immovable Asset Management Act 19 of 2007.

Cabinet's decision to sell the Tafelberg properties to the Phyllis Jowell School, and (c) the Provincial Cabinet's subsequent decision not to resile from the sale.⁷

10. Equal Education submits that the lawfulness of the decisions under review is also vitiated by the failure of the Premier and the Provincial Cabinet to have proper regard, if any, to the impact of their decisions on the rights of learners under sections 9, 10, 12, 28 and 29 of the Constitution and their constitutional obligation to promote equal access to quality basic education. These failures are evidenced by the rule 53 record, and also justify the relief sought in the applicants' review.

11. We structure these submissions as follows:

11.1. First, we summarise the evidence of the prevailing impact of spatial apartheid on learners' access to and enjoyment of the right to basic education in Cape Town.

11.2. Second, we address the constitutional and statutory obligations of the State to promote equal access to and enjoyment of the right to basic education. We submit that the State's obligations under section 29 of the Constitution, and related rights of learners, require the State to redress spatial apartheid (in addition to the obligations imposed by the constitutional rights the applicants have relied upon).

⁷ EE's FA, p 1376, para 19.

11.3. Third, we address the additional review grounds that Equal Education has raised. In doing so, we explain why it is permissible in this case for Equal Education to raise these grounds, notwithstanding that it is an amicus curiae.

THE IMPACT OF SPATIAL APARTHEID ON LEARNERS' RIGHT TO BASIC EDUCATION

12. The manner and extent to which the persisting apartheid geography in Cape Town impacts on learners' access to and enjoyment of the right to education is addressed in EE's founding affidavit. This evidence is not squarely refuted by the Province (represented in its answer by the Superintendent-General of the Western Cape Education Department, Mr Schreuder).⁸

13. In detailing these impacts, EE relies on:

13.1. questionnaires completed by learners and school principals, which Equal Education obtained in taking instructions in this litigation;⁹

13.2. the expert affidavits of Professor Aslam Fataar, Distinguished Professor in the Department of Education Policy Studies at Stellenbosch University, and Dr Barbara Holtmann, a consultant and advisor in the field of community safety and development; and

⁸ On the WCED's misrepresentation of EE's case, and the inadequacy of its answer, see EE's RA pp 5974-77, paras 6-14 and pp 5980-83, paras 20-27.

⁹ The learners' questionnaires are attached as a single bundle as annexure TM9, pp 1449-1552. The principal of Walmer Secondary School, Mr Jansen's questionnaire is annexure TM10, pp 1553-1556.

- 13.3. the submissions made by parents, learners and principals to the Province in response to the proposed sale of the Tafelberg properties (which are in the Rule 53 record and attached to EE’s founding affidavit).¹⁰
14. The schooling system in and around Cape Town remains unequal, with race and wealth still the major fault-lines. These fault-lines are still expressed geographically. Schools in wealthy, predominantly white suburbs in central Cape Town generally offer greater educational opportunities – with safer and better equipped schools and better qualified teachers – than schools in the poorer, predominantly black and coloured, townships and informal settlements situated on the outskirts of the city.¹¹
15. The persistence of racial and class-based inequalities in the quality of schooling that learners receive is reflected, inter alia, in the Annual National Assessment results of 2014;¹² the 2017 National Senior Certificate Results (which show the matric pass rate and Bachelor degree pass rates); and the 2017 “systemic test results” for mathematics and language in Grades 3, 6 and 9 at schools in the Western Cape.¹³ These results are reported ‘per quintile’, which reflects the socio-economic status of the school’s immediate surrounding community. There are presently five national quintiles for public schools, ranging from

¹⁰ The letter the principal of Sea Point High School, Mr Botha submitted to the Premier is annexure TM11, p 1557. The letter submitted by a teacher at Thandokhulu High School, Mr Slamang, is annexure TM12, pp 1558-1559. The letters that learners submitted to the Premier are collated as annexure TM13, pp 1560-1688. The letters that parents submitted to the Premier are collated in annexures TM14 and TM15, at pp 1689-1702.

¹¹ EE’s FA p 1377 para 20.

¹² EE’s FA p 1377 para 21.

¹³ Annexures TM24 and TM25 to EE’s RA, pp 6080-6082. The gist of these results is summarised in EE’s RA pp 5983 – 85, paras 29-30.

schools in the poorest communities (quintile 1) to schools in the wealthiest communities (quintile 5).¹⁴ The statistics demonstrate that the former model C-schools situated in the wealthier suburbs of central Cape Town generally continue to outperform the schools in poorer township areas and on the Cape Flats. Learners at quintile 4 and 5 schools in Cape Town typically outperform learners at schools in quintiles 1 to 3 on academic assessments.

16. While the WCED takes issue with Equal Education’s high-level of analysis of the geography of schooling in Cape Town, it does not deny that this is generally true. Indeed, Mr Schreuder admits that:

*“[I]t is clear that the legacy of apartheid continues to shape the schooling experiences of many learners in the Western Cape, and that race- and class-based inequalities in the quality of schooling that learners receive do persist”.*¹⁵

17. In response to the persisting inequality in the quality of schooling in Cape Town, and in the hope of getting a better education, thousands of learners living in the surrounding township areas and on the Cape Flats are commuting great distances to attend schools in central Cape Town. This phenomenon of commuting learners manifests daily on all modes of public transport, and has been documented by academics, including Professor Fataar.¹⁶ It was described

¹⁴ The quintile system is described in Prof Fataar’s affidavit pp 1712-1714, paras 7-11. For the distribution of school quintiles across Cape Town, see the maps in annexure TM22 and TM23, pp 6078-6079.

¹⁵ WCED’s AA p 5167, para 75. See also p 5142, para 10; and p 5156, para 47.

¹⁶ See Professor Fataar’s affidavit p 1724, para 24, and his 2009 article ‘Schooling subjectivities across the post-apartheid city’ (annexure AF4) at pp 1841-1859. See also EE’s RA p 5978, para 15 and the further references cited there.

in submissions to the Premier by (amongst others) the principal of Sea Point High School, Mr Botha, the principal of Walmer Secondary School, Mr Jansen and a teacher at Thandokhulu High School, Mr Slamang.¹⁷

18. In response to the WCED's apparent denial of this phenomenon,¹⁸ Professor Fataar obtained confirmation from the principals of thirteen other public schools in central Cape Town that between 60 and 95% of their learners commute from the townships and the Cape Flats.¹⁹

19. As is detailed in the learner questionnaires and the accounts of the school principals, teachers and academics to which EE refers, enormous sacrifices are made by learners and their families in order to access better-resourced, better-performing and safer schools in central Cape Town. The daily commute has a number of immediate impacts on the commuting learners' educational experiences and outcomes. They include the following:

19.1. Higher rates of absenteeism, missed and interrupted classroom time. This is a result of late, interrupted or unaffordable public transport and greater opportunities for truancy and school-avoidance behaviour.

19.2. Exhaustion and hunger at school as a result of long hours of travelling and reduced sleep, which impairs concentration and learning capacity both in and outside of the classroom.

¹⁷ See annexures TM11 to TM13, pp 1557-1688.

¹⁸ See, for instance, the WCED's AA pp 5156 – 5159, paras 49-52 and 55.

¹⁹ EE's RA pp 5978-79, paras 17-18; and Professor Fataar's confirmatory affidavit, annexure TM21 p 6076.

- 19.3. Heightened safety risks, anxiety and fear that learners experience as they make the daily commute, especially when this is done alone and in the dark. This can negatively impact on learners' experience of schooling, their self-confidence and levels of concentration.
- 19.4. The daily commute exposes girls especially to sexual violence on trains and taxis, which negatively impacts their psycho-social and educational well-being.
- 19.5. In the learner questionnaires, almost all of the learners described feeling unsafe on their daily commute. Many describe fears of being mugged on the train or the bus, or robbed, raped or kidnapped as they walk to collect public transport or walk home. Many of the learners, especially girls, expressed fear of sexual harassment and rape.
- 19.6. The cost of the daily commute means that learners sometimes cannot afford to attend school, and there is less money for other necessities in the home (including food, learning materials and school-related and social activities). The cost of the daily commute is typically between R500 and R1000 per month.²⁰
- 19.7. The time constraints imposed by public transport inhibit learners' ability to participate in extra-mural activities and extra classes at school – activities that are important not only for educational outcomes but for learners' personal and social development.

²⁰ EE's FA p 1390 para 37.

19.8. Schools have difficulty enforcing discipline as a result of the distance between learners' homes and the school, as parents cannot readily be called upon to attend at the school and learners cannot be required to attend after-school detention.

20. There are other, less immediate but no less important, impacts on the learners' educational experience at schools removed from their communities. These impacts shape learners' experiences of schooling and can have a direct bearing on their continued attendance at school and their educational outcomes. They are described by both Professor Fataar and Dr Holtmann.

20.1. Professor Fataar explains that, in his research on commuting black learners in Cape Town, he has observed an "assimilation dynamic" which engenders in the learners feelings of alienation and social exclusion. Parents and children from black townships are situated as transient passers-through in the inner-city schools, and are often expected to assimilate into the school's dominant, pre-existing cultural registers. This dynamic is expressed in a variety of ways, including through language, sport, cultural and educational forms. The result is that commuting learners experience the school environment as a place of exclusion from the cultural, racial or linguistic "norm", which undermines their self-confidence and participation in the school environment.²¹

²¹ See Fataar affidavit pp 1727-1728, paras 28-30.

20.2. Dr Holtmann also describes the “significant non-material costs” of the commuting learner phenomenon.²² She explains that:

20.2.1. Daily migration scatters families and reduces family time.

20.2.2. Travel to and from school increases risks and vulnerability for children. They do not have the benefit of natural oversight by neighbours or others who know them. They are exposed to opportunities for their own risky behaviours and are vulnerable to the influence of others along the way. Truancy and absenteeism become more likely when children have to travel to school, which adds to the difficulties experienced by teachers and children.

20.2.3. Parents struggle to maintain appropriate contact with the school. Children need integrated support and protection from both school and family. Unless parents or guardians and teachers are vigilant and in contact, the opportunity to guide and direct children to their best outcomes is easily missed.

20.2.4. Children are isolated from both the community where they live and the community where they go to school, with inadequate identity in either.

²² Holtmann affidavit pp 1873-1875, paras 19.2 to 21.

20.2.5. Where a school has significant numbers of children who come from outside of the community in which it resides, the sense of community ownership and investment in the school is lost. This impacts on the resources available to the school and on its capacity to promote an optimum learning environment with parental involvement.

21. The WCED has not put up any evidence that contradicts these accounts. The Department acknowledges that many of the difficulties described by the Equal Education learners “*are experienced by large numbers of learners in the Western Cape as well as other provinces*”.²³ The WCED also appears to recognise that “*the pursuit of spatial justice*” is at least “*a partial solution to those fundamental problems*”.²⁴
22. What the Department fails to acknowledge, however, is that the City and the Western Cape Provincial Government’s failure to proactively pursue spatial justice is a breach of their constitutional and statutory obligations arising not only from sections 25 and 26 of the Constitution, but also section 29 and the related rights of learners.

²³ WCED’s AA p 5143, para 12.

²⁴ *Id.*

THE STATE'S DUTY TO PROMOTE EQUAL ACCESS TO AND ENJOYMENT OF THE RIGHT TO BASIC EDUCATION

Section 29(1) of the Constitution

23. Section 29(1) of the Constitution provides that everyone has the right to a basic education. Unlike other socio-economic rights, it is an unqualified right and immediately realisable: it is not subject to the state's available resources, progressive realization or reasonable legislative measures.²⁵ This signals the importance of the right.
24. The right to basic education is exceptional in its nature as an empowerment right: education is an end in itself, but it is also a means of realising and promoting other rights, including dignity and equality. For this reason too, the right to education is essential to human development.²⁶
25. The Constitutional Court emphasised this feature of the right in *Juma Masjid*, observing that:

“Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by

²⁵ *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) ('*Juma Masjid*') at para 37; *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) ('*Basic Education for All*') at para 44.

²⁶ *Juma Masjid* para 41, citing with approval General Comment 13 of the United Nations' Committee on Economic, Social and Cultural Rights on the right to education (art. 13 of the International Covenant on Economic, Social and Cultural Rights).

section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.”²⁷

26. The Constitutional Court has also emphasised the significance of the realisation of the right to basic education – for both individual and societal development in South Africa’s democratic dispensation – in the light of the legacy of apartheid.
27. The Constitutional Court has repeatedly acknowledged the persistence of the apartheid legacy of unequal education in addressing the State’s duty to realise the right to education. For instance –

27.1. In *Juma Masjid*, the Court recognised that:

“The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.”²⁸

27.2. In *Ermelo*, the Constitutional Court observed that “*the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education*”;²⁹ and

²⁷ *Juma Masjid* at para 43.

²⁸ *Juma Masjid* at para 42.

²⁹ At para 46.

27.3. In *MEC for Education: KwaZulu-Natal v Pillay*,³⁰ O'Regan J similarly noted that the “*pattern of disadvantage engraved onto our education system by apartheid has not been erased.*”

Other affected rights

28. The importance of the right to basic education for learners is reinforced by section 28(2) of the Constitution, which provides that “[a] *child’s best interests are of paramount importance in every matter concerning the child.*”³¹ The Constitutional Court has held that the protections in section 28 are not merely “*interpretive guides*”, nor “*advisory*” nor are “*they exhortatory . . . [but] . . . are enforceable precepts determining how officials and judicial officers should treat children.*”³² Most of the learners whose experiences Equal Education describes are children.³³

29. The hardships experienced by learners and their families as a result of the City and the Province’s failure to provide affordable housing in central Cape Town implicates not only learners’ right to a basic education, but also their rights to family life (protected under section 10 of the Constitution) and their rights to freedom and security of the person (under section 12 of the Constitution).

³⁰ *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para 123.

³¹ The Constitutional Court has been critical of other courts for failing to recognise the intersection of the paramouncy principle, the right of access to a basic education and other rights pertaining to a child: *Juma Masjid* para 66.

³² *Centre for Child Law v Minister for Justice and Constitutional Development and Others (NICRO as amicus curiae)* 2009 (11) BCLR 1105 (CC); 2009 (6) SA 632 (CC) at paras 25-7 (emphasis added). See also *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (7) BCLR 637 (CC); 2009 (4) SA 222 (CC) at para 73; *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) at paras 14-15.

³³ Section 28(3) of the Constitution defines ‘child’ as any person under the age of 18 years.

30. Learners' right to freedom and security of the person are impacted, as the long commute they are compelled to take in order to access better schools places them in personal danger and causes them to experience fear of violence and unsafety on a daily basis.³⁴
31. For some learners, the lack of affordable housing in central Cape Town also impacts on their right to family life, as it results in the separation of families and the absence of care-givers who cannot live with their children close to their places of employment.³⁵

Section 9(2) of the Constitution

32. The right to equality is enshrined in section 9 of the Constitution as follows:
- ‘9 (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (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.’
33. Section 9(2) imposes a vital and encompassing positive obligation on the State to promote “the full and equal enjoyment” of all rights in the Bill of Rights, including the right to basic education. As Moseneke ACJ explained in *SAPS v Barnard*³⁶, section 9(2) requires the State to take “reasonable, prompt and

³⁴ EE's FA pp 1390-1393, paras 39-40.

³⁵ EE's FA pp 1404-1406, paras 56-57.

³⁶ *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC), majority judgment.

effective measures” to achieve substantive equality and the equal enjoyment of the rights in the Bill of Rights.

34. Moseneke ACJ explained that this obligation extends beyond the affirmative action or restitution measures required in section 9(2). He stated:

‘We must remind ourselves that restitution measures, important as they are, cannot do all the work to advance social equity. A socially inclusive society idealised by the Constitution is a function of a good democratic state, for the one part, and the individual and collective agency of its citizenry, for the other. Our state must direct reasonable public resources to achieve substantive equality “for full and equal enjoyment of all rights and freedoms.” It must take reasonable, prompt and effective measures to realise the socio-economic needs of all, especially the vulnerable. In the words of our Preamble the state must help “improve the quality of life of all citizens and free the potential of each person.”’³⁷

35. The interplay between the right to equality and the right to basic education is of especial significance in South Africa. As noted, unequal access to education along racial lines has historically entrenched and perpetuated socio-economic disparities and unequal access to skills, jobs and livelihoods, and this legacy persists.

36. The Constitution commits the State to redressing these historical injustices, as a matter of priority. Writing for a unanimous Court in *Ermelo*, Moseneke DCJ held emphatically that –

³⁷ At para 33. See also para 35.

“In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.”³⁸

37. In *City of Tshwane Metropolitan Municipality v Afriforum*,³⁹ the Constitutional Court also addressed the imperative of redressing the lasting impacts of apartheid, and the State’s obligations to promote social cohesion, inclusiveness and substantive equality. While the court was not concerned in that case with the right to education, the judgment conveys the import of the constitutional imperatives of section 9(2).

38. Writing for the majority, Mogoeng CJ observed that “*colonialism or apartheid is a system so stubborn that its divisive and harmful effects continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy*.”⁴⁰ He held that –

“Nothing that objectively encourages or seeks to perpetuate the stereotypes, prejudice or discriminatory practices of the past is to be tolerated. Inclusivity, unity in diversity, recognition of the culture and history of white and black South Africans and reconciliation are our chosen paths to the prosperous future. They accelerate social cohesion and the process of healing the divisions of the past. This national project demands that we reject everything that sustained, entrenched and still promotes racial discrimination.

...

³⁸ *Ermelo* para 47, emphasis added.

³⁹ 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC).

⁴⁰ Para 4.

Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities. The kind of justice that our constitutional dispensation holds out to all our people is substantive justice. This is the kind that does not ignore the overall constitutional vision, the challenges that cry out for a just and equitable solution in particular circumstances and the context within which the issues arose and are steeped.”⁴¹

39. Given the special nature of the right to a basic education and the historical context – in which the denial of equal education to black South Africans was an institutionalised tool of oppression – the State’s obligation to promote “the full and equal enjoyment” of the right to a basic education is, we submit, of particular constitutional importance.⁴² The State must take all reasonable measures to promote the full and equal enjoyment of the right to basic education.
40. The interwoven and inter-related nature of socio-economic rights – or what Moseneke DCJ has referred to as the “*cluster of warranties*” that must drive “*radical transformation of society*”⁴³ – also means that the State’s obligation to promote the full and equal enjoyment of the right to a basic education does not

⁴¹ At paras 16 and 18. See also para 6, where a similar injunction is expressed:

“Knowing just how deep and engrafted the distrust, divisions and injustices were in the very being of some of our people from the days of apartheid, we have made a solemn undertaking to embark on an all-inclusive constitutional project, geared at achieving national unity and reconciliation. The injustices of the past are not to be pampered or approached with great care or understanding or sympathy. And the immeasurable damage racism or cultural monopoly has caused requires that stringent measures be taken to undo it. That approach will help us move away from exclusivity to opportunities, racial domination and intolerance to inclusivity, social cohesion and equitable access to opportunities.”

⁴² *Juma Masjid* at para 42.

⁴³ *Ermelo* at para 47.

vest solely and exclusively in the national and provincial departments of Basic Education.

41. The obligation must inform the policies and priorities of all departments whose work has a material impact on the enjoyment of the right to basic education. As this case demonstrates, this must include the policies and priorities of the departments of transport, public works and housing.

Legislative obligations

42. The constitutional commitment to take corrective measures and promote the full and equal enjoyment of the right to education is recognised and reinforced in legislation and various policy documents. Navsa JA put it well when he remarked that ‘*The legislature took seriously its constitutional obligations in relation to the right to basic education.*’⁴⁴

43. The South African Schools Act 84 of 1996 provides in its preamble:

‘WHEREAS the achievement of democracy in South Africa has consigned to history the past system of education which was based on racial inequality and segregation;

WHEREAS the country requires a new national system for schools which will redress past injustices in education provision, provide an education of progressively high quality for all learners and in doing so lay a strong foundation for the development of all our people’s talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the

⁴⁴ *Basic Education for All* at para 38.

economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators’.

44. The Western Cape Provincial School Education Act, 1997 provides in its preamble for a commitment—

‘[to] redress past imbalances in education provision, provide an education of progressively high quality for all learners and in doing so lay a strong foundation for the development of all our people’s talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, protect and advance our diverse cultures and languages, uphold the rights of learners, parents and educators’.

45. The National Education Policy Act, 1996 defines the principles that must inform national education policy. These include ‘*achieving equitable education opportunities and the redress of past inequality in education provision*’.

46. The National Development Plan (‘NDP’) identifies ‘*unity and social cohesion*’ as two key priorities for social and economic development. It emphasises the importance of specific redress measures, including in education, to realise these goals and to promote meaningful social transformation. It states in the Executive Summary:⁴⁵

“... Uniting South Africa is both an essential input into the process of reducing poverty and inequality and a direct outcome of successful poverty reduction. To build a socially cohesive society, South Africa needs to reduce poverty and inequality by broadening opportunity and employment through economic inclusion, education and skills, and

⁴⁵ See Annexure TM16, pp 1703-1706.

specific redress measures; promote mutual respect and inclusiveness by acting on the constitutional imperative that South Africa belongs to all who live in it, and that all are equal before the law; and deepen the appreciation of citizens' responsibilities and obligations towards one another.

... Despite consistent progress since 1994, South Africa remains a divided society, with race still forming the main divide.... Although progress has been made to improve the lives of women; discrimination, patriarchal attitudes and poor access to quality education persists....

South Africa's own history and the experiences of other countries show that unity and social cohesion are necessary to meet social and economic objectives. The preamble to the Constitution captures this balance best. It recognises the obligation of the state to reverse the effects of apartheid, in a context where all citizens feel part of the country and its programmes.”

47. The NDP acknowledges that the measures taken to reverse the effects of apartheid have not been adequate. It notes that –

“limited progress has been made in reversing entrenched spatial inequities. In some instances, post-1994 policies have reinforced the spatial divides by placing low-income housing on the periphery of cities. Reshaping South Africa's cities, towns and rural settlements is a complex, long-term project, requiring major reforms and political will. It is, however, a necessary project given the enormous social, environmental and financial costs imposed by existing spatial divides.”

48. The NDP also highlights the prevailing inequality in education. It notes that:

“The quality of education for most black children is poor. This denies many learners access to employment. It also reduces the earnings potential and career mobility of those who do get jobs – and limits the potential dynamism of South African businesses.”

The declaratory and structural relief is appropriate

49. The declaratory and structural relief the applicants seek is necessary and appropriate not only to vindicate and promote the rights to property and housing (which the applicants have emphasised), but also to promote the full and equal enjoyment of the right to basic education, and to achieve the above legislative objects.
50. Equal Education accepts that achieving spatial justice is, as Mr Schreuder put it, “a long-term and complex project”. This does not, however, excuse the failure of the Western Cape Provincial Government and the City of Cape Town to take all reasonable steps to achieve spatial justice, which is required to promote the full and equal enjoyment of the right to basic education. The State has a positive obligation to take reasonable, prompt and effective measures to this end, and is further obliged not to pursue policies that entrench unequal access and enjoyment of the right to basic education and related rights.
51. The Provincial Government and the City have, however, failed to prioritise the redress of spatial apartheid in Cape Town and to take reasonable measures within their available resources to do so, as they are constitutionally enjoined to do. This appears to be the result, at least in part, of a failure to take account of the multiplicity of impacts that the prevailing apartheid geography has on the poor and spatially-marginalised in the City, including on the rights of many young learners.

THE REVIEW OF THE PROVINCE'S DECISIONS IN RESPECT OF THE TAFELBERG PROPERTIES

52. In addition to the grounds of review pleaded by the applicants, Equal Education submits that the lawfulness of the impugned decisions is vitiated by the failure of the Provincial Cabinet to have proper regard to the material impact of their decisions on the rights of learners, in particular under sections 9, 10, 12, 28 and 29 of the Constitution, and the State's constitutional obligation to promote and advance the full and equal enjoyment of the right to basic education.⁴⁶
53. The Provincial Government respondents have taken issue with Equal Education pleading additional grounds of review, from the position of *amicus curiae*.⁴⁷ We address this issue first, and then address the substance of the review grounds.

Pleading additional grounds of review

54. *Amici curiae* play an important role in constitutional litigation under Rule 16A of the Uniform Rules of Court.⁴⁸ They facilitate public participation in matters of constitutional significance, and assist the court in coming to an informed and correct decision.
55. The function of an *amicus*, as described by the Constitutional Court, is to provide information or argument regarding questions of '*law or relevant fact*

⁴⁶ EE's FA pp 1416-1420, paras 80-85.

⁴⁷ Province's AA, p 5161, para 58.

⁴⁸ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC) at para 11.

*which will assist the Court in a way in which the Court would otherwise not have been assisted.*⁴⁹

56. Rule 16A(6) describes the ambit of the submissions that an amicus may make in the High Court. It provides:

- ‘(6) An application contemplated in subrule (5) shall—
- (a) briefly describe the interest of the *amicus curiae* in the proceedings;
 - (b) clearly and succinctly set out the submissions which will be advanced by the *amicus curiae*, the relevance thereof to the proceedings and his or her reasons for believing that the submissions will assist the court and are different from those of the other parties; and
 - (c) be served upon all parties to the proceedings.’ (Emphasis added.)

57. The limitations in subrule (6) are, therefore, that an *amicus*’s submissions must be relevant to the proceedings; they must be of assistance to the Court; and they must be different from those of the other parties in the proceedings.

58. Rule 16A (9) provides that a court “may dispense with any of the requirements of this rule if it is in the interests of justice to do so”. Therefore, the only

⁴⁹ *Institute for Security Studies In Re S v Basson* 2006 (6) SA 195 (CC) at para 5. See also *In re Certain Amicus Curiae Application: Minister of Health and others v Treatment Action Campaign and others*,⁴⁹ the Constitutional Court held:

‘[A]n amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The amicus must not repeat arguments already made out but, must raise new contentions; and generally those new contentions must be on the data already before the Court. Ordinarily it is inappropriate for an amicus to try and introduce new contentions based on fresh evidence.’

limitation on a court's discretion to dispense with any of the requirements of the rule, is whether it is in the interests of justice to do so.⁵⁰

59. While we are not aware of an amicus having pleaded additional grounds of review in constitutional litigation in the High Court, the Constitutional Court has permitted such intervention by an amicus curiae on appeal. In *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others*,⁵¹ the Constitutional Court considered an entirely different cause of action advanced by the amicus curiae (of legitimate expectation under public law), even though that cause of action was not expressly advanced or argued by the applicants (who relied only on a contractual claim).
60. The Constitutional Court noted that a lack of prejudice to any party is a factor that weighs in favour of entertaining a cause of action that was not expressly advanced or pleaded – in that case, because the evidence on record laid a sufficient basis for the legal claim.⁵²
61. The Constitutional Court's interpretation of Rule 16A is similarly purposive and permissive. In *Children's Institute*, the Constitutional Court held that Rule 16A permits an *amicus* to adduce new evidence in High Court proceedings. (It interpreted the word '*submissions*' in Rule 16A(6)(b) to include evidence.)⁵³

⁵⁰ *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others* 2013 (2) SA 620 (CC) para 20.

⁵¹ *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC). On the nature of the applicants' claim, paras 9, 14 and 19. On the amicus curiae's submissions, see paras 25-28.

⁵² *KwaZulu-Natal Joint Liaison Committee supra* para 68.

⁵³ *Children's Institute* at para 17, where Khampepe J held for a unanimous Court: "Properly interpreted, Rule 16A is in my view permissive and allows for an amicus to adduce evidence. Both a textual and purposive interpretation of the Rule support this conclusion."

62. Given the importance that the Constitutional Court attaches to the full ventilation of constitutional issues on the pleadings or papers in the court of first instance,⁵⁴ the approach adopted by the High Court to amici should be congruent, as far as possible, with that of the Constitutional Court.
63. It is also trite that a court should guard against overly technical approaches to the Rules that may ultimately hamper the full and proper ventilation of the matter, and the court's ability to see to it that justice is done.⁵⁵ The Rules must be applied flexibly where the interests of justice require it. For this reason, the section 173 of the Constitution vests courts with the power to regulate their own proceedings, taking into account the interests of justice.⁵⁶ As the Constitutional Court held in *Mukaddam* –

“... [R]ules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice... After all, in terms of s 173 each superior court is the master of its process.”⁵⁷

64. In light of these principles, we submit that Rule 16A(6) must be interpreted and applied to permit an amicus curiae to plead and argue for additional grounds of review, which appear from the Rule 53 record. Even if the Court were to find that Rule 16A(6) is not capable of such an interpretation, the Court has the

⁵⁴ *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) at para 39.

⁵⁵ *PFE International and Others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) para 30; *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) paras 32 and 39. See also, for a common law statement of the same principle: *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others* 1982 (3) SA 353 (W).

⁵⁶ Section 173 of the Constitution provides: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common-law, taking into account the interests of justice.”

⁵⁷ *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) para 32.

power under Rule 16A(9) and section 173 of the Constitution to permit an amicus to introduce new grounds of review where it is in the interests of justice to do so.

65. In the present matter, it is in the interests of justice to permit the additional grounds of review, for the following reasons:

65.1. The grounds of review that Equal Education has pleaded appear from the Rule 53 record; the evidence emanates from the Province.⁵⁸ Reliance on that evidence can hardly be prejudicial to the Province, nor has the Province alleged any prejudice.

65.2. The additional grounds of review are narrowly circumscribed and do not repeat the grounds pleaded by the applicants under a different guise. Equal Education's grounds of review stem from and relate to its submissions in support of the declaratory and structural relief, which the Court is in any event called upon to adjudicate.

65.3. The Province consented to Equal Education's admission as amicus curiae, and did not change this stance after Equal Education filed its founding affidavit in which the additional review grounds were pleaded.⁵⁹

⁵⁸ The information includes representations made to the Premier on the lack of affordable housing in central Cape Town made to the Premier by the principal of Sea Point High School; a teacher at Thandokhulu High School in Mowbray; learners from Thandokhulu High School, Salt River High School and Sea Point High School; parents, civic organisations, concerned citizens and other learners, other teachers and school principals.

⁵⁹ Province's AA, p 5166, para 71.

65.4. Province has had an opportunity to address the grounds of review in answer.

65.5. Equal Education was also actively involved in the public participation process, presenting a submission (together with the Equal Education Law Centre) to the Province in June 2016 on the lack of affordable housing in central Cape Town and its impact on access to education.⁶⁰

66. In light of the above, we submit that there is no merit in the Province's objection to the additional grounds of review pleaded by Equal Education, and that the Court may – and should – consider these grounds of review.

The grounds of review

67. Many submissions were made to the Premier addressing the detrimental impact of the lack of affordable housing in central Cape Town for learners who commute to attend schools in central Cape Town.⁶¹

68. The Province also received many submissions that evidenced that there are many impoverished families who live in cramped, squalid and wholly inadequate conditions in central Cape Town in order to access schools and work.⁶² Moreover, the Province received submissions evidencing that the lack of affordable housing results in the forced separation of families, as working

⁶⁰ EE's FA, p 1373, para 11; Annexure "TM3" to EE's FA, pp 1427-1432.

⁶¹ These are collated as annexure TM13 to EE's founding affidavit, pp 1560-1688.

⁶² See annexure TM15 to EE's founding affidavit, pp 1698-1709.

mothers and fathers cannot afford to live near their workplace in central Cape Town with their children.⁶³

69. Given the seriousness of these impacts, and the State's obligations to respect, protect, promote and fulfil learners' rights to basic education, equality (including equal access to quality basic education) and the rights of children under sections 9, 10, 12, 28 and 29 of the Constitution and legislation enacted to give effect to these rights, these impacts were material considerations that ought to have been taken into account by the Provincial Cabinet.
70. The scant and inadequate reasons given for the decisions – which appear in annexures TA21 and TA26 to the applicants' founding affidavit (in the main application)⁶⁴ – indicate that these considerations were not adequately taken into account, or were not taken into account at all. Equal Education submits that this failure renders the Provincial Cabinet's decision to sell the Tafelberg property and its subsequent decision not to resile from the sale of the property unlawful and invalid.
71. Province's bald assertion that it did consider the relevant submissions has no factual foundation in either the reasons for the decisions or the Rule 53 record.⁶⁵

⁶³ These are collated as annexure TM14 to EE's founding affidavit, pp 1689-1697.

⁶⁴ The reasons for the Province's decision to declare the Tafelberg properties '*surplus*' under GIAMA and to sell them to the Phyllis Jowell School are contained in annexure "TA21" at pp 438-440, which is a letter to the applicants, Ndifuna Ukwazi.

The reasons for the Province's subsequent decision not to resile from the decision to sell the Tafelberg properties to the Phyllis Jowell School are contained in annexure "TG26" at pp 450-452, which is a minute of the provincial cabinet's decision and reasons.

⁶⁵ WCED's AA p 5161, para 59. See also EE's reply p 6008, para 98.

On the contrary, the latter is conspicuously silent on any attempt to engage critically with EE's submission to the provincial cabinet.⁶⁶

72. In the absence of any evidence to support its claim to the contrary, we submit that the Province must be taken not to have considered this relevant information, properly or at all.
73. Second, the Province's failure to take into account these relevant considerations bears on the rationality of the Province's decision. The test for rationality review was recently summarised by the Supreme Court of Appeal in *Zuma v Democratic Alliance*:⁶⁷

“Rationality review is concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred. Rationality review also covers the process by which the decision is made. So, both the process by which the decision is made and the decision itself must be rational. If a failure to take into account relevant material is inconsistent with the purpose for which the power was conferred there can be no rational relationship between the means employed and the purpose.”

⁶⁶ EE's RA, pp 6006-6007, para 94; p 6008, para 98.

⁶⁷ *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* [2017] 4 All SA 726 (SCA); 2018 (1) SA 200 (SCA) para 82. See also *Democratic Alliance v President of the RSA* 2013 (1) SA 248 (CC) paras 33 and 34, 40 and *Albutt v Centre for the Study of Violence and Reconciliation & Others* 2010 (3) SA 293 (CC).

74. The numerous submissions that addressed the impact on learners and schools of the lack of social housing were plainly material to the decision the Province was required to make. Given that the Province's decisions entailed the disposal of public land, which required it to assess whether the land is needed for public purposes, the failure to consider the submissions that addressed the pertinent need for social housing, was inconsistent with the purpose for which the power was conferred and exercised. This renders the decisions procedurally irrational.
75. Third, the decisions were unreasonable in light of the Province's constitutional and statutory obligations of social and economic transformation and redress (including the duty to promote the full and equal enjoyment of the right to basic education). Upholding the sale of the Tafelberg property would serve only to benefit an already privileged, private school that caters for the educational needs of a relatively privileged category of learners.⁶⁸ On the other hand, the submissions to the Province documented the extensive need for affordable and social housing in central Cape Town, and the serious prejudice suffered by the poorer residents of the city and learners whose rights are undermined daily as a result of the city's apartheid geography.

⁶⁸ The Phyllis Jowel School declared in its audited financial statements for the period 2012-2013 a rise in total assets of approximately R2.1 million to R9.4 million, an increase in donations of almost R1 million and an increase in cash flow in approximately the same amount (pages 3545 and 3553 of the Rule 53 record). According to Investec Bank, the school is in a position to afford a capital payment of R135 million to the Province (page 3532 of the Rule 53 record).

The school is currently situated in Camps Bay, one of the wealthiest suburbs in the City, and seeks to relocate 'to increase access to learning within the catchment area of the Atlantic Seaboard and surrounding areas', and caters for the private education demand of a discrete and relatively privileged class of learners, as a school that "offers a blended secular-religious curriculum, founded on traditional Jewish values and observance" (pages 139-140 of the Rule 53 record).

76. Mr Schreuder’s contention that *“poorer learners and communities will benefit from the transaction, because the substantial purchase price will be applied by the WCG in the pursuit of its constitutional and statutory obligations”*⁶⁹ is misleading, and underscores the unreasonableness of the decision. The proceeds of the sale are destined for the Western Cape Government’s Asset Finance Reserve Fund, to finance new offices for the Western Cape Education Department. They were not allocated to the provision of educational services or school infrastructure for the benefit of poor learners.⁷⁰
77. For these additional reasons, we submit that the impugned decisions must be declared constitutionally invalid and set aside on review.
78. Remittal is almost always the appropriate remedy for irregular administrative decisions or exercises of public power.⁷¹ Equal Education supports the applicants’ proposed remittal of the decision not to resile from the sale of the Tafelberg properties to the Premier, subject to directions that the Premier and the Provincial Cabinet—
- 78.1. Pay due regard to the need for social housing, in the light of the constitutional and legislative prescripts identified by the applicants and Equal Education; and
- 78.2. Pursue a consultative intergovernmental approach in taking a fresh decision, by first consulting with the National Department of

⁶⁹ WCED’s AA p 5163, para 62.

⁷⁰ EE’s RA p 6007, para 95.

⁷¹ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) at para 42.

Human Settlements, the Provincial Department of Human Settlements, the City and the Social Housing Regulatory Authority.

CONDONATION

79. These heads of argument were due to be filed on Friday, 23 August 2019. A bona fide error by one of the counsel in diarising the due date for filing resulted in delays in the preparation of these submissions. Despite the error, the amicus and its counsel and attorneys worked with all possible haste to finalise the submissions and readied them for circulation in the morning of Saturday 24 August 2019. We respectfully submit that no material prejudice could have been caused by the delay, and we respectfully seek condonation therefor.

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24 August 2019