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LEGAL OPINION
[Confidential]

TO: Honorable B P Mbinqo-Gigaba, MP
Chairperson, Portfolio Committee on Basic Education

COPY: X George
Secretary to Parliament

FROM: Z Adhikarie – Chief Legal Adviser
Constitutional and Legal Services Office

DATE: 25 August 2023

REF: 374/23

MESSAGE: Attached please find a legal opinion on the Basic Education Laws Amendment Bill.

PP

Adv Z Adhikarie

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Chairpersons of the Portfolio Committee on Basic Education

FROM: Z Adhikarie – Chief Legal Adviser
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SUBJECT: LEGAL OPINION ON PROCEDURE AND CERTAIN PROVISIONS OF
THE BASIC EDUCATION LAWS AMENDMENT BILL [B 2- 2022]

INTRODUCTION

1. Our office received a request from the Portfolio Committee on Basic Education (the Committee) to advise on the legislative procedure following provincial public hearings, and the constitutionality of certain provisions of the Basic Education Laws Amendment Bill [B 2- 2022] (the BELA Bill). During the deliberations of clause by clause on the BELA Bill, from 15 August to 17 August 2023, the Committee requested a written legal opinion on procedural and content issues that will be outlined below in the legal question.

2. The BELA Bill was introduced to Parliament in 2022 and given official parliamentary reference number as [B 2- 2022].

LEGAL QUESTION

3. The legal question is two-fold. First, the Committee requires guidance on the process of the motion of desirability and on the proceedings to process the BELA Bill since the provincial hearings have been finalised pursuant to the obligation on Parliament and provincial legislatures to facilitate public involvement. On 17 August 2023 a motion of desirability was placed before the Committee.
4. The second leg of the legal question requires an opinion on whether the provisions under clauses 4 and 5, are lawful and in alignment with the Constitution of the Republic of South Africa, 1996 (the Constitution). Clauses 4 and 5 confer authority on the Head of Department (HOD) in respect of the powers of the School Governing Bodies to determine the school's policies on admission and languages used at schools.

LEGAL FRAMEWORK

5. National Assembly Rule 286 provides for the legislative procedure in a committee. NA rule 286(4)(i) requires the relevant committee, after due deliberation, "to consider a motion of desirability on the subject matter of the Bill". If the motion is rejected, the committee must immediately table the Bill and its report on the Bill. Paragraph (j) provides that "if the motion of desirability is adopted, [the committee] must proceed to deliberate on the details of the legislation;".
6. Section 29 of the Constitution provides for the right to basic education as follows (own emphasis):

Education

- (1) Everyone has the right –
 - (a) to a **basic education**, including adult basic education; and
 - (b) ...

- (2) Everyone has the **right to receive education in the official language or languages of their choice in public educational institutions** where that education reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
- (a) *equity;*
 - (b) *practicability; and*
 - (c) *the need to redress the results of past racially discriminatory laws and practices.*
- (3) Everyone has the right to establish and maintain, **at their own expense, independent educational institutions** that-
- (a) do not discriminate on the basis of race;
 - (b) are **registered with the state**; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) ...

Sections 28(2) and (3) of the Constitution provide that a child's best interests are of paramount importance in every matter concerning the child. In this section a "child" means a person under the age of 18 years.

7. In *Ermelo*¹ the Constitutional Court held that the primary objective of the Schools Act is to provide for the organisation, governance and funding of schools and to give effect to the constitutional right to education.² Public schools are by virtue of the design of the South African Schools Act, 1996 (Act No. 84 of 1996) (Schools Act or the SASA) governed following a three-tier partnership consisting of national government, provincial government and parents of the learners together with the members of the community in which the school is located, referred to as the school governing bodies.

¹ Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another (CCT40/09) 2010 (3) BCLR 177 (CC)

² *Ermelo* at para 55.

8. According to the Schools Act and Ermelo, the three crucial partners in the education sector translates into the Minister representing national government, provincial government represented by the Member of the Executive Council responsible for education, working with the Head of Department (HOD), who is represented by the principals to exercise control over public schools. The parents of the learners, members of the community where the school is located, and the learners form the third tier through elections to a school governing body which has defined autonomy to run domestic affairs in public and private schools. In Rivonia,³ the Constitutional Court held that the three-tier approach means that when the Schools Act addresses issues of admissions and capacity, it does so with reference to national government, provincial government and school governing bodies.
9. Chapters 3 and 5 of the Schools Act, regulate public schools and independent schools. The Schools Act defines a public school as a school contemplated in Chapter 3 of this Act. Section 1 of the Schools Act defines independent school as a school registered or deemed to be registered in terms of section 46 of the SASA.
10. The Constitution confers a right to “a basic education to everyone”. “A basic education” is not defined in the Constitution. However, the BELA Bill makes an attempt to define that phrase as meaning grade R to grade 12, as evidenced in the National Curriculum Statement.
11. Section 59(1)(a) of the Constitution, provides that the National Assembly (NA) must facilitate public involvement in the legislative and other processes of the Assembly and its committees. As pointed out during the Committee deliberations, various judgments⁴ have guided the implementation and interpretation of the related and

³ MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others (CCT135/12); 2013 (12) BCLR 1365 (CC) (Rivonia); at para [37].

⁴ Doctors for life International v Speaker of the National Assembly and Others 2006 (12) BCLR 1399 (CC) (Doctors for life, Merafong City Local Municipality v Anglo Gold Ashanti Limited (CCT106/15) 2017 (2) BCLR 182 (CC) (Merafong), Glenister v President of the Republic of SA and Others 2011 (7) BCLR 651 (CC) (Glenister 2), Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT40/15); 2016 (10) BCLR 1277 (CC) (LAMOSA) and recent Mogale and Others v Speaker of the National Assembly and Others CCT73/22 are judgements

relevant prescripts and scope of this constitutional obligation. In *Doctors for life* the Constitutional Court gave meaning to the obligation to “facilitate” public involvement in the legislative process. The Constitutional Court held that in giving effect to the constitutional obligation to facilitate public involvement, Parliament and the provincial legislatures have a broad discretion. That discretion must be exercised reasonably, given the circumstances, to provide a meaningful opportunity to participate effectively in the law-making process.

12. Section 85 of the Constitution empowers the President, together with members of the Cabinet, to exercise executive authority. Similar powers are conferred in section 125 of the Constitution, in respect of the exercise of provincial executive authority.
13. Section 85(2)(b) of the Constitution confers power on the national executive authority of the Republic to develop and implement national policy. This power is mirrored in section 125(2)(d) of the Constitution with regards to developing and implementing provincial policies by the provincial executive authority.
14. Part A of Schedule 4 to the Constitution, sets out “education at all levels” but with the exclusion of “tertiary education”, as a functional area capable of concurrent national and provincial legislative competence. Read with section 85(2)(b), and its mirror section 125(2)(d) of the Constitution, Schedule 4 permits that the state, in both the national and provincial spheres of government, may regulate basic education through legislation to give effect to section 29 of the Constitution.

DISCUSSION

15. National Assembly Rule 286 (NA Rule) provides the process that must be followed by a Portfolio Committee of the National Assembly when processing Bills in line with the relevant provisions of the Constitution. Various subsections of the NA Rule 286 were canvassed and clarified during the Committee proceedings, including direction in respect of motion of desirability⁵, request for permission from the NA should the

directive on the obligation to facilitate public participation, amongst others, which we will not in detail canvass for purposes of this opinion.

⁵ NA Rule 286 (4)(i) and (j).

Committee inquire into extending⁶ the subject of the Bill and where the Bill amends provisions of existing legislation⁷, which is the case with the BELA Bill.

16. The Constitution provides that “basic education” is a concurrent national and provincial legislative competence. The implementation of such legislation would also materialise both at national and provincial spheres of government, making it essential that the principles of co-operative government are observed, and intergovernmental relations be protected and maintained in line with Chapter 3 of the Constitution and Intergovernmental Relations Framework Act, 2005 (Act No.13 of 2005). It thus became imperative that clause 3, read with clause 4 and clause 5 of the BELA Bill be assessed whether they pass constitutional muster.

17. It is necessary to explain the distinction between the principle of separation of powers and the exercise of a conferred public power. In *Akani Garden Route*⁸ judgment the court expressed itself on policy and legislation as follows:

“[L]aws, regulations and rules are legislative instruments, whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise, the separation between Legislature and Executive will disappear.”⁹

(Wherever bold appears it is our emphasis added.)

18. Clause 2 of the BELA Bill seeks to amend section 3 of the Schools Act on compulsory attendance of learners both in public schools and independent institutions and gives effect to section 29 of the Constitution.

19. Clauses 4 and 5 seek to amend sections 5 and 6 of the Schools Act, which provides for the regulation of how the three-tier partnership can exercise their powers and play their roles in respect determining and approving of admission

⁶ NA Rule 286 (4)(b).

⁷ NA Rule 286 (4)(c).

⁸ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA).

⁹ *Id* at para 7.

policies to public schools and language policy of public schools. None of these provisions give rise to a question on the separation of powers principle. It is rather a question of the legislative and executive competency to make policies to govern the schools.

20. Several Constitutional Court judgments¹⁰ relating to governance at schools deal with the provisions related to the power of school governing bodies to determine and make policies in respect of admissions to schools and language policies.

21. In paragraph 8 of *Bel Porto*,¹¹ Chief Justice Chaskalson depicted the history that, prior to the Interim Constitution coming into effect, education in South Africa was conducted at racially segregated schools managed by different departments of education. He records that the Western Cape had four departments reflecting the segregation and disparities of the education system. The House of Assembly (HOA) had better buildings, better grounds, better pupil teacher ratios than other departments. The Department of Education and Training (DET) schools had worst conditions than all the others. Chief Justice records that section 36 of the Schools Act, which is a regulation on responsibility of governing bodies of a public school, still sanctions the distinctions. Furthermore, the judgment asserts that policy is not cast in stone and can easily be reviewed and amended.

22. Acting Justice Mhlantla opens the *Rivonia* judgment with a dictum that the right to basic education in section 29 of the Constitution is a promise. She records the reality that historical systematic discrimination has continually brought the radically unequal distribution of resources, consequentially making the constitutional guarantee inaccessible for a large number of South Africans. The impact of this painful legacy was recognized and recorded by the Constitutional Court in the *Ermelo* judgment. *Ermelo* paragraph 45 records:

¹⁰ *Juma Masjid Primary School* 2011 (8) BCLR (CC); *Federation of Governing Bodies of South Africa v Member of Executive Council Education (Gauteng)* 2016 (8) BCLR 1050 (CC); *Head of Department Free State v Welkom and Harmony Schools* 2013 (9) BCLR (CC) (*Welkom/Harmony*); *Mpumalanga Department of Education v Ermelo* (CC) (*Ermelo*); *Gauteng MEC v Rivonia (Rivonia)* and *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002(9) BCLR 891 (CC) (*Bel Porto*)

¹¹ *Bel Porto School Governing Body and Others v Premier of the Western cape Province and Another* (CCT58/2000) 2002 (9) BCLR 891 (CC).

.. Apartheid left us with many scars, but some remedial work has been done since the advent of constitutional democracy. Including in access to education, unequal access to opportunities has prevailed in every other domain.

23. Paragraph 2 of Rivonia gives the dictum as follows:

*Continuing disparities in accessing resources and quality education perpetuate socio-economic disadvantage, thereby reinforcing and entrenching historical inequity.¹² **The question we face as a society is not whether, but how, to address this problem of uneven access to education. There are various stakeholders, a diversity of interests and competing visions. Tensions are inevitable. But disagreement is not a bad thing. It is how we manage those competing interests and the spectrum of views that is pivotal to developing a way forward. The Constitution provides us with a reference point – the best interests of our children.**¹³ The trouble begins when we lose sight of that reference point. **When we become more absorbed in staking out the power to have the final say, rather than in fostering partnerships to meet the educational needs of children.***

24. The Rivonia case required the court to strike an appropriate balance between the powers of the three-tier partnership. The same was issue in the Welkom/Harmony¹⁴ judgment but with regards to the policy and management of pregnancy by learners at school. Thus, the judgments serve as authoritative reference points on how amendments, repeals or re-enactment of basic education legislation should and can maintain government structures or organs of state that do not usurp public powers conferred on one another, but instead work jointly and collaboratively as policy dictates and the law demand of them, whilst maintaining a healthy three-tier partnership.

¹² Id at para 2, where Moseneke DCJ stated:

“It is trite that education is the engine of any society. And therefore, an unequal access to education entrenches historical inequity since it perpetuates socio-economic disadvantage.”

¹³ Section 28(2) of the Constitution provides:

“A child’s best interests are of paramount importance in every matter concerning the child.”

¹⁴ Head of Department, Department of Education, Free State Province v Welkom High School and Another, HOD, Department of Education Free State Province v Harmony High School and Another (CCT 103/12) 2013(9)BCLR 989 (CC).

25. Clauses 4 and 5 of the BELA Bill gives effect to the Rivonia judgment, in respect of the role players and extent of the power and authority to determine schools' policies and uniform norms and standards within the three-tier partnership in promoting the paramount interest of educating a child.
26. The public hearings and submissions shone a spotlight on the various issues that still require attention from the Committee members and eventually Parliament when it exercises its power to amend and re-enact matters affecting basic education. Giving effect to the constitutional obligation in section 59 and 72 to facilitate public involvement, as was adumbrated by the Constitutional Court in LAMOS¹⁵ and Mogale¹⁶ judgments, dictate that every public submission must be given consideration and be seen to influence the final product or decision processing of the Committee and Parliament. To alleviate fears of not considering submissions, it is advisable to have a matrix of submissions and themes that arose from all public hearings and submissions as opposed to issues of quantifying the number of submissions. Content issues raised must be brought to the attention of the Committee and deliberated on accordingly.
27. Our courts continually portray a picture that there is still so much that must be done to alleviate the plight of inequality and bring equal opportunities and access or reality to "a basic education" for all.

ADVICE

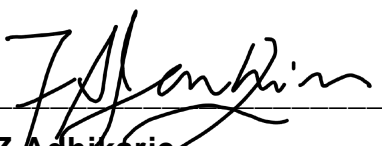
28. Concerning the first part of the legal question, the committees considering Bills must consider a motion of desirability as required in terms of NA rule 286(4)(i). The motion must be proposed after due deliberation. In other words, based on the contents of the Bill and the deliberations in the Committee, the Committee must decide whether it wants to proceed with the Bill. If the Committee adopts the motion, it must proceed to deliberate on the details of the legislation.

¹⁵ Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016).

¹⁶ Mogale and Others v Speaker of the National Assembly and Others (CCT 73/22) [2023] ZACC 14 (30 May 2023).

29. Noting the findings of the Bel Porto, Rivonia and Welkom/Harmony judgments of the Constitutional Court and some minor rephrasing of certain BELA Bill provisions for purposes of bringing clarity and attempt to do away with ambiguity on roles and conferral of powers to the correct authorities as per the Constitution and the Schools Act, whilst taking into account all public submissions, we are of the view that the proposed changes in the A list in respect of clauses 4 and 5 of the BELA Bill, are constitutional and other legal concerns raised have been taken care of.
30. Clauses 4 and 5 of the BELA Bill does not traverse or deal with the principle of separation of powers but brings clarity on the responsibilities and autonomy of the three-tier partnership originally envisaged by the Schools Act and verified as correct in the judgments that have pronounced on the issue of admissions and language policy at schools.
31. Therefore, with reference to our tagging opinion, meetings of the Committee that were attended, the BELA Bill is still pursuing the correct legal process of Bills in line with section 29 and 76 of the Constitution. In respect of the question whether there is compliance with section 59, all public submissions must be considered and seen to influence the deliberations of the Committee, regardless of whether they are all or not effected as presented.
32. The motion of desirability taken on the Bill after the clause-by-clause deliberation points to the fact that the Committee desires to proceed with the Bill. Hence, the Committee must proceed with the Bill and adopt a report on the Bill and the Bill itself and refer these to the National Assembly in line with the relevant Rules of Parliament.
33. We so advise.

PP



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Date: 25.08.2023