IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 1416/2015

In the matter between:

ROSINA MANKONE KOMAPE	First Plaintiff
MALOTI JAMES KOMAPE	Second Plaintiff
MOKIBELO LYDIA KOMAPE	Third Plaintiff
LUCAS KHOMOTSO KOMAPE	Fourth Plaintiff

and

MINISTER OF BASIC EDUCATION	First Defendant
MEMBER OF THE EXECUTIVE COUNCIL LIMPOPO DEPARTMENT OF EDUCATION	Second Defendant
PRINCIPAL OF MAHLODUMELA LOWER PRIMARY SCHOOL	Third Defendant
SCHOOL GOVERNING BODY, MAHLODUMELA LOWER PRIMARY SCHOOL	Fourth Defendant

and

TEBEILA INSTITUTE OF LEADERSHIP EDUCATION, GOVERNANCE AND TRAINING	First Amicus Curiae
EQUAL EDUCATION	Second Amicus Curiae

PLAINTIFFS' HEADS OF ARGUMENT:
DEFENDANTS' COMPLIANCE WITH STRUCTURAL ORDER

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I INTRODUCTION

1 On 23 April 2018, this Court granted an order (**"structural order"**), inter alia –

1.1 Ordering the first and second defendants (**"defendants"**) to supply and install at each rural school in Limpopo currently equipped with pit latrines a sufficient number of toilets that are accessible, secure and safe and that provide privacy and promote health and hygiene, based on an assessment of the most suitable, safe and hygienic sanitation technology;

1.2 Directing the defendants to furnish the Court with a list containing the names and locations of all schools in rural areas with pit toilets for use by learners, the estimated period required to replace the pit toilets at those schools, and a detailed programme developed by the relevant experts for the installation of new toilets based on an assessment of the suitable sanitation technology requirements of each school.[1]

2 The Court considered the structural order to be a just and equitable remedy to effectively vindicate the Constitution. In this regard the Court held that –

> The best interests of all learners at schools with pit toilets must take preference. It is the only means by which the state will be compelled to take active steps to provide the lacking basic sanitary requirements to learners in those schools. It will, no doubt be a mammoth task for the state to undertake. But that cannot deter this court from ordering the state to comply with its obligations in terms of the Constitution. The evidence shows that efforts were made, inadequate as they are, to replace old pit toilets at some schools. Effective remedial action is to be undertaken to restore the dignity and wellbeing of learners attending government schools in the

[1] *Komape and others v Minister of Basic Education and others* 2018 JDR 0625 (LP); (1416/2015) [2018] ZALMPPHC 18 (23 April 2018) ("***Komape 1***").

> province. The flagrant violation of their rights cannot be allowed to continue without remedial steps being taken to enforce, protect and prevent future encroachment of the rights of learners protected in the Bill of Rights.[2]

3 The defendants filed an affidavit, setting out their plan for the eradication of inappropriate sanitation, on 31 August 2018.[3] They filed a progress report, with an updated plan, on 13 May 2020.[4]

4 The plaintiffs assert that this plan falls short of the defendants' obligations in terms of the structural order, and in terms of their constitutional and statutory obligations to provide safe and adequate school sanitation facilities to learners attending public schools across Limpopo. This assertion is based on the following:

4.1 There is no clear, coherent and comprehensive sanitation plan;

4.2 The defendants have failed to make available adequate financial resources for the provision of safe and appropriate sanitation facilities;

4.3 The plan makes no provision for those in urgent need;

4.4 The plan lacks transparency and responsiveness;

4.5 The plan is not reasonable in its implementation;

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[2] *Komape 1* at para 70.
[3] Pp 1 – 126.
[4] Pp 886 – 1286.

4.6 The information that the defendants have provided to the Court is confusing, incoherent, and does not place this Court in a position for it to determine whether its structural order has been complied with;

4.7 The plan is based on an unduly restrictive and unlawful interpretation of the structural order; and

4.8 The plan is inconsistent with the defendants' obligations arising from the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure (**"School Infrastructure Norms"**).[5]

5 The plaintiffs therefore seek an order, inter alia, –

5.1 Declaring that the defendants' plan submitted is unconstitutional and in breach of the structural order;

5.2 Directing the Member of the Executive Council in the Limpopo Department of Education (**"MEC"**) to remedy the shortcomings of the defendants' plan to ensure that it is constitutionally compliant and file a revised plan in both physical and electronic format with the Court within 45 days. The plaintiffs request that the Court retain its supervisory jurisdiction in relation to this updated plan;

5.3 Directing the MEC, within two weeks of the order, to constitute a "sanitation task team", headed by an independent expert in the field of infrastructural management, established in consultation with plaintiff's attorneys and the

[5] GNR 920, *Government Gazette 37081*, 29 November 2013.

second amicus curiae and which comprises of representatives of the Limpopo Department of Education, the Limpopo Provincial Treasury, the relevant school infrastructure implementing agents, and representatives from civil society. The mandate of the sanitation task team is to verify, update and ensure the accuracy and currency of the National and Provincial government's information on school sanitation in Limpopo, and to ensure implementation of a reasonable plan for the elimination of pit toilets.

6 In what follows:

6.1 We set out the background to this matter;

6.2 We discuss the relevant legal principles for assessing the defendants' compliance with their socio-economic obligations;

6.3 We analyse the defendants' plans against these principles; and

6.4 Finally, we discuss the question of appropriate relief.

II BACKGROUND

7 In *Komape 1*, this Court found that there is a widespread sanitation crisis in Limpopo, which crisis has been known to the defendants for many years. The Court further found that the defendants have done little to address this sanitation crisis, despite the existence of workable solutions:

> The undisputed evidence shows that the witness Heywood from Section 27 engaged the second respondent by addressing correspondence to the second defendant drawing attention to the unsafe toilets at schools and the need to install safe toilets. Second

> defendant identified schools which needed upgrades. The photographic evidence adduced revealed distressing, dangerous and poor sanitary conditions at a large number of rural schools. In some schools learners are forced to make use of open dilapidated pits, not worthy for use as toilets by humans which afford those using them no privacy at all. The evidence also showed that there are safe and affordable products available on the market for use by children. It is disturbing to learn from the evidence that funds allocated to second defendant in annual budgets are not utilised for the purpose budgeted for. It is clear that due to lack of political will no effort was made to better the situation at schools of which the second defendant was well aware of.[6]

8 The lack of safe and adequate school infrastructure, and the threats associated with this, extend to public schools across South Africa. In *Equal Education and another v Minister of Basic Education and others,*[7] Msizi AJ, commenting on the state of public school infrastructure and the absence of any real commitment to address this, held that –

> The crude and naked facts staring at us are that each day the parents of these children send them to schools as they are compelled to. They expose these children to danger which could lead to certain death.

9 The state of sanitation in public schools in Limpopo culminated in the tragic death of five-year-old Michael Komape, who drowned in a pit toilet following the collapse of a dilapidated structure that could not support his weight. It was Michael's death that triggered the structural order granted by this Court. The tragedy that befell the Komape family is, however, not an isolated incident.

10 The undisputed evidence before this Court is that there have been at least three other learners nationally who have lost their lives as a direct consequence of the dilapidated toilets at their schools. Another child has been severely injured and

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[6] *Komape 1* at para 59.
[7] 2019 (1) SA 421 (ECB) ("***Equal Education (Infrastructure)***").

traumatised after a similar fall into a pit toilet.[8] The plaintiffs rely on this evidence to illustrate that the tragedy that befell Michael Komape and his family, as well as these four other learners and their families, may well recur in the near future. The defendants have simply ignored these concerns.

11 In the face of a crisis requiring their urgent intervention, as well as an order of this Court compelling an adequate and appropriate response, the defendants have persisted in their failure to take steps to prevent a recurrence of these tragedies. One month after the deadline for their sanitation plan[9] in terms of the structural order, the defendants filed an affidavit in which they –

11.1 identified 1 658 schools "with sanitation needs" of which 1 489 had pit toilets on school premises. No indication was provided as to the criteria used in identifying these "sanitation needs";

11.2 indicated the number of pit toilets at each school as well as the planned starting and completion dates at each site;

11.3 confirmed their selection of the Enviro-Loo system for schools in Limpopo; and

11.4 set out average planned start dates for pit toilet eradication between 2026 and 2028, and average planned end dates for pit toilet eradication of between 2028 and 2030.[10]

[8] Plaintiffs' affidavit in response to defendants' report filed on 31 August 2018; p 131, para 9.
[9] The structural order required the defendants to report to the Court by 31 July 2018. The defendants applied for an extension of this deadline one day before its expiry. It was not practicable for the plaintiffs and the second amicus curiae to oppose that application. See plaintiffs' affidavit in response to defendants' report filed on 31 August 2018, structural interdict bundle, p 130, para 6.
[10] Affidavit on behalf of first and second defendant, pp 1 – 126.

12 In other words, the defendants had indicated to the Court their intention to follow a "business as usual" approach in addressing what the Court in *Komape 1* described as a flagrant violation of learners' rights.

13 In response, the plaintiffs filed an affidavit in which they demonstrated the failure by the defendants to meet the basic constitutional requirements for reasonableness. The plaintiffs highlighted:

13.1 The shocking delay in the timeframe for the eradication of unsafe sanitation,

13.2 the lack of clear information as to how sanitation needs would be identified and addressed,

13.3 evidence that establishes that the defendants' plan had been developed on the basis of inaccurate and incomplete data. As such, the plan would not be able to ensure the provision of safe and adequate sanitation to all learners attending public schools in Limpopo.[11]

14 The second amicus curiae (**"Equal Education"**) also filed an affidavit critiquing the defendants' sanitation plan.[12]

15 The defendants did not reply to this affidavit, nor did they take any steps to implement their plan on its own terms. Instead, almost two years later, and only

[11] Plaintiffs' affidavit in response to defendants' report filed on 31 August 2018; pp 127 – 162.
[12] Second amicus curiae's affidavit, pp 472 – 505.

in response to an invitation from this Court,[13] the defendants filed a supplementary affidavit on 15 May 2020 containing another plan (**"second plan"**).[14] In this supplementary affidavit, the defendants appear to provide additional detail, aimed at plugging omissions in the first plan. However, the second plan succeeds only in introducing further confusion and lack of clarity.

16 The second plan lists a number of different school infrastructure programmes, implementing agents for programmes, and sources of funding. It is unclear how these relate to one another, or to the initial sanitation plan filed on 31 August 2018. Many aspects of the initial sanitation plan, and the critiques of that plan raised by the plaintiffs and Equal Education, have simply been ignored.

17 Instead, the defendants have chosen to spend a substantial portion of their purported second plan addressing only the specific examples that the plaintiffs and second amicus curiae relied upon to establish the depth of the sanitation crisis in Limpopo and the inaccuracy and incompleteness of the data on which the defendants' sanitation plan is based.

18 Only the defendants have the mandate, capacity, resources and access to relevant information to compile a full list of every school in Limpopo Province which has a pit toilet. Where the plaintiffs and Equal Education are aware of schools omitted from the defendants' sanitation plan despite having unsafe and/or inadequate sanitation, these have been brought to the Court's attention

[13] Annexure "FV3" to plaintiff's supplementary affidavit in response to first and second defendants' report, pp 632 – 633.
[14] Defendants' progress report and replying affidavit, pp 8865 – 1286,

to highlight broader challenges to the reasonableness of the sanitation plan. The defendants have, however, elected to dispute the examples placed before the Court rather than to engage the underlying arguments that they remain in breach of their constitutional obligations.

19 Regrettably, the learners in Limpopo have had to suffer the consequences for poor planning and implementation by the first and second defendants before. In relation to the non-delivery of textbooks in Limpopo, the Supreme Court of Appeal said the following:

> The truth is that the [Department of Basic Education]'s management plan was inadequate and its logistical ability woeful. One would have expected proper planning before the implementation of the new curriculum. This does not appear to have occurred. The [Department of Basic Education] also had a three-year implementation period during which it could have conducted proper budgetary planning, perfected its database, and ensured accuracy in procurement and efficiency in delivery. It achieved exactly the opposite and blamed all and sundry. It lacked introspection and diligence."[15]

20 There is currently no coherent plan before the Court for pit toilet eradication. The effect of this is to frustrate this Court's powers of supervisory jurisdiction to scrutinise the constitutionality of government's plan to eradicate pit toilets in the Limpopo Province in line with the constitutional obligations enumerated in *Komape 1*. We submit on this basis that the only reasonable conclusion to be drawn is that the defendants have not complied with the structural order and that, in order to ensure effective remedial action, the Court ought to grant the relief that the plaintiffs seek.

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[15] *Minister of Basic Education and others v Basic Education for All and others* 2016 (4) SA 63 (SCA) ("***BEFA***") para 43.

III THE RELEVANT LEGAL PRINCIPLES FOR ASSESSING GOVERNMENT COMPLIANCE WITH ITS SOCIO-ECONOMIC OBLIGATIONS

21 Section 7(2) of the Constitution enjoins the state – including the defendants – to respect, protect, promote and fulfil the rights in the Bill of Rights. The suite of qualified socio-economic rights, in particular, imposes positive obligations on the state to develop reasonable plans and programmes for the promotion and fulfilment of these rights.

22 The test for reasonableness is not uniform in all circumstances. O'Regan J has held that "*the concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable*."[16] There are, however, a number of considerations that will guide a court in assessing the reasonableness of a plan.

23 The Constitutional Court[17] has developed a set of criteria against which the reasonableness of such plans and programmes is to be measured. These criteria have been developed through decisions dealing with the set of qualified socio-economic rights which are subject to "*progressive realisation*" within the state's "*available resources*". These include the rights of access to housing, health care services and water.

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[16] *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) (**"Mazibuko")** para 71.
[17] See in particular *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) (**"Grootboom"**); *Minister of Health and others v Treatment Action Campaign* 2002 (5) SA 721 (CC) (**"TAC"**); *Mazibuko*.

24 The right to basic education, which includes the right to safe and adequate school sanitation,[18] is by contrast unqualified. It has been described by the Constitutional Court as *"immediately realisable"*.[19] We submit that the effect of this is to impose on the defendants a standard higher than that articulated in respect of qualified socio-economic rights in assessing their compliance with their legal obligations. We elaborate on this submission in the next section. We first deal with the standard articulated by the Constitutional Court in the context of rights that are subject to progressive realisation.

25 The plan must be capable of facilitating the realisation of the right:[20]

25.1 When considering this factor, it is clear that there is a requirement on government to go beyond simply drawing up a plan. The government party is required to consider the content of the right and its obligations in relation to that right. These considerations should inform both the design and the implementation of programmes to achieve the realisation of the right.

26 It must be reasonable in both its conception and implementation:[21]

26.1 In *Grootboom*, Yacoob J held that *"The formulation of a programme is only the first step in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is*

[18] *Komape 1* at para 63.
[19] *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (7) BCLR 651 (CC) (***"Juma Musjid"***) para 37.
[20] *Grootboom* at para 41.
[21] *Grootboom* at para 42.

not implemented reasonably will not constitute compliance with the state's obligations."[22]

26.2 This requires appropriate and well-directed policies and programmes that not only appear to be constitutionally-compliant in theory, but will produce such results in practice. This requires co-ordination and co-operation between the different branches and spheres of government.

27 It must be clear, coherent and comprehensive:[23]

27.1 In order to comply with the standard of reasonableness, the plan or programme must respond systematically to a clearly-identified social need.[24] It must be based on complete and accurate information as to the nature and extent of that need, and be geared towards addressing that need directly.

27.2 A plan or programme that focuses only on one sector of society will not be reasonable.[25] Nor will a plan that is disjointed or fragmented. We submit that without adequate co-ordination between the different elements of the plan or programme directed at ensuring a comprehensive and coherent response to an identified need, any plan for the advancement of socio-economic rights will be unreasonable.

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[22] *Grootboom* para 42.
[23] *Grootboom* at para 54, *TAC* para 121-122.
[24] *Grootboom* at para 54.
[25] *Grootboom* at paras 53 – 54; *TAC* at para 122.

28 The plan must clearly allocate responsibilities and tasks to the different spheres of government:[26]

28.1 In *Grootboom*, in the context of the right of access to adequate housing, Yacoob J emphasised the need for each sphere of government to accept responsibility for the implementation of the national housing programme.[27] Although it is incumbent on the national sphere of government to create a statutory and policy framework that is capable of advancing constitutional rights, each of the branches of government in all three spheres is obliged to ensure that the statutory and policy framework is funded and implemented in a manner that achieves its purpose.

28.2 This requires a clear delineation of responsibilities and tasks.[28] This ensures that beneficiaries of the impugned plan/programme know who to hold accountable and what they are to be held accountable for.

29 It must make available appropriate financial and human resources necessary for implementation:[29]

29.1 In order to ensure that the plan or programme in question will be reasonable in its implementation, it is essential that the necessary human and financial resources be allocated for this purpose.

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[26] *Grootboom* at para 39.
[27] *Grootboom* at para 40.
[28] *Grootboom* at para 39.
[29] *Grootboom* at para 39.

29.2 This allocation must take into account the nature of the right and the content of the obligations arising therefrom.[30] In the context of the progressively-realisable socio-economic rights, such as the rights to health care, housing and water, the state's obligation is to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right.

29.3 In addition to this substantive obligation, the state is required to provide sufficient information to the Court to enable it to assess whether the state has in fact taken reasonable measures within its available resources. In other words, bald allegations of resource constraints are insufficient; the state bears the onus of placing clear information before the Court of its available resources and how these are being used to meet its applicable constitutional and statutory obligations.[31]

30 It must be balanced and flexible and make appropriate provision for short-, medium- and long-term needs:[32]

30.1 A key criterion for assessing the reasonableness of programmes devised to advance socio-economic rights is that such programmes should systematically deal with the provision of services at various levels, addressing not only long-term plans but also immediate problems.

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[30] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (*"**Blue Moonlight**"*) para 74.
[31] *Blue Moonlight* para 74.
[32] *Grootboom* para 43.

30.2 In the *TAC* case, the Constitutional Court assessed the reasonableness of a national programme that restricted the availability of nevirapine, a drug for the prevention of mother-to-child transmission of HIV, to only a few pilot sites pending a comprehensive programme based on data to be gathered on safety, efficacy and resistance. The Court held that there was an obvious public interest in a comprehensive programme and ongoing research, but that these long-term interests could not justify a denial of life-saving treatment in the short- and medium-terms.[33]

30.3 This takes account of the reality that even if a perfect solution to the promotion and fulfilment of rights is not immediately available, this does not justify a failure to provide short- and medium-term relief to manage and mitigate the impact of this.

31 It must be responsive and transparent, with its contents made known effectively to the public:[34]

31.1 In *TAC*, the Constitutional Court added the requirement of transparency as a necessary criterion for reasonableness.

31.2 The Court held that the enormous challenge that HIV/AIDS posed to all sectors of society could only be met if there is "*proper communication, especially by government*".[35] In order for a programme to be "*implemented*

[33] *TAC* at 68.
[34] *Mazibuko* para 96.
[35] *TAC* at 123.

optimally", its contents must be made known and understandable to all stakeholders.

31.3 In *Mazibuko* the Constitutional Court recognised the importance not only of a one-way channel of communication from government to stakeholders, but also the requirement that plans and programmes be responsive.[36] The development of a plan for the advancement of socio-economic rights must be informed by the needs of those it is intended to benefit, and to the extent that it does not accommodate these needs it must be reworked in order to do so. This necessarily requires ongoing engagement between the state and the relevant stakeholders.

32 It must make short-term provision for those whose needs are urgent:[37]

32.1 In *Grootboom* the Constitutional Court considered whether, through its state housing programme, the state had met its constitutional obligations in the context of a deep and widespread shortage in housing. The Court held that –

> Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must

[36] *Mazibuko* at para 96.
[37] *Grootboom* at para 44. See also Liebenberg S "The Interpretation of Socio-Economic Rights" in Chaskalson et al *Constitutional Law of South Africa* 2ed (2004) at 33-24.

> not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[38] (emphasis added)

32.2 In assessing the reasonableness of the state housing programme in that case, the Court held that although what the state had accomplished through its housing programme was "a major achievement", it had failed to meet its constitutional obligations.[39] The programme made no provision to ameliorate desperate need, even through temporary measures, and was therefore unreasonable. In this regard the Court held that given the scale of the housing crisis, the desperate people would remain in desperate need for the foreseeable future, unless provided with immediate temporary relief in terms of the housing programme.[40]

32.3 In other words, what is required of the state in the context of reasonableness is that it makes provision for an incremental increase in both access to and the quality of services, thus working towards the full realisation of the right concerned for everyone, but that it cannot do so blind to the realities in which people live. Its plans and programmes must take account of those in most desperate need, and meet these needs in a way that people are not forced to live intolerable lives while these incremental improvements are being made.

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[38] *Grootboom* paras 43 – 44.
[39] Id at para 53.
[40] Id at paras 52 and 65.

32.4 The Constitutional Court developed this further in the *PE Municipality* case.[41] The case involved the possible eviction from municipal land of people occupying the land unlawfully. In determining whether granting the eviction order would be just and equitable, the Court was required[42] to consider whether the people occupying the land would have any suitable alternative accommodation. In considering this factor in the circumstances before it, the Court held as follows:

> In this respect it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided.[43] (emphasis added)

32.5 It follows that, in order for a plan or programme to meet the standard of reasonableness, it must make provision for those in most desperate need. A failure to do so, even if the plan meets all of the other criteria for reasonableness, will render it unreasonable.

The content and threshold applicable to the right to basic education

33 The rights of access to housing, health care services and water all expressly impose a duty on the state to take reasonable legislative and other measures,

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[41] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[42] In terms of section 6(3)(c) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[43] Id at para 29.

within its available resources, to achieve the progressive realisation of these rights.[44] The right to basic education – which includes the right to safe and decent sanitation – contains no such qualification.[45]

34 As confirmed by the Constitutional Court in *Governing Body of the Juma Musjid Primary School v Essay NO*:

> 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 a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom.*[46]*

35 This means that, unlike other socio-economic rights, where the state need only demonstrate that a plan is reasonable in progressively ensuring the fulfilment of the right, a plan for the promotion and fulfilment of the right to basic education must be capable of the immediate fulfilment of the right.

36 In assessing this criterion, it is also necessary to consider the defendants' statutory obligations in relation to school sanitation, and whether the plan is capable of meeting those requirements. In this regard the School Infrastructure Norms largely echo the requirements laid out in the structural order. Regulation 12 provides as follows:

> (1) All schools must have a sufficient number of sanitation facilities, as contained in Annexure G, that are easily accessible to all learners and educators, provide privacy and security, promote

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[44] See for example, sections 26(2) and 27(2) of the Constitution.
[45] *Juma Musjid* para 37, footnotes omitted.
[46] *Juma Musjid* para 37.

health and hygiene standards, comply with all relevant laws and are maintained in good working order.

(2) The choice of an appropriate sanitation technology must be based on an assessment conducted on the most suitable sanitation technology for each particular school.

(3) Sanitation facilities could include one or more of the following:
(a) Water borne sanitation;
(b) Small bore sewer reticulation;
(c) Septic or conservancy tank systems;
(d) Ventilated improved pit latrines; or
(e) Composting toilets.

(4) Plain pit and bucket latrines are not allowed at schools.

37 Particularly noteworthy in respect of the School Infrastructure Norms is that, since they were promulgated in 2013, plain pit toilets have been unlawful. This case must therefore been seen in the context of the obligations that the state has set for itself.

38 In order to meet the standard of reasonableness, the sanitation plan must be capable of meeting these requirements – including the requirement that plain pit latrines be eradicated from Limpopo schools – in full and immediately.

39 The immediately realisable nature of the right to basic education, as expressed in *Juma Musjid,* has been confirmed in several subsequent cases, which have used this principle in the context of giving content to the right.

40 In *Madzodzo and others v Minister of Basic Education and others*[47]*,* the Mthatha High Court stated emphatically that the right to basic education is "*an unqualified right which is immediately realisable and is not subject to the limitation of*

[47] 2014 (3) SA 441 (ECM) ("***Madzodzo***").

progressive realisation."[48] The Court held further that "*the right requires that the state take all reasonable measures to realise the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to education be provided*."[49] (Our emphasis)

41 We submit that this distinguishing characteristic of the right to basic education arises, at least in part, from the fact that the right is necessarily held by children. Children enjoy special protection under the Constitution, which provides in section 28(2) that a child's best interests are of paramount importance in every matter concerning the child.

42 This nexus between the right to basic education and the obligation to hold paramount the interests of the child was recognised by the Constitutional Court in *Juma Musjid*. In that case, the Constitutional Court considered an appeal against an order of eviction of a public school from private property. One of the reasons relied upon in setting aside the eviction order was that the lower court had incorrectly given precedence to property rights over the rights entrenched in section 28(2) of the Constitution.

43 The interconnection between these rights was also recognised by this Court in *Komape 1*:

> The right to basic education includes provision of adequate and safe toilets at public schools for learners the failure of which compromised the best interests of the children referred to in section 28(2) of the Constitution. Provision of adequate toilet facilities at schools is not only

[48] *Madzodzo* at para 15.
[49] *Madzodzo* at para 17, Court's emphasis.

> [a] basic requirement for daily human existence but it also provides for a healthy environment where the children spend their days. The importance of education as one of the pillars of society since ancient times which is the means by which every child is able to realise their dreams by exercising this right can hardly be over stated.[50]

44 The second critical nexus is between the right to basic education and the right to equality. The Supreme Court of Appeal, in the context of the delivery of textbooks to schools in Limpopo, emphasised the importance of this intersection:

> I agree with Kollapen J in *Section 27* that the failure to provide textbooks to learners in schools in Limpopo in the circumstances referred to above is a violation of the rights to a basic education, equality, dignity, SASA and s 195 of the Constitution. The Constitutional Court in *Pretoria City Council v Walker* …, in dealing with s 8 of the interim Constitution, which entrenched the right to equality and equal protection under the law and which prohibited unfair direct or indirect discrimination, said the following (paras 30 – 31):
>
> > 'Section 8(2) prohibits unfair discrimination which takes place directly or indirectly. This is the first occasion on which this Court has had to consider the difference between direct and indirect discrimination and whether such difference has any bearing on the s 8 analysis as developed in the four judgments to which I have referred.
> >
> > The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8(2).'[51]

45 Against this backdrop, courts have held that the right to basic education requires more of the state than to make available places in schools; the state is obliged

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[50] *Komape 1* para 63.
[51] *BEFA* para 46, footnotes and citations omitted.

to provide textbooks[52], school furniture[53], scholar transport[54] and school nutrition[55].

46 In relation to school infrastructure in particular, the Court in *Equal Education (Infrastructure)* described the right to basic education as *"unarguably immediately deliverable"*[56], and stated that –

> I cannot fathom a reason why, given the nature of the right in question, and the abundant crisis, the respondent cannot develop a plan and allocate resources in accordance with her obligations. In the event that she alleges that she is unable to do so, it is incumbent on her to justify that failure under section 36 or 172(1)(a) of the Constitution.[57]

47 The Court held further that "*basic infrastructure is indisputably [an] integral component of the right to basic education*".[58]

48 In *Komape 1*, this Court acknowledged explicitly that basic infrastructure includes safe and decent sanitation. [59]

49 It follows that there exists an immediately-realisable right to basic education, which includes in its ambit the right to safe and adequate school sanitation facilities. We submit that this distinguishes the reasonableness analysis to be

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[52] *BEFA* para 53
[53] *Madzodzo* para 20.
[54] *Tripartite Steering Committee and another v Minister of Basic Education and others* 2015 (5) SA 107 (ECG).
[55] *Equal Education and others v Minister of Basic Education and others (Children's Institute as Amicus Curiae) 2020 JDR 1545 (GP);* (22588/2020) [2020] ZAGPPHC 306 (17 July 2020) ("***Equal Education (Feeding Scheme)***").
[56] *Equal Education (Infrastructure)* at para 48.
[57] *Equal Education (Infrastructure)* at para 185.
[58] *Equal Education (Infrastructure)* para 181.
[59] *Komape* 1 para 63

applied in the context of the right to basic education from that applied in the context of the qualified socio-economic rights in two key respects:

49.1 First, it demands that the state meet the requirements of reasonableness enumerated above within shorter timeframes, and that its budgets are clearly directed at doing so. While the other socio-economic rights require a steady and incremental improvement in the provision of, for example, health care services, water and social security, the immediately realisable nature of the right to basic education must mean that the improvement takes place as speedily as possible. We submit that this interpretation gives effect to the standard of immediacy while taking into account the realities of instant realisation of the right to basic education.

49.2 Second, it imposes on the state an onus to justify any failure to provide the components of the right to basic education, including safe and adequate sanitation facilities, within these shorter timeframes. In this regard we submit that the evidence necessary to justify such failure will fall exclusively within the knowledge of the responsible people in the relevant state department, and that the imposition of such an onus is necessary in order to give effect to the standard of reasonableness specific to the right to basic education. As such, to the extent that the state is unable to meet the standard of reasonableness within the applicable timeframes, it must persuade the Court, either that its failure to achieve full and immediate realisation is a justifiable limitation of the right to basic education in terms

of section 36 of the Constitution,[60] or that an order compelling full and immediate realisation would not be just and equitable in the circumstances.[61]

50 In the context of safe toilets it is a question of life and death for children. We have already witnessed the tragic consequences that were the genesis of this litigation.

51 The state is under a duty to demonstrate to the Court that its sanitation plan developed pursuant to the structural order is compliant with its obligations arising from the right to basic education and as such, meets these obligations. We submit that the sanitation plan furnished by the defendants is wholly unreasonable, on the grounds set out below.

IV ANALYSIS OF PLANS BEFORE THIS COURT

52 The defendants' sanitation plan is inadequate for three key reasons:

52.1 It does not meet the criteria for reasonableness, 'pace of delivery' and onus;

52.2 It does not comply with the structural order; and

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[60] Section 36(1) of the Constitution provides as follows:

The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

[61] Section 172(1)(b) of the Constitution empowers courts to *"make any order that is just and equitable."*

52.3 It is unlawful.

The defendants' plan is unreasonable

<u>There is no clear, coherent and comprehensive sanitation plan</u>

53 The defendants have failed to place before the Court a clear, comprehensive, coherent programme for the eradication of unsafe and inadequate sanitation in Limpopo schools. They have filed two affidavits with this Court, purporting to be a sanitation plan[62] and a progress report[63] on the implementation of that plan. However, on a reading of these documents, it is still not possible to ascertain precisely what the defendants intend to do, and by when, to ensure the provision of safe and adequate sanitation facilities to schools across Limpopo.

54 Instead of providing a sanitation plan to the Court, the defendants have described several infrastructure programmes, with no indication as to how these programmes relate to one another, how these programmes will advance the right of learners to safe and adequate sanitation and how compliance with these plans may be monitored. In particular:

54.1 The progress report makes no reference to the sanitation plan or to the defendants' compliance with the timeframes set out therein (which timeframes are, in any event, unreasonable);

[62] Affidavit on behalf of first and second defendant, pp 1 – 22.
[63] Defendants' progress report and replying affidavit, pp 886 – 916.

54.2 There are several contradictions between the sanitation plan and the progress report. Most notably, the sanitation plan describes a list of 1 489 sanitation projects with an average start date of 23 April 2027 and an average end date on 18 May 2029.[64] The progress report, on the other hand, makes reference to a series of sanitation programmes that were already underway at the time that the sanitation plan – which makes no reference to them – was filed.[65]

54.3 The plaintiffs have provided examples of schools with urgent sanitation needs, which schools have been omitted from the sanitation plan. They have done so to highlight the fact that the sanitation plan is not comprehensive.[66] These assertions are met with attempts by the defendants to distinguish the schools referred to from those schools to which the structural order applies, through the adoption of an overly-narrow interpretation of the structural order.[67]

55 The following examples are illustrative:

55.1 The defendants' sanitation plan indicates that Mokwasela Primary School, with an enrolment of 507 learners, currently has 8 pit toilets. The plan indicates a project start date of 1 April 2029 and a project end date of 30 March 2031. No information is provided as to what the "project" referred to entails, including the sanitation facilities to be constructed, whether the

[64] Affidavit on behalf of first and second defendant, p 13, para 9.3.
[65] See, for example, the progress reports submitted by Mvula Trust, structural interdict bundle, p 1126.
[66] Plaintiffs' supplementary affidavit in response to first and second defendants' report filed on 31 August 2018, pp 607 – 610, paras 16 – 23.
[67] Defendants' progress report and replying affidavit, p 900, para 28.

existing pit toilets will be demolished and whether there will be sufficient toilets constructed for the number of learners enrolled at the school.[68] This school does not appear at all in the progress report filed by the defendants.

55.2 Similarly, the sanitation plan lists Mushoti Primary School, with an enrolment of 236 learners and a current count of 10 pit toilets. The project start date is 1 April 2029 and the project end date is 30 March 2031. There is no indication as to what the project entails, and whether, on completion of the project, this school will have safe and sufficient sanitation facilities.[69] This school is also not mentioned in the defendants' progress report.

55.3 Finally, Rivubye Secondary School, with an enrolment of 749 learners, is stated to have 28 pit toilets on site. The project start date is 1 April 2029, and the project end date is 30 March 3031. There is no information as to the nature and number of toilets to be built at the school.[70] This school is excluded from the defendants' progress report.

56 As such, there is no single, coherent, comprehensive programme before the Court which can be assessed against the requirements of reasonableness. The defendants cannot simply assert their plan is reasonable. They must establish this through clear evidence of their compliance.

[68] Annexure "A" to affidavit filed on behalf of first and second defendant, p 55, item 807.
[69] Annexure "A" to affidavit filed on behalf of first and second defendant, p 60, item 928.
[70] Annexure "A" to affidavit filed on behalf of first and second defendant, p 70, item 1186.

The defendants have failed to make available adequate financial resources

57 One of the criteria for determining that a plan is reasonable, is that adequate financial resources are made available for its implementation.

58 The starting point for an evaluation of arguments based on resource constraints is whether the state allocated its resources according to a correct understanding of its obligations. In *Blue Moonlight*, the Constitutional Court held that *"it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations."*[71]

59 The Constitutional Court has further held that, where a party relies on budget constraints, *"[d]etails of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided."*[72]

60 This is precisely where the defendants' description of the budget available for compliance with their constitutional duties, and with the structural order, falls short: In their affidavit filed on 31 August 2018, the defendants simply told the Court that they had committed their current budget and could not afford to commence with their sanitation projects before an average start date of 23 April 2027.[73] They provided nothing to substantiate their assertions.

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[71] *Blue Moonlight* para 74.
[72] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) para 88.
[73] Affidavit on behalf of first and second defendant, pp 11 – 14, para 9.

61 In the progress report filed on 13 May 2020, the defendants make reference to additional sources of funding, including the Education Infrastructure Grant ("**EIG**"),[74] "public private partnerships",[75] donations and sponsors,[76] and the National Lotteries Commission.[77] It is not clear, however, whether sufficient funding has been raised for the implementation of the sanitation plan and how these sources of funding will be applied to a clear, coherent and comprehensive plan for the eradication of pit toilets. It is also not clear whether there is still a shortfall in funding, what the impact of this is on the implementation of the sanitation plan, and what will be done to address this.

62 It is noteworthy however that in the Supplementary Budget tabled on 24 June 2020 by National Treasury in response to the COVID-19 pandemic, R1, 7 billion originally allocated for school infrastructure grants was cut from the national budget. These funds are from the EIG and the School Infrastructure Backlog Grants (SIBG). A further R4, 4 billion has been reallocated from the EIG for COVID-19 essential expenditure in schools.[78]

63 We submit that, read in the context of the sanitation plan filed on 31 August 2018, which suggested that there were no funds available for the implementation of the sanitation plan for many years, the progress report has not established that sufficient financial resources have been made available.

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[74] Defendants' progress report and replying affidavit, p 893, para 13 and p 894, para 15.
[75] Defendants' progress report and replying affidavit, p 909, para 58.
[76] Defendants' progress report and replying affidavit, p 895, para 18.
[77] Defendants' progress report and replying affidavit, p 909, para 58.
[78] See Supplementary Budget Review 2020 and "*Education Spending is Falling and the COVID-19 Budget has Slashed it Further*" Julia Chaskalson, Hopolang Selebalo and Daniel McLaren, Daily Maverick (31 July 2020), Available at https://www.dailymaverick.co.za/article/2020-07-31-education-spending-is-falling-and-the-covid-19-budget-has-slashed-it-further/.

64 There is substantial undisputed evidence before this Court, showing that the defendants are not doing everything possible to make sufficient resources available for, and to apply these funds in the implementation of, their sanitation projects.

64.1 This Court noted in *Komape 1* that:

> It became apparent during the evidence presented by a budget analyst called by the plaintiffs that although funds were allocated in the 2012-2013 budget for provision of sanitation facilities at 66 schools nothing was achieved because the signing of service level agreements could not be attained. What is clear from the evidence, however, is that the Limpopo Department of Education displayed a total lack of urgency or commitment to use the funds allocated for specific programs foreshadowed in the budget. Millions of unused funds were returned to the treasury instead of spending [them].[79]

64.2 On appeal, the SCA pointed out that:

> Although the evidence established that it would have cost as little as R500 per seat for structurally sound seats to be built, the education authorities failed to do so.[80]

64.3 In the 2017/8 financial year, due to poor planning, the Limpopo Department of Education missed an opportunity for the allocation of R133 million in EIG incentive funds from National Treasury.[81] In the 2018/19 reporting period, a further R188 million in EIG incentive funds was missed.[82]

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[79] *Komape 1* para 25.
[80] *Komape and others v Minister of Basic Education and others* 2020 (2) SA 347 (SCA) para 10.
[81] Budget Analysis of the LDoE 31 August Report, annexure "MH6" ("***First Budget Analysis***"), p 333, para 2.1.
[82] Budget Analysis of the LDoE 31 August Report (Amended February 2020), annexure "FV17" ("***Second Budget Analysis***"), p 748, para 2.1.

64.4 In the 2017/18 financial year, the Department incurred R194.5 million in fruitless and wasteful expenditure.[83] The auditor general found a further R87.9 million in fruitless and wasteful expenditures by the Limpopo Department of Education in 2018/19. [84]

64.5 In the 2017/18 financial year, the Department incurred R950 million in irregular expenditure.[85] Irregular expenditure was found to be R649 million in the 2018/19 financial period.[86]

64.6 The Department further recorded R91.5 million in under-expenditure on infrastructure development projects in the two financial years 2016/17 and 2017/18.[87]

65 The defendants have not responded to any of these allegations in their affidavits. They have failed to illustrate to the Court that they have allocated sufficient resources to the implementation of a sanitation plan. The evidence suggests that they have not done so. As such, we submit that the defendant's sanitation plan fails to meet this element of reasonableness.

<u>The plan makes no provision for those in urgent need</u>

66 The fact that there were numerous schools in dire need was common cause before the Court in *Komape 1.* Indeed, this was the basis for the structural order granted.

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[83] First Budget Analysis, p 334, para 2.2.
[84] Second Budget Analysis, p 749, para 2.2.
[85] First Budget Analysis, p 334, para 2.3.
[86] Second Budget Analysis, p 750, para 2.3.
[87] First Budget Analysis, p 333, para 2.1.

67 The defendants' sanitation plan filed on 31 August 2018 made no mention at all of those in urgent need. In terms of this plan, the earliest that schools would receive intervention was 2026, with the average start date for intervention being in the year 2027.[88] A number of these interventions were planned to end only in 2030, thus potentially putting hundreds of thousands of learners in harm's way until that time. The sprinkling of schools scheduled to receive sanitation infrastructure any earlier have seen their construction start dates come and go without any sign of implementation.[89]

68 The progress report does not disclose a clear timeframe for the eradication of pit toilets. The report makes references to several deadlines that had already passed at the time that it was filed, without any indication as to whether these deadlines have been met. In any event, the progress report similarly ignores the plight of schools in most desperate need of safe and adequate sanitation facilities.

69 Nothing could have shown this failing as painfully as the desperately urgent needs that have recently been imposed by the COVID -19 pandemic. In response to COVID-19, Department of Basic Education ("**DBE**") has spent a combined R180 million on renting mobile toilets for schools for period of six months. In Limpopo, 453 schools were identified as needing rented toilets as part of this emergency response. At least 1 750 rented toilets were installed. Funding for

[88] Plaintiffs' affidavit in response to first and second defendants' report filed on 31 August 2018, p 158, para 79.
[89] Plaintiffs' supplementary affidavit in response to first and second defendants' report filed on 31 August 2018, pp 619 – 620, para 42.

these rented toilets was drawn from existing education budgets.[90] None of these (now publicly visible) emergency sanitation measures that have been taken by the defendants to respond to the pandemic emergency, were foreshadowed in either the first plan or the progress report before this Court. As noted above too, in the Supplementary Budget, because the DBE was not considered a COVID-19 "frontline" department, it was not provided a special budget allocation to deal with the emergency needs created by the pandemic. Instead, it was considered a "donor" department cutting its overall budget in order to support "frontline departments" and redirecting existing funds, notably from infrastructure grants, to COVID-19 expenditure.[91]

70 There is a clear obligation on the defendants to cater in the sanitation plan for schools in dire need. If they are unable to provide long-term relief to them, they are obliged at least to put interim measures in place pending more permanent interventions. Their failure to cater to these needs renders the sanitation plan unreasonable.

71 The following remarks made by the Supreme Court of Appeal are apposite:

> [T]he court a quo in its judgment castigated the education authorities for failing to provide proper toilet facilities at schools, stating that those which had been provided were not fit for human use and that it was clear that 'due to lack of political will no effort was made to better the situation at schools of which the [MEC, Department of Education] was well aware.'

[90] See "*Department of Education Spends Close to R1 Billion Providing Water Tanks, Rented Toilets*" Kabelo Khumalo, Sunday World (31 August 2020) Available at https://sundayworld.co.za/education/department-of-education-spends-close-to-r1-billion-providing-water-tanks-rented-toilets/.

[91] See Supplementary Budget Review 2020 and "*Education Spending is Falling and the COVID-19 Budget has Slashed it Further*" Julia Chaskalson, Hopolang Selebalo and Daniel McLaren, Daily Maverick (31 July 2020), Available at https://www.dailymaverick.co.za/article/2020-07-31-education-spending-is-falling-and-the-covid-19-budget-has-slashed-it-further/.

> This stinging rebuke, which this court endorses, will hopefully in itself move those in authority to take action to improve the situation.[92]

The defendants' plan lacks transparency and responsiveness

72 The defendants' sanitation plan is based on inaccurate data. The defendants have repeatedly omitted schools in need of intervention from their list of schools that will receive such intervention.[93] Publicly-available government information about the numbers of schools in need of intervention has contradicted that which is set out in the defendants' plan.[94] The plan does not provide objective criteria to allow the public to determine its scope.[95] In practical terms this would mean that a school with dangerous pit toilets will not be able to determine if it is earmarked for sanitation upgrades and what upgrades it is entitled to.

73 The plaintiffs highlighted these deficiencies in their response to the sanitation plan, and again in their supplementary affidavit. The defendants have, however, failed to address the deficiencies in their progress report, opting instead to argue that the plaintiffs' critiques are unfounded.

74 All of these characteristics are those of a plan which is not transparent, and fails to respond to the needs of those it is intended to benefit.

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[92] *Komape and others v Minister of Basic Education and others* 2020 (2) SA 347 (SCA) para 65.
[93] Plaintiffs' affidavit in response to first and second defendants' report filed on 31 August 2018, pp 140 – 143, paras 33 – 39.
[94] Plaintiffs' affidavit in response to first and second defendants' report filed on 31 August 2018, p 146, para 47; Plaintiffs' supplementary affidavit in response to first and second defendants' report filed on 31 August 2018, p 613, para 26.
[95] Plaintiffs' affidavit in response to first and second defendants' report filed on 31 August 2018, pp 135 – 138, paras 20 – 30.

75 This is contrary to the defendants' special duties of candour and transparency in constitutional litigation. They are duty-bound to provide a full and frank account of their efforts to advance the right to safe and adequate sanitation in order to assist the Court in determining whether they have met their constitutional obligations.

76 In *Public Protector v South African Reserve Bank*[96] the Constitutional Court explained these duties of state litigants as follows:

> The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court.

77 In *Matatiele Municipality v President of the Republic of South Africa*,[97] Sachs J further affirmed that:

> [T]he 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.

78 The sanitation plan and the progress report filed by the defendants undermines these duties as well as undermining the structural order itself. For this reason, too, their plan is unreasonable.

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[96] 2019 (9) BCLR 1113 (CC) at para 152.
[97] 2006 (5) SA 47 (CC) at para 107

The plan is not reasonable in its implementation

79 We have addressed above the lack of objective criteria to identify schools with unsafe and inadequate sanitation facilities, as well as the incompleteness and inaccuracy of the data relied upon by the defendants in developing their plans.

80 In addition to establishing on their own that the sanitation plan is unreasonable, these deficiencies also negate the ability of the sanitation plan to be reasonably implemented. A plan which is founded on inaccurate information, and which cannot be understood as a coherent whole cannot be reasonably implemented.

81 The plaintiffs have also provided several examples to illustrate the defendants' failure to implement their sanitation plan in respect of the schools that do appear on the plan. The sanitation projects at the schools they refer to has not yet commenced.[98] The defendants have not responded to these allegations.

82 It follows that the sanitation plan is unreasonable in its implementation and accordingly unreasonable.

The defendants' sanitation plan does not comply with the structural order

83 The structural order sets out clear and simple requirements.

83.1 The Defendants were ordered "**to supply and install** at each rural school **currently equipped with pit latrines** in the Province of Limpopo with **a**

[98] Plaintiffs' supplementary affidavit in response to first and second defendants' report filed on 31 August 2018, pp 619 – 621, paras 40 – 45.

sufficient number of toilets for each school for the use of children which are easily **accessible**, secure and **safe** and which provide **privacy** and promote **health and hygiene** based on an assessment of the most suitable safe and hygienic sanitation technology."

83.2 Further, the Defendants were ordered to furnish this Court with the following information:

83.2.1 A **list** containing the names and location of all the schools in rural areas with pit toilets for use by the learners;

83.2.2 The **estimated period** required to replace all the current pit toilets at schools so identified.

83.2.3 A detailed **program** developed by the relevant experts based for the installation of the toilets on an assessment made in respect of the suitable sanitation technology requirements of each school inclusive of a proposed date (and reasons for the proposed date) for the commencement of the work referred to above.

84 This Court added that –

> Information as to the time it will take and the program to be developed to achieve that goal in the shortest period of time must be placed before the court to enable this court to play a supervisory role in the execution of the order to vindicate the constitutional rights of the children attending schools with pit toilets in rural Limpopo.
>
> The defendants shall be required, for the order to be implemented, to file a report under cover of an affidavit at this court which must specifically deal with the required issues in detail.[99]

[99] *Komape 1* paras 71 and 72.

85 The defendants refer to a number of separate infrastructure programmes, without any indication of how these are understood to interact with one another, or how the defendants are monitoring these programmes together to ensure the advancement of the right to school infrastructure generally, and sanitation provision and pit toilet eradication specifically. There is no complete and accurate list of schools with pit toilets, nor have the defendants provided clear timeframes for the eradication of these pit toilets.

86 In their progress report in particular, the defendants appear to conflate information regarding:

86.1 Type of infrastructure contract;[100]

86.2 Source of funding to pay for each infrastructure project;[101] and

86.3 Implementing agent or contractor responsible for delivering a project [102]

87 Again, no clear explanation is provided as to how these pieces of information overlap, which they inevitably must do, since every contract to provide sanitation facilities will be of a particular type, will have a funding source and will be implemented by an identified agent.

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[100] For example, annexure RR7 provides a list of "Turnkey" Projects, with no indication of who is responsible, how each project will be funded, or timelines for completion. See Defendants' progress report and supplementary affidavit, p 911, para 63.

[101] Annexures RR1 Items 1-5 appear to list projects to be funded either through the ASIDI (Accelerated Schools Infrastructure Development Initiative) programme (by the SIBG (School Infrastructure Backlogs Grant)), the EIG, a "*public private partnership*" between the Limpopo Department of Education and National Lotteries Commission (Defendants' progress report and replying affidavit, p 909, para 58), or in the case of Annexure RR1 Item 4, have not been allocated a source of funding at all.

[102] Annexure RR(1)A provides a list of projects "*allocated to the Mvula Trust*".

88 For the reasons addressed above, the information that the defendants have provided to the Court is confusing, incoherent, and evades the direct terms of the structural order.

89 This lack of coherence and clarity frustrates this Court's powers of supervisory jurisdiction. It also frustrates the ability of the plaintiffs, schools, and other stakeholders to engage meaningfully with the contents of the sanitation plan.[103]

The defendants' plan is unlawful

90 We submit that the sanitation plan is unlawful for two reasons in addition to those discussed above.

90.1 First, it is based on an interpretation of the structural order which excludes from its ambit an obligation to demolish unused pit toilets as soon as possible. This interpretation, which condones the continued presence on school premises of a threat to the lives of learners, does not accord with the spirit of the structural order and is therefore unlawful.

90.2 Second, to the extent that there are clear time frames captured in the plan, these do not accord with the School Infrastructure Norms.

[103] In this regard see *Matatiele Municipality* at para 107.

The defendants' interpretation of the structural order is unlawful

91 The defendants have provided a plan which, by their own admission, excludes the demolition of unused pit toilets in schools. They do not deny that there are many schools across Limpopo with unused pit toilets on their premises. They state only that they have no obligation in terms of the structural order to demolish these as part of their plan to provide safe, adequate, dignified school sanitation facilities. They assert that because these unused pits are not intended for use by learners, there is no obligation to remove them.[104]

92 In this regard the plaintiffs have highlighted that the presence of undemolished pit toilets on school premises, even if not intended to be used by learners, still poses a safety threat to learners who may fall into the pits. This threat is particularly acute in primary schools, as is illustrated by the tragic deaths of Michael Komape and Lumka Mketwa.[105] The defendants do not dispute the existence of this threat.

93 The defendants' interpretation of the structural order is cynical at best. It goes against the spirit of the structural order, which emphasised the importance of the safety of learners attending schools across Limpopo.

[104] Defendants' progress report and supplementary affidavit, p 900, para 28.1.
[105] Plaintiffs' affidavit in response to first and second defendants' report filed on 31 August 2012, p 142, para 37.4.

94 The interpretation also does not accord with the defendants' obligations, clearly set out in the School Infrastructure Norms, which state explicitly that schools must have sanitation facilities which provide privacy and security.[106]

95 In *Komape 1* this Court held that –

> [T]he right to an environment which is not harmful, as set out in the Constitution, applied not only to Michael [Komape] but applies to all children in the Limpopo Province faced with the dangerous and harmful effects of inadequate or non-existing sanitation at toilets in schools, [is] beyond doubt.[107] (our emphasis)

96 The Court held further that –

> Society has a substantial interest in the safety of their children when absorbed into the school system and placed in the care of schools and teachers who are charged with upholding the rights of children protected by the Constitution. Its failure to do so touches upon their dignity, safety and health and as such their best interests of every learner attending school in rural Limpopo[108] (our emphasis)

97 An interpretation of the defendants' obligations which excludes an obligation to demolish unused pit toilets cannot be sustained. It renders the structural order far less effective in ensuring the safety and dignity of learners in Limpopo and entrenches the risk of a repeat of the tragedy that befell the plaintiffs.

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[106] Regulation 12 of the School Infrastructure Norms.
[107] Paragraph 62 of the School Infrastructure Norms.
[108] Paragraph 65 of the School Infrastructure Norms.

The defendants' timeframes for pit toilet eradication do not comply with the School Infrastructure Norms

98 The defendants' sanitation plan filed on 31 August 2018 provided for average planned start dates for pit toilet eradication between 2026 and 2028, and average planned end dates for pit toilet eradication between 2028 and 2030. The earliest start date, which would be in the Lebowakgomo District, would be more than eight years after the defendants filed their plan.[109]

99 The defendants' progress report contains no mention of a coherent, overarching timeline, despite this being a clear requirement of the structural order.[110]

100 We must therefore assume that the timelines set out in the sanitation plan filed on 31 August 2018 represent the defendant's overarching timeline commitment.

101 The School Infrastructure Norms, prescribed by the first defendant on 29 November 2013, require the complete eradication of pit toilets in schools by November 2016, some fourteen years before the defendants are planning to eradicate these from schools.[111]

102 The defendants' planned timelines are patently unlawful. They make no attempt to justify such a radical departure from their own timeframes in the School Infrastructure Norms. Indeed, they do not even acknowledge the existence of

[109] Affidavit on behalf of the first and second defendant, p 13, para 9.3.
[110] Paragraph 2.3.2 of the structural order provides that "*The first and second respondents, are ordered to* ***furnish this court*** *with the following information … the* ***estimated period*** *required to replace all the current pit toilets at schools so identified*".
[111] Regulation 4(1)(b)(i) of the School Infrastructure Norms.

this obligation to eradicate all pit toilets by November 2016. For this reason too, the defendants' sanitation plan is in breach of their constitutional and statutory obligations.

V APPROPRIATE RELIEF

103 The purpose of a structural order is to maintain the participation of the Court in ensuring the effective implementation of its order, in this case, to ensure that learners have safe and decent school sanitation. To enable the Court to perform this supervisory role, the Court requires detailed information on compliance with its previous order and co-operation of the relevant parties.[112] The defendants are required to take the Court and the plaintiffs into their confidence and to demonstrate that they are doing everything possible to comply with their constitutional and statutory obligations.

104 Unfortunately, the defendants have not done this.

105 The following words from Nkabinde J, writing for a unanimous Court in *Pheko and others v Ekurhuleni Metropolitan Municipality (No 2)*[113] are apposite:

> The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends on it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risk rendering our courts impotent and judicial authority a mere mockery. The

[112] *Kenton on Sea Ratepayers Association and others v Ndlambe Local Municipality and others* 2017 (2) SA 86 (ECG) para 115.
[113] 2015 (5) SA 600 (CC) ("***Pheko***")

> effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.[114]

106 The defendants' sanitation plan and progress report fall far short of the requirements of the structural order. They are also grossly unreasonable. Not only does this frustrate this Court's powers of supervisory jurisdiction, it aggravates an existing crisis that has already claimed the lives of at least three children and threatens to claim the lives of more.

107 We submit, therefore, that this Court must retain its supervisory jurisdiction in respect of the structural order.

108 It is important for the Court to maintain its supervisory jurisdiction until the order is properly discharged. In *Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another*[115] the Court found as follows:

> This finding entitles the applicants to appropriate relief for violation of their fundamental rights as envisaged in section 38 of the Constitution. As to what constitutes 'appropriate relief', the Constitutional Court said in Fose 'it is left to the Courts to decide what would be appropriate relief that is required to protect and enforce the Constitution. Depending on the circumstances of each case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the Courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

109 The exercise by courts of supervisory jurisdiction is an effective way of ensuring satisfactory compliance with their orders.[116] This Court in *Komape 1* recognised

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[114] Pheko para 1.
[115] 2020 (1) SA 52 (SCA)
[116] *Mzalisi NO and Others v Ochogwu and Another* 2020 (3) SA 83 (SCA) para 13.

that a structural order was critical in ensuring the effective vindication of the Constitution. The defendants have failed to provide a coherent and reasonable plan for the provision of safe and adequate sanitation to learners across Limpopo. The effective vindication of the Constitution will not be possible unless this Court retains its supervisory jurisdiction until such time as a coherent and reasonable plan is produced.

110 This would not violate the principles of separation of powers. In *Mwelase v Director-General for the Department of Rural Development and Land Reform*[117] the Constitutional Court found that –

> The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.
>
> . . .
>
> In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is in crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in Black Sash I, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery.
>
> *The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In case of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has*

[117] 2019 (6) SA 597 (CC) paras 46 – 49.

> *been shown to be unable to perform, then there is little choice: it must be done*. (our emphasis)

111 In *Equal Education (Feeding Scheme),* the court applied precisely this standard when granting a structural interdict. Potterill J held -

> Children are categorically vulnerable, poor hungry children are exceptionally vulnerable. The degree of the violation of the constitutional rights [is] thus egregious.
>
> …
>
> The evidence shows that the undertakings given were not complied with. With this extreme rights infringement, the ultimate boundary lies at court control of the remedial process. The Court has little choice but to grant a temporary supervisory interdict.[118]

112 Against this background, and having established that the defendants' sanitation plan is unreasonable and unlawful, the plaintiffs ask this Court to –

112.1 Declare that the defendants' plan is unconstitutional and does not comply with the structural order;

112.2 Direct the MEC to revise and file with this Court, within 45 days, a plan that consists of:

112.2.1 the definition of the categories of schools with sanitation challenges that have been identified;

112.2.2 a single consolidated list of schools falling into the categories identified above;

112.2.3 an indication of the estimated time required to address the specific sanitation challenges of the schools identified;

[118] *Equal Education (Feeding Scheme)* at paras 88.2 and 101.

112.2.4 the resources available to fund the plan, and

112.2.5 the officials tasked with ensuring the implementation of the plan.

112.3 Order the MEC, within two weeks of the order, to constitute a "sanitation task team", headed by an independent expert in the field of infrastructural management, established in consultation with plaintiff's attorneys and the second amicus curiae and which comprises of representatives of the Limpopo Department of Education, the Limpopo Provincial Treasury, the relevant school infrastructure implementing agents, and representatives from civil society. The mandate of the sanitation task team is to verify, update and ensure the accuracy and currency of the National and Provincial government's information on school sanitation in Limpopo, and to ensure implementation of a reasonable plan for the elimination of pit toilets.

112.4 Order the sanitation task team to deliver progress reports every quarter until the plans are fully implemented, providing this Court and the parties with feedback on progress in implementing a reasonable plan for pit toilet eradication.[119]

VI CONCLUSION AND COSTS

113 For the reasons set out above, the plaintiffs seek an order as set out in paragraph 112 above.

[119] Plaintiffs' affidavit in response to first and second defendants' report filed on 31 August 2018, pp 159 – 162, paras 87 – 89.

114 Plaintiffs also seek a costs order against the defendants. In the event the Court does not find in favour of the plaintiffs, we submit that they ought to be immunised against an adverse costs order in terms of the *Biowatch* principle.[120]

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12 October 2020

[120] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at paras 56 – 60, 75.

LIST OF AUTHORITIES

CASES

1. *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA).

2. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

3. *Equal Education and another v Minister of Basic Education and others* 2019 (1) SA 421 (ECB).

4. *Equal Education and others v Minister of Basic Education and others (Children's Institute as Amicus Curiae) 2020 JDR 1545 (GP);* (22588/2020) [2020] ZAGPPHC 306 (17 July 2020).

5. *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (7) BCLR 651 (CC).

6. *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

7. *Kenton on Sea Ratepayers Association and others v Ndlambe Local Municipality and others* 2017 (2) SA 86 (ECG).

8. *Komape and others v Minister of Basic Education and others* 2018 JDR 0625 (LP); (1416/2015) [2018] ZALMPPHC 18 (23 April 2018).

9. *Komape and others v Minister of Basic Education and others* 2020 (2) SA 347 (SCA).

10. *Madzodzo and others v Minister of Basic Education and others* 2014 (3) SA 441 (ECM).

11. *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC).

12. *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC)

13. *Minister of Basic Education and others v Basic Education for All and others* 2016 (4) SA 63 (SCA).

14. *Minister of Health and others v Treatment Action Campaign* 2002 (5) SA 721 (CC).

15. *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC).

16. *Mzalisi NO and Others v Ochogwu and Another* 2020 (3) SA 83 (SCA).

17. *Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another* 2020 (1) SA 52 (SCA).

18. *Pheko and others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (5) SA 600 (CC).

19. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

20. *Public* Protector *v South African Reserve Bank* 2019 (9) BCLR 1113 (CC).

21. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

22. *Tripartite Steering Committee and another v Minister of Basic Education and others* 2015 (5) SA 107 (ECG).

LEGISLATION

1. Constitution of the Republic of South Africa, 1996.

2. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

3. Regulations Relating to Minimum Norms and Standards for Public School Infrastructure GNR 920, Government Gazette 37081, 29 November 2013.

ACADEMIC WORKS

1. Liebenberg S “The Interpretation of Socio-Economic Rights” in Chaskalson et al *Constitutional Law of South Africa* 2ed (2004) at 33-24.

OTHER

1. “*Department of Education Spends Close to R1 Billion Providing Water Tanks, Rented Toilets*” Kabelo Khumalo, Sunday World (31 August 2020) Available at https://sundayworld.co.za/education/department-of-education-spends-close-to-r1-billion-providing-water-tanks-rented-toilets/.

2. “*Education Spending is Falling and the COVID-19 Budget has Slashed it Further*” Julia Chaskalson, Hopolang Selebalo and Daniel McLaren, Daily Maverick (31 July 2020), Available at https://www.dailymaverick.co.za/article/2020-07-31-education-spending-is-falling-and-the-covid-19-budget-has-slashed-it-further/.

3. Supplementary Budget Review 2020