

25th April 2019

Ministry of Education

Western Cape Government

Att: Deborah Schafer

Email: [edumin.edumin@westerncape.gov.za](mailto:edumin.edumin@westerncape.gov.za)

Dear Deborah,

Re: Your recent correspondence with me regarding homeschooling

Many thanks for your prompt response to my letter of 10<sup>th</sup> April. Yes, it would seem that we are as far apart in our understanding of the issues at hand as we have ever been. Further discussion seems as though it is unlikely to resolve our fundamentally different opinions on these matters. It does therefore seem we have to agree to disagree; and that in due time the judiciary will be required to rule on the legalities of the laws and policies. It is a great pity we have not been able to bridge the divide and I am hoping that through such a judicial process we do not inadvertently undermine the entire schooling system. I feel it is so critical, before embarking on such an undertaking, to think through the unforeseen consequences very carefully. With our education system in a rather fragile state it makes me anxious to take my homeschool grievances into the very public domain of the Constitutional Court where the legality of the SASA and the many loopholes I see in it would be shown up. What Pandora's box might be opened? I am desperate for the children of South Africa to have the best lives and the best opportunities we, as a society, can offer to them. I am passionate about education as a tool for self-development and the advancement of society. I appreciate that you too are working hard to do all that you and your department can to achieve the same. It is a monumental task. I am also aware that the proposed Bella Bill is in consultation and so changes to the future law can be made right now by the Western Cape government. I am trusting that you will use whatever powers and influence you have to ensure such an amendment to the current law that will be proposed to Parliament will be of the highest possible calibre and stand up to scrutiny by the best legal minds in the world.

I have spent many long hours ploughing through the research and the legalities of education and have not been able to come up with any better offering for you, by way of solution, in regard to homeschooling, than that I proposed in my first letter. How can I be happy to operate without any governmental procedures? Because all of the options I have looked at are catastrophically flawed on some level. It is a mind-bending conundrum to think of a regulation or a policy, which is legally enforceable, and achieves what it sets out to achieve. I wish there was such a thing which guaranteed to all children that they would become well educated members of society through the passing of some law, implementing some policy, filling in some form. I just don't see it. That is why after reviewing most education laws in modern democracies I support the UK law as the one most closely aligned to the legal framework within South Africa. I appreciate you feel you need to be involved in the education of homeschooled children and always welcome dialogue and relationship between all parties.

Just for clarity's sake, I am wanting to respond to only one point in your reply. My comment that a child may choose NOT to be educated is a well-established legal paradigm in the legislation of any right. I am not sure how familiar you are with the law pertaining to rights, I'm only learning about these things myself, but as I understand it, a right has to be exercised by the individual in whom it vests.

Since it is Freedom Day and since we are two weeks away from an election let's look at the right to vote. In order for me to exercise that right I actually have to get myself registered on the roll, get to the voting station and actually cast my vote. The government's responsibility is to ensure that there is due process in place for me to register and provide the necessary stations and materials required for me to do so. I equally have the right to simply sit at home and never register or vote. It is not illegal for me to do so. I can't be arrested for not voting. Yet, the government is still obligated to make sure I have every opportunity to vote and does have a legally binding obligation to do so, regardless of how many citizens choose to exercise their right, or not. I am sure you can see why we can't criminalise the right to vote because that undermines the whole point of democracy which is based on individual freedoms.

If we were to decide our kind of democracy needed to include a criminal sanction to enforce voting, then we would have moved the right to vote into the arena of an obligation to vote. Even if we did do that, we would face the very real and practical hurdle – what do we do with people who do go to vote under sanctions and just draw Mickey Mouse faces (or something less wholesome) all over the ballot paper? Do we have a further sanction against spoilt papers ie you absolutely have to make a neat x against the name of the candidate or party of your choosing and there are no other options? How would we check? How could we do that without pushing up against free and fair elements of the law? What about people who don't like any of the offerings? Is "I choose not to choose" an option? The further practical thing is how would you police such an undertaking? Checking on millions of people over one day of voting to make sure everyone voted? What would we do about the thousands of practical reasons people might have for not voting? So, you see how it starts to get more and more complex. Perhaps if we ever decided to go with a Big Brother government model then the technology could be harnessed to enforce voting. It's not beyond the realms of possibility but is possibly beyond the realms of acceptability in a free and democratic society like ours.

If you think carefully about the right to an education it works the same way. If my child has the right to an education, he or she actually has to open a book, or YouTube or find a tutor or whatever resources are required and apply his or her mind and study and learn and absorb and question and actually become educated (like I need to register, educate myself on the various options, make a decision, attend a voting station and actually vote). The government's responsibility is to ensure that there is access to the necessary resources for my child to become educated (as the government needs to ensure there is a voting station and ballot papers etc for me to use to vote). It is not illegal for my child to remain uneducated (as it is not illegal for me to not vote), he or she can't be arrested for being uneducated (as I can't be arrested for not voting). Think about this very carefully. If we say that a person HAS to vote or HAS to be educated, they are no longer rights to be exercised but obligations to comply with (and failure to comply is usually associated with legal penalty). On the surface of it I am sure it sounds like semantics, but they are not the same thing and the legal framework surrounding each is vastly different. I really hope you will find the time to speak to your legal department and find out the differences between rights, responsibilities and obligations, from a strictly legal point of

view. I am sure they will tell you the difficulties in legislating the exercising of rights in such a way as to be legally enforceable and remain aligned with the Constitution.

It is one of the fundamental flaws of the legalities of Section 3. I have included the wording at the bottom of my letter for convenience (bold is my own). If you read the first page of your response to me again "*Your comment, therefore, that a child may choose NOT to be educated, is incorrect*" Then very carefully read the EXACT words of Section 3 of the SASA again, not what you think it says but what it actually says and you will realise that your response should read "*Your comment, therefore that a child may choose NOT to **attend school**, is incorrect*" Since Section 3 does not mention, even once, the words educated, education or educate. Your response assumes "attending school" and "education" are interchangeable and one means the other. It is like a magician's sleight of hand, because it is almost impossible to legislate for education, and so we don't legislate for that which is the only legally binding concept, and we swop out the very difficult thing for the far easier substitute i.e school. Which is why, I surmise, there is not a definition of education in the statute, because what would you actually write? And it is why, I guess, the stated aim of the SASA is "*To provide for a uniform system for the organisation, governance and funding of **schools**; to amend and repeal certain laws relating to **schools**; and to provide for matters connected therewith.*" Wow – not a word on education! It is chock full of changing "a right to education" to "an obligation to attend school". Now you have to watch carefully, as I've said, a person choosing not to exercise their rights, can't be legislated against. That means we are not able to arrest all the children who fail exams, don't attend school, are illiterate and innumerate, draw Mickey Mouse faces all over their arms instead of paying attention to their teachers, just as we can't imprison the various non-voters.

So, what we do? Because we are so desperate to enforce "education" on all children in South Africa and yet we can't imprison uneducated children, we convert the word "education" into the word "school" and we apply sanctions onto parents whose children don't attend school, in a ruse that somehow compulsory school attendance is legally defensible in regard to their right to an education, and in the process convert the right into an obligation. This is important to understand as indeed, we both can absolutely be sanctioned (myself, as parent, and you, as Minister) as we both have an **obligation** to ensure we are doing all that is possible to facilitate a child's **right** to an education. This converting "a right to education" to "an obligation to attend school" is another one of the fundamental flaws of the legalities of Section 3. My children do not have a right to attend school, or to follow a curriculum or pass an assessment or anything mentioned in the SASA they have a "right to an education".

In summary, the one point of clarity from your reply is that actually our children do have the right to remain uneducated, as I have the right not to vote. Our opinions diverge so substantially on these matters I do despair, after 5 years, if further progress is possible, and so I will leave it there.

Kind regards

Joy Leavesley

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SASA Section 3.

*3. Compulsory attendance.—(1) Subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a **school** from the first **school** day of the year in which such learner reaches the age of seven years until the last **school** day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first. (2) The Minister must, by notice in the Government Gazette, determine the ages of compulsory attendance at **school** for learners with special education needs. (3) Every Member of the Executive Council must ensure that there are enough **school** places so that every child who lives in his or her province can attend **school** as required by subsections (1) and (2). (4) If a Member of the Executive Council cannot comply with subsection (3) because of a lack of capacity existing at the date of commencement of this Act, he or she must take steps to remedy any such lack of capacity as soon as possible and must make an annual report to the Minister on the progress achieved in doing so. (5) If a learner who is subject to compulsory attendance in terms of subsection (1) is not enrolled at or fails to attend a **school**, the Head of Department may— (a) investigate the circumstances of the learner’s absence from **school**; (b) take appropriate measures to remedy the situation; and (c) failing such a remedy, issue a written notice to the parent of the learner requiring compliance with subsection (1). (6) Subject to this Act and any other applicable law— (a) any parent who, without just cause and after a written notice from the Head of Department, fails to comply with subsection (1), is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months; or (b) any other person who, without just cause, prevents a learner who is subject to compulsory attendance from attending a **school**, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding six months*