**IN THE HIGH COURT OF SOUTH AFRICA**
**LIMPOPO DIVISION, POLOKWANE**

**CASE NO. 3158/18**

In the matter between:

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| **SCHOOL GOVERNING BODY, MAKANGWANE SECONDARY SCHOOL** | APPLICANT |

and

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| **MEMBER OF THE EXECUTIVE COUNCIL, LIMPOPO DEPARTMENT OF EDUCATION** | 1st RESPONDENT |
| **HEAD OF DEPARTMENT, LIMPOPO DEPARTMENT OF EDUCATION** | 2nd RESPONDENT |
| **MINISTER OF BASIC EDUCATION** | 3rd RESPONDENT |
| **DIRECTOR-GENERAL OF BASIC EDUCATION** | 4th RESPONDENT |

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**APPLICANT'S HEADS OF ARGUMENT**

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**INTRODUCTION**

1 The applicant seeks urgent relief to ensure that learners at Makangwane Secondary School (hereinafter referred to as "Makangwane" or "the School") have safe and adequate school facilities before 17 July 2018, when the third school term begins.

2 Makangwane is a public high school situated in Non-Parella Village, Maleboho West Circuit, in the Capricorn District of Limpopo.[1] It serves a poor, rural community and is a "no-fee school", meaning that it cannot and does not charge fees.[2] It presently has 105 learners enrolled.[3]

3 It is common cause that Makangwane's school buildings are in a dire state and are not conducive for teaching and learning.[4] A report prepared by the Limpopo Department of Education (Department) in April 2018 describes these buildings as "*uninhabitable*" and a "*disaster*".[5]

4 The respondents further admit that they have been aware of these conditions since at least 2016.[6] Correspondence dating back more than decade shows that they have known of the problem for much longer.[7]

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[1] FA p 10, para 6.

[2] FA p 23, para 38.

[3] FA p 24, para 40.

[4] AA p 333, para 10. FA pp 25 -34, paras 43 -66.

[5] Annexure NBM 4 p 362 para 3.1.

[6] AA p 329 para 6.14.

[7] FA p 34, paras 67 -68. See, in particular, JN 15 p 114.

5 Despite being aware of the conditions at the School, the respondents failed to address the problem. They do not deny that they have performed no maintenance on the school buildings since they were constructed in the 1970s.[8]

6 The Department further admits that it placed the School on its priority list for school construction in the 2017/2018 financial year, but failed to take any further action.[9]

7 The respondents' inaction has resulted in a crisis at the School:

7.1 On 22 January 2018, the corrugated iron roof of one of the classrooms blew off during school break time nearly injuring learners.[10]

7.2 On 30 January 2018, the school governing body (SGB) and community members decided to move the learners out of the classrooms due to concerns for their safety.[11]

7.3 From this time, learners received lessons under nearby trees, although classes were disrupted and some teachers refused to teach outdoors.[12]

7.4 From 14 March 2018 to 17 May 2018, learners in grades 8 to 11 received no regular lessons after Department officials refused to allow teaching to continue outdoors.[13]

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[8] FA p 29, para 50. AA p 342 para 29.

[9] AA p 329, para 6.14.

[10] FA p 11 para 10; FA p 38, para 79.

[11] FA p 11 para 10; FA p 38, para 80.

[12] FA p 11 para 10.2; FA p 32, para 61.

[13] FA p 11 para 11; FA pp 45 – 46, paras 97 – 98.

7.5 From 17 May 2018, learners and teachers returned to the Makangwane classrooms and remained there until the end of the second term.[14]

7.6 If nothing is done before 17 July 2018, these learners face another school term in unsafe and inadequate facilities.

8 The applicant and their legal representatives, SECTION 27, have made repeated attempts to engage with the respondents to find a solution to this matter.[15] SECTION 27 sent five urgent letters to the respondents between 5 March 2018 and 22 May 2018, seeking action and clarity on the respondents' plans to address the problem. The respondents failed to respond.

9 As a result, the Makangwane SGB launched this urgent application on 24 May 2018, seeking a hearing in urgent court on 26 June 2018.

10 As set out in the notice of motion, the Makangwane SGB seeks four primary forms of relief:

10.1 First, declarations of invalidity in respect of the respondents' failure to provide safe and adequate school facilities and their failure to develop and / or make known plans to address these failures.[16]

10.2 Second, an interdict requiring the respondents to put in place short-term measures by no later than 16 July 2018 to allow teaching and learning to

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[14] FA p 52 para 113.

[15] FA pp 34 – 53, paras 67 – 115.

[16] NoM prayers 2 – 3 p 2.

resume by the start of the third school term on 17 July 2018, which measures must include:

10.2.1 delivering to the School a minimum of five mobile classrooms;

10.2.2 delivering adequate school furniture to allow all learners to have their own space to read and write;

10.2.3 developing a detailed and costed catch-up plan to compensate for the gaps in the curriculum as a result of the disruptions to teaching and learning in 2018.[17]

10.3 Third, a further interdict directing the respondents to develop and begin implementing a detailed and costed implementation plan, by no later than 30 September 2018, setting out a permanent solution to the problem.[18]

10.4 Fourth, orders directing the respondents to report to this Court, the Makangwane SGB and its attorneys, at regular intervals, on the steps taken to comply with these orders.[19]

11 The applicant has also, subsequently, brought an interlocutory application to join the School Governing Body of the Sephaoweng Primary School (Sephaoweng SGB) in these proceedings. As we explain in detail below, the Sephaoweng SGB now has a direct and substantial interest in the matter.

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[17] NoM prayer 4 pp 2 – 3.

[18] NoM prayer 5 pp 3 – 4.

[19] NoM prayers 6 – 8 pp 4 – 5.

12 In what follows, we demonstrate the applicant's entitlement to this relief by addressing the following points in turn:

12.1 First, urgency.

12.2 Second, the relevant factual background, focusing on the respondents' conduct before and after this litigation was launched.

12.3 Third, the applicable legal framework, focusing on the rights of the learners and the correlative duties on the respondents.

12.4 Fourth, how the respondents' actions resulted in a limitation of these rights and breaches of their obligations.

12.5 Sixth, the just and equitable remedy for these limitations and breaches.

12.6 Finally, two matters of procedure:

12.6.1 The joinder of Sephaoweng; and

12.6.2 The respondents' various technical objections.

13 At the outset, we emphasise three points.

14 First, given the respondents' concessions on the state of the School's infrastructure and their own inaction, it cannot be seriously disputed that learners at Makangwane have suffered and continue to suffer an ongoing limitation of their section 29(1)(a) right to a basic education, in addition to other violations of their rights. The respondents have not sought to justify this breach under section 36 of the Constitution.

15 Second, given these unjustified limitations of rights, the primary question to be determined is the just and equitable remedy to provide learners with safe and adequate school facilities.

16 Third, rather than engaging with the Makangwane SGB on an appropriate remedy, the Department has instead embarked on a unilateral course of action in response to this litigation.

17 On 25 May 2018, after this litigation was initiated, the second respondent (the HoD) declared that the Department intends to temporarily merge Makangwane with the Sephaoweng Primary School, pending a plan to merge Makangwane with another high school.[20] These plans were announced without any attempt to consult with the two affected SGBs and without any attempt to secure their consent.

18 As we explain in detail below, the Department's unilateral plans offer no meaningful solution to the ongoing violation of learners' rights. Instead, these plans threaten to compound these violations by presenting further risks to the rights of learners at Makangwane and Sephaoweng.

19 The Makangwane SGB and its legal representatives have made repeated attempts to engage with the Department on its plans. However, the Department has refused to disclose further details and abruptly cancelled a meeting arranged between the parties for 22 June 2018 which was intended discuss solutions.

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[20] NBM 11 pp 371 – 372.

20 Accordingly, the Makangwane SGB persists in seeking the relief set out in the notice of motion, as this remains the just and equitable remedy to address the ongoing violation of learners' rights.

**URGENCY**

21 The learners at Makangwane require an appropriate remedy to guarantee safe and adequate facilities before the commencement of the third school term on 17 July 2018. The learners have already suffered disruptions to their learning which would be compounded by any further delay. This renders this application manifestly urgent.

22 We emphasise six points on urgency.

23 First, the Courts have repeatedly held that the denial of the right to a basic education is an inherently urgent matter, given the prejudice to the learners. In ***Section 27 v Minister of Education*** **2013 (2) SA 40 (GNP) at para 20**, the first round of litigation over the government's failure to deliver textbooks in Limpopo, Kollapen J held that the matter was urgent on the following basis:

> *"Given the centrality of education in the Constitutional framework that I have described, the fact that schools in Limpopo do not have text books as they approach the halfway mark of the academic year, in my view renders the matter urgent. A week or even a day is material under these circumstances. The nature of the relief they seek renders the matter sufficiently urgent."*

24 Second, the Makangwane SGB and learners will be denied substantive redress if this matter were heard in the ordinary course.

24.1 The absence of safe and adequate school facilities is an ongoing violation of the learners' rights. As a result, an effective temporary solution is required now, before the term starts. A hearing in the ordinary course would likely only occur late in the school year, potentially after matric exams have commenced on October 2018.

24.2 A plan and timeline for a long-term, permanent solution are also required as a matter of urgency. In the absence of a plan, any temporary solution granted by this Court may become a *de facto* permanent solution, resulting in further rounds of litigation. The absence of a plan would also create ongoing uncertainty for the applicant and its learners.

24.3 It is therefore necessary that any urgent relief must include a proper planning process for the long-term.

25 Third, this matter was launched as soon as possible, following extensive attempts to engage with the respondents to find some solution to the matter. As indicated above, SECTION 27 wrote five letters in three months seeking clarity on the respondents' intentions, without a response.

25.1 The Makangwane SGB cannot be faulted for attempting to exhaust all possibilities of engagement with the respondents before launching this litigation.

25.2 In **South African Informal Traders Forum v City of Johannesburg 2014 (4) SA 371 (CC) at paras 37-38** the Constitutional Court has affirmed that such engagement is a "*prudent and salutary*" step before launching litigation which should not count against an applicant in assessing urgency.

26 Fourth, the abridgement of timeframes and relaxation of the rules is proportionate the urgency of the matter. This application has been timed to ensure that appropriate relief can be granted before the start of the third term, while still

affording the respondents a reasonable opportunity to respond and to comply with any remedy that this court grants.

27 Fifth, the respondents have not alleged any prejudice.[21] They had ample warning of the Makangwane SGB's intention to resort to litigation if no adequate steps were taken to address the conditions at the school. The SGB's extensive attempts to engage with the respondents meant that none of the facts were new to them.

28 Sixth, the respondents allege that their plan to temporarily relocate Makangwane to Sephaoweng somehow removes the urgency of this matter.[22] This is unsustainable.

28.1 First, the temporary merger with Sephaoweng is a haphazard plan, first raised by Department officials in February 2018, then retracted on 17 May 2018, and then reinstated in the HoD's letter of 25 May 2018, only after this litigation was launched. In the face of the Department's shifting and uncertain position, the Makangwane SGB can hardly be faulted for approaching this Court for urgent relief.

28.2 Second, the Department's unlawful intention to force Makangwane and Sephaoweng into a temporary merger, without any process of meaningful engagement or a clear plan, renders this matter more urgent, not less. We address this unlawfulness in detail below.

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[21] FA p 23, paras 35 – 36. Not denied at AA pp 338 – 340, para 23.

[22] AA pp 338 – 340, para 23.

28.3 Third, due to the respondents' failure to take action to address the poor conditions at Makangwane, the respondents have now resorted to a plan that jeopardises the rights of learners at both Makangwane and Sephaoweng. Rather than addressing the problem, the respondents' actions now threaten another group of learners. We also return to this point below.

**FACTUAL BACKGROUND**

29 This case follows more than a decade of requests and appeals to the respondents to take action to address the conditions at Makangwane.

30 In what follows, we briefly summarise the applicant's engagements with the respondents. A detailed chronology of events is attached as **Annexure A**.

31 At the outset, we note that the respondents' answering affidavit contains a series of bald denials, specifically in respect of the applicant's interactions with Department officials. None of these denials establish a genuine dispute of fact under the *Plascon-Evans* test.[23]

31.1 In **National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para 26**, the SCA stressed that "*if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers"*.

31.2 In **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at para 55 -56**, the SCA added that, in the interests of justice, courts should not allow respondents to "*shelter behind patently implausible affidavit versions or bald denials.*"

31.3 The respondents' bald denials are particularly implausible in this case as the applicant has presented detailed minutes of its interactions with the

[23] *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

Department's officials. In response, the respondents have merely denied these allegations and offered unsigned, pro forma affidavits from some, but not all, of the officials concerned.

32 In addition to these bald denials, the respondents have also failed to take this court into their confidence. They provide no explanation for their repeated changes in plans and their broken promises. They have also failed to offer any specific detail regarding their current plans for learners at Makangwane. This is in breach of the special duties of candour and transparency that are imposed on government litigants in constitutional litigation:

32.1 As Sachs J emphasised in **Matatiele Municipality v President of the RSA 2006 (5) SA 47 (CC) at para 107**:

> *"The Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires."*

32.2 Similarly, in **Kalil NO v Mangaung Metropolitan Municipality 2014 (5) SA 123 (SCA) para 30**, the SCA emphasised the following:

> *"The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance."* (Emphasis added)

33 The Department's silences and bald denials fall short of these requirements.

***The respondents' conduct before this litigation was launched***

34 The majority of the school buildings at Makangwane were built by the community during the 1970s, with no assistance from the government.[24] Despite the community's best efforts, these buildings have now fallen into disrepair.

35 The inadequate infrastructure at Makangwane and the impact of these conditions on the learners are addressed in great detail in the founding affidavit and supporting affidavits. As indicated above, these facts are common cause or are not disputed.

36 Despite knowing of the conditions at the school, the respondents failed to address the problem. Their response has been characterised by broken promises, haphazard plans, a lack of transparency and dismissive treatment. This is reflected in four key features of the Department's engagements with the applicant.

37 First, the Department admits that it planned to commence construction of new school buildings for Makangwane in the 2017/2018 financial year.[25] However no action was ever taken and the respondents offer no explanation for their sudden decision to abandon this plan.

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[24] FA p 23, para 37.

[25] AA p 329, para 6.14.

37.1 The HOD of the Limpopo Department admits that the Department conducted an assessment of the school in 2016 and proceeded to place Makangwane on the priority list for school construction in the 2017/2018 financial year.[26]

37.2 The Department failed to inform Makangwane that it had been placed on the priority list. However, officials repeatedly assured the Makangwane SGB that new buildings would eventually be constructed. Minutes from meetings held in 2016 and correspondence in 2017 reflect these assurances. [27]

37.3 By as late as 11 April 2018, the Department still intended to commence construction of new school buildings. A report from the District Director, annexed to the answering affidavit as NBM 4, recommended temporary measures "*while in the process of planning to build a new infrastructure*".[28]

37.4 No explanation is provided for why the Department failed to commence construction or what happened to the funds that were budgeted.

37.5 The respondents now claim that Makangwane is too small to deserve a new school. However, Makangwane's enrolment numbers have not changed materially between 2016 and 2018.[29] The respondents are also mistaken in believing that the Norms and Standards for School

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[26] Ibid.

[27] 8 April 2016 meeting: FA p 36 para 74; JN 21 p 132; AA p X para 42.

14 March 2017 meeting: FA p 37, para 77; JN 24 p 148.

[28] NBM 4 p 362, para 5.1.

[29] AA p 328, para 6.9.

Infrastructure mandate its immediate closure. We address this in detail below.

38 Second, the Department's officials made repeated promises that mobile classrooms would be delivered to the school as a temporary measure.

38.1 From as early as April 2016, officials promised that they would negotiate for the delivery of mobile classrooms pending construction of a new school.[30]

38.2 On 14 February 2018, two Department officials, Mrs Mahlo and Mr Mootwana, promised that they would arrange for the delivery of seven mobile classrooms and that these classrooms would be "delivered any time from now".[31]

38.3 On 1 March 2018, Mrs Mahlo informed the Makangwane SGB that mobile classrooms had been procured by the Department but there were merely problems securing transport to the school.

38.4 On 12 March 2018 and 14 March 2018, Mr Motemane, the District Director, informed the Makangwane SGB that he would follow-up on the delivery of mobile classrooms.[32]

38.5 The Department gives a series of bald denials that any promises were made. However, it offers no alternative explanation of the various

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[30] FA p 36 para 74; JN 21 p 132. Bald denial at AA p 345 para 42

[31] FA pp 41 – 42 para 86; JN 32 p 173. Respondents give a bald denial at AA p 347 para 53.

[32] FA p 44 para 96; JN 35 p 193.

FA p 45 para 97; JN 37 p 200.

meetings held, nor does it offer any reason to contest the validity of the detailed meeting minutes. Only three unsigned, *pro forma* confirmatory affidavits from some, but not all, of the officials concerned are attached to the answering affidavit.

38.6 The respondents' denials are also contradicted by the 31 January 2018 report prepared by Mr Phosa, from the Department's Infrastructure Division. Mr Phosa's report to the Department specifically recommended that mobile classrooms be delivered pending construction of a new school.[33] The respondents failed to disclose this report to the court and only did so in response to a Rule 35(12) request.

39 Third, from 31 January 2018, the Department's officials initially explored the possibility of a temporary merger of Makangwane with the Sephaoweng Primary School. However, this plan was retracted on 17 May 2018 and only revived after this litigation was launched.

39.1 Minutes from 14 March 2018 indicate that this temporary merger was initially presented as an interim measure pending the delivery of mobile classrooms.[34]

39.2 However, from 26 March 2018, Department officials then announced that no mobile classroom would be built and no construction would commence.

[33] Response to Rule 35(12) notice, pp 480 – 481.

[34] FA p 45 para 97; JN 37 pp 200 – 201; JN 40 pp 212. Bald denial at AA p 349 para 62.

The move to Sephaoweng was then presented as an indefinite measure, with no indication of any long-term plan.[35]

39.3 On 9 May 2018, Mrs Mahlo, the Circuit Manager, then ordered the principal of Makangwane to move the learners to Sephaoweng. The learners and teachers carried desks and chairs to Sephaoweng, However, Sephaoweng refused to admit these learners.[36]

39.4 On 17 May 2018, Department officials attended a meeting with community members who voiced opposition to the temporary merger. The officials then agreed that the temporary merger should not proceed. The District Director, Mr Mothemane, retracted the instruction to temporarily merge Makangwane and Sephaoweng and promised to put this position in writing by the next day.[37]

39.5 On 22 May 2018, SECTION 27 wrote to the Department to confirm that this temporary merger was not taking place and seeking clarity on the Department's plans to deliver mobile classrooms and permanent infrastructure.[38] No response was received from the Department by the deadline of 23 May 2018.

40 Fourth, throughout this time, the applicants' legal representatives sent a series of five letters to the Department seeking clarity on its plans and demanding

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[35] FA p 47 para 100; JN 40 p 213.

[36] FA pp 50 para 108 – 109; Supporting affidavit of Ms Mokoena p 246 para 11. AA p 352 para 75.

[37] FA pp 51 – 52, para 111; JN 45, p 229. Respondents admit this meeting but merely claim that the "authenticity of the minutes cannot be confirmed", AA p 352 para 77.

[38] FA p 52, para 112; JN 46 pp 230 – 231 para 4.

urgent action to fix the problem.. The respondents failed to provide any response before this litigation was launched.

41 On 24 May 2018, the applicant proceeded to launch this application on the understanding that the temporary merger with Sephaoweng was no longer proceeding and that the Department had no plans in place to provide mobile classrooms or to commence construction of a new school.

***The respondents' conduct after this litigation was launched***

42 The Department only responded to the applicant's letters after this litigation was launched. In a letter dated 25 May 2018,[39] the second respondent, the HoD of the Department announced that:

42.1 The temporary merger with Sephaoweng would proceed.[40]

42.2 A merger process was "underway" to merge Makangwane with a local high school, Ramohlakana Secondary School.[41]

42.3 No mobile classrooms would be delivered and no permanent construction would commence as this would be "fruitless and wasteful spending".[42]

43 This correspondence reflected yet another shift in the Department's plans which was announced without prior consultation:

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[39] NBM 11, pp 371 – 372.

[40] Ibid p 372, para 5.

[41] Ibid p 371-372, paras 4, 6.

[42] Ibid p 372 para 6.

43.1 The instruction that the temporary merger would proceed contradicted the retraction of this instruction at the 17 May 2018 meeting.

43.2 Furthermore, until this letter, the Department had not informed the Makangwane SGB of any intention to proceed with a merger with Ramohlakana. Moreover, the Department announced the merger process as if it was already underway, despite the fact that it had not conducted any of the mandatory consultation processes required under section 12A of the South African Schools Act 84 of 1996 (Schools Act).

44 In the founding affidavit and replying affidavit, the applicant has set out in detail its concerns over the Department's attempts to unilaterally impose a temporary merger on Makangwane and Sephaoweng. We address these concerns below in explaining why the Department's unilateral actions are unlawful and threaten to compound the violation of learners' rights.

45 Despite these concerns and objections, the applicant has attempted to engage meaningfully with the Department's HOD over this proposed temporary merger. However, the Department has refused all attempts at engagement.

45.1 In a letter dated 4 June 2018, the applicant set out the conditions that would need to be satisfied in order for the Makangwane SGB to consider consenting to a temporary merger with Sephaoweng. This was in anticipation of a meeting between the Department and the SGBs on 5 June 2018.[43]

[43] Reply p 403 para 45.

45.2 On 5 June 2018, the Makangwane SGB and its legal representatives arrived at a meeting to discuss the temporary merger, only to be turned away by the Department officials.[44]

45.3 On 13 June 2018, a further, "with prejudice" letter was sent to the Department setting out the applicant's detailed conditions that would need to be satisfied in order for the applicant to consent to any temporary merger.[45]

45.4 On 14 June 2018, the Department responded without offering any of these undertakings but agreeing to meet to discuss these proposals.[46]

45.5 A meeting was then scheduled for 22 June 2018 in an attempt to allow all parties to negotiate a possible solution to this matter.[47]

45.6 On 21 June 2018, the respondents' legal representatives cancelled this meeting without prior warning and indicated that the matter must proceed to argument.[48] This followed after the applicant sent its proposals to the respondents in the form of a proposed settlement order.

46 Instead of engaging with the two SGBs, the Department has instead opted to take unilateral action to force the two schools into a temporary merger:

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[44] Reply p 399 para 35.

[45] Reply p 403 para 46. JN 56 pp 432 – 435.

[46] Reply p 404 para 47. JN 57 pp 436 – 437.

[47] Reply p 405 para 49.

[48] See reply in joinder application.

46.1 To date, the Department has failed to reveal precisely how this sharing arrangement is meant to work and what safeguards will be put in place to protect the rights of learners.

46.2 On 12 June 2018, Department officials arrived at Sephaoweng and dictated that a "platooning" arrangement must be imposed, whereby the Makangwane and Sephaoweng learners will attend school at different times.[49] In other words, the primary school learners would attend school in the mornings and the secondary school learners would start their school days in the afternoons, and continue into the evenings. This decision was made without any consultation with the applicant and in defiance of the fact that SGBs have the exclusive power to determine school times under section 20(1)(f) of the Schools Act.

46.3 On the same day, the Department arrived at Sephaoweng with a load of desks and chairs, without any prior warning and without prior consultation with Sephaoweng.[50]

46.4 The Department has also remained silent on how long this arrangement is intended to last or when it envisages commencing its newly announced merger process.

47 This conduct is directly at odds with the constitutional rights of learners and the clear statutory obligations imposed on the respondents. We now address this legal framework.

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[49] Reply p 404 para 48.1.

[50] Ibid.

## LEGAL FRAMEWORK: RIGHTS AND OBLIGATIONS

### *The unqualified right to a basic education*

48 The importance of the section 29(1)(a) right to basic education has been aptly described by the Constitutional Court as "beyond question". Indeed, the Court opened its judgment in its decision in **FEDSAS v MEC for Education, Gauteng 2016 (4) SA 546 (CC) at para 1** with the following statements:

> *"Teaching and learning are as old as human beings have lived. Education is primordial and integral to the human condition. The new arrivals into humankind are taught and learn how to live useful and fulfilled lives. So education's formative goodness to the body, intellect and soul has been beyond question from antiquity. And its collective usefulness to communities has been recognised from prehistoric times to now."*

49 Against this background, section 29(1)(a) guarantees that "*Everyone has the right to a basic education, including adult basic education"*.[51]

50 The text of the right to basic education sets it apart from the other socio-economic rights. The Constitutional Court confirmed this in **Governing Body of the Juma Musjid Primary School v Essay NO 2011 (8) BCLR 761 (CC) at para 37**:

> *"It is important, for the purpose of this judgement, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of the law of general application, which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). the state is, in terms of that right,*

[51] Section 29(1)(a) of the Constitution.

*obliged, through reasonable measures, to make further education 'progressively available and accessible'."*

51 This "*unqualified*", "*immediately realisable*" right means that whenever a learner is deprived of a basic education – or, as we address in further detail below, any component of the right to basic education – that is a limitation of the right. Such limitations are permissible only if they are sanctioned by a law of general application that satisfies the section 36 justification analysis.

52 A basic education is an education with a substantive content.

52.1 The concept of a "basic education" traces its roots to the 1990 World Declaration on Education for All (1990 Declaration) which was instrumental in introducing the concept of 'basic education' into international human rights law. Art 1 of the 1990 Declaration explains that the right to basic education is a guarantee that:

> *'Every person — child, youth and adult — shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.' (Emphasis added.)*

52.2 In **Juma Musjid** at para 43, the Constitutional Court echoed this description in describing the purpose of a basic education as follows:

> "[B]asic education is an important socio-economic right directed, among 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 world opportunities."

53 Accordingly, a "basic education" is not merely a right to a place in school. Instead, the state is obliged to deliver all the necessary resources required for the achievement of a basic education. In **Madzodzo v Minister of Basic Education 2004 (3) SA 441 (ECM) at para 20**, Goosen J held that:

> *"The state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners."*[52]

54 The Courts have increasingly given substantive content to the right to a basic education. To date, the courts have held that this right includes the entitlement to:

54.1 Educators and non-educator personnel;[53]

54.2 Textbooks;[54]

54.3 Adequate age and grade appropriate school furniture;[55]

54.4 Scholar transport for those in need.[56]

55 It follows that the right to a basic education must also include the right to safe and adequate school infrastructure that is conducive to teaching and learning. The facts of this case are the clearest demonstration that inadequate and unsafe facilities can have a severe impact on teaching and learning. Indeed, the state's

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[52] Id at para 20.

[53] *Centre for Child Law v Minister of Basic Education* [2012] 4 All SA 35 (ECG); ***Linkside and others v Minister of Basic Education and others*** [2015] ZAECGHC (26 January 2015.

[54] *Minister of Basic Education v Basic Education for All and others* 2016(4) SA 63 (SCA) para 44

[55] *Madzodzo v Minister of Basic Education* 2004 (3) SA 441 (ECM)

[56] Tripartite Steering Committe and Another v Minister of Basic Education 2015 (5) SA 107 (ECG).

own policy documents recognise the clear "*link between the physical environment learners are taught, and teaching and learning effectiveness, as well as learning outcomes.*"[57]

***Learners' rights in education***

56 Inadequate school facilities not only impact on the right to a basic education, but also threaten other constitutional rights, including the rights to dignity,[58] equality,[59] and the right to have the best interests of the child given paramount importance in all matters concerning children.[60]

The right to dignity

57 The right to dignity involves the recognition of the intrinsic worth of human beings and their right to be treated with respect and concern.[61] A basic education is central to a life of dignity. In turn, a basic education must be provided in an environment that respects the dignity of learners.

58 The structure in which learners learn, the way in which they are taught and their sense of safety and well-being all have a great impact on dignity and self-worth. To force learners to continue to attend school in conditions that threaten their

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[57] National Policy for an Equitable Provision of an Enabling School Physical Teaching Environment, 2010.

[58] Section 10 of the Constitution.

[59] Section 9 of the Constitution.

[60] Section 28(2) of the Constitution.

[61] *S v Makwanyane and another* 1995 (30 SA 391 (CC) para 328.

health and safety and undermine the right to learn sends a strong message to learners that they are unworthy of respect and concern.

The right to equality

59 The right to a basic education assumes particular importance given the legacy of apartheid, which saw the deliberate, unequal allocation of resources based on race. In **Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010 (2) SA 415 (CC) at paras 45 – 47** Moseneke DCJ described this legacy as follows**:**

> *"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.*
>
> *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.*
>
> *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."*

60 This passage accurately describes the history and present reality at Makangwane. The conditions at the school are, in large part, a legacy of the

racist apartheid education system. The respondents' failures to act to address these conditions actively perpetuate this unfair discrimination.

61 Makangwane is a no-fee school, and is therefore, by definition, one of the poorest schools in the country. It caters to an overwhelming majority of black learners, in a rural area, whose families do not have the financial means to mitigate the risks to which the learners are exposed on a daily basis.[62] These learners form part of a group that was already marginalised and disadvantaged during the apartheid era, and this is perpetuated the longer that learners are denied their basic rights. Their race and social origin has put them in this position, and is the basis for the discrimination that they suffer.

62 In ***Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA)* at paras 3 and 46 - 49**, the SCA concluded that the failure to deliver textbooks to poor, black, rural learners in Limpopo constituted indirect unfair discrimination against these learners. The same conclusion must apply in this case.

<u>The best interests of the child</u>

63 Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child.

64 This provision serves a dual purpose: it is a guiding principle in each case that deals with a particular child, as well as being a standard against which to test

[62] FA p 23, paras 37-38.

legal provisions or conduct affecting children in general.[63] As such, the Constitutional court had made clear that our laws must be interpreted and developed in a manner that favours and protects the interests of children, and the courts must at all times function in a manner that shows due respect for children's rights.[64]

65 In **Governing Body of the Juma Musjid Primary School and others v Essay N.O. and others 2011 (8) BCLR 761 (CC)** at paras 66 and 71 the Constitutional Court emphasised that one of the considerations in evaluating whether the best interests of the child are protected is whether the right to basic education has been breached.[65]

66 The circumstances of this case clearly show the link between safe and adequate infrastructure and the best interests of children. The fact that the children attend school each day and are exposed to serious risks to their safety cannot, on any interpretation, be held to be in their best interests.

***Statutory obligations***

67 The Schools Act seeks to give effect to the right to a basic education.

68 In terms of section 3(3) of the Schools Act, every Member of the Executive Council in each province must ensure that there are enough school places so

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[63] *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2014 (2) SA 168 (CC0 para 69.

[64] *S v M* 2008 (3) SA 232 (CC) para 15.

[65] See also A Skelton 'The role of the courts in ensuring the right to basic education in a democratic South Africa: A critical evaluation of recent education case law' (2013) 1 *De Jure* 1, 8.

that every child who lives in his or her province can attend school while they are of compulsory school going age.

68.1 In light of what has been said above, this duty requires more than merely making places available in schools.

68.2 This duty includes an obligation to deliver the core components of the right to basic education, including safe and adequate infrastructure.

69 This duty is reinforced by the Minister's obligation under section 5A of the Schools Act to prescribe norms and standards for school infrastructure.[66] The Minister prescribed such norms and standards in 2013.[67] It is common cause that, far from meeting the basic norms and standards as set out in these regulations, the conditions at the school do not even comply with the basic minimum requirements of safety.[68]

70 As part of this matrix, section 3 (1) of the Schools Act requires every parent to ensure that every learner for whom he or she is responsible attends school while that learner is of the compulsory school going age. Failure to do so attracts criminal penalties under sections 3(5) and 3(6).

70.1 In circumstances such as this case, parents are therefore faced with an impossible dilemma: they must either send their children to school in which

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[66] Section 5A(1)(a)of the Schools Act.

[67] Regulations relating to Minimum Uniform Norms and Standards for Public School Infrastructure, GNR 920 in *GG 37081*, 29 November 2013 (Infrastructure Norms and Standards).

[68] FA p 10, para 8. AA p 331, para 10.1

their lives and safety are at risk or take steps to prevent any harm to the children but which may attract criminal liability.

70.2 The solution to this dilemma is that the state must be compelled to provide safe and adequate schools. In **Avinash Mehrota v Union of India (2009) 6 SCC 398**, the Supreme Court of India made this point as follows:

> *'Parents should not be compelled to send their children to dangerous schools, nor should children suffer compulsory education in unsound buildings. . . .No matter where a family seeks to educate its children, the State must ensure that children suffer no harm in exercising their fundamental right and civic duty.'*

71 In light of this scheme, the Supreme Court of Appeal has emphasised that both the provincial and national executive have constitutional and statutory duties to ensure the delivery of a basic education:

> *"The constitutional and statutory scheme applicable to education as one in terms of which there is an interconnection between national and provincial government to ensure constitutional compliance. The right to a basic education is thus constitutionally entrenched and statutorily enforced."*[69]

***The respondents' duties to act lawfully, fairly and cooperatively***

72 In fulfilling their constitutional and statutory obligations, the respondents are obliged to work within the framework for the governance of public schools prescribed by the Schools Act.

73 In ***Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*** **2010 (2) SA 415 (CC) at para 56**, the Constitutional Court described this

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[69] BEFA above n 54 para 40.

framework as involving a "*partnership*" between national government, provincial government and SGBs in which SGBs exercise "*defined autonomy over some of the domestic affairs of the school*", which are prescribed in the Schools Act.

74 In a series of judgments, the Constitutional Court has distilled three key principles that govern how the respondents must engage with SGBs.

75 First, the respondents must at all times act lawfully and within the powers conferred upon them under the Schools Act. In **Head of Department, Department of Education, Free State Province v Welkom High School 2014 (2) SA 228 (CC) at paras 86 - 87**, the Constitutional Court emphasised the following:

> *[86] The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means. On the contrary, the rule of law obliges an organ of state to use the correct legal process.*
>
> *…*
>
> *[87] … This is particularly so in relation to legislation such as the Schools Act, where the sensitive scheme of powers enacted by parliament needs to be respected. This would accord with the doctrine of separation of powers, as the legislature's prerogative to frame a particular legislative scheme cannot be usurped or disrupted by the executive unless such laws are set aside by a court. In this way the state can promote and safeguard individual rights whilst still adhering to the rule of law."*

76 Second, the respondents must at all times act reasonably and in a procedurally fair manner in their dealings with SGBs.[70]

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[70] *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* 2013 (6) SA 582 (CC) at para 58; *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) at para 1.

77 Third, the respondents have a duty to cooperate with SGBs in good faith, mutual trust, and through processes of meaningful engagement.

77.1 In **Head of Department, Department of Education, Free State Province v Welkom High School 2014 (2) SA 228 (CC) at para 124**, the Constitutional Court held the following:

> *"Given the nature of the partnership that the Schools Act has created, the relationship between public school governing bodies and the state should be informed by close cooperation, a cooperation which recognises the partners' distinct but inter-related functions. The relationship should therefore be characterised by consultation, cooperation in mutual trust and good faith. "*

77.2 It is on this basis that the courts have repeatedly criticised provincial officials for failing to meaningfully engage with SGBs over the delivery of the right to a basic education. Where necessary, the courts have ordered meaningful engagement.[71]

77.3 These duties of cooperation and meaningful engagement are reinforced by section 195 of the Constitution which sets out the basic values and principles governing public administration. It provides in relevant part:

> *"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
>
> *(a) A high standard of professional ethics must be promoted and maintained.*
>
> *. . .*
>
> *(d) services must be provided impartially, fairly, equitably and without bias.*

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[71] See, for example, *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC).

*(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*

*(f) Public administration must be accountable.*

*(g) Transparency must be fostered by providing the public with timely, accessible and accurate information."*

**LIMITATION OF RIGHTS AND BREACHES OF OBLIGATIONS**

78 In light of the facts set out above, there is clear evidence of an ongoing breach of the respondents' constitutional and statutory obligations, as just described, including the following:

78.1 The obligation to provide all components of the right to basic education, including safe and adequate infrastructure;

78.2 The obligation to keep learners safe;

78.3 The obligation to treat learners with dignity and respect;

78.4 The obligation not to discriminate unfairly against learners on any grounds, including the grounds of race and social origin;

78.5 The obligation to hold paramount the best interests of learners;

78.6 The obligation to engage meaningfully and to produce outcomes that are in learners' best interests; and

78.7 The obligations to act cooperatively and with high degrees of transparency, responsiveness and accountability.

79 The respondents' breaches of these rights and obligations are compounded by the manner in which the respondents have engaged with the applicant and Sephaoweng.

79.1 Officials have routinely made promises which have been broken.

79.2 The respondents repeatedly failed to disclose their plans to the school and changed plans repeatedly.

79.3 The respondents failed to respond to communications and attempts to resolve this matter.

79.4 The applicant only received a response to its repeated pleas for help only after this litigation was launched, despite the situation being manifestly urgent.

80 The respondents' conduct after this litigation has only served to compound these limitations of rights and breaches of obligations.

***The respondents' attempt to shift the blame***

81 The respondents now impermissibly seek to shift the blame to the parents at Makangwane, alleging that they have been "negligent".[72] This displays a misunderstanding of the respondents' obligations and contempt for those that they are meant to serve.

82 First, the Makangwane SGB has no lawful power to conduct maintenance, as it has not been afforded section 21 status under the School Act.[73] Unless this power has been specifically conferred on an SGB, it remains the responsibility of the provincial education department to maintain school infrastructure.

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[72] AA p 342 para 30.

[73] FA p 24 para 39; Reply p 391 para 18.

83 Second, despite not having the legal power or duty to maintain the school, the parents of Makangwane have gone to great efforts in an attempt to perform repairs, but their efforts have not been enough without assistance from the Department.[74]

84 Finally, the work required to fix the school goes far beyond mere maintenance. The Department itself accepted in 2016 that new school buildings would need to be constructed. This therefore constitutes capital expenditure, which is clearly an obligation that falls squarely on the Department and not on the SGB.

85 The respondents' blame shifting is therefore further evidence of their failure to comply with their constitutional and statutory obligations.

***The respondents' belated plans***

86 The respondents' belated plans for a temporary merger of Makangwane with Sephaoweng, pending a long-term merger with Ramohlakana, do not absolve the applicants of responsibility for the ongoing limitation of learners' rights.

87 Instead, the Departments' unilateral attempts to impose a temporary merger on Sephaoweng and Makangwane, without securing their consent or making any attempt to engage meaningfully with these schools, threatens to compound the respondents' violations of constitutional rights and their unlawful conduct. This is evident in several respects.

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[74] FA p 25 – 26, para 25; FA p 29, para 50. Reply pp 391 – 392 paras 17 – 24.

88 First, the respondents have disclosed no clear plan for how the sharing arrangement will work and have made no attempt to engage meaningfully with the two SGBs to devise a plan together. In the absence of a clear plan and sufficient safeguards, the rights of learners at Makangwane and Sephaoweng are at further risk.

88.1 This proposed sharing arrangement will double the number of learners at Sephaoweng as well as putting children as young as five in contact with high school learners.

88.2 A plan and sufficient resources are therefore needed to address a range of practical matters such as ensuring that there are sufficient classrooms available, keeping primary school learners and high school learners separate, providing sufficient furniture, providing additional toilets, arranging for the doubling of daily meals and a host of other practical difficulties.

88.3 There is no evidence that the Department has devised such a plan or committed the resources necessary to make it work.

88.4 The Department's level of disorganisation is evident from the fact that it is confused over the number of classrooms that are available at Sephaoweng.

88.4.1 The Department's April 2018 report claimed that there were six available classrooms.[75]

[75] NBM 4 p 362 para 4.3

88.4.2 Yet the HOD's letter of 31 May 2018 claimed that there are only four classrooms available.[76]

88.4.3 In the answering affidavit, the HOD now claims there are five available classrooms at Sephaoweng.[77]

88.4.4 In contrast with this confusion, the chairperson of Sephaoweng's SGB confirms on affidavit that there are, in fact, only three classrooms available of the five that are needed to accommodate Makangwane learners.[78]

88.4.5 If the Department cannot even confirm that there are a sufficient number of classrooms available, it cannot be expected to navigate the other complexities of a sharing arrangement.

89 Second, the Department's attempts to unilaterally impose a temporary merger on the two schools, without securing their consent, is unlawful and in conflict with the Schools Act.

89.1 The Department and the HOD are constrained by the principle that they *"may exercise no power and perform no function beyond that conferred upon them by law"*.[79]

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[76] NBM 10 p 369 para 3.

[77] AA p 331 para 6.21 – 6.22.

[78] Ms Sheila Mokwena's affidavit p 245 -246, paras 7 and 9.

[79] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58.

89.2 Under the Schools Act, the only means through which two schools could be forced to share premises against their will, even on a temporary basis, is through the section 12A merger provisions.

89.2.1 Section 12A provides that only the MEC may take a decision to merge two public schools, following a lengthy process of consultation under section 12A(2) of the Schools Act.

89.2.2 It is common cause that this process has not been followed.

89.3 Even if it were found that this proposed temporary merger is not a "merger" for the purposes of section 12A, the Department would still be constrained by section 13 of the Act.

89.3.1 Section 13(2) provides that any public school on state property has an exclusive right of use and occupation of the property.

> *"[A] public school which occupies immovable property owned by the State has the right, for the duration of the school's existence, to occupy and use the immovable property for the benefit of the school for educational purposes at or in connection with the school."*

89.3.2 That right can only be restricted by the MEC in narrow circumstances under section 13(3) and section 13(4):

> *"(3) The right referred to in subsection (2) may only be restricted -*
>
> *(a) by the Member of the Executive Council; and*
>
> *(b) if the immovable property is not utilised by the school in the interests of education.*
>
> *(4) The Member of the Executive Council may not act under subsection (3) unless he or she has -*

> *(a) informed the governing body of the school of his or her intention so to act and the 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) duly considered any such representations received."*

89.3.3 Sephaoweng is certainly using its premises "*in the interests of education*", meaning that the section 13(3)(b) jurisdictional prerequisite has not been triggered. Two of the three available classrooms are used to store food, equipment and tools while the third is used as a dining room and staff room. [80]

89.3.4 Furthermore, the MEC has never sought to engage in a process of consultation and the SGBs have not been offered any opportunity to make representations to the MEC. Instead, Department officials have merely issued instructions and orders, as is evident from the HOD's letter of 31 May 2018.[81]

90 Third, even if the respondents had some lawful power to impose a temporary merger against the SGBs' will, the respondents would still be bound to act in a cooperative manner through a process of meaningful engagement. They have failed to do so.

90.1 The respondents took a decision to merge the School and Sephaoweng on a temporary basis, without consulting with the SGBs.

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[80] Ms Mokwena's affidavit p 245 para 7.
[81] NBM 10 p 369 – 370.

90.2 The respondents appear to have taken a final decision to merge the School with Ramohlakana, without having consulted the applicant and the community.

90.3 The respondents excluded the applicant and its legal representatives from the 5 June 2018 meeting called to discuss the proposed temporary merger with Sephaoweng.

90.4 The respondents then abruptly cancelled the meeting scheduled for 22 June 2018 which was intended to find some common ground.

90.5 Furthermore, the respondents are now resisting an application to join Sephaoweng as a co-applicant in this litigation, despite Sephaoweng's obvious direct and substantial interest in the matter.

91 Fourth, the respondents have also offered no clear timelines for when the temporary merger will end, despite repeated requests for this information.

91.1 The respondents claim that this temporary merger will persist as long as is necessary to effect a permanent merger process between Makangwane and the Ramohlakana School.

91.2 However, the respondents have not embarked on the required section 12A(2) process of consultation, which may take anywhere from six months to several years to complete. The respondents have also not addressed any of the applicant's concerns over the viability of this merger.

91.3 As a result, there is the real risk that any temporary merger with Sephaoweng will become a permanent reality, to the prejudice of all learners.

92 In this light, the respondents' plans offer no meaningful solution to the ongoing breach of learners' rights, but instead threaten to compound the problem.

**JUST AND EQUITABLE REMEDY**

93 We submit that the just and equitable remedy in this case must have four key components:

93.1 First, the respondents' unconstitutional conduct must be declared invalid.

93.2 Second, an appropriate and effective temporary remedy must be put in place to allow teaching and learning to resume on 17 July 2018.

93.3 Third, a medium- to long-term remedy must be put in place to provide the applicant, teachers and learners with certainty as to the future of their school.

93.4 Finally, any relief granted must be coupled with duties of consultation and reporting.

***General principles***

94 This Court's remedial powers in constitutional matters are set out in section 172(1) of the Constitution, which provides:

> *"(1) When deciding a constitutional matter within its power, a court—*
>
> *(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*
>
> *(b) may make any order that is just and equitable, including -*
>
> *(i) an order limiting the retrospective effect of the declaration of invalidity; and*
>
> *(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."*

95 Whenever this Court finds that the state's conduct is inconsistent with the Constitution, it is bound declare the conduct invalid under section 172(1)(a) of the Constitution. That is a mandatory duty that cannot be avoided.

96 Under section 172(1)(b), this Court has a further remedial discretion to grant any just and equitable remedy in constitutional matters. This broad remedial discretion exists even in the absence of a declaration of invalidity.[82]

97 Two key principles are relevant in crafting a just and equitable remedy.

98 First, the Constitutional Court has consistently emphasised that a "*just and equitable*" and "*appropriate*" remedy must be an effective remedy.

98.1 Effectiveness requires that the remedy must be capable of vindicating and protecting the constitutional rights at stake. As the Court held in ***Gory v Kolver NO and Others* 2007 (4) SA 97 (CC) at para 40:**

> "*This Court has consistently emphasised that, where a litigant does establish that an infringement of an entrenched right has occurred, he or she should as far as possible be given effective relief so that the right in question is properly vindicated.*"[83]

98.2 The pursuit of effective remedies necessarily requires some judicial innovation, as Ackermann J observed in ***Fose v Minister of Safety and Security***:

> *"Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an*

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[82] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at para 97.

[83] *Gory v Kolver NO and Others* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 40. See also *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 45.

> *infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."*[84]

99 Second, effective relief requires this Court to grant remedies that go to the heart of the dispute. In ***Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at para 97**, the Constitutional Court underlined this point as follows:

> *"This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements."*

***Declarations of invalidity***

100 It follows from what is set out above that this Court is obliged to grant the declarations of invalidity as the respondents' conduct is in clear breach of the learners' constitutional rights and the respondents' statutory obligations.

101 Even in the absence of a declaration of invalidity, this Court is empowered to grant further just and equitable relief to protect the rights of the learners, including interdictory relief. For example:

101.1 In ***Hoërskool Ermelo***,[85] the Constitutional Court granted a mandatory interdict directing an Afrikaans-medium school to reconsider its language

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[84] 1997 (3) SA 786 (CC) at para 69.

[85] *Ermelo* n 82 above.

and admissions policy and to report back to the Court, in the absence of any declaration of constitutional invalidity.

101.2 Similarly, in ***Welkom High School***,[86] the Court directed three schools to revise their exclusionary pregnancy policies, despite the fact that the Court was unable to determine on the papers before it whether these policies were unfairly discriminatory.

***The temporary remedy***

102 The temporary remedy sought by the applicant is an interdict directing the respondents to take three specific actions before 16 July 2018:

102.1 Deliver five mobile classrooms to allow each grade at Makangwane to have a safe and adequate space for teaching and learning;

102.2 Deliver adequate desks and chairs; and

102.3 Formulate and implement a catch-up plan to compensate for the gaps in the curriculum as a result of the disruptions to teaching and learning in 2018.

103 We address each of these components of the relief in turn.

Mobile classrooms

104 The delivery of mobile classrooms is just and equitable for three key reasons.

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[86] *HOD, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC).

105 First, mobile classrooms avoid all of the complexities and risks inherent in the respondents' proposal of a forced temporary merger with Sephaoweng. Specifically it avoids:

105.1 The uncertainties over the availability of adequate classrooms for all five Makangwane classes;

105.2 The risks inherent in placing teenagers in the same school as children as young as five years old;

105.3 The logistical complexities of a "platooning arrangement", which would threaten to cut short the school day for both schools and force learners travel home after dark;

105.4 The costs and risks involved in arranging for sufficient sanitation facilities, food preparation and storage facilities, administrative offices and the like.

105.5 Placing the burden on Sephaoweng to deal with the problems created by the respondents' failure to provide adequate facilities at Makangwane.

105.6 The risk that this temporary arrangement may become a final solution through the respondents' further inaction.

106 Given the complexities of any sharing arrangement with Sephaoweng, this arrangement is likely to give rise to further disputes and further applications to Court. This is contrary to the requirements of effective relief.

107 Second, the order to deliver five mobile classrooms merely compels the respondents to deliver that which has been consistently promised:

107.1 As explained above, Department officials repeatedly assured the School that mobile classrooms had been procured and would soon be delivered, but were merely held up by transport problems.

107.2 This is reinforced by the 31 January 2018 report prepared by the Department's own Mr Phosa, who recommended that mobile classrooms be delivered.

107.3 It is clear that the Department itself planned to deliver these classrooms at some point, but inexplicably changed its mind.

107.4 In reliance on those promises and assurances, the community went as far as to clear ground at the school in the belief that this would assist in the installation of these mobile classrooms.[87]

108 In **KwaZulu Natal Joint Liaison Committee v MEC Department of Education, KwaZulu Natal 2013 (4) SA 262 (CC),** the Constitutional Court held that in the realm of the right to a basic education, the principles of "*reliance, accountability and rationality*" require that the government should be held to its promises.

108.1 On the basis of these principles, the Court held that where an MEC promised to pay subsidies to independent schools, and the time for payment had elapsed, that promise crystallised into a duty. This was so even though there is no constitutional obligation on MECs to pay subsidies.

108.2 The case for enforcing a promise is even stronger in this case.

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[87] FA p 39, para 81.

108.3 Here mobile classrooms were promised in order to remedy an ongoing breach of the right to a basic education. It is accordingly just and equitable to order the respondents to follow through on that promise.

109 Third, there is no merit to the respondents' claims that "*the Department does not have the budget*" to deliver these mobile classrooms.[88] The Department offers no specifics to substantiate these claims, such as the costs involved in procuring and delivering these classrooms, let alone an explanation for why these costs were not adequately budgeted for in the first place.

109.1 It is trite that where organs of state allege budgetary constraints as the reason for why they are unable to fulfil their constitutional obligations, they are required to place full evidence before the Court.[89]

109.2 In **Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA) at para 43,** in the context of the delivery of school textbooks in Limpopo, the SCA further stressed that where respondents seek to rely on budgetary constraints, they should further set out on affidavit why they are unable to obtain funds from other sources in order to fulfil their duties.

109.3 Moreover, even if these budgetary constraints had been substantiated, the Constitutional Court decision **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC) para 74**, provides the complete answer. There the Court

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[88] AA p 355, para 83.4.

[89] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) at para 88; *Khosa v Minister of Social Development 2004 (6) SA 505 (CC)* at paras 18 – 19.

emphasised that *'it is not good enough for [government] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its [constitutional] obligations*'

109.4 This principle was applied by the High Court in **Madzodzo v Minister of Basic Education 2014 (3) SA 441 (ECM) at para 34** in compelling the state to provide adequate school furniture to learners in the Eastern Cape.

109.5 On the respondents' own version, they have been aware of the crisis for a number of years and ought to budgeted to address this crisis.

110 Finally, the respondents repeatedly allege that the delivery of mobile classrooms would somehow be "*fruitless and wasteful expenditure*" under the Public Finance Management Act 1 of 1999.

110.1 Fruitless and wasteful expenditure is narrowly defined as "*expenditure which was made in vain and would have been avoided had reasonable care been exercised*".

110.2 The delivery of vital components of the right to a basic education could, under no circumstances, be described as expenditure "*made in vain*" or expenditure that should be "*avoided*".

110.3 Moreover, mobile classrooms are, by their nature, reusable. A prudent Department would have had a stock of mobile classrooms on hand to cater to emergency situations such as these. Furthermore, any classrooms acquired for Makangwane could be reused in future.[90]

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[90] Reply p 400, para 39.

111 On this basis, the delivery of mobile classrooms remains the most expedient, just and equitable means of addressing the ongoing violation of learners' rights.

Furniture and a catch-up plan

112 While the respondents oppose the delivery of mobile classrooms, they now appear to accept the need for adequate school furniture and a catch-up plan.

113 The founding affidavit clearly explains the urgent need for adequate furniture for learners at Makangwane. While the respondents baldly deny the furniture shortages at Makangwane, they have since attempted to deliver 60 desks and chairs to Sephaoweng.[91]

114 The respondents have further admitted the need for a catch-up plan for learners at Makangwane, although they initially refused to reveal any details of this plan. Late on the afternoon of 22 June 2018, the respondents filed an answering affidavit in the joinder application revealing this catch-up plan for the first time.

115 The fact that the respondents have taken steps to deliver on this relief does not in any way diminish the Makangwane SGB's entitlement to a final interdict directing the respondents to continue to comply with their obligations. Instead, it is a concession that this relief is necessary.

[91] Respondents' AA in Joinder, p 42 para 21.3.

116 First, it is trite that a party's entitlement to a final interdict is determined at the time that the application is launched, not at the time of the hearing.[92] The mere fact that the respondents have anticipated an order by making some attempts to comply before the hearing does not diminish the right to this relief.

117 Second, a final interdict is just and equitable in the circumstances as it would give the Makangwane SGB the ability to hold the respondents to these undertakings, in circumstances where the respondents have repeatedly broken their promises and changed plans without warning.

118 Third, this relief would also allow for ongoing court supervision of the implementation of this remedy and regular reporting, to ensure that the respondents remain accountable and transparent. We address these reporting duties in further detail below.

The temporary merger with Sephaoweng

119 If this Court orders the delivery of mobile classrooms, it follows that there will be no grounds for the respondents to persist with the planned temporary merger with Sephaoweng.

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[92] *Philip Morris Inc v Marlboro Shirt Co. S.A Ltd* 1991(2) SA 720 (A) at 735 B-C ("*Philip Morris was obliged to have established that at the time it instituted these proceedings in 1987 Marlboro Shirt was still representing that its merchandise was associated with Marlboro cigarettes"*). See also *Mathias International Ltd and Another v Baillache and Others* 2015 (2) SA 357 (WCC) at para 60: "*the applicants are nevertheless entitled to an interdict framed with regard to the circumstances that obtained when the application for the interdict was instituted."*

120 However, if this Court refuses to applicant's relief for any reason, it would then be necessary to make just and equitable orders relating to the proposed temporary merger.

121 This Court is fully competent to grant such relief. In ***EFF v Speaker of the National Assembly*** **2018 (2) SA 571 (CC) at para 211**, the Constitutional Court explained a court's remedial discretion under section 172(1)(b) of the Constitution empowers courts to grant any just and equitable order, even if this goes beyond the notice of motion or the original pleadings:

> *"The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution."* (Emphasis added)

122 As explained in the Makangwane SGB's replying affidavit,[93] any temporary merger with Sephoaweng would require a host of conditions to be in place, enforced by an appropriate court order:

122.1 First, there must be adequate safeguards in place by 16 July 2018 to protect the rights of learners while this temporary sharing arrangement is in place, which include:

122.1.1 A sufficient number of classrooms must be made available to ensure that each grade in Sephaoweng and Makangwane has their own classroom;

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[93] Reply p 402 para 43.1.

122.1.2 Sufficient qualified teachers are made available to provide lessons for every grade in both schools;

122.1.3 Sufficient age and grade appropriate desks and chairs must be delivered so that each learner at Makangwane and Sephaoweng has his/her own writing and reading space;

122.1.4 Scholar transport must be provided, where necessary, for learners at Makangwane who are required to travel a distance of over 3km to Sephaoweng;

122.1.5 Learners from Makangwane and Sephaoweng must continue to receive their allocated meals in terms of the National School Nutrition Programme, without interruption;

122.2 Second, there must be a clear plan to deliver adequate facilities for Makangwane in the medium- to long-term, which should be developed through meaningful engagement between the parties.

122.3 Third, the temporary merger should be subject to a clear end-date, to ensure that the Department does not treat this short-term solution as a final solution.

123 In proposing these conditions, the applicant has not waived its right to meaningful consultation in accordance with the procedures set out in section 12A of the Schools Act. These are precisely the concerns that the applicants would have raised had the section 12A procedures been followed, given that they are in place

to ensure that teaching and learning can continue uninterrupted in the context of a school merger and that the best interests of the learners are kept paramount.

124 Given the complexities in crafting this relief and the risks of repeat returns to court when the respondents inevitably breach these orders, the simplest and most expedient remedy remains the delivery of five mobile classrooms.

***The long-term remedy***

125 In the notice of motion, the applicant seeks a long-term remedy that would compel the respondents to formulate a plan by 30 September 2018 for construction of new school buildings or extensive renovations at Makangwane.[94]

126 This remedy is designed to give effect to the respondents' obligation to provide a school environment that is conducive to teaching and learning, and to mitigate any risks to learners' safety.

127 It also gives effect to the respondents' own plans. On their own version, the respondents had resolved to construct a new school for 2017/18.[95] While they admit (without providing a reason) that no action has been taken in this regard, they do not assert that this resolution was ever reversed.

128 The respondents now rely on the Infrastructure Norms and Standards in asserting that they are not permitted to effect permanent renovations at the

[94] NOM p 3, prayer 5.
[95] AA p 327, para 6.14.

School or to instruct new buildings. Instead, they argue, they are somehow duty-bound to merge Makangwane with another high school. They contend that this is an automatic consequence of the size of the school, which falls below the learner enrolment that defines a “small school” under the Norms and Standards. There is no basis for this assertion.

128.1 Regulation 5 of the Infrastructure Norms and Standards describe the types of schools, defining small secondary schools as schools with a minimum capacity of 200 learners. This definition does not mean that schools with less than 200 learners should cease to exist immediately.

128.2 Indeed, it is not even automatic that the schools should be merged with other schools. Regulation 5(6) empowers the relevant MEC to approve the retention of the school below the minimum capacity based on valid reasons and subject to available infrastructure and the Infrastructure Norms and Standards.

128.3 Finally, it must be noted that the Department, in relying on the Infrastructure Norms and Standards, ignores regulation 4(1)(b)(iv). This provision makes clear that the minimum enrolment guidelines will only become operational on 31 December 2030.

128.4 The irony is that the Department seeks to accelerate its compliance with this one non-binding aspect of the Norms and Standards, while ignoring the more pressing and urgent obligations, such as fixing unsafe and inappropriate schools.

129 Moreover, the Department has not yet even begun to comply with the merger requirements under section 12A of the Schools Act. No official notice of the merger has been published and the schools have not been afforded any opportunity to make representations. This process is likely to require a substantial period of time.

130 The applicant does not have sufficient information at this stage to formulate its position in relation to the proposed merger with Ramohlakana; indeed, the purpose of meaningful engagement is partly to provide this information to enable the applicant to exercise its meaningful engagement rights so as to ensure the uninterrupted exercise of the right to basic education of learners impacted by the merger. But on the information that it does have, the applicant has expressed two serious concerns about the proposed merger:

130.1 The first is that Ramohlakana is a substantial distance from the School, and learners will therefore be required to travel long distances on unsafe roads to get to school and back.[96]

130.2 The second is that there appears to be conflict at Ramohlakana between two traditional leadership authorities, and the applicant does not want the learners currently attending the School to be affected by this.[97]

131 We do not ask the Court to resolve these issues. They are most appropriately resolved through a process of meaningful engagement. But this process must

[96] Reply p 412, para 77.1.
[97] Reply p 412, para 77.2.

comply with section 12A of the Schools Act, and the applicant is concerned at the apparent lack of intention to follow these procedures.

132 We therefore submit that there are two viable options for long term relief:

132.1 First, an order compelling the respondents to renovate the existing infrastructure at the School, and/or to construct new buildings, to provide a permanent space for learners that is both safe and creates an environment conducive to teaching and learning; or

132.2 Second, if the respondents wish to proceed with the proposed merger, an order directing them to comply with the section 12A procedures before taking a decision on the proposed merger. This would involve an order directing the respondents –

132.2.1 To initiate the section 12A procedures within two weeks of the order of this Court;

132.2.2 Directing the respondents to report to this Court within one week of the initiation of these processes, and thereafter on a monthly basis, on their compliance with section 12A and the progress in resolving whether a merger of the schools is appropriate and in the best interests of the learners concerned; and

132.2.3 In the event that the Department does not comply with these processes, or in the event that a merger is found to be inappropriate, directing the respondents to develop and

implement an implementation plan for the provision of safe permanent infrastructure to the School.

133 This will enable the parties to engage meaningfully with each other, as well as ensuring that the learners' best interests will take priority.

***Reporting duties***

134 Supervisory interdicts have become increasingly common remedies to ensure compliance with constitutional obligations. There is little doubt that this Court has the power to supervise the implementation of its order.[98]

135 These reporting duties are neither punitive nor disrespectful to the respondents. Instead, they serve to foster accountability, transparency and good faith. As Budlender and Roach explain:

> "Supervisory jurisdiction with reports back to the court should not be seen as a punishment of government for defiance of the Constitution. Rather, it is simply a means of ensuring effective compliance with the Constitution, which must be the core concern of the courts."[99]

136 Reporting obligations are particularly important in this case for two reasons.

137 First, the respondents have persistently failed to engage with the applicant in an open and accountable manner. The respondents have repeatedly broken

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[98] M*inister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) at para 107; *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 (23 April 2018) at paras 55 – 57.

[99] 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325 at 350.

promises, refused to divulge their plans and there have been repeated breakdowns in communications.

137.1 In this context, court supervision is a means of ensuring transparency and accountability and promises to foster the good faith cooperation that is required under the Schools Act.

137.2 As Budlender and Roach further note, where a Court "*requires an elected government to communicate with its people about important matters of governance and steps taken to comply with constitutional rights [it] cannot reasonably be criticized for being undemocratic or infringing the separation of powers.*"[100]

138 Second, ongoing supervision can help to avoid the possibility of repeated returns to court in the form of contempt proceedings or similarly heavy-handed enforcement measures.

138.1 In ***Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another*** **2015 (2) SA 413 (SCA) at para 35** the SCA refused to uphold an order of contempt of court for a municipal official who had not complied with a complex order concerning a dispute between a rich suburb and a poor, informal settlement.

138.2 At paragraph 35 of the judgment, Wallis JA and Schoeman AJA explained why supervisory remedies, involving ongoing oversight over compliance,

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[100] G Budlender 'Remedying Breaches of the Constitution' in J Klaaren (ed) *A Delicate Balance: the Place of the Judiciary in a Constitutional Democracy* (2006) 83 at 88.

are generally preferable to contempt proceedings in the field of socio-economic rights:

> "*Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order.*"

139 For these reasons, the reporting obligations proposed are a vital component of an effective remedy that will ensure accountability and transparency going forward.

**PROCEDURAL MATTERS**

***Joinder***

140 Joinder of the Sephaoweng SGB is now necessary given the respondents' stated intention to pursue a temporary merger of Makangwane with Sephaoweng.

141 It is trite that any party with a direct and substantial interest in the matter must be joined by necessity, unless a court is satisfied that the party has waived his or her right to be joined.[101]

141.1 In **Gordon v Department of Health, Kwazulu-Natal 2008 (6) SA 522 (SCA) at para 9**, the SCA explained that a party has a direct and substantial interest in a matter if an order or judgment cannot be sustained or carried into effect without prejudicing that party's interests.

141.2 Any delay is irrelevant to the question of joinder. Where joinder is necessary, a court of appeal may even raise non-joinder *mero motu*, despite not being raised by any party.[102]

142 The Sephaoweng SGB now has a direct and substantial interest in this application, as any relief granted by the court has the potential to materially prejudice the rights and interests of the SGB and its learners.

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[101] A*malgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659 – 660.

[102] *Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (WLD) at para 11.

142.1 If this court dismisses this application, the temporary merger will proceed and the Sephaoweng SGB and its learners will be directly affected.

142.2 Alternatively, this court may deem it just and equitable to give orders regulating the temporary merger. Those orders would also have the potential to threaten Sephaoweng's rights.

142.3 Sephaoweng therefore has a clear entitlement to be heard on these matters, particularly in light of its fiduciary duties under section 16(2) of the Schools Act.

143 In any event, it would also be appropriate to join the Sephaoweng SGB as a matter of convenience to allow it to provide this court with relevant information on conditions at Sephaoweng and to make submissions on the just and equitable remedy.

***Technical objections***

144 The respondents raise a number of technical objections in respect of the commissioning of the founding papers. They also seek to criticise the applicant's attorney of record for deposing to an affidavit in the joinder application.

145 In ***Permanent Secretary, Department of Welfare, Eastern Cape Province v Ngxuza*** **2001 (4) SA 1184 (SCA)** at para 15, Cameron J condemned such technical point-taking in socio-economic rights litigation:

> "[W]hen an organ of government invokes legal processes to impede the rightful claims of its citizens, it not only defies the Constitution, which commands all organs of State to be loyal to the Constitution and

> requires that public administration be conducted on the basis that 'people's needs must be responded to'. It also misuses the mechanisms of the law, which it is the responsibility of the courts to safeguard. The province's approach to these proceedings was contradictory, cynical, expedient and obstructionist. It conducted the case a though it were at war with its own citizens, the more shamefully because those it was combatting were in terms of secular hierarchies and affluence and power the least in its sphere."

146 The respondents' first technical objection, relating to the commissioning of affidavits by police officers, has no merit.

146.1 As explained in the replying affidavit, the commissioners' details contained in the signature line are substantially compliant with the requirements of regulation 4 of the Regulations Governing the Administering of an Oath or Affirmation.[103]

146.2 Any non-compliance is not material, as the purpose of regulation 4 has been satisfied. There is no doubt that police officers are *ex officio* commissioners of oath. In this regard, in **Unlawful Occupiers of the School Site v City of Johannesburg [2005] 2 All SA 108 (SCA) at para 22**, the SCA stressed the following**:**

> *"[E]ven where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved"*

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[103] GN R1258 of 1972 GN R1258 in GG 3619 of 21 July 1972. Regulation 4 provides:

*"(1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.*

*(2) The commissioner of oaths shall-*

*(a) sign the declaration and print his full name and business address below his signature; and*

*(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."*

146.3 Finally, this court has the discretion to condone any defects in commissioning and to consider the affidavits given that these are urgent proceedings.

147 The second technical objection also has no merit. The applicant's attorney deposed to the affidavit in support of the joinder application given the urgency. There is no bar to attorneys deposing to matters on which they have personal knowledge, particularly on purely procedural matters such as joinder.[104]

**CONCLUSION**

148 For the reasons set out above, the applicant persists in seeking an order for just and equitable relief to address the ongoing violation of the rights of learners at Makangwane.

149 We submit that the applicant is entitled to its costs, including the costs of two counsel.[105]

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25 June 2018

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[104] The only circumstances where attorneys have been criticised for deposing to affidavits is where they appear in court on behalf of a client and have also deposed to an affidavit on the merits. See *Carolus v Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 348; *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2015 (5) SA 192 (SCA) at para 38.

[105] *Trustees for the Time Being of the Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC).