

## CASE NOTE

# The Significance of Equal Education and Others v Department of Basic Education and Others

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*On 17 July 2020, the North Gauteng High Court in Pretoria handed down a judgment that ordered the Minister of Basic Education, Angie Motshekga, and eight Members of Executive Council (MECs) to produce a progress report every 15 days on the implementation of the National School Nutrition Programme (NSNP). The decision in Equal Education and Others v Department of Basic Education and Others is significant because it recognises the interrelatedness of the right to food, nutrition and education. It also highlights the importance of access to food during a time of crisis, especially as socio-economic conditions worsen.*

## The status of the NSNP during the Covid-19 pandemic

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The Covid-19 pandemic has disrupted economies, societies and every aspect of daily life – there is no country that has not been affected. In South Africa, as in numerous other countries, the government ordered a nationwide lockdown to curb the spread of the virus. This led to the closure of workplaces, schools and public spaces, with only essential services continuing to operate. This had devastating impacts on the private and public sectors, where resources were stretched to respond to a myriad crises. The initial lockdown was particularly difficult for marginalised groups unable to support themselves and dependent on government programmes for survival.

In particular, the closure of schools prevented the implementation of the NSNP, which is a national programme run by the Department of Basic Education (DBE) and feeding roughly 10 million learners in public schools daily. The NSNP was founded in 1994 with the aim

of combating malnutrition and hunger and noticeably improving educational outcomes. It is seen as a critical programme for realising learners' constitutional rights to basic nutrition, guaranteed in section 28(1)(c) of the Constitution, and basic education, protected in section 29(1)(a) of the Constitution.



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The NSNP has been widely celebrated as one of the government's most effective pro-poor policies, reaching the most vulnerable children in the country. However, the complete disregard of its significance during the lockdown was described as 'an astounding betrayal of its previous undertakings', where those who required the most support during a time of crisis were ignored.

Director-General Mathanzima Mweli explained the DBE's position, stating that

[b]ecause the Disaster Management Regulations did not provide for school nutrition as an 'essential service' ... all key stakeholders in the Basic Education Sector concluded that school feeding would not only be unlawful ... but undesirable as young learners would violate the law by leaving their homes.

He also noted that, according to the Public Finance Management Act,

[t]his Conditional Grant is made available on the basis that the NSNP is designed to run and operate when schools are in session, in other words on school days when the schools are open. The legal authorisation thereof is thus for a feeding Programme in school, and to go outside these parameters will be unlawful ....

## The facts

On 18 March 2020, schools closed in order to combat the spread of Covid-19 in South Africa, immediately halting the rollout of 10 million meals daily. On 26 March, the lockdown commenced, resulting in loss of income for millions of families and a surge in food insecurity.

On 10 April, an open letter entitled 'Open letter to the Minister of Basic Education Planning in a time of crisis – School feeding schemes can and must continue' was drafted by Equal Education (EE), Equal Education Law Centre (EELC), SECTION27, the Children's Institute, and the Centre for Child Law to Minister Motshekga, who had claimed previously that the DBE had 'assessed [its] capacity' and determined that it would not 'be able to' run feeding schemes during the lockdown.

The letter contested this, stating that 'the continuation of school nutrition provisioning for learners is critical and urgent ... to ensure that children's needs are prioritised and protected in government's plans'. On 17 April 2020, the EELC and SECTION27 wrote a letter to the Presidency and DBE for the urgent resumption of the NSNP, regardless of whether schools reopened.

Communications continued in the months to follow, with the EELC and SECTION27 calling for an urgent joint portfolio committee meeting on children's access to food with the portfolio committees for the DBE and Department Social Development (DSD) to ensure that children would have access to basic nutrition.



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The DBE eventually responded on 11 May, stating that the NSNP would resume once schools reopened. Throughout May, public meetings were held at which Minister Motshekga declared the NSNP would be reinstated, based on context-sensitive models. The Standard Operating Procedures for Covid-19 in schools were eventually published, with guidelines for resuming the NSNP safely.

However, there were discrepancies among provinces in terms of the availability of food resources for learners. The DBE announced that schools would reopen on 1 June 2020 for learners in grades 7 and 12, but this statement was revoked and schools were permitted to open on 8 June. Minister Motshekga then backtracked on her previous statement that the NSNP would resume for all qualifying learners, announcing that

[w]e would have wished also even to provide nutrition for grades that we have not phased in. But I had requested the sector and the MECs to say maybe we need to wait a little. Get ourselves to acclimatise to the new environment, manage that which we are still struggling to get right before we can introduce new programmes ....

Minister Motshekga went on to say that

there is no way we can take care of 12 million kids outside of the education system infrastructure. We are not going to run special programmes. We won't be able to do it, so parents must take that responsibility and communities must assist.

## Legal action taken

EELC and SECTION27 wrote to the Minister seeking clarity on the roll-out of the NSNP and threatening to take legal action if the plans for implementation were not made available. They released a statement arguing that '[t]he proposed suspension of the NSNP is a regressive measure in violation of various rights enshrined in the Constitution'. The Minister responded by confirming that all learners would receive meals based on the context-specific plans. However, when schools reopened on 8 June, the NSNP did not resume for learners at home, and reports showed that even some learners in grades 7 and 12 who had returned to school did not receive a meal.

On 9 June 2020, the Director-General presented to the National Coronavirus Command Council the state's readiness to reopen schools, but noted that food supplies varied from province to province. Frustrated by this response, the EE and two school governing bodies in Limpopo launched an application to the North Gauteng High Court.

In the days that followed, the legal action resulted in a speedy response from the DBE, who then compelled all eight MECs (excluding the Western Cape, which had already committed to implementing the NSNP) to reinstate the programme for all learners from 22 June 2020. The responses from various provinces were unsatisfactory, relying on the excuse of 'context-specific plans' and saying that 'chaos and confusion' characterised the roll-out of the NSNP during this period.

On 2 July 2020 the urgent application of *Equal Education and others v the Department of Basic Education and others* was heard virtually by Judge Potteril. The EE and others argued that the rights to basic education and basic nutrition are interdependent and that the decision not to roll out the NSNP to all qualifying learners, where plans had been made to do so safely and promises made to that effect, was 'irrational, unreasonable and unlawful'.

The judgment was handed down on 17 July in favour of the applicants. The court relied on the argument that the government has a 'negative' obligation not to impair a right protected in the Constitution and that the Minister and the MECs had diminished the rights protected by sections 27(1)(b), 28(1), and 29(1)(a) by stalling the implementation of the NSNP. Additionally, the court detailed the dismal conditions of child hunger in South Africa even during the normal operation of the NSNP, and concluded that without its resumption, the health of millions of learners would diminish.

The court concluded that all qualifying learners are entitled to a daily meal from the NSNP. It held that the NSNP had been introduced expressly to address both the right to basic education and the right of children to basic nutrition; that, as such, the Minister of Basic Education and the MECs had a constitutional duty to provide basic nutrition to learners; that learners had a basic right to nutrition; and that the suspension of the NSNP had infringed upon that right.

The court ordered Minister Motshekga and the eight MECs to produce a progress report every 15 days on the implementation of the NSNP. However, as of the first reporting period, only the Minister had filed a report to the court, with most of the MECs filing at later dates. The decision is significant because it recognises the interrelatedness of the right to food, nutrition and education. It also highlights the importance of access to food during a time of crisis, especially as socio-economic conditions worsen. The court reiterated that it required urgent action by ordering that the NSNP



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be fully implemented without delay. The order of regular reports also ensures that there is some level of accountability, even after the judgment. EE, EELC and SECTION27 have since continued to advocate for the full resumption and effective implementation of the NSNP since the judgment.

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