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Mr. H. M. Mveli
The Director-General
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0001

Attention: Thembisile Jiyane

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Dear Mr. Mveli

RE: LEGAL OPINION ON WHETHER THE PUBLIC FINANCE MANAGEMENT ACT, 1999 (ACT NO, 1 OF 1999) APPLIES TO SCHOOLS: YOUR E-MAIL DATED 27 NOVEMBER 2018

Introduction

1. We have been requested by the Department of Basic Education ("Department") to provide a legal opinion on whether the Public Finance Management Act, 1999 (Act No. 1 of 1999) ("PFMA") applies to schools.
2. For the purposes of this opinion, we have considered the following legal instruments:

- (a) the Constitution of the Republic of South Africa, 1996 ("Constitution");
- (b) the PFMA; and
- (c) the South African Schools Act, 1996 (Act No. 84 of 1996) ("SASA")

Discussion

CONSTITUTION

3. The starting point for any evaluation is the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The Department's attention is drawn to section 2 of the Constitution which provides for the supremacy of the Constitution and that the obligations imposed by it, must be fulfilled.

THE PFMA

4. The long title of the PFMA provides that the PFMA regulates financial management in the national and provincial governments ensuring that all revenue, expenditure, assets and liabilities of those governments are efficiently and effectively managed.

5. Section 2 of the PFMA provides that the objects of the PFMA is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the PFMA applies. Section 2 of the PFMA reads as follows:

"2 Object of this Act

The object of this Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies" (Our underlining).

6. Section 3 of the PFMA provides for the institutions to which the PFMA applies, which includes departments, public entities listed in Schedule 2 or 3 and constitutional institutions. Section 3 of the PFMA reads as follows:

“3 Institutions to which this Act applies

(1) This Act, to the extent indicated in the Act, applies to-

- (a) departments;*
- (b) public entities listed in Schedule 2 or 3; and*
- (c) constitutional institutions.*
- (d)*

(2)

(3) In the event of any inconsistency between this Act and any other legislation, this Act prevails”.

7. Section 13 of the PFMA provides for deposits into the National Revenue Fund (“NRF”) and those monies which are excluded from being paid into the NRF. Section 13(1)(f)(iv) of the PFMA provides that money received by a national department is excluded from being paid into the NRF, if the money is of a kind described in Schedule 4 to the PFMA. Section 13(1)(f)(iv) of the PFMA reads as follows:

“13 Deposits into National Revenue Fund

(1) All money received by the national government must be paid into the National Revenue Fund, except money received by-

(a) ...

...(f) a national department...

...(iv) if the money is of a kind described in Schedule 4; or ...”.

8. Further, section 22 of the PFMA provides for deposits into the provincial revenue funds and those monies which are excluded from being paid into the provincial revenue funds. Section 22(1)(d)(v) of the PFMA provides that money received by a provincial department is excluded from being paid into the provincial revenue fund, if the money is of a kind described in Schedule 4 to the PFMA. Therefore, as school fees are excluded by item 1 of Schedule 4 to the PFMA, such fees do not have to be deposited into the provincial revenue fund. Section 22(1)(d)(v) of the PFMA reads as follows:

“22 Deposits into Provincial Revenue Funds

(1) All money received by a provincial government, including the province's equitable share, and grants made to it, in terms of the annual Division of Revenue Act, must be paid into the province's Provincial Revenue Fund, except money received by-

(a) ...

...(d) a provincial department in the province-

(i) ...

...(v) if the money is of a kind described in Schedule 4...”.

9. Schedule 4 to the PFMA provides for exclusions from the revenue funds. Item 1 of Schedule 4 to the PFMA provides that the SASA (covering school fees) is excluded from such revenue funds. Thus, in terms of section 13(1)(f)(iv) read with section 22(1)(d)(v) of the PFMA and item 1 of Schedule 4 to the PFMA, school fees do not form part of the revenue funds, which are regulated by the PFMA. Schedule 4 to the PFMA reads as follows:

**“Schedule 4
EXCLUSIONS FROM REVENUE FUNDS
(In terms of section 13 (1) or 22 (1))**

1. SA Schools Act (covering school fees)

2. Fines and estreated bails paid in respect of offences and alleged offences in terms of-

(a) by-laws enacted by municipalities; or

(b) national or provincial legislation, the administration of which is assigned to municipalities” (Our underlining).

10. Therefore, it becomes clear that the PFMA does not apply to schools fees.

The SASA

11. Section 1 of the SASA defines the term “school” to mean a public or an independent school which enrolls learners in one or more grades from grade R (Reception) to grade twelve.

12. Section 15 of the SASA provides that every public school is a juristic person with legal capacity to carry out its functions in terms of the SASA, which means that it can sue and be sued. Section 15 of the SASA reads as follows:

“15 Status of public schools

Every public school is a juristic person, with legal capacity to perform its functions in terms of this Act”.

13. Section 35 of the SASA empowers the Minister to determine national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance. Section 35(2)(d) of the SASA deals with the norms and standards for school funding contemplated in section 35(1) of the SASA, wherein the Minister must determine the procedure in terms of which the Member of the Executive Council must apply the criteria contemplated in section 35(2)(a) of the SASA. Section 35 of the SASA reads as follows:

“35 Norms and standards for school funding

(1) Subject to the Constitution and this Act, the Minister must determine national quintiles for public schools and national norms and standards for school funding after consultation with the Council of Education Ministers and the Minister of Finance.

(2) The norms and standards for school funding contemplated in subsection (1) must-

(a) set out criteria for the distribution of state funding to all public schools in a fair and equitable manner...

...(d) determine the procedure in terms of which the Member of the Executive Council must apply the criteria contemplated in paragraph (a)”
(Our underlining).

14. Section 37 of the SASA provides for school funds and assets of public schools. Section 37(1) of the SASA provides that the school governing body (“SGB”) must establish a school fund and that the SGB is responsible for administering the school fund in accordance with the directions issued by the Head of Department (“HOD”). Section 37(2) of the SASA provides that all money received by a school including school fees, must be paid into the school fund. Thus, in terms of section 37 of the SASA, the SGB is

responsible for administering all school money in accordance with the HODs directions. In this regard, section 37 of the SASA reads as follows:

“37 School funds and assets of public schools

(1) The governing body of a public school must establish a school fund and administer it in accordance with directions issued by the Head of Department.

(2) Subject to subsection (3), all money received by a public school including school fees and voluntary contributions must be paid into the school fund.

(3) The governing body of a public school must open and maintain one banking account, but a governing body of a public school may, with the approval of the Member of the Executive Council, invest surplus money in another account.

(4) Money or other goods donated or bequeathed to or received in trust by a public school must be applied in accordance with the conditions of such donation, bequest or trust.

(5) All assets acquired by a public school on or after the commencement of this Act are the property of the school.

(6) The school fund, all proceeds thereof and any other assets of the public school must be used only for-

- (a) educational purposes, at or in connection with such school;*
- (b) educational purposes, at or in connection with another public school, by agreement with such other public school and with the consent of the Head of Department;*
- (c) the performance of the functions of the governing body; or*
- (d) another educational purpose agreed between the governing body and the Head of Department.*

(7) (a) Money from the school fund of a public school may not be paid into a trust or be used to establish a trust.

(b) If a trust was established from a school fund of a public school or if such money was paid into a trust prior to 1 January 2002, such trust or payment is invalid and the money must be paid back into the school fund.

(c) A governing body of a public school may not collect any money or contributions from parents to circumvent or manipulate the payment of compulsory school fees and to use such money or contributions to establish or fund a trust, and if such money or contributions of parents were paid into a trust prior to 1 January 2002, the trust must pay such money or contributions into the school fund” (Our underlining).

15. Further, section 42 of the SASA provides that the SGB must keep records of monies received and used by the school, records of all financial transactions and that the SGB must draw up annual financial statements. Section 42 of the SASA reads as follows:

"42 Financial records and statements of public school

The governing body of a public school must-

- (a) keep records of funds received and spent by the public school and of its assets, liabilities and financial transactions; and*
- (b) as soon as practicable, but not later than three months after the end of each financial year, draw up annual financial statements in accordance with the guidelines determined by the Member of the Executive Council".*

16. Section 43 of the SASA provides that the SGB must appoint an auditor to audit the records and financial statements referred to in section 42 of the SASA. Section 43 of the SASA reads as follows:

"43 Audit or examination of financial records and statements

(1) The governing body of a public school must appoint a person registered as an auditor in terms of the Auditing Profession Act, 2005 (Act 26 of 2005), to audit the records and financial statements referred to in section 42.

(2) If the audit referred to in subsection (1) is not reasonably practicable, the governing body of a public school must appoint a person to examine and report on the records and financial statements referred to in section 42, who-

(a) is qualified to perform the duties of an accounting officer in terms of section 60 of the Close Corporations Act, 1984 (Act 69 of 1984); or

(b) is approved by the Member of the Executive Council for this purpose.

(3) No person who has a financial interest in the affairs of the public school may be appointed under this section.

(4) If the Member of the Executive Council deems it necessary, he or she may request the Auditor-General to undertake an audit of the records and financial statements of a public school.

(5) A governing body must submit to the Head of Department, within six months after the end of each financial year, a copy of the annual financial statements, audited or examined in terms of this section.

(6) At the request of an interested person, the governing body must make the records referred to in section 42, and the audited or examined financial statements referred to in this section, available for inspection”.

17. Effectively, Chapter 4 of the SASA ensures effective financial management by the SGB, in its administration of the school's finances.

Conclusion

18. In light of the foregoing, it is our considered view that schools are not listed in section 3 of the PFMA as institutions to which the PFMA applies. In terms of sections 13 and 22 of the PFMA, school fees do not form part of the revenue funds, which are regulated by the PFMA. We are therefore of the opinion that the PFMA does not apply to schools and that the financial management of school funds is provided for in the SASA and not the PFMA.

Yours Sincerely

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**FOR THE OFFICE OF THE CHIEF STATE LAW ADVISER
R. HARICHARAN / X. MDLUDLU / S. MASAPU**