THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 11279/2017P

In the matter between:

THE MPUNGOSE TRADITIONAL COUNCIL	First Applicant
MPUNGOSE, ZAKHE DAVIDSON	Second Applicant
NKUNGUMATHE NPO	Third Applicant
KHANYILE, JIKILE PRINCESS	Fourth Applicant
MCHUNU, NOMBUSO HLUSHWAYINI	Fifth Applicant
MCHUNU, MZIBENI ROBERT	Sixth Applicant

and

THE MEC FOR EDUCATION, KZN PROVINCE	First Respondent
HEAD OF THE EDUCATION DEPARTMENT, KZN PROVINCE	Second Respondent
KHUBA SECONDARY SCHOOL	Third Respondent
ITHALA SECONDARY SCHOOL	Fourth Respondent
VELANGAYE SECONDARY SCHOOL	Fifth Respondent
MPHATHESITHA SECONDARY SCHOOL	Sixth Respondent
THE MINISTER OF BASIC EDUCATION	Seventh Respondent

JUDGMENT

Vahed J:

[1] This is a case about enforcing the fundamental right of access to basic education under s 29 of the Constitution, and the foundational principles of the rule

of law and the principle of legality insofar as the exercise of public powers are concerned.

INTRODUCTION

[2] The applicants are Inkosi Zakhe Mpungose, as Nkosi of and on behalf of the Mpungose Traditional Council ("the Council"), together with the Nkungumathe NPO, a non-profit organisation which is a community representative organisation, and two parents and one grandparent who are members of the community and who act on behalf of their children and grandchild respectively.

[3] The applicants act in their own interests, in the interests of the Mpungose community who reside in the Nkungumathe area in the Nkandla district of the KwaZulu-Natal ("the Province"), and the public generally. Importantly, the applicants jointly act in the stead of the children whose constitutional rights are directly at issue. Standing in terms of s 38 of the Constitution is not in doubt and is, in any event, not challenged.

[4] In essence, the applicants want the first respondent, as the political head of the Department of Education in the Province ("the Department"), to make good on its promise to build and provision the Khuba Secondary School ("Khuba"). I shall refer to the first respondent as "the MEC" and the second respondent as "the HOD".

[5] The community applied to the Department for the establishment of a secondary school in 1996, 2002 and then again in 2007.

[6] During or about May 2010, the incumbent MEC took the decision to establish and register Khuba as a school, the effect of which was that Khuba was to be constructed and appropriately provisioned.

[7] Nothing happened. In June 2016 efforts were renewed to bring about the construction of Khuba.

[8] Then, on 16 February 2017, without notice or consultation, the incumbent MEC withdrew the decision of his predecessor to register and establish Khuba.

[9] Thus, the gist of the present application: a review in which the applicants seek to have reviewed and set aside the MEC's decision of 16 February 2017 to deregister and disestablish Khuba on the basis that it was irrational, procedurally unfair and a breach of an enforceable public promise.

[10] The consequence of this is that the original decision stands and should be enforced.

[11] In what follows I take liberally from the very helpful heads of argument delivered on behalf of the applicants by Mr *du Toit SC* who, with Mr *Raizon*, appeared for them, and on behalf of the respondents by Mr *Khan* who appeared for them. I am grateful for that assistance.

EDUCATION FACILITIES IN NKUNGUMATHE VIEWED THROUGH THE PRISM OF BASIC EDUCATION UNDER THE CONSTITUTION

[12] In order to contextualise the material facts, a brief overview of the right to basic education under the Constitution and the state of education in the Nkungumathe area is perhaps necessary.

[13] Section 29(1)(a) of the Constitution provides that "… [e]veryone has the right to a basic education, including adult basic education… ".

[14] The state has an obligation under section 7(2) of the Constitution to fulfil the right to basic education. That much was made abundantly clear in *Governing*

Body of the Juma Musjid Primary School & Others v Essay N.O. and Others 2011 (8) BCLR 761 (CC) at para 45.

[15] In para 37 in *Juma Musjid* the court observed that the right to basic education provided for in section 29(1)(a) of the Constitution is an unqualified right which is immediately realisable. The internal limitations in ss 26 and 27, the other socio-economic rights in the Constitution, requiring that those rights be "progressively realised" within "available resources" subject to "reasonable legislative measures" do not apply to the right to a basic education.

[16] In *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) at para 17 Goosen J pointed out that "[t]his has important implications for determining whether the state is in compliance with its constitutional obligations in respect of the right to basic education. In the first instance the nature of the right requires that the state take all reasonable measures to realise the right to basic education *with immediate effect*. This requires that all necessary conditions for the achievement of the right to education be provided.".

[17] The right to basic education must be understood in the context of our fractured past. In *Juma Musjid* (para 42) the Constitutional Court reminds us that "[t]oday, 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.".

[18] In *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC), paras 45 to 47, Moseneke DCJ explained:

"[45] Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us."

[46] It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.

[47] 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.".

[19] Thus, the right to basic education can also be understood, as it was in *Governing Body of Rivonia Primary School v the MEC for Education: Gauteng Province* [2012] 1 All SA 576 (GSJ) at para 26.1 and at para 18 in *Madzodzo*, as an "empowerment right" and basic education, as it was in *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) at para 40, that it "… should be seen as a primary driver of transformation in South Africa.". As was noted by the Constitutional Court at para 43 in *Juma Musjid* (footnote omitted):

"Indeed, basic education is an important socio-economic right directed, amongst 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 basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."

[20] However, the state's obligation to provide basic education is not limited to providing schools *per se*. The right to basic education requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners.

[21] The courts have held, as in *Juma Musjid*, that the content of the right to basic education includes at least access to schools, enough school places for every child to attend school, as was held in *Rivonia Primary School*, the provision of teaching and non-teaching staff (as was held in *Centre for Child Law and Others v Minister of Basic Education and Others (National Association of School Governing Bodies as amicus curiae)* 2013 (3) SA 183 (ECG)) and of adequate teaching resources (as was held in *Madzodzo*), including the provision of one textbook for every learner (as was found in *Basic Education for All*), the provision of adequate and age and grade appropriate furniture which will enable each child to have his or her own reading and writing space (as was held in *Madzodzo*), the supply of transport for learners to and from school (as was found in *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 (5) SA 107 (ECG)) and the provision of adequate and safe toilets for learners (as was held in *Komape and Others v Minister of Basic Education* [2018] ZALMPPHC 18 (23 April 2018)).

[22] Mr *du Toit* submits that the learners in the Nkungumathe area, for whom the applicant organisations, parents and grandparents seek to hold government to

its promise to build and provision Khuba, are the very learners, from rural and impoverished backgrounds, that must as a priority be empowered through education. Absent Khuba, the state of education facilities for secondary school learners in Nkungumathe is dire.

[23] Mr Mthokozi McDonald Mchunu ("Mr Mchunu"), the deponent to the affidavits delivered on behalf of the Nkungumathe NPO (ie. the third applicant), reveals that he is a primary school teacher in science and technology and the Deputy Principal at Phalane Primary School in Nkandla. His affidavit discloses that he is a community activist and a mentor to learners in the Nkungumathe area and a founder of the Nkungumathe Youth Centre.

[24] Indicating that he has engaged with primary school learners throughout the Nkungumathe area, and taking account of his professional experience, Mr Mchunu's evidence is that the resources and curricula offered at surrounding secondary schools is severely lacking. His view is that learners deserve the best education possible but cannot find it at the secondary schools in the vicinity of the Nkungumathe area or do not have the means to attend better schools further away.

[25] Jikile Khanyile, the fourth applicant, says the following:

> "I only seek the best possible education for my child and the children of the community, to enable them to make as much progress as they can as part of previously, and tragically still, disadvantaged persons in South Africa.
>
> I was very happy when I learned in 2015 and then again in 2016 that the Khuba school would be erected … Should the school have come into existence, I would have been happy to take my child from Ithala [the fourth respondent] where she currently is and place her in Khuba even if it might mean the repetition of a year. Education in those areas [the Nkungumathe

area] would have broadened the knowledge and opportunities of children so educated which would have justified the move.

There is no public transport and service provided by the KZN education department to convey learners to schools and back. From our homestead it takes more than an hour to walk to Ithala. The result is that the children take a shortcut through the veld (still almost taking an hour) having to face the dangers in the veld such as snakes. The longer, safer route is easily 3 kilometres further than the shortcut.

…

I am aware that there are far too many learners for the available space of 10 classrooms at Ithala. The entire community knows this. Philile [my daughter] informed me that she has to share textbooks with 3 or more learners. She cannot do her homework every day, with others sharing the [book] living far apart.

Philile confirms that [there] are up to one hundred learners per class. Some [have] to sit on their knees and others bring mats to sit on. There are no desks for every [learner].

I simply do not have the funds to send my children to schools further afield. I cannot afford daily commutes or hostel fees and communing to and from such a school."

[26] Apart from denying those allegations and asserting that Ithala is within 5 kilometres of residences in Nkungumathe and that public transport is available in the area the HOD puts up no evidence to counter them.

[27] Ithala's evidence (ie. the fourth respondent) as presented by its principal reveals the following:

a. The purchase of textbooks is the responsibility of a section 21 school and the relief against the MEC is misguided;

b. the school had not fully managed to replace all its learners' text books due to budget constraints;

c. at least two learners share one text book;
d. desks designed for two learners are being used by three; and
e. it is conceded that there are too few classrooms.

[28] I struggle to discern how this provides answers for Mrs Khanyile's troubles, or the plight of other similarly placed individuals. It acknowledges serious breaches of constitutional principles. The basis for the HOD's denial that Philile has to walk an hour to and from school every day, or that learners' constitutional rights are violated by the conditions at Ithala is not understood.

[29] Similar concerns are raised by Mrs Nombuso Mchunu, the fifth applicant, about her daughters' experiences at Ithala. Again, the HOD's denials are not understood in the absence of any countervailing evidence being put by him or the MEC.

[30] Simphiwe Mchunu, the grandson of the sixth applicant, Mr Mzibeni Mchunu, attends grade 9 at Mphathesitha Secondary School, approximately 15 kilometres from the Nkungumathe area. It was his grandfather's intention to enrol Simphiwe in Khuba, but the Department's alleged reneging on its promise made this impossible. The papers reveal that currently, Mr Mchunu rents a space for Simphiwe to live near Mphathesitha. At school there are 81 learners in grade 9 and one classroom to accommodate all learners. There are not enough chairs for all learners and four learners share one textbook.

[31] The sixth applicant's allegations are not answered by the MEC or the HOD. The principal at this school (the sixth respondent), Mr Ncama, reveals the following:

a. He admits that there is a shortage of text books and the evidence that four learners share a text book is not refuted;

b. desks designed for two learners are being used by three; and

c. it is conceded that there are too few classrooms.

[32] The papers disclose that the position at the fifth respondent, Velangaye, is similar with a shortage of text books and with desks designed for two learners being used by three.

[33] In fact, on the HOD's own version, access to basic education in the Nkungumathe area is severely lacking. The HOD attaches to his affidavit a list of the schools neighbouring Khuba. The list deals with the number of learners and learning spaces at each school and reveals that, on the Department's figures, the 712 learners at Ithala (fourth respondent) are accommodated in 11 classrooms, i.e. approximately 64 learners per classroom. The 1508 learners at Velangaye (fifth respondent) utilise 26 learning spaces which is the equivalent of 58 leaners per classroom. At Mphathesitha (sixth respondent) 532 learners have access to 10 classrooms, making it 53 learners per classroom.

[34] The sixth applicant's evidence is that, although there are a few parents who can afford to arrange transportation for their children to schools like Velangaye, this option remains out of reach for the vast majority of the Nkungumathe children. The HOD denies this. In this regard there is merit in Mr *du Toit's* submission to the effect that it is astounding that a government official could meet allegations of parents' dire financial situations with a bald denial.

[35] Accordingly, on the uncontested evidence provided by the applicants, read with the responses of the schools and the HOD, school provisioning falls far short of the norm required for basic education. The right of access to basic

education of the Nkungumathe learners that have no choice but to attend schools such as Ithala is severely violated. Any improvements to the surrounding secondary schools will assist only a few children in Nkungumathe in view of the considerable distance between these schools and the Nkungumathe area.

THE RELEVANT FACTS – THE RESULTING CONSEQUENCES

The application for the establishment of a secondary school

[36] Representatives of the community have for nearly twenty years sought to establish a secondary school in the Nkungumathe area, one which would serve the needs of the immediate community and provide access to basic education. The first such application was made in 1996 (at that time the proposed name of the school was the Siphosethu Secondary School). The community received no response from the Department. The process was repeated in 2002 and in 2004. Again, there were no responses from the Department.

[37] A final application was made in 2007. This one was successful.

[38] On 20 March 2007 representatives of the Department visited the proposed site for the construction of Khuba to verify the information supplied in the application form submitted by the community. On 18 April 2007, the District Director for the Empangeni District addressed a letter to the Nkungumathe Youth Development Forum. There it is recorded that –

> "RE: PROPOSED NEW SCHOOL (SIPHOSETHU HS)
>
> Please be informed that the following steps have been taken in order to speed up the process of registration and construction of the above-mentioned school:
>
> 1. A memorandum requesting EMIS number and a registration form has been sent to the District Manager.

2. The MEC for Education has been informed about our visit to the proposed school.
3. Physical planning has been informed to prioritise the school for the 2009 financial year.
4. Construction of school will probably begin in 2010."

[39] The applicants submit that as at 18 April 2007 an unequivocal promise to provide the school had been delivered to the community. It is difficult to fault that submission.

[40] On 9 October 2007, in her motivation for the establishment of Siphosethu (as Khuba was then known), the District Director for the Empangeni District noted *inter alia* that "…the building of the school will be budgeted for the financial year 2009 to the amount of R7 000 000.00…", and that a proposed site for the school had been identified, was feasible and was within one kilometre of the Nkungumathe Primary School.

[41] That motivation concluded with a proposal that the HOD "… authorize the establishment and consequently the registration of [Khuba]. This action will not only enhance the educational efforts but will foster societal participation in school-related activities".

Khuba – its registration and the allocation of an EMIS number

[42] Some three years later, the recommendation of the District Director was accepted. Khuba was allocated an EMIS number and registered and established on or about 26 May 2010. The fact of registration and the allocation to Khuba of an

EMIS number are not denied by the HOD, who, however, contends for different consequences. I deal with this later.

[43] The letter issued by the Department to the Circuit Manager, Nkandla, records the following:

> "RE: REGISTRATION OF KHUBA SECONDARY SCHOOL [EMIS No. 490731]
>
> Attached hereto please find the certificate of registration for the aforenamed school. Kindly inform the applicant(s) that the school has not been commissioned to operate, but will be included in the Infrastructure Plan of the department, whose function it is to build classrooms, ablution facilities, fencing and specialist rooms, and that the school will start to operate when the department has provided the facilities mentioned."

[44] The applicants submit that taken at face value, the letter means that Khuba was formally registered and established and that facilities would be built, in accordance with the Infrastructure Plan and funds appropriated, in order for the school to commence operating. The submission continues that accordingly, the promise of 18 April 2007 that a school would be built for the community was now formalised by way of a decision to register and establish Khuba and to provision it for operation.

[45] However, the HOD contends that the allocation of an EMIS number did not mean that the construction and provisioning of Khuba had been approved in May 2010 (although the HOD admits the EMIS number was allocated). The HOD says that the allocation of an EMIS number "… is not indicative of the full 'establishment' of Khuba as Khuba does not have buildings, personnel, furniture,

equipment, text books and stationary, which is necessary before a school can be established.”.

[46] The question that must be asked is what then is the effect of registering a public school and allocation of an EMIS number?

[47] Mr *du Toit* submits that upon the allocation of an EMIS number, it was incumbent on the department to take all steps necessary to construct and provision Khuba. This is so because, first, the Department explicitly says that it will build the necessary facilities to allow Khuba to operate, and, second, because it presupposes budgetary provisioning.

[48] In terms of s 12 of the South African Schools Act, 1996 (“SASA”) and s 16(4) of the KwaZulu-Natal School Education Act, 1996 (“KZN Act”) the MEC may only establish a state-subsidised school out of monies appropriated for that purpose.

[49] The KZN Department of Education School Management Team (“SMT”) Handbook clarifies the position for educators, departmental officials and community members. Chapter 3 is titled “Education Management Information System [EMIS]”. Sections 3.5 and 3.6 deal with the “establishment” and “registration” of schools respectively. They provide in relevant part as follows:

“**3.5 Establishment of a School**

(a) The need to establish a new school must be identified either by the Department or by the school community. The involvement of the Ward Manager and the Physical Planning and EMIS Section is central to the whole process.

(b) The responsible officials will verify the need for such a school and, based on the findings, will advise accordingly. If the

need is authentic, the necessary consultative processes will unfold.

(c) The consultation process initiated by the Department should involve stakeholders such as, *Amakhosi, Izinduna*, local councillors, and the community.

…

(e) In the case of a rural school, an ITB 1 form (*Ingonyama* Trust Tenure Option Application Form), a letter of consent from the *Inkosi* and a letter from the local municipality must accompany the application form.

…

(g) Before the new school is built, its curriculum must be negotiated with the relevant stakeholders and approval sought from the Provincial Curriculum and Infrastructure units. This will assist in ensuring that the buildings match the needs of the curriculum.

3.6 Registration of Schools

…

(c) The Head of Department must approve registration of a school, and allocate an EMIS number prior to its operation.

(d) Registration of schools before commencement of teaching and learning ensures that the curriculum to be offered is approved by the DoE and complies with set standards.

(e) The school is budgeted for in terms of Norms and Standards, infrastructure provisioning, staffing and other relevant resources."

[50] It was submitted that that extract from the handbook demonstrates that the required verification is nothing more than a feasibility study by another name and that a physical structure (ie. a school building) is not required for the establishment of a school.

[51] The process, on the department's own documentation, is thus four-fold:

a. First, the need for a school is identified, and then verified;

b. second, what follows is a consultative process between stakeholders including parents, community members and traditional authorities. In the case of a rural school, such as Khuba, the Department must apply to the Ingonyama Trust to enter into a lease agreement for the use of the land for the development of a school, culminating in the determination of the curriculum and completing the establishment phase;

c. third, and after the above, the HOD approves the registration of the school and allocates an EMIS number; and

d. finally, a budget is prepared in terms of prescribed norms and standards.

[52] On the facts in this matter all of these steps were achieved:

a. First, and as indicated above, the need for Khuba was identified in 1996 and the identification and verification process for the school and the site for its construction was completed by 18 April 2007.

b. Second, a lengthy consultative process followed, and because Khuba is a rural school, it was the obligation of the Department – and not the community - to apply to the Ingonyama Trust for the use of land for Khuba.

c. The papers reveal that the applicants are not in possession of the Department's application to the Ingonyama Trust. They are also not in possession of the letter required from Inkosi Mpungose consenting to the use of traditional land to build a school prior to May 2010. What is known is that the material letter of consent was provided by the first applicant to the Department during or about the end of June 2016. Whatever the case, it is submitted that it must be accepted that the necessary processes were followed up by the Department, otherwise step three, the allocation of the EMIS number could not, on the Department's documentation, have occurred. It is accordingly submitted that regularity of the process is to be assumed. The submission is attractive.

d. Third, by 9 October 2007 the Department had already commenced budgeting for Khuba for the 2009 financial year and the Infrastructure Plan was "to prioritise [Khuba] for the 2008-2009 financial year".

e. Finally, on 26 May 2010 the registration of Khuba was approved. Khuba was allocated an EMIS number and had been budgeted for.

[53] The effect of an EMIS number is that a school has been established and is registered. What remains is its construction and provisioning. No other reasonable explanation is on record for the award of an EMIS number.

The period 2011 to 2015: More delays – more dashed promises

[54] Despite the May 2010 decision no physical construction commenced.

[55] On 7 April 2011 a meeting of community representatives and departmental officials took place and considered a number of matters relevant to the Nkungumathe community, including the building of Khuba. The minutes of the meeting record, *inter alia*, that:

a. The process to establish Khuba commenced in 1996 and that "no action has taken place";

b. Khuba has been registered and established as a public school;

c. the school was supposed to have been built in 2010, but fiscal constraints prohibited this;

d. the Department now committed to commencing construction of the school in the financial year 2011/2012;

e. the construction and provisioning of Khuba was on the Department's financial plan as at the date of the meeting; and

f. the community and Department district office would jointly meet to formulate a curriculum.

[56] Mr *du Toit* submits that this demonstrates that community had again been promised that Khuba would be built.

[57] There having been no building activity in the ten months since the meeting of 7 April 2011, the sixth applicant says that he headed a delegation of community members to meet with Departmental officials. That meeting took place in February 2012. The community was informed that Khuba was still on the waiting list for construction, but that building would not commence, as promised, by the end of the 2012 financial year.

[58] The community then approached an attorney for advice in about July 2012. The attorney wrote to the Department calling for an explanation. Mr Chonco, the District Director, responded on 13 August 2012 as follows:

> "The Department has an interest of ensuring that each and every school on its waiting list for construction is attended to; the same goes for Khuba Secondary School. Unfortunately, the school in question is not at the top of such list; however, the school is again assured that construction will take off in due course."

[59] Mr *du Toit* submits that again the community was made an official promise. He submits further that again it was broken.

[60] The sixth applicant endeavoured to meet with the Department in the course of mid-2013 but was not successful. The next meeting occurred on 18 October 2014. The community was represented by, *inter alia*, the second and sixth applicants, and the Department by senior management officials.

[61] The Department recommitted itself to provisioning Khuba. It promised to commence provisioning in 2016, but in place of a formal build, the initial plan would be for mobile classrooms. This presented an acceptable start.

[62] On 20 July 2015, the sixth applicant met with representatives of the Departmental Infrastructure Team, Messrs Smith and Mkhize. They reported that

five mobile classrooms had been sourced and were available for installation at Khuba to enable classes to commence in January 2016.

[63] On 25 September 2015 another meeting took place between a community delegation led by the sixth applicant and representatives of the Department led by Ms Judy Dlamini. The Department indicated that all was on track for the commencement of the 2016 academic year at Khuba.

[64] On the established facts accordingly, as at 25 September 2015, it appeared that Khuba would be open to learners from January 2016.

The period 2015 to 2016: The Transversal Task Team

[65] On 9 October 2015 the Transversal Task Team ("the TTT") was established by the erstwhile HOD, Dr Nkosinathi S P Sishi. It comprised members of the community and representatives of the Department. The aim of the TTT was to realise the Khuba project in terms of the build, the provisioning and the curriculum.

[66] The TTT process was fraught with delays and, it seems, Departmental mismanagement. The affidavits reveal that draft reports were presented by the Department on 8 March 2016 and 20 May 2016. A final report was also produced. The applicants were not provided with the reports and the Department has not provided the Court with copies.

[67] On 30 June 2016 the TTT produced a Joint Management Plan. The plan set out every stage and target date for the complete build and provisioning of Khuba, from the procurement of mobile classrooms, toilets, fencing, and furniture, to the appointment of officials, teachers and the allocation of norms and standards, with a fully operational Khuba completed by November 2016.

[68] The site where Khuba was to be built was the vacant land near the Nkungumathe Youth Centre and Nkungumathe Primary School ("the Khuba site").

[69] It will be recalled (see para 40 above) that on 9 October 2007, in her motivation for the establishment of Siphosethu, the District Director for the Empangeni District noted inter alia that the "land set aside by the community leader for the proposed school is suitably positioned for the secondary school". The proposed Khuba site of four hectares had been identified, was feasible and was within one kilometre of the Nkungumathe Primary School. It is noteworthy that this fact is not denied by the HOD. The HOD only questions whether the land was lawfully allocated. This aspect was, however, a matter in the hands of the Department and which was dealt with earlier when discussing the processes of the Ingonyama Trust.

[70] There is, in my view, no substance in the point, as the HOD alleges, that subsequent to the TTT report and the approval of the Khuba site a new site was identified as the potential land for the construction of Khuba. The HOD does not say who identified this piece of land. It was not identified by the community, nor by any of the applicants nor by the TTT.

The "new" feasibility studies

[71] It was submitted that the basis for the MEC's decision on 16 February 2017 not to build Khuba appears now, *ex post facto* from his letter of that date, to be that "…subsequent feasibility studies revealed that the proximity of the proposed school to another secondary school in the sparsely populated area, would render one of those schools surplus to the requirement.".

[72] It is significant that the respondents' papers do not contain affidavits deposed to by anyone involved in any feasibility study.

[73] In his affidavit, the HOD refers to a "feasibility study" consisting in part of a "town planning report" and an "environmental management report". These reports are undated (they are not verified under oath), but are premised on alleged visits to the Khuba site on or about 16 August 2016. This is some six weeks after the TTT report. They were never previously disclosed to the applicants i.e. not until they were attached to the answering affidavit.

[74] I am told that because the HOD's affidavit implied that there were further documents forming part of the feasibility study and which were not attached to the papers, in its letter to the state attorney of 2 May 2018, the applicants' attorneys requested a copy of the "feasibility study". On 20 May 2018 the state attorney responded that "'…the feasibility study' is neither in a written document nor a report."

[75] The applicants argue that this is a response begging for specificity. It is a report on which the respondents intend to rely but which they cannot produce and evidently is not in existence apart from the environmental management and town planning reports attached to the HOD's affidavit. The implication that the report exists, although not in written form is startling, to say the least.

[76] Mr *du Toit* submits that given that the feasibility study apparently exists, but not in writing, the HOD does not identify the official with the requisite knowledge to speak to the additional reasoning perhaps underpinning the decision to deem the Khuba site not suitable or that Khuba was not necessary at all.

Crying foul, The dashed promise and the decision to deregister and disestablish Khuba

[77] Towards the end of 2016, the community's patience with the Department appeared to wear thin with the result that on 4 November 2016 a report entitled "Crying Foul: Report on Khuba Secondary School Nkungumathe Area, Nkandla" ("the Crying Foul Report") was produced.

[78] The report sets out much of the chronology canvassed herein. It emphasised the community's frustration with the persistent delays and the rebuffs from the Department. The MEC was urged to take all the steps necessary to build and provision Khuba.

[79] The Crying Foul Report was prepared by the community representatives on the TTT and was submitted to the MEC and the HOD. It was never responded to.

[80] MEC's letter of 16 February 2017 withdrawing the May 2010 decision to build Khuba was then received and the present application launched on 4 October 2017.

[81] The MEC's letter of 16 February 2017 is pivotal to this application. It was written in response to a letter of complaint dated 6 February 2017. I repeat its contents:

> "**COMPLAINT: PROPOSED SCHOOL NOT ERECTED IN DECEMBER 2016**
>
> 1. The above matter refers.
> 2. I hereby acknowledge receipt of your letter dated 6th February 2017.
> 3. I would therefore like to state the following:
>
> 3.1 Although approval for the registration of the school was granted in 2007, subsequent feasibility studies have revealed that the proximity of the proposed school to another secondary school in the sparsely populated area, would render one of the schools surplus to the requirement.
>
> 3.2 The number of households in the vicinity of the proposed school site are not sufficient to grant building a new school

3.3 The Department has no knowledge of any learners that are currently not enrolled at any school.

4. Taking the above into account, unfortunately the Department is not in a position to construct the proposed secondary school under these circumstances.

5. We however, remain committed to provide access to quality education to all learners, within our available resources."

[82] Mr *Khan* contended that the original decision of the first respondent was one simply to register the Khuba Secondary School, and no more. He said that the respondents based this premise on the fact that when the applicants applied for the registration of Khuba, they did so on an application form titled "APPLICATION FOR REGISTRATION OF PROPOSED NEW SCHOOL". He then submitted that the original decision and the February 2017 decisions are independent, each of the other, as the former pertains only to the process of registration of the school whereas the latter pertains to commissioning the school for construction. Thus, he submitted that the decision of February 2017 does not amount to a withdrawal or reversal of the original decision and is therefore not reviewable. As I demonstrate herein, I do not agree.

THE GROUNDS OF REVIEW

Review under PAJA

[83] Under the Promotion of Administrative Justice Act, 2000 ("PAJA"), only "administrative action" so defined is reviewable. In *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) the Constitutional Court analysed the definition of administrative action in the following terms (footnotes omitted):

“[33] The concept of “administrative action”, as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions. In the present matter there are two elements in dispute: whether the Minister’s decision under section 8(c) of the Armscor Act is of an administrative nature (element (a)) and whether it falls under any of the listed exclusions (element (g)). Both can be answered by interrogating the nature of the power.

[34] To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that enquiry. But the requirement has two important functions. First, it obliges courts to make a “positive decision in each case whether a particular exercise of public power . . . is of an administrative character”. Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration.

[35] As a starting point, in *New Clicks* Chaskalson CJ suggested that the definition of administrative action under PAJA must be “construed consistently” with the right to administrative justice in section 33 of the Constitution.**[40]** As section 33 itself contains no express attempt to delimit the scope of “administrative action”, it is helpful to have reference to jurisprudence regarding the interpretation of that section.

[36] It is the function rather than the functionary that is important in assessing the nature of the action in question. The mere fact that a power is exercised by a member of the Executive is not in itself determinative. It is also true that the distinction between executive and administrative action is often not easily made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula.

> [37] Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, "[a]dministrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals." Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example. The verb "implement", which also appears in section 85(2)(a) of the Constitution and distinguishes it from section 85(2)(e), may serve as a useful guide: administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation."

[84] It was submitted that the February 2017 decision was not administrative action because the MEC did not take the decision "…in terms of any legislation or an empowering provision".

[85] Section 33 of SASA provides as follows:

> "**33. Closure of public schools**
>
> (1) The Member of the Executive Council may, by notice in the *Provincial Gazette*, close a public school.
>
> (2) The Member of the Executive Council may not act under subsection (1) unless he or she has—
>
> (*a*) informed the governing body of the school of his or her intention so to act and his or her reasons therefor;
>
> (*b*) granted the governing body of the school a reasonable opportunity to make representations to him or her in relation to such action;

(*c*) conducted a public hearing on reasonable notice, to enable the community to make representations to him or her in relation to such actions; and

(*d*) given due consideration to any such representations received.

(3) If a public school is closed in terms of subsection (1) all assets and liabilities of such school must, subject to the conditions of any donation, bequest or trust contemplated in section 37 (4), devolve on the State unless otherwise agreed between the Member of the Executive Council and the governing body of the school."

[86] The submission continues that the only provision upon which the MEC could have relied was section 33(2)(c) of SASA and it is clear from the papers that the MEC did not make the February 2017 decision, and does not purport to have done so, pursuant to any power under section 33(2)(c) of SASA.

[87] Thus, not having acted in terms of any empowering provision, the MEC's February 2017 decision cannot constitute administrative action and is not reviewable under PAJA. It thus can only be reviewed on the principle of legality.

[88] If, however, I am wrong and it can be contended that the February 2017 decision does indeed constitute administrative action, then it nevertheless still falls to be set aside under PAJA.

[89] The applicants were given no notice of the impending decision, no opportunity to engage with the MEC about the decision and its effect on the learners of the community, no clear statement of the administrative action and no notice of their right to request reasons for the decision. These are clear breaches of section 3(2)(a) of PAJA.

[90] Assuming also that the MEC had acted under section 33(2)(c) of SASA (which he did not), that section provides that an MEC may not close a public school unless he or she has "…conducted a public hearing on reasonable notice, to enable the community to make representations to him or her in relation to such actions."

[91] In addition, it is established law that administrative action which materially and adversely affects legitimate expectations must be procedurally fair under PAJA. It is arguable that the community had a legitimate expectation that Khuba would be built and that the February 2017 decision materially affected that legitimate expectation, and as such the community should have been afforded notice and an opportunity to make representations to the Department. Where a person has on the basis of a promise or a past practice acquired a reasonable expectation as to an administrator's future conduct, the administrator ought not to disappoint the expectation without at least hearing the person. In *Premier, Mpumalanga and Another v Executive Committee, Association of Governing Bodies of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at paras 36 to 42 the principle was discussed as follows (footnotes omitted):

> "[36] The concept of "legitimate expectation" employed in section 24 of the interim Constitution needs to be interpreted in the light of the concept of "legitimate expectation" that sprang from Lord Denning's judgment in *Schmidt* and that has been adopted in a wide variety of jurisdictions as mentioned above. Expectations can arise either where a person has an expectation of a substantive benefit, or an expectation of a procedural kind. There are also circumstances in which a legitimate expectation will arise which has inter-related substantive and procedural elements as Corbett CJ also recognised in *Traub* (at 758F). Once a person establishes that a legitimate expectation has arisen, it is clear from the language of section 24(b) of the interim Constitution that he or she will be entitled to procedural fairness in

relation to administrative action that may affect or threaten that expectation. It is not necessary for us to decide in this case, in what circumstances, if any, a legitimate expectation will confer a right to substantive relief beyond that ordinarily contemplated by a duty to act fairly.

[37] In this case, there is no dispute between the parties that a system whereby government paid tuition, transport and boarding bursaries to schools on behalf of needy pupils had been operating for some years. That system originated under the former government and favoured white pupils at the expense of black pupils in the education system. Bursaries were generally paid quarterly in arrear. Accordingly, debts had to be incurred by governing bodies in the expectation that the bursaries would be paid in due course. There can be no doubt that this system could not continue for long under the new constitutional dispensation. Nevertheless, governing bodies of schools were obliged to budget each year for the operating costs incurred by the school in the provision of tuition, transport and boarding bursaries. Towards the end of the 1994 school year, notice was given to the governing bodies that payment of transport and boarding bursaries would continue until the end of 1995 or until the new provincial governments decided otherwise. As it happened, bursaries were paid for the first term and at least in some schools for the second term of 1995. What is more, the budget proposed by the second applicant in May 1995 allocated sufficient funds for the payment of bursaries until the end of the 1995/6 year, although in his budget speech the second applicant did state that bursaries would be reviewed during the course of the year.

[38] In all these circumstances, it is clear that the governing bodies of schools had a legitimate expectation that government bursaries would continue to be paid during the 1995 school year subject to reasonable notice by the government of its intention to terminate such payment. Such legitimate expectation that bursaries would continue to be paid subject to reasonable notice meant that if the second applicant wished to terminate the bursaries he could not do so unless he gave reasonable notice prior to termination. Once, however, he had given reasonable notice there would have been no obligation to consult with the governing bodies or the schools concerned. This legitimate expectation, therefore, is one which has intertwined substantive and procedural

aspects as discussed above. There can be no doubt that when the second applicant notified school principals on 5 August 1995 that he intended to terminate bursaries with effect from July 1995, no reasonable notice of termination had been given to the respondent's members. It is equally clear that the letter of 31 August 1995 does not constitute reasonable notice because, at best for the second applicant, it represented a decision to terminate the payment of bursaries with effect from a date more than a month before the date of that letter.

[39] The question that arises is whether the second applicant acted procedurally fairly in the context of the legitimate expectation that the respondent and its members entertained. It needs to be emphasised that section 24(b) requires that administrative action which affects or threatens legitimate expectations be procedurally fair. That does not mean that in all circumstances a hearing will be required. It is well-established in our legal system and in others that what will constitute fairness in a particular case will depend on the circumstances of the case.

[40] In this case, it is clear that before the meeting of 5 August 1995, no notice had been given to the members of the respondent that a termination of bursaries with effect from the beginning of the third term was contemplated by the second applicant. Nor did the notice of the meeting itself intimate that the second applicant intended terminating the payment of bursaries. The members of the respondent were therefore given no opportunity to restructure their contractual obligations with transport companies or suppliers or staff in the light of the diminished income that they would receive as a result of the retroactive termination of the bursaries. At the meeting of 5 August 1995, or shortly thereafter, they were afforded a period of two weeks in which to make representations to the second applicant, concerning the particular financial difficulties they would face if the bursaries were summarily, indeed retroactively, terminated. It appears from the papers filed in this case that many of them took advantage of that opportunity. However, before that period had ended, the second applicant had reported to the provincial cabinet recommending that retroactive termination be approved. Although the second applicant avers that he sought the approval of the provincial cabinet "in principle"only, it appears from the memorandum that he prepared and

circulated to his colleagues in the provincial cabinet that his recommendation went beyond a decision “in principle”. He unqualifiedly recommended termination of the payment of bursaries. The respondent and its members were finally informed by a letter dated 31 August 1995 of the second applicant’s decision to terminate the bursaries with effect from 1 July 1995.

[41] In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly. On the other hand, to permit the implementation of retroactive decisions without, for example, affording parties an effective opportunity to make representations would flout another important principle, that of procedural fairness. This is a principle, which the second applicant himself recognised as important in his speech on 5 August 1995… . Indeed, it may be that in many cases a retroactive termination of benefits will not be fair no matter what process is followed unless there is an overriding public interest, as the European Court of Justice has held on several occasions. In the light of the conclusions I reach, it is not necessary to explore that issue further in this case. Citizens are entitled to expect that government policy will ordinarily not be altered in ways which would threaten or harm their rights or legitimate expectations without their being given reasonable notice of the proposed change or an opportunity to make representations to the decision-maker. In this regard, there are similarities between the facts of this case and those in the recent decision of the English Court of Appeal, *R v Devon County Council ex parte Baker and another; and R v Durham County Council, ex parte Curtis and another* [1995] 1 All ER 73 (CA) in which the court was faced with the closure of state-run residential homes for old people. It was held that there was a duty on the county councils concerned to consult the permanent residents in the homes before the decision to close the homes was taken. In one of the cases heard on appeal, the court held that the failure to consult prior to the taking of the decision rendered the decision susceptible to judicial review.

> [42] I conclude that in the circumstances of this case the decision by the second applicant to terminate the payment of bursaries to members of the respondent with actual retroactive effect and without affording those members an effective opportunity to be heard was a breach of their right to procedural fairness enshrined in section 24(b) of the interim Constitution. It is not necessary, therefore, to consider the merits of the respondent's reliance on the provisions of section 24(d) of the interim Constitution. In this case, in relation to the breach of section 24(b), no question of justification in terms of section 33 can arise as the decision taken by the second applicant did not constitute "a law of general application" as required by that provision."

[92] Accordingly, the February 2017 decision must be reviewed and set aside under PAJA for want of procedural fairness.

Legality review

[93] The rule of law is a founding value of our constitutional dispensation. It encompasses the principle of legality which, *inter alia*, obliges public functionaries to act within their powers and also requires that the exercise of all public power be rationally related to a legitimate government purpose. Rationality in this sense means rational both as to process and as to the merits of the action taken. A decision can be irrational because the procedure by which it was taken was unfair.

[94] The requirement of rationality is most often invoked to challenge executive decisions. The requirement will only be met where, objectively considered, there is a cogent link between the means adopted and the end sought to be achieved. In *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at para 51 it was put thus:

> "The Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution. This is true of the exercise of the power to pardon under section 84(2)(j)."

The MEC lacked authority to withdraw the May 2010 decision

[95] The general principle in our law is that once an administrator has taken a decision the administrator has no power to change it or set it aside. The administrator is said to be *functus officio*.

[96] In general, the principle relating to an administrator being *functus officio* applies only to final decisions. A decision is revocable before it becomes final. Finality is a point arrived at when the decision is published, announced or otherwise conveyed to those affected by it. As indicated in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), which concerned the President's power to appoint a commission of inquiry, "…the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification…"; the President would have been "…entitled to change his mind at any time prior to the promulgation of the notice". In order to be regarded as final the decision must have passed into the public domain in some manner.

[97] In the absence of a statutory corrective power, or the application by an administrator to set aside its own decision, the decision remains final and cannot be revoked. In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) it was made clear that a formal review application was a condition precedent, both as a matter of form and constitutional principle, should a public body wish to disregard its own decisions (footnotes omitted):

> "[64] Can a decision by a state official, communicated to the subject, and in reliance on which it acts, be set aside by a court even when government has not applied (or counter-applied) for the court to do so? Differently put, can a court exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own officials' decisions? That is the question the judgment of Jafta J (main judgment) [the minority judgment] answers. The answer it gives is Yes. I disagree. Even where the decision is defective – as the evidence here suggests – government should generally not be exempt from the forms and processes of review. It should be held to the pain and duty of proper process. It must apply formally for a court to set aside the defective decision, so that the court can properly consider its effects on those subject to it.
>
> [65] The reasons spring from deep within the Constitution's scrutiny of power. The Constitution regulates all public power. Perhaps the most important power it controls is the power the state exercises over its subjects. When government errs by issuing a defective decision, the subject affected by it is entitled to proper notice, and to be afforded a proper hearing, on whether the decision should be set aside. Government should not be allowed to take shortcuts. Generally, this means that government must apply formally to set aside the decision. Once the subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done. The decision, despite being defective, may have consequences that make it undesirable or even impossible to set it aside. That demands a proper process, in which all factors for and against are properly weighed."

[98] I agree with the applicants' submission that here the final decision was communicated at the latest by May 2010. The decision to budget for, build and provision Khuba had been taken and was final. There is no statutory provision that would enable the incumbent MEC to reverse his predecessor's decision; nor has the incumbent MEC elected to have the May 2010 decision reviewed and set aside as he ought to have done.

[99] In my view in those circumstances the May 2010 decision stands.

The decision was irrational

[100] Khuba was established, registered in May 2010, and was to be built on a site that the applicants have established that had already been identified in 2007.

[101] It was implicit in the May 2010 decision to register and establish Khuba that it was preceded by a 'feasibility study' on the basis of the requirements set out in the formal application form for the registration of a proposed new school. After delivery of the TTT report at or about the end of June 2016 the community did not participate in a further feasibility study and the leadership was unaware of any.

[102] The applicants submit that the environmental management and town planning reports which form the basis for (and are the only "evidence" put up by the HOD for) the MEC's decision to disestablish and deregister Khuba are materially flawed. The submission is underpinned by the fact that the reports surveyed a site which was not the Khuba site. The submission is undoubtedly correct.

[103] The Khuba site is approximately one kilometre from the Nkungumathe Primary School. The site fits into the same cluster of buildings as the primary

school, the Nkungumathe Community Centre and the provincial library located across the road.

[104] The location referenced in the two reports is a considerable distance from the Khuba site. According to the Department's own documents the distance between the site referenced in the two reports and Nkungumathe Primary is three kilometres. Although the GPS coordinates mentioned in the two reports are the correct ones, the site examined simply cannot be the site identified jointly by the Department, Inkosi Mpungose and representatives of the Nkungumathe community.

[105] The applicants make the point that the two reports contain sparse information and that as a consequence the HOD, in his affidavit, resorts to generalisations and assumptions. They say that it is simply not good enough for the HOD to make statements like "…the number of households surrounding [the incorrect site] appear to be very sparse…" or that Nkungumathe Primary "…appears to be situated exactly…" between the Khuba site and Ithala, or that he "…would estimate…" approximate distances. All these calculations depart from the wrong starting point, being the incorrect site.

[106] The obvious conclusion is that the means used (ie. environmental and town planning reports which evaluated the incorrect site) are not rationally connected to the decision no longer to build on the correct Khuba site.

[107] The environmental and town planning reports show that the decision of the MEC not to construct and provision Khuba was made on the basis of wholly irrelevant material (the incorrect site was evaluated), which immaterial information was in any event compiled after Khuba had been established and registered in May 2010.

[108] The MEC's decision to withdraw the decision to register, establish, construct and provision Khuba was accordingly arbitrary and irrational and falls to be set aside under section 172 of the Constitution.

The decision was procedurally irrational

[109] The question of procedural fairness must be considered, first, as part of the rationality enquiry into the MEC's decision and, second, in the light of the community's legitimate expectation that Khuba would be built.

[110] Executive action, to be rational, must be procedurally fair.

[111] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) concerned the appointment by the President of the National Director of Public Prosecutions (executive action). It was held that both the process by which the decision is made and the decision itself must be rational. The position was explained at para 36:

> "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."

[112] *Albutt* concerned a special dispensation process established by the President to deal with applications for pardon from persons convicted for offences they claim were politically motivated, but who did not participate in the Truth and Reconciliation Commission. In the Constitutional Court, Mr Albutt, an applicant for pardon under the dispensation, together with the state parties, argued that the

victims of the offences in respect of which pardon was sought were not entitled, in a legality review concerning executive action, to procedural fairness before a decision to grant pardon was made. The respondent victims submitted they had a right to make representations. Ngcobo CJ (at para 50) held that (footnotes omitted):

> "To pass constitutional muster … the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution."

[113] Thus, the question for determination was whether the decision to exclude victims from participating in the special dispensation process was rationally related to the objectives that the President set out when he announced the process. It was held that the means could not be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard, in order to determine the facts on which pardons are based, namely, whether the offence was committed with a political motive.

[114] In my view, when considered in that light, the MEC's February 2017 decision was procedurally irrational.

[115] The manner in which the decision was taken, i.e. in the absence of consultation with community representatives and learners, was not consonant with the purpose of the decision to halt construction of Khuba and to deregister it.

[116] As explored earlier, it is in the first instance the community that identifies the need for a school and then applies to the Department. What is required in

terms of the KZN Department of Education SMT Handbook, and what in fact occurred here, was a lengthy, admittedly halting, consultative process, from 2007 through to 2016.

[117] As at 30 June 2016, it was agreed by all parties, in terms of the Management Plan, that construction and provisioning would commence on 8 July 2016, with Khuba being fully operational by November 2016 for the start of the 2017 academic year. This was a direct result of a meaningful, albeit frustrating, consultative process.

[118] The decision to establish Khuba in May 2010 was based on the formal consultative process that had been undertaken. The purpose of that decision was to build Khuba to fulfil the basic educational requirements of secondary school learners in the Nkungumathe area. The consultative process was necessary and foundational, not incidental, to the purpose of the decision and to the manner in which it was taken. If there was to be a change in the decision, in this instance the purpose now being to disestablish Khuba, then to be rational a consultative process would likewise be a necessary pre-condition.

[119] In the circumstances of this case, for the February 2017 decision to be rational the Council and community should at the very least have been given notice of the MEC's intention to close Khuba, information as to how the decision was taken and why, and the opportunity to engage with Departmental officials on the nature of the decision and its effect on learners' rights.

[120] The decision was thus manifestly procedurally irrational and falls to be set aside.

THE DECISION WAS AN UNCONSCIONABLE BREACH OF PROMISE

[121] The applicants submit that this is a tale of promises made and promises breached.

[122] The facts make plain that the community was promised a school. The promise to build Khuba was first made on or about 18 April 2007. The May 2010 decision to establish, build and provision Khuba reinforced that promise.

[123] The promise was again made on 7 April 2011 and 13 August 2012.

[124] That the members of the community understood that a promise had been made is clear. Mr M Mchunu, the sixth applicant, says that he and his grandson "…have been seriously left in the lurch by the breach of promises and undertakings…" to establish Khuba and that "…these broken promises caused real hardship".

[125] A public promise is enforceable if it would be unconscionable for a public body to renege on its promise. The decision in *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC) is relevant here. The KZN Department of Education notified independent schools in September 2008 of the subsidies payable to them the following year. The first portion of the subsidies was payable in April 2009. The Department did not make this payment and in May 2009 announced that it had decided to reduce the subsidies with retrospective effect.

[126] A majority of the Constitutional Court (Cameron J) held that the Department's conduct was unlawful and that the independent schools were entitled to hold it to its promise, not on the pleaded contractual or administrative law grounds but "…on broader public law and regulatory grounds…". This was so because the promise to pay "…created a legal obligation unilaterally enforceable at

the instance of those who were intended to benefit from…" it. Cameron J (at para 52) went on to say:

> "…a public official who lawfully promises to pay specified amounts to named recipients cannot unilaterally diminish the amounts to be paid after the due date for their payment has passed. This is not because of a legitimate expectation of payment. Legitimate expectation relates to expected conduct. Rather, this principle concerns an obligation that became due because the date on which it was promised had already passed when it was retracted."

[127] The principle is thus that a promise, seriously and lawfully made by a public official, may be enforceable at public law by those to whom it was made if it would be "…both legally and constitutionally unconscionable…" for the public official to renege on the promise.

[128] Whether reneging on the promise is legally and constitutionally unconscionable is measured against the public law standards of reliance, accountability and rationality. This was also how Froneman J, in his concurring judgment, saw matters (para 83, footnotes omitted):

> "The substantive justification the main judgment gives for preventing a public official from retracting a lawful promise to pay an amount to someone after the date for payment has passed is that it is 'legally and constitutionally unconscionable' when tested against the standards of 'reliance, accountability and rationality'.".

[129] The Court concluded that the MEC's conduct had been legally and constitutionally unconscionable because he had reneged on his promise after the due date for payment of the subsidies. But the broader principle established by the judgment is that a public official may be held to his promise at public law if it would be legally and constitutionally unconscionable for him to renege on his promise.

The court proceeded to evaluate the state's conduct against the constitutional principles of reliance, accountability and rationality, to conclude that its failure to keep its promise was, in the circumstances, legally and constitutionally unconscionable. In addition, it found that the schools' reliance on the first tranche of the promised subsidy payment had "crystallised" into an entitlement to that payment because, by that stage, the schools could not counteract the prejudice of non-payment.

[130] Here the community relied on the promise to build and provision Khuba. Mr Mchunu explained how he had rearranged his affairs and decided for his grandson, at great cost, to attend a secondary school 15 kilometres away from Nkungumathe and had made arrangements for his accommodation and transport.

[131] Each year, when the promise is remade, parents order and plan their lives: they must determine to which secondary school they will apply on their children's behalf, and be able to account for the costs that are incurred the further away a school might be. They cannot act with any degree of certainty when Khuba is planned to be operational in 2012 or 2014 or 2016 and are in no position to counter the prejudice they suffer at the hands of a non-performing government department. The nature of the community's reliance on the Department's promises is such that a breaking of the promise would be legally and constitutionally unconscionable.

[132] Turning to rationality, the ability of the party relying on the promise to "tailor behaviour and expectations to a promise" is fundamental to the rationality standard that informs the principle of unconscionable state conduct.

[133] The Court in *KwaZulu-Natal Joint Liaison Committee* said that "…it is impossible to tailor behaviour and expectations to a promise made in relation to a

period that has already passed. Revoking a promise when the time for its fulfilment has already expired does not constitute rational treatment of those affected by it."

[134] In her discussion of the *KwaZulu-Natal Joint Liaison Committee* judgment, Professor Hoexter explains that the Constitutional Court "…seemed to have in mind a very particular kind of 'rationality' here: the rule-of-law idea that official behaviour ought to be capable of guiding citizens and informing their plans, or what one may call reliance-based rationality." (See C Hoexter: *'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court'* (2015) 132 South African Law Journal 207 at 210).

[135] The breaking of the promise to build Khuba was thus, in my view, irrational and ought to be declared to be enforceable.

THE APPROPRIATE REMEDY

[136] With their amended heads of argument the applicants delivered an amended Notice of Motion. The relief is described differently, and, they suggest, more clearly, with no new substantial relief claimed.

[137] The applicants submit that If PAJA is found to apply, then the review application was not brought within 180 days as required by section 7(1) of PAJA.

[138] Mr Khan submitted that the applicants have failed to furnish a full and reasonable explanation for the delay which covers the entire duration of the 180 day period from 17th January 2017 to 16th July 2017 (on the respondents' version), alternatively from 16th February 2017 to 15th August 2017 (on the applicants' version) to the date when the application was instituted. ie. 04th October 2017. He submitted additionally that the delay should be determined together with the consideration that the applicants have poor prospects of

succeeding in the review application and that the application for review should be dismissed accordingly.

[139] It was submitted by the applicants that the delay was not unreasonable. They have furnished an explanation of the circumstances leading to the delay. That, in large measure, has been canvassed with the facts dealt with earlier. In addition, they stress the important factor that the first applicant and the first respondent are organs of state as defined in section 239 of the Constitution, and have a duty in terms of section 41 of the Constitution to avoid litigation. Despite repeated requests rather to consult about the matter and reach agreement, the MEC never responded to these attempts to act in accordance with the demands of the Constitution. They accordingly submit that the applicants should not be non-suited. Condonation is accordingly sought in terms of section 9(1)(a) of PAJA. To the extent necessary, my view is that it ought to be granted.

[140] The decision to deregister and disestablish Khuba made in February 2017 is unlawful. It must be set aside.

[141] In *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others (No 3)* 2016 (10) BCLR 1308 (CC) the Court said:

> "Supervisory orders arising from structural interdicts ensure that courts play an active monitoring role in the enforcement of orders. In an appropriate case, this guarantees commitment to the constitutional values of accountability, responsiveness and openness by all concerned, in a system of democratic governance. By granting the structural interdict a court secures a response in the form of reports and thereby prevents a failure to comply with the positive obligations imposed by its order. Generally, the court's role continues until the remedy it has ordered in a matter has been fulfilled."

[142] A structural interdict in terms whereof organs of state are ordered to perform their constitutional obligations and in terms whereof this court may perform a supervisory function to ensure compliance with and proper implementation of the order is thus competent. In this matter one is required.

[143] The HOD has acknowledged that the original decision might stand. If so, he says the Department cannot afford to implement it. This he contended notwithstanding the fact that the MEC did not raise budgetary constraints as a reason for his decision.

[144] In terms of the Amended National Norms and Standards for School Funding (31 August 2006), Departments of Education are compelled to assess capital expenditure on an on-going basis. The following provisions are relevant here:

> "75. Despite the current shortage of funds for capital development, as an aid to planning and decision-making, each PED must:
>
> (a) maintain an accurate, prioritised, annually updated database of school construction needs, and
>
> (b) undertake annually updated long-term projections of new school construction targets and funding requirements, based on these norms.
>
> 77. The scenario planning should initially estimate the requirements to eliminate backlogs and provide sufficient school places by the target year 2008. This must form part of the analytical work required for the MTEF, and should be adjusted annually in the light of new data and performance in new school construction. Depending on the availability of funds each year, and construction performance, the plan may require acceleration or deceleration.
>
> ….

> 81. Using these criteria, the PEDs must develop a ranking of geographical areas from neediest to least needy, based on the numbers of children out of school or in existing crowded schools. Backlogs must be eliminated by starting with the neediest, most crowded areas, and proceeding as quickly as possible down the list of priorities."

[145] Whatever the Department's position, moving forward it must be accepted that the construction and provisioning of Khuba must be prioritised and accommodated within the Department's user management plan and budget.

[146] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 74 the Constitutional court addressed an argument advanced by the City of Johannesburg that it was not obliged to go beyond its available budgeted resources to deal with emergency housing needs, in the following terms:

> "This court's determination of the reasonableness of [housing] measures within available resources [in the present case the right to education which is immediately realisable] cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."

[147] As was said in *Equal Education and Another v Minister of Basic Education and Others* [2018] 3 All SA 705 (ECB) at para 195, budgetary and resource constraints cannot amount to "… a lifetime indemnity against discharging the duty [government] owes in terms of section 29(1)(a)" of the Constitution.

[148] It must be accepted that the Department is under severe resource constraints and that as a matter of policy the allocation of budgets and the determination of priorities resides primarily with the Department. This, however, cannot detract from the fact that the 2010 decision was to the effect that Khuba be established, registered, constructed and provisioned. This is the purpose of the structural interdict I propose granting. It will permit the Department the time to determine the best way forward and to report on how and when this will be achieved.

[149] The relief relating to the provision of resources at the respondent schools must also undoubtedly be granted.

[150] As for costs, these must follow the result. Punitive costs were originally sought when the proceedings commenced but at the hearing Mr *du Toit* was content with an Order that the applicants be awarded ordinary costs.

I make the following Order:

1. **The identities of the minor children referred to in the affidavits filed of record in this matter and in this judgment are to be kept confidential and are not to be made public.**

2. **To the extent necessary and relevant the delay in commencing this review is condoned.**

3. **The decision of the first respondent taken on or about 16 February 2017 to withdraw the first respondent's earlier decision to establish and construct the Khuba Secondary School ("the third respondent") for and within the Nkungumathe community is reviewed and set aside.**

4. **The decision of the first respondent, made on or about 26 May 2010, to establish the third respondent must be implemented in accordance with the provisions of this Order.**

5. **The first and second respondents are ordered to:**

a. **provide the necessary budgetary provisions, infrastructure, equipment, teaching and learning materials and personnel to construct and provision the third respondent in order to render it a functional school in all material respects, including, but not limited to, those aspects identified in paragraphs 7(a), (b) and (c) of this Order;**

b. **prepare and deliver a Management Plan setting out the time periods and targets identified to achieve progress towards and fulfilment of the objects set out in is sub-paragraph 5(a) above, such Management Plan to be furnished, under cover of an explanatory affidavit, to this Court and to the first applicant by no later than 31 October 2019;**

c. **on a quarterly basis thereafter, prepare written reports in affidavit form, to be delivered to this Court and to the first applicant, on the progress made in the implementation of that Management Plan.**

6. **Within one month of the receipt of the Management Plan and of each of the subsequent written reports the first applicant shall be entitled to deliver written comment and make written submissions to the first and second respondents on the contents of such Plan or report.**

7. **It is declared that the first and second respondents are in breach of section 29(1)(a), (read with sections 9 and 10), of the Constitution by not ensuring that learners at the fourth, fifth and sixth respondent schools each have access to or use of:**

a. a textbook (where the curriculum prescribes one) in every subject taken by such learner;

b. adequate age and grade appropriate furniture;

c. sufficient classrooms.

8. The first and second respondents are ordered to remedy the breaches identified in paragraph 7 of this Order without delay, but in any event by no later than the commencement of the 2020 school year in respect of paragraphs 7(a) and (b) and by no later than the commencement of the 2021 school year in respect of paragraph 7 as a whole.

9. The reports identified in paragraph 5(c) of this Order shall, at the appropriate times, include reports indicating and detailing compliance with paragraph 8 of this Order.

10. After delivery of the Management Plan and after delivery of any of the subsequent reports, or upon a failure to deliver such Plan or reports, if, after attempts at meaningful engagement with the first and second respondents concerning any issue arising out of such Plan or report have failed, the applicants are given leave, on three weeks' notice to the first and second respondents, and on the same papers duly supplemented, for such additional relief as may then appear appropriate and warranted in the then prevailing circumstances.

11. **The first respondent is ordered to pay the costs of the application, such costs to include the costs of two counsel.**

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Vahed J

CASE INFORMATION

Date of Hearing: 26 October 2018

Date of Judgment: 17 July 2019

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Respondent's Counsel:	A R Khan
Respondent's Attorneys:	State Attorney, Kwazulu-Natal (Ref: Ms N E Peete/ 35/002097/17/M/P1B) Locally represented by: Cajee Setsubi Chetty Inc 195 Boshoff Street Pietermaritzburg (Ref: Mr A Essa/ND) Tel: 033 345 6719