REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 3158/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

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.....

DATE 1.2.2019 SIGNATURE MDemenya

In the matter between:

SCHOOL GOVERNING BODY,

MAKANGWANE SECONARY SCHOOL : APPLICANT

And

MEMBER OF THE EXECUTIVE COUNCIL,

LIMPOPO DEPARTMENT OF EDUCATION : RESPONDENT

HED OF DEPARTMENT, LIMPOPO

DEPARTMENT OF EDUCATION : 2ND RESPONDENT

MINISTER OF BASIC EDUCATION : 3RD RESPONDENT

DIRECTOR – GENERAL OF BASIC EDUCATION : 4TH RESPONDENT

JUDGMENT

SEMENYA J:

[1] The salient issue in this application is whether the applicant is entitled to the following orders:

> i). An order declaring that the respondents' failure to provide adequate school buildings, building maintenance and school furniture for the Makangwane Secondary School ("the School") and to develop and/or make known plans to address these failures is unconstitutional and unlawful;
>
> ii). An order declaring that the respondents' failure to take swift and appropriate action to address the unsafe conditions at the School and to develop and/or make known plans to address these failures is unconstitutional and unlawful.

[2] The application initially came on an urgent basis before Muller J, who granted the relief sought with the exception of the abovementioned declaratory relief and costs. The granting of the remaining orders was postponed sine die. The respondents were directed to file supplementary affidavits and heads of argument by certain specified dates. It is apposite to state at this stage that the respondents failed to file the said supplementary affidavits and

the hearing of the arguments on the remaining prayers was proceeded with without them. I am informed that the orders were granted by consent of the parties. In the light of this fact, I find that the argument proffered by the respondents in which they maintain the stance that the application was not urgent is without merits. They should not, based on that, have consented to the granting of the orders.

[3] The respondents were ordered to install five specific temporary classrooms and sufficient number of desks and chairs that would ensure that each learner has his or her own reading and writing space at the school. The applicant was further granted remedial orders in terms of which the respondents were to formulate short and long term remedial measures, in consultation with the applicant and its attorneys, which addresses the time the learners lost due to inadequate learning facilities.

[4] The crux of the applicant's argument is that this court should deduce, from the nature of the orders already granted, that the court has made a finding that the conduct of the respondents is inconsistent with the Constitution. It was submitted that following this finding, this court has no discretion, but is instead obliged, in terms of section 172 (1) (a) of the Constitution, to declare the said conduct is invalid to the extent of its inconsistency.

[5] What follows hereinafter is a summary of common cause facts which led to the granting of the final orders as stated above. The School is a no-fee school which depends entirely on the government for maintenance. Most windows of the classrooms are broken. The School is dilapidated in that the walls, floors and the wooden roof support beams are cracked with large holes on the floor. Wires are used to hold the corrugated iron sheets to

the beams. One is able to see through the other classroom because of cracks on the walls. Electrical wires that run from one classroom to provide electricity to the rest of the School building are exposed. Some of the corrugated iron sheets of the roof have been blown off by strong winds and the School Governing Body's (SGB) attempt to repair it yielded no success. The furniture is also run down due to wear and tear and rain. Chairs and tables are broken and are held together by wires.

[6] It is further common cause that there has been very little maintenance, repairs or renovations done by the Department of Education since the classrooms were built, some since 1974. The state of the School infrastructure has exposed the learners to the elements such as rain, wind, cold, heat and sun. The blown off iron sheets of the roof put the lives of the learners in danger. It is alleged that these conditions make it difficult for the learners to concentrate on their lessons. Some valuable learning period has been lost in that some teachers refused to teach outside classes and under the trees.

[7] I am unable to agree with counsel for the applicant's submission that I am obliged to declare that the conduct of the respondent is inconsistent with the Constitution solely on the basis of the orders that are already granted. It is evident that the issue of unlawfulness and inconsistency with any of the provisions, norms and values of the Constitution was never addressed. It was simply postponed *sine die*. I am enjoined, therefore, to find whether the applicant has discharged the onus that rests on it to prove inconsistency.

[8] It is the applicant's contention that the conduct of the respondents violates learners' rights to basic education, dignity, equality and to conduct that is in their best interests. It

cannot be denied that these rights are guaranteed in the Constitution. It follows therefore, that every conduct that violates these rights will invariably be inconsistent with the Constitution. It remains to be determined whether the condition of the School as stated in the founding and confirmatory affidavit violate these rights.

[9] The starting point is the founding provisions of the Constitution as provided in Chapter 1. Section 1 and 2 provides that:

> *"Section1. South Africa is one, sovereign, democratic state founded on the following values:*
> *(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
> *Section2. This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

[10] In bringing the facts of this case in line with the two provisions above, it can be said that any conduct that has the effect of making the learners feel that they are not worthy of honour or respect will inevitably trample on their right to dignity which is entrenched in section 10 of the Constitution. Section 10 provides that everyone has inherent dignity and the right to have their dignity respected and protected. Counsel for the applicant submitted that a basic education is central to a life of dignity and that a basic education must be provided in an environment that respects this right. I agree with this submission.

[11] The photographs of the classrooms which are attached to the founding affidavit tell a sad story. It is hard to believe that a self-respecting child, who is expected to take a bath

and wear clean school uniform will be made to bear with learning in these dilapidated classes. The fact that Makangwane is a no-fee school is in itself an indication that it serves a poor community. One can infer that some of the children live in houses that are not up to standard. The extension of their conditions of living to an educational facility, by a Government institution for that matter, cannot be condoned. There can be no doubt that the learners at the School will never feel honoured and respected learners from well-equipped schools. I therefore agree with counsel for the applicant's contention that the structures in which learners learn, the way in which children are taught and their sense of safety and well-being all have a great impact on dignity and self-worth. It is on this basis that I find that their rights to dignity have been violated.

[12] Section 29 (1) of the Constitution guarantees everyone the right to basic education. In the Governing Body of the **Juma Musjid primary School v Essay NO 2011(8) BCLR 761 (CC) at par 37** (Juma Musjid) it was stated that:

> *"It is important, for the purpose of this judgment, 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 '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, obliged, through reasonable measures, to make further education progressively available and accessible."*

At par [43] of the same judgment:

> *"Basic 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."*

[13] It is given that for a child to immediately realise the basic right envisaged in section 29, the environment in which such right is offered must be conducive for leaning. In their confirmatory affidavits, the learners express concern about being taught in an environment where there is a possibility that part of the roof may be blown away whenever it rains or there are strong winds. The fact that the learners are able to see and hear what is happening in another class through cracks that run from the floor to the roof can in no way promote concentration. It is the applicant's evidence that the learners were forced to move out of unsafe classrooms to be taught under the trees. This cannot be regarded as a suitable alternative and the teachers' refusal to teach under those conditions is justifiable, albeit detrimental to the learners.

[14] Apart from the buildings, the basic rights to education of the children at the School are violated by the condition of the chairs, tables and the library. In **Madzodzo v Minister of Basic Education 2004 (3) SA 441 (ECM)** at para 20, the following sentiments, which I agree with, were expressed:

"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 recourses: schools, classrooms, teachers, teaching materials and appropriate facilities for the learners."

Tables and chairs are some of the recourses referred to above without which proper teaching and learning would not be possible.

[15] Equality is one other fundamental right which, according to the applicant, is trampled upon by the respondents. One look at the pictures attached to the founding affidavit reveals a vast difference between Makangwane Secondary School and most schools in urban areas. In **Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC)** at paras 46 it was stated that:

"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, formally 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."

Sadly, the condition of Makangwane School has not improved up to this day. The learners are still experiencing inequality.

[16] I must be guided by section 28 (2) of the Constitution in making a decision on the issues raised in this matter. This section provides that the best interests of the children are of paramount importance in every matter that concerns children. This in essence means that the test to be applied is whether the conduct of the respondents in subjecting the learners to the conditions as they presently are at the School is lawful and consistent with the Constitution. Violation of the children's rights to basic education, dignity, and equality can in no way be in the best of their interests. Exposure to danger and to the elements during school hours, as well as interruptions that leads to loss of learning hours can never be in the child's best interests.

[17] The respondents' defence rests mainly on two grounds. Firstly, they (respondents) allege that it is the responsibility of the SGB to maintain schools and that the Department of Education allocate funds each year for that purpose. It was submitted that the conditions under which the learners find themselves can, for that reason, be attributed to the SGB of Makangwane ad not the respondents. Secondly, it was argued by the respondents that the issues between the parties have become moot in that the department intends to merge the School with another school with adequate facilities. In the process, the department has decided to temporarily relocate the learners to another school while it is embarking on this process. That it is the teachers and the SGB who refuse to relocate, thereby making it impossible for the respondents to fulfill their Constitutional mandate. The respondents' contention is that the building of a new school will amount to fruitless and wasteful expenditure in view of the declining numbers of learners at the School. The respondents'

contention is that a new school may only be built in 2026 and that there is a possibility that there will be no children at the school by that time.

[18] The applicants admits in their replying affidavit that the Member of the Executive Council (MEC) for Education has the powers, in terms of section 12A (1) of the South African Schools Act 84 of 1996 (the Act) to merge two or more public schools into one. It was however contended that in doing so, the MEC is bound to follow the procedure prescribed in section 12A (2). In terms of this subsection the MEC is expected to do the following before merging schools:

> "(a) give written notice to the schools in question of the intention to merge them;
> (b) publish a notice giving the reasons for the proposed merger in one or more newspapers circulating in the area where the schools in question are situated;
> (c) give the governing bodies of the schools in question and any other interested persons an opportunity to make representations within a period of not less than 90 days from the date of the notice referred to in paragraph (b);
> (d) consider such representations; and
> (e) be satisfied that the employers of staff at the public schools have complied with their obligations in terms of the applicable labour law."

[19] The applicant contends that the procedure to be followed will not be completed soon and that the learners will have to continue to learn under difficult conditions. The allegation that the learners and teachers of the other school are not willing to accommodate them is not disputed. The Department had ample opportunity to follow the procedure laid down in

section 12A to avoid litigation. The respondents failed to furnish reasons why it took so long to remedy the situation. The argument that the Department acted swiftly is without merits. The decision to relocate the learners was made after the respondents were served with the papers. The dilapidation did not start when Section27 complained about the conditions of the School. The extent of the damage is so glaringly obvious that any caring official of the Department would have taken action without involvement on the part of an outsider. In addition, the said swift action contravenes section 12A of the Act.

[20] The respondents submitted that the Department of Education lacks the necessary budget to build new schools. In support of this argument, counsel for the respondents referred the court to the case of **Soobramoney v Minister of Health (Kwazulu Natal) (CCT32/1997 [1997] ZACC 17** (Soobramoney). The applicant in that case was denied regular renal dialysis at state's expense on the basis that the available resources at a public hospital were limited. Counsel for the respondents argued that the principle applied in that case can be applied in the instant matter in that the Department of Education lacks resources to build a new school. Counsel loses sight of the fact that in the Soobramoney case, the court was dealing with the right to health care as entrenched in section 27 of the Constitution. it was stated at para [11] of that judgment that the obligations imposed on the State in sections 26 and 27 are dependent upon the availability of resources and that the corresponding rights themselves may be limited by reason of lack of such resources. Counsel for the respondents' contention cannot stand in the light of the decision in Juma Musjid above, where it was held that the right to basic education does not depend on the availability of resources.

[21] On the contention that it is the responsibility of the SGB to maintain the School, it is common cause that this case involves a no-fee school. It is further common cause that the School is situated in a remote rural area with unemployed community members. It is the respondent's argument that the Department has allocated money to the SGB for maintenance. However the applicant's submission that the money was not enough is not disputed. Furthermore, there is no evidence that the SGB applied for permission to be allocated the function to maintain and improve the School's property, nor was such permission granted as envisaged in section 21 of the Act. It will be unreasonable to shift the blame to the SGB in view of the dire state of the building and furniture.

[22] The rights to basic education in terms of section 29 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, equality and freedom. I agree with the applicant that there is no law of general application that can justifiably limit a learner's rights in terms of section 36 of the Constitution. I am not prepared to limit these rights in this case. In my view, the limitation would not be just and reasonable. I therefore find that the conduct of the respondents is unlawful and inconsistent with the Constitution.

[23] Section 172 of the Constitution provides that a court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. After declaring such conduct invalid, the Court may make any order that is just and equitable. I am of the view that it is not necessary for me to make any such order in view of the orders granted by Muller J. The respondents are obliged to comply with the said orders. In so doing, the learners will be able to enjoy their Constitutional rights to dignity, equality and

basic education. I therefore find that the applicant is entitled to the remaining issued sought in the notice of motion.

[23] With regard to costs, I see no reason why costs should not follow the results. There is substantial success on the part of the applicant. There is a possibility that the issues would have been resolved outside court had the respondents attended to the pre- application letters addressed to them by the applicant.

[24] In the result I make the following order:

i. That the failure of the respondents to provide adequate school buildings, building maintenance and school furniture for the Makangwane Secondary School and to develop and/or make plans to address these failures is unconstitutional and unlawful;

ii. It is declared that the respondent's failure to make swift appropriate action to address the unsafe conditions at Makangwane Secondary School and to develop and/or make known plans to address these failures is unconstitutional and unlawful;

iii. the respondents are jointly and severally liable to pay the applicant's costs in the urgent application and in this application.

MVSemenya.

M.V SEMENYA
JUDGE OF THE HIGH COURT; LIMPOPO DIVISION.

APPEARANCES

ATTORNEYS FOR THE APPLICANT	: BUTHANE RASEMANA ATT
COUNSEL FOR THE APPLICANT	: ADV. NGWETSANA M.E
ATTORNEY FOR THE RESPONDENTS	: STATE ATTORNEYS
COUNSEL FOR THE RESPONDENTS	:
RESERVED ON	: 31 OCTOBER 2018
JUDGMENT DELIEVERED ON	: 01 FEBRUARY 2019