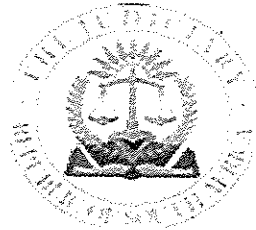


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
	.....
	.....
DATE.....	SIGNATURE:.....

In the matter between:

CASE NO:1416/2015

ROSINA MANKONE KOMAPE  
MALOTI JAMES KOMAPE  
MOKIBELO LYDIA KOMAPE  
LUCAS KHOMOTSO KOMAPE

FIRST PLAINTIFF  
SECOND PLAINTIFF  
THIRD PLAINTIFF  
FOURTH PLAINTIFF

And

MINISTER OF BASIC EDUCATION  
MEMBER OF THE EXECUTIVE COUNCIL LIMPOPO  
DEPARTMENT OF EDUCATION  
PRINCIPAL OF MAHLODUMELA LOWER PRIMARY SCHOOL  
SCHOOLGOVERNING BODY, MAHLODUMELA LOWER  
PRIMARY SCHOOL

FIRST DEFENDANT  
SECOND DEFENDANT  
THIRD DEFENDANT  
FOURTH DEFENDANT

And

TEBEILA INSTITUTE OF LEADERSHIP EDUCATION,  
GOVERNANCE AND TRAINING  
EQUAL EDUCATION

FIRST AMICUS CURIAE  
SECOND AMICUS CURIAE

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**JUDGMENT**

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**MULLER, J**

- [1] This court previously granted a structural interdict the terms whereof are set out in the order. I do not propose to refer in any detail to its contents. The main purpose of the structural order was to set in motion the eradication of pit toilets from all schools in the Limpopo Province. The first and second defendants were required to develop a detailed program based on recommendations by experts to implement procedures and steps to achieve that aim promptly.
- [2] To ensure compliance until the order is fully discharged, this court retained its supervisory jurisdiction. The structural order required that the defendants deliver an affidavit on 31 August 2018 to report on the schools with pit toilets and to set out the plan which the defendants will embark on, to comply with the order. An updated plan was delivered on 15 May 2020.
- [3] Intrinsically linked to the structural order are the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure<sup>1</sup> which contain the principles which the defendants are obliged to follow and implement. Regulation 12(4) puts it bluntly that pit toilets are not allowed in schools.
- [4] The defendants are on record that they have planned to replace the pit toilets at schools over an estimated period of 14 years (reckoned from 2018 until 2031) and to replace them with adequate toilet facilities, taking into account the number of pupils in each such schools. The reason proffered for the inordinate long period is that it

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<sup>1</sup> Hereinafter "the Regulations".

will take that long to replace the pit toilets based on available funds in the budget and funds required for infrastructure development per year.

- [5] The plaintiffs argued that the proposed period of 14 years provides cold comfort to children, and parents with children in school and those who have children who will attend school within the next few years. If the period of 14 years is implemented current learners will actually complete their entire school going years without any relief. The aim of the order is to vindicate the rights of current and future learners on a sustainable basis.
- [6] I agree with the submission. The proposed 14 year period is unduly long. The rights of the children who are attending school presently are being ignored. They are in constant danger when attending school and when they are compelled to utilize these dangerous toilets, some of which also do not afford adequate privacy. The dignity of many learners are seriously impaired when they have to use these facilities. It cannot be countenanced. Another unfortunate and tragic death of a child at school, due to dangerous pit toilets will be a catastrophe which should be avoided at all costs.
- [7] Urgent and effective steps are needed. There is little doubt that adjustments need to be made with regard to the budget and the allocation of funds to cater for this project. It is not business as usual. The replacement of pit toilets is a national emergency and must be treated accordingly. A revised plan to implement the order with the necessary urgency must be given urgent attention. It cannot be gainsaid that the plan put forward by the defendants fail to meet the expectations expressed by the Regulations and the structural interdict.

- [8] Counsel on behalf of the plaintiffs, on the one hand, suggested that a task team should be established whereas counsel on behalf of the defendants, on the other hand, suggested that such a step is unnecessarily invasive.
- [9] The defendants identified 1658 schools with sanitation needs of which 1489 are schools equipped with pit toilets. It was held in *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>2</sup> that with regard to the right to have access to adequate housing, measures directed towards the progressive realization of the right be established. The court, without being prescriptive, held that a program be implemented which is capable of facilitating the realisation of the right within the available means of government. The state must nevertheless ensure that the measures that they adopt are reasonable. I am of the opinion that those words are equally applicable to the present situation.
- [10] When consideration is given to the reasonableness of the measures, a court:
- “will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.”<sup>3</sup>
- [11] The answer to this question is a resounding No! The time period of 14 years is unreasonable when learners are unable to enjoy their right to education throughout their school careers of 12 years. They are without doubt the most vulnerable members of society whose best interests are specifically protected by section 28 of the Constitution.
- [12] *Grootboom supra* also stated:

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<sup>2</sup> 2001 (1) SA 46 (CC).

<sup>3</sup> Par 41.

"Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test for reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate they may not pass the test." <sup>4</sup>

[13] It is also important to point out the latest report was dated in May 2020 which is more than a year ago. To meet the test of reasonableness a plan has been prepared with a new revised time frame in which to replace the pit toilets urgently at the schools identified as required by the structural order.

[14] The appointment of a task team is very attractive, at first blush. Such an order will encourage an ongoing hands on approach be adopted and followed by the defendants. I am, nevertheless, not convinced that a stage has been reached where a specialist task team is called for to be appointed to guide and assist the defendants in their task to comply with the principal aim of the structural interdict.

[15] In *Mwelase and Others v Director-General Department of Rural Development and Land Reform and Another*<sup>5</sup> a state organ has neglected its statutory duties for 25 years. Cameron J said:

"The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done.

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<sup>4</sup> Par 44.

<sup>5</sup> 2019 (6) SA 597 CC.

Here, the fact that the Department's tardiness and inefficiency in making land reform and restitution real has triggered a constitutional near-emergency, as explained earlier."<sup>6</sup>

- [16] Courts must step in to intervene in the implementation of programmes to protect the infringed rights of the learners by insufficient and unreasonable conduct. It is, in my view, the purpose of the task team is to replace officials of defendants which are tasked to implement the structural interdict. Such a step is not warranted at the moment. The defendants must be given the opportunity put up a revised plan which meets the test of reasonableness. I want to make the following clear. If the defendants are incapable of vindicating the rights of learners on a sustainable basis within the foreseeable future the appointment of a task team may well be the final solution.
- [17] Counsel on behalf of the defendants very properly conceded that the plan which the defendants proposed to be implemented is not perfect. Financial constraints are a fact of life. Adequate financial provision should be put in place to address the plight of the learners in schools with pit toilets.
- [18] I am of the view that the defendants should pay the costs of the plaintiffs. Both parties employed two counsel.
- [19] I am minded to grant the prayers in terms of the revised draft order proposed by the plaintiffs.

## **ORDER**

1. It is declared that the defendants plan is unconstitutional and does not comply with the structural order.

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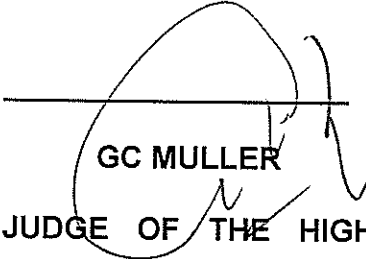
<sup>6</sup> Par 49.

2. The first and second defendants, the Minister of Basic Education ( Minister) and the Member of the Executive Council, Limpopo Department of Education (MEC), are directed to file with this Court, within 90 days the date of this order, a revised and detailed plan that:
  - 2.1 provides an accurate, consolidated and verified list of schools with pit toilets in the Limpopo Province, identifying the name and location of the school, and indicating:
    - 2.1.1 schools which only have pit toilets;
    - 2.1.2 schools which have pit toilets in use, alongside other forms of sanitation;
    - 2.1.3 schools which have pit toilets which are not in use but have not yet been demolished.
    - 2.1.4 schools which have sanitation facilities which are otherwise non-complaint with the sanitation requirements of the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure ("School Infrastructure Norms").
    - 2.1.5 the number and condition of the pit toilets and other sanitation facilities at the school.
  - 2.2 Provides a clear methodology for updating and auditing the list of schools on a regular basis.
  - 2.3 Identifies which sanitation program each school on the list falls under (ASIDI, SAFE, Limpopo Department of Education, or other programmes).
  - 2.4 Explains how the different sanitation programmes will be coordinated to implement the revised plan.

- 2.5 Identifies the criteria used in selecting schools for the different sanitation programmes.
  - 2.6 Identifies the relevant department, officials and implementation agents tasked with ensuring the implementation of the plan.
  - 2.7 Provides a revised deadline for the eradication of pit toilets in the Limpopo Province, with a detailed justification for this deadline.
  - 2.8 Provides the estimated time required to address the specific sanitation needs of each of the schools identified on the list, with reasons for these estimated time periods.
  - 2.9 Explains the criteria for determining which schools on the list receive priority, with reasons for the priority level assigned to each school.
  - 2.10 Provides a detailed budget for the implementation of the revised plan, reflecting the estimated cost of all inputs, the funds available to implement the plan, the steps to be taken to source further funds, and how these funds are allocated across the various sanitation programmes managed by the Limpopo Department of Education and the National Department of Basic Education.
  - 2.11 Provides appropriate interim measures to address schools' urgent sanitation needs and immediate safety risks pending the delivery of permanent sanitation measures.
3. The defendants are to deliver progress reports every six months to this Court and the parties with a detailed account and evaluation of the steps taken to implement the revised plan until the revised plan is fully implemented.



4. The parties are entitled to re-enroll the matter on the same papers, duly supplemented to the extent necessary, to address the need for further relief arising from the orders set out above.
5. The first and second defendants are jointly and severally liable to pay the plaintiffs' costs in these proceedings, including the costs of two counsel.



**GC MULLER**  
**JUDGE OF THE HIGH COURT**  
**LIMPOPO DIVISION:POLOKWANE**

**APPEARNCES**

1. For the Plaintiff : C McConnachie  
: T Pooe
2. For the Defendant : M.S Phaswane  
: K Ramailela
3. For the Amicus Curiae : H Cassim
4. Date of the hearing : 06 August 2021
5. Date judgment delivered : 17 September 2021