

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO: 3969/2018

In the matter between:

**CONCERNED PARENTS OF LEARNERS AT
ATWELL MADALA SENIOR SECONDARY SCHOOL**

1st Applicant

**CONCERNED PARENTS OF LEARNERS AT
ENDUKU JUNIOR SECONDARY SCHOOL**

2nd Applicant

**CONCERNED PARENTS OF LEARNERS AT
DUDUMAYO SENIOR SECONDARY SCHOOL**

3rd Applicant

**CONCERNED PARENTS OF LEARNERS AT
MNCEBA SENIOR SECONDARY SCHOOL**

4th Applicant

and

GOVERNMENT OF THE EASTERN CAPE

1st Respondent

**MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF BASIC EDUCATION
EASTERN CAPE PROVINCE**

2nd Respondent

**SUPERINTENDENT GENERAL DEPARTMENT OF
BASIC EDUCATION, EASTERN CAPE PROVINCE**

3rd Respondent

MINISTER OF BASIC EDUCATION

4th Respondent

JUDGMENT

RUSI J

[1] The applicants call themselves the Concerned Parents of Learners at four different public schools in the rural Mthatha, Mqanduli, eNgcobo and Mount Fere areas of the Eastern Cape Province. The schools which each of the four applicants represents are Atwell Madala Senior Secondary School, Enduku Junior Secondary School, Dudumayo Senior Secondary School and Mnceba Senior Secondary School, respectively. These schools are either no-fee or low-fee schools that rely on the state for the provision of school infrastructure and other services.

[2] In the interests of brevity and convenience, the applicants shall be referred to as the “applicant schools”, the second respondent individually as “the MEC”, and the second and third respondents collectively as “the ECDOE” (Eastern Cape Department of Education). Reference to the “Provincial Government” will be to the first respondent.

[3] In this application the applicants seek to vindicate the right of the learners of the four mentioned schools to basic education in a safe and appropriate learning environment. They allege that the ECDOE has failed to address the pervading problem of overcrowding in classrooms utilizing its Infrastructure Norms and Plans and by proving adequate infrastructure, thus making the learning environment at the applicant schools inconducive.

[4] The applicants also allege that they represent other schools in the OR Tambo Inland, Chris Hani East and Alfred Nzo education districts in the Eastern Cape Province, which similarly experience classroom overcrowding.

[5] As a form of redress, the applicants seek, in their amended notice of motion, review and systemic relief against the second and third respondents. No relief is sought against the first, fourth and fifth respondents and the applicants indicate that they cited them as parties who may have an interest in these proceedings.

[6] As at the time of hearing of this application, the provision of temporary infrastructure sought by the applicants had become limited to Mnceba Senior Secondary School (otherwise conveniently referred to herein as “Mnceba”) pursuant to an order of this Court¹ dated 18 February 2020, in which the respondents were ordered to provide 65 emergency classrooms to the applicant schools. More about this aspect of the application later on.

[7] Before the review relief and a portion of the systemic relief claimed by the applicants fell away on the date of hearing of this application as I will elaborate below, the applicants had sought, as immediate relief, (a) an order declaring the respondents’ failure to address and provide safe and adequate temporary classrooms at Mnceba Senior Secondary School unconstitutional and unlawful; and (b) directing the respondents to provide Mnceba Senior Secondary School, which the fourth applicant represents, with 24 temporary classrooms within 90 days of the court order, and other ancillary relief.

[8] Concerning the systemic relief, the applicants initially sought an order directing that the respondents provide within 30 days of the granting of the order by this Court, a list of public schools in the OR Tambo Inland, Chris Hani East and Alfred Nzo districts of the Eastern Cape Province (“the education districts”) that have on average 60 learners or more per classroom. This relief fell away too when, on the date of hearing of this

¹ Per Mngqandi AJ.

application, the ECDOE provided the applicants with the list of public schools dated 06 November 2023 of schools in the OR Tambo Inland, Chris Hani East and Alfred Nzo education districts in the Eastern Cape Province, which have more than 60 learners per classroom (“the list”).

[9] In the remaining portion of the systemic relief, the applicants further seek an order directing that where any of the public schools in the list provided are not included in the ECDO’s Plan in Terms of the Department of Education’s Infrastructure Norms, the MEC must provide an explanation on affidavit within 90 days of this Court’s order explaining any failure to include any of those schools in the said Plan. The applicants also seek an order granting them an opportunity to respond to the affidavit and list filed by the ECDOE.

[10] As further systemic relief, the applicants seek an order that this Court retain supervisory jurisdiction over this matter until it is satisfied that the overcrowding in the schools appearing in the list provided by the ECDOE has been remedied, or the MEC has provided a satisfactory explanation for any failure to remedy such overcrowding. The applicants further ask that leave of court be granted to any of the parties to re-enroll the matter for hearing at any stage on duly supplemented papers for the re-consideration of any of the orders sought.

[11] The remaining portion of the systemic relief is opposed by the second and third respondents who contend that the applicants are asking this Court to exercise supervisory jurisdiction over the functions otherwise vested in the ECDOE. They further contend that the lines of separation of powers would be blurred in such a case.

[12] To aid ease of comprehension, I set out first hereunder a brief background of the events and litigation that culminated in the present application.

A factual and litigation background

[13] The applicants' initial engagements with the respondents regarding the alleged failure to address and remedy the overcrowding and dilapidated state of infrastructure at the applicant schools was in 2012. A series of correspondence was exchanged, and meetings were held between the applicants and the ECDOE – this included a delegation of departmental officials sent by the ECDOE to inspect the state of the schools.

[14] When there was no resolution of the problem in sight, the applicants approached this Court first in 2018 to seek redress. On 18 February 2020 they obtained an order ("the court order") in terms of which the respondents were ordered to provide 65 emergency classrooms to the four applicant schools. This court order was obtained by agreement between the applicant schools and the ECDOE.

[15] After the granting of the court order, the ECDOE began the process of delivering temporary classrooms to three of the schools save Mnceba Senior Secondary School. Meanwhile, there was an exchange of affidavits between the parties in which the ECDOE placed on record facts regarding the progress it had achieved in remedying its failure to fully comply with the court order. When the application was enrolled for hearing almost 2 years later, Mnceba Senior Secondary School had not received any temporary classrooms despite the court order to which the ECDOE consented on 18 February 2020.

[16] The ECDOE's explanation of its failure to provide Mnceba Senior Secondary School with temporary infrastructure is that the provision of temporary infrastructure at this school was sanctioned in February 2018 and the envisaged date of the handing over of the prefabricated classrooms at this school was 28 May 2021. The process entailed a dismantling and relocation of 25 prefabricated classrooms that were originally intended for another school, Arthur Ngunga Senior Secondary School.

[17] The ECDOE went on to explain that at the time at which the relocation of the prefabricated classrooms was scheduled to take place, it emerged from a report

submitted by its project implementing agent, the Development Bank of Southern Africa (DBSA), that the 25 prefabricated classrooms were vandalized during previous occupancy and were in bad condition. Having secured assessment services from the relevant contractors, it came to light that additional services of refurbishment and earthworks would be required at an additional cost. This process was brought to a halt when the ECDOE could not timeously secure specialist suppliers who would refurbish the vandalized prefabricated structures.

[18] As regards the review component of the relief that the applicants initially sought, it had become common cause between the parties that the impugned User Asset and Infrastructure Programme Management Plans no longer existed when the applicants brought the instant application. They had been superseded by the 2020/2021 Infrastructure Plan which was inclusive of three of the applicant schools except Mnceba Senior Secondary School at the time.

[19] On the date of hearing of the application the ECDOE sought and was granted leave of court to file a further supplementary affidavit the purpose of which was to place before me further facts pertaining to the progress it made in relation to the procurement and provision of temporary classrooms in Mnceba. In this further supplementary affidavit, the ECDOE's Chief Director: Infrastructure Directorate, Mr Melikhaya Mduba ("Mr Mduba"), states the project of delivery of 28 new prefabricated classrooms in Mnceba had been set in motion.

[20] Mr Mduba further states that at the time he deposed to the affidavit in November 2023, the manufacturing of these temporary classrooms had commenced, and it was estimated that their delivery would begin in December 2023. He goes on to state that there is also a project schedule which the ECDOE's implementing agent, DBSA would review, in terms of which the entire project of delivery of classrooms in Mnceba would be completed during July 2024.

[21] As regards the list of schools in the already named education districts which still have classrooms with an average of 60 learners per classroom, Mr Mduba further states that the list that the ECDO provided to the applicants contains some 4248 schools. He came to understand that this number of schools denotes an additional 2109 schools which were not in the list that was previously produced in March 2023, as well as schools which are located in education districts which do not form part of these proceedings.

[22] I was handed the list which spans about 300 or so pages. It was indicated to me that Ms Renalelona Goodness Maumo, an officer designated by the applicant schools' legal representatives, undertook an analysis of this list. Her evidence of the results of her analysis of the list is contained in a further supplementary affidavit filed on behalf of the applicant schools dated 09 October 2023. The list was provided to her by the ECDOE electronically. There has been no dispute regarding the result of her analysis which I will deal with in this judgment once it becomes opportune for me to do so.

[23] In essence, the ECDOE's further supplementary affidavit rendered the immediate relief entirely moot. Mr *Watson* and Mr *Quinn* who represented the applicants and the ECDOE, respectively, indicated that I would no longer need to pronounce on the immediate relief with Mr *Watson* accepting the ECDOE's plan regarding the provision of temporary classrooms in Mnceba as being 'a concrete one'.

The central issue for determination

[24] What therefore remains for this Court's determination is whether the remainder of the systemic relief which the applicants seek is warranted in the circumstances of the present case. Even though the immediate relief that the applicant schools initially sought fell away on the date of hearing of this application, the facts on which the applicants relied in support of that relief remain relevant as the contextual basis for the portion of the systemic relief which now remains as the only live issue for this Court's

determination. With this said I turn to deal with the cases put forward by each of the parties in support of their respective cases.

The applicants' case

[25] The applicants allege that the applicant schools and others in the aforementioned education districts have for years been plagued by overcrowding and dilapidated infrastructure which the ECDOE has failed to address and remedy. It is the applicants' version, which the ECDOE admits, that the maximum number of learners allowed in a classroom in terms of the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure (the Norms) promulgated in 2013², is forty.

[26] To illustrate the overcrowding complained of, the applicants provided tables which tabulate the number of classrooms and learners per classroom in each of the four schools at the time of launching these proceedings. The applicants lament the ECDOE's poor planning as the reason for its failure to comply with its constitutional obligations.

[27] The first applicant school is situated in the Northcrest Suburb and falls under the OR Tambo district. It had a total of 27 classrooms with an enrolment of 1716 learners. Only one of these classrooms had less than 40 learners. The lowest number of learners in the remaining classes ranged between 43 and 54 learners with the highest number of learners between 54 and 93 in other classrooms. In one instance, 80 learners were accommodated in a wooden classroom.

[28] The pattern of overcrowding was common to all the four applicant schools and in the second applicant school which is a full-service school in the sense of accommodating learners with learning difficulties and situated 10 km south of eNgcobo Town, there were classrooms made of mud. The second applicant school had 24

² GN R920 GG 37081 of 29 November 2013, promulgated as envisaged in section 5A of the South African Schools Act 84 of 1996.

classrooms for the 1367 learners enrolled thereat. The lowest number of learners in these classrooms was 37 while 84 is the highest.

[29] The third applicant school is situated 25 km southeast of Mqanduli Town and enrolls 1319 learners. It had 15 classrooms and the lowest number of learners in the classrooms is 50. The numbers of learners in the five severely overcrowded classrooms were, respectively, 101, 109, 113, 128 and 140 in each classroom.

[30] The fourth applicant school is situated in the rural village of Mnceba in Ntabankulu under the Alfred Nzo district. At the time of hearing of this application 1752 learners were enrolled in Mnceba Senior Secondary School and were still accommodated in 19 classrooms. None of these classrooms had less than 40 learners. The highest number of learners accommodated in one of the classrooms was 105.

[31] The admittedly dreadful experiences of both the educators and learners of the applicant schools, which the ECDOE has acknowledged, are well documented in the confirmatory affidavits filed in this application and the photographs annexed to them. The applicants further state that the dire conditions of teaching and learning caused by the overcrowding are a threat to the best interests of children and inconsistent with the rights of the learners and teachers to dignity and equality. They further constitute a violation of the learners' right to basic education in a safe and conducive environment.

[32] According to the applicants, the results of their interactions with the ECDOE over the period commencing in 2012 up to the time of this application have been less than satisfactory. The undertakings that the ECDOE previously made have not been met satisfactorily and it failed to provide them with progress reports on the status of their demand for adequate infrastructure. In a desperate attempt to alleviate the overcrowding in the first applicant's classrooms, the School Governing Body at some point applied its own financial resources to defray the costs of building six temporary structures, and despite having done so, classrooms remained overcrowded.

[33] It is the applicants' contention that over a period of seven years of its implementation of its Infrastructure Norms the ECDOE has attained the minimum level of infrastructure provision which in their view is unsatisfactory. School infrastructure is either poorly built or not properly maintained. Regarding the instant matter and the ECDOE's failure to fully comply with the court order, the applicant schools insist that the steps that the ECDOE has taken in trying to remedy its failure are insufficient.

[34] The applicants further state that the failure of the ECDOE constitutes a violation of the obligations imposed on it by the Norms and Standards for basic infrastructure in public schools. It further violates the right to basic education which is constitutionally guaranteed and immediately realizable. The applicants gave short shrift to the budgetary concerns that the ECDOE has repeatedly raised in its Infrastructure Plan as a relevant factor in the fulfilment of its obligation to provide adequate school infrastructure. According to the applicants, compliance with the Infrastructure Norms is not subject to available budget.

[35] Against this background and in substantiating the systemic relief that they seek, the applicants state that the problem of overcrowding is not limited to the applicant schools. They make reference to four other schools in the rural areas of the OR Tambo district, further stating that the attempts of these schools to obtain redress from the ECDOE were brought to naught. These other schools are Mpondombini Senior Secondary School in the Alfred Nzo East district, Phuthuma Junior secondary School and Mhlahlane Senior Primary School which are both in the Zithulele rural town falling under the OR Tambo education district.

[36] The applicant schools state that there are likely more schools in the four education districts which have also been excluded from the ECDOE's Infrastructure Provision and Delivery Plan.³ Reference is further made by the applicants to a further two schools which previously had to have recourse to the court in order to seek redress against the ECDOE in similar circumstances.

³ Emphasis intended.

[37] According to the applicants, the annual tours of the National and Provincial Government officials around the Eastern Cape Province do not provide an efficient, systemic and effective way of identifying schools that are in critical need of infrastructural intervention. They allege that this is so because the said tours only cover less than one percent of the schools in the Eastern Cape Province. It is the applicants' contention that the systemic relief that they seek will allow the Court to satisfy itself that other schools and learners experiencing a similar problem of overcrowding obtain adequate redress.

The case for the respondents

[38] While admitting the overcrowding of classrooms at not only the schools identified by the applicants but many other schools across the Eastern Cape Province together with their appalling effects, the ECDOE opposes the grant of the systemic relief.

[39] The ECDOE states that the infrastructure provision and delivery in the Eastern Cape Province is governed by its Infrastructure Programme Management Plan which includes a project list (the project list) for the relevant financial year's Medium Term Expenditure Framework.

[40] According to the ECDOE, the determination of schools that ought to be included in its project list as requiring infrastructure is guided by a polycentric process which entails a constant needs evaluation of each school in each district against fluctuating student numbers. In this regard the ECDOE states that even though there are still overcrowded schools in the already mention education districts, there are a thousand others situated in the remaining education districts and which are also in need of urgent provision of infrastructure.

[41] The ECDOE goes on to state that the rationalization and realignment of schools that it undertook in the Eastern Cape Province also impacted the determination of

schools that ought to be listed in its project list as requiring infrastructure. It further cites the migration of learners from the rural areas to the urban centres resulting in overcrowding at the receiving schools. It also cites the legislative framework governing the procurement and delivery of infrastructure.⁴ The ECDOE goes on to set out its procurement process which, for the present purposes I do not consider necessary to repeat nor cite as it is common cause between the parties.

[42] It is the ECDOE's contention further, that its obligation to provide infrastructure to the applicants and other schools does not supersede the obligation it has to uphold the rule of law in terms of which it is enjoined to comply with the legislative framework applicable to the procurement and delivery of infrastructure.

[43] Regarding its previous failure to provide and deliver infrastructure to the fourth applicant school, Mnceba, in full compliance with the court order, the ECDOE also cited challenges with the cumbersome procurement process, and budgetary constraints which took the form of reduction of the ECDOE's Infrastructure Grant from National Government in order to defray the costs occasioned by the Covid-19 response programmes during 2020. The ECDOE goes on to state that the disruptive effects of the Covid-19 pandemic negatively impacted its operations and recruitment of new and/or additional staff, contractors and/or subcontractors.

[44] It further alleges that infrastructural damage to various schools which was caused by destructive storms during December 2021 and January 2022 further hampered its efforts to remedy its failure to deliver emergency infrastructure at Mnceba. This, the ECDOE says, entailed budgetary reallocation in order to prioritize the repair of the storm-damaged infrastructure in those affected schools.

⁴ The ECDOE specifically cites these legislative instruments: infrastructure Public Finance Management Act 1 of 2000; the National Treasury Instruction No. 4 of 2015/2016: Standard for Infrastructure Procurement and Delivery Management and the Framework for Infrastructure Delivery and Procurement Management and the Treasury Regulations as the applicable legislative framework governing the procurement and delivery of infrastructure.

[45] It is the ECDOE's contention further that its rationalization and realignment, which is an ongoing process entailing closure of several small and non-viable schools across the Eastern Cape Province, serves to improve school efficiency. The new Service Delivery Model which merged 23 previous education districts into 12, has improved the distribution of resources across the education districts in the Eastern Cape Province.

[46] In resisting the supervisory jurisdiction of this Court which the applicants contend for, the ECDOE further states that this will threaten the separation of powers as this Court is effectively called upon to undertake functions that aptly reside within its competence. According to the ECDOE, this Court's supervisory role over this matter would be undesirable and disruptive to the core functions of the court owing to the immense work that the implementation of Infrastructure Delivery Plan entails.

[47] In reply, the applicant schools contend that in as much as the ECDOE has indeed provided the list of schools that still experience classroom overcrowding, this Court's supervisory jurisdiction over this matter is necessary in the light of the ECDOE's previous persistent breach of the Infrastructure Norms and the learners' right to basic education.

[48] As set out in the applicants' supplementary affidavit deposed to by Ms Maumo on 09 October 2023 in which she gives an analysis of the list of schools which the applicants received from the ECDOE, the problem of overcrowding of classrooms persists in four education districts (OR Tambo Inland, Chris Hani East and Alfred Nzo East and West districts).

[49] According to Ms Maumo, between 21 and 31 per cent of a total of 3353 schools in the four education districts have overcrowded classrooms. She further explains that this translates to 2107 classrooms in the 424 of the schools. In turn, each of the 424 schools has five overcrowded classrooms where they accommodate more than 60

learners per classroom, and there are 92 of those schools which have extremely overcrowded classrooms.

[50] The applicant schools persist with the contention that the ECDOE's failure to comply with its constitutional obligations pertaining to the provision and delivery of infrastructure to these affected schools is as a result of its failure to plan adequately and effectively. According to the applicants, this, coupled with the ECDOE's previous long-standing failure to comply with the court order of 18 February 2020, renders the systemic relief that they seek necessary.

The parties' submissions

[51] On behalf of the applicant schools Mr *Watson* submitted that the remainder of the systemic relief will afford redress to the other schools in whose interest the applicants act, notwithstanding the fact that the review relief and the immediate relief which entailed the delivery of temporary infrastructure at Mnceba have fallen away.

[52] Principally, Mr *Watson* submitted that in the light of the ECDOE's previous breach of the court order and its persistent failure to meet the undertakings it made since the applicants commenced engagements with it regarding overcrowding in the applicants and other schools in 2012, it is evident that it can no longer be left to the ECDOE to comply with its constitutional obligation of ensuring that the learners' right to basic education is given effect to.

[53] Relying on the decision of this Division in *Madzodzo*⁵ where GOOSEN J granted systemic relief in relation to the provision of adequate and age-appropriate furniture to schools in the entire Eastern Cape Province, Mr *Watson* contended that a similar order in the instant matter will effectively hold the ECDOE to its constitutional obligation rather than threaten the separation of powers. He further submitted that in as much as the

⁵ *Madzodzo and Others v Minister of Basic Education and Others* (2144/2012) [2014] ZAECHMHC 5; [2014] 2 All SA 339 (ECM); 2014 (3) SA 441 (ECM) (20 February 2014).

ECDOE maintains best intentions of fulfilling its constitutional obligations, there still remains endemic breaches of the learners' right to basic education in the already mentioned four education districts.

[54] Mr *Quinn* submitted on behalf of the ECDOE that in the light of the fact that the review and immediate relief have fallen away in respect of the applicant schools, the issue of persistent breaches by the EDCOE does not arise. He further submitted that it would be inapposite for any further affidavits to be filed by any of the parties in the absence of any proceedings before court in which the schools contained in the recently provided list are litigants.

[55] The list required by the applicants, of schools which are not included in the MEC's Infrastructure Delivery Plan, so Mr *Quinn's* submission went, could in any event, be sought by way of a request to have access to information. According to Mr *Quinn* such a request to access information would not intrinsically require that this court exercise supervisory powers over the instant matter especially since the immediate relief concerning the four schools has fallen away.

[56] Mr *Quinn* further submitted that since the schools which the ECDOE has not included in the Infrastructure Delivery Plan have not been identified from the list, it is open to the applicants to institute fresh proceedings and seek an appropriate order to vindicate the rights of those schools as may be identified. According to Mr *Quinn*, the remaining systemic relief is impractical in the light of the fact that there are no affected schools who seek relief in this Court.

[57] These submissions notwithstanding, Mr *Quinn* indicated that the ECDOE is amenable to providing a report to the applicants' attorneys of record, the Legal Resources Centre, within 90 days of the granting of the order, regarding schools which do not form part of the ECDOE's Infrastructure Delivery Plan and an explanation why such schools do not form part of the list; as well as the steps it intends to take to address the overcrowding.

The Law

[58] The country's transformative constitutional order enables the courts to grant appropriate relief that will protect and enforce the rights enshrined in the Constitution where an infringement of such rights has occurred.⁶ Among such relief are structural interdicts and the retention of supervisory jurisdiction by the courts in a given matter in order to provide effective and meaningful constitutional remedies.

[58] It is trite that the right to basic education that section 29(1)(a) of the Constitution guarantees is an unqualified right which, unlike other socio-economic rights, is immediately realizable.⁷

[60] As the court observed in *Madzozo*,⁸ the state's obligation to provide basic education *perforce* requires the provision of a range of educational resources such as schools, classrooms, teachers and teaching materials and appropriate facilities for learning.

[61] In as much as the Court's exercise of supervisory jurisdiction over the roles of other arms of government implicates judicial overreach, this does not mean that the Courts cannot grant appropriate relief to compel an organ of state to act reasonably and comply with its constitutional obligations.

[62] The legitimacy of structural interdicts and retention of supervisory jurisdiction by the courts was affirmed by the Constitutional Court in *Minister of Health and Others v*

⁶ *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) para 19 and 69.

⁷ *Governing Body of the Juma Musjid Primary School and Others v Essay N.O and Others* 2011(8) BCLR 761 (CC), para 37.

⁸ *Ibid* para 20; see also *AB and Another v Pridwin Preparatory School and Others* (CCT294/18) [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) (17 June 2020), Judgement of THERON J at para 166.

*Treatment Action Campaign and Others (No 2)*⁹ when it said that the supervisory powers should in appropriate cases be exercised if it is necessary to secure compliance with a court order.¹⁰ This would be the case where the consequences of non-compliance with the constitutional obligations imposed on the state cannot be remedied by mere mandatory interdicts and other relief directing the government actors to take certain positive steps in complying with their constitutional obligations.

[63] The exercise of supervisory jurisdiction has been found to be necessary where there has been persistent breach of constitutional rights and a breach of previous undertakings by government actors to remedy constitutional violations.¹¹

[64] To sum these legal principles up, far from impinging upon the separation of powers, structural interdicts which also confer upon the court supervisory jurisdiction over a particular matter, serve to ensure that the government retains its autonomy in policy making as a means of compliance with its constitutional obligations while simultaneously being caused to act reasonably in striving for compliance with those obligations.

[65] I turn to deal with the question whether the systemic relief in which the applicants seek this Court's supervisory jurisdiction over the instant matter is necessary.

Discussion

[66] It is necessary to state that the application papers filed of record in this matter have undergone several permutations since the launching of the application. In the various further affidavits filed of record after the court order of 18 February 2020, the

⁹ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002) (to be conveniently referred to as "TAC2").

¹⁰ TAC2 at para 12.; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 96.

¹¹ *Madzodzo*, supra, fn 4.

ECDOE provides an outline of the progress it had made in addressing and providing appropriate infrastructure at the applicant schools.

[67] Throughout its several affidavits, the EDCOE acknowledges the problem of overcrowding not only at the four applicant schools but in other schools across the Eastern Cape Province. It makes this concession concomitantly with what seems to have been trickling provision, construction and delivery of classrooms initially at the first to third applicant schools and later in Mnceba being the last of the four schools to receive temporary classrooms.

[68] It is evident from the common cause facts of this application that while the ECDOE had in previous years implemented its policy on infrastructure provision and delivery at schools in various education districts of the Eastern Cape Province, as of November 2023, there still exists a total of 2107 overcrowded classrooms in the 424 schools in the four education districts mentioned above.

[69] As already mentioned, the court order was obtained on 18 February 2020 by agreement between the applicants and the ECDOE. This must have been the ECDOE's acknowledgement of its failure to fulfil its constitutional obligation of providing the applicants and other schools with adequate infrastructure in order for the learners in those schools to have meaningful access to basic education. That it took the ECDOE too long a period of time to finally provide the applicant schools with adequate infrastructure to alleviate the overcrowding cannot be gainsaid either.

[70] In keeping with its acknowledgment of the fact that the problem of overcrowding in the already mentioned schools across the four education districts still persists, Mr *Quinn* submitted that the ECDOE is amenable to submitting to the Legal Resources Centre, a report on schools that do not form part of the ECDOE's Infrastructural Delivery Plan and the steps the ECDOE intends taking in addressing the overcrowding at the schools contained in the list is provided.

[71] According to Mr *Watson*, this offer by the ECDOE's is not sufficient when regard is had to its previous breaches of the undertaking it made of remedying the overcrowding in the applicants and other schools, and this makes the systemic relief that the applicants persist with necessary.

[72] Mr *Watson*'s argument overlooks the fact that the review relief which would have entailed a determination of the reasonableness of the ECDOE's conduct in delaying to provide the affected schools with infrastructure has fallen away. Not only that, the argument flies in the face of Mr *Watson*'s acceptance on behalf of the applicants, of the ECDOE's intended plan in delivering temporary infrastructure at Mnceba. This is the same plan that Mr *Watson* described as being 'concrete'.

[73] I hold the view that the ECDOE's plan as accepted by Mr *Watson* served to remedy its previous breaches of the undertakings it made with regards to the delivery of infrastructure at Mnceba. I agree with the submission made on behalf of the ECDOE that its previous breaches do not arise in the determination of the live issue before me.

[74] Significantly, regard must also be had to the ECDOE's assertion that it has begun embarking on the rationalization and realignment of schools in the Eastern Cape Province which entails the closure of smaller and non-viable schools with the learners from those schools admitted at the schools which it identifies as the receiving schools. The ECDOE further alleges that an extensive needs assessment of each school must be undertaken in order to determine which schools must be included in the project list as requiring additional infrastructure. The applicants have not disputed this assertion.

[75] The applicants have not disputed nor admitted that the ECDOE has established a Service Delivery Mode which has merged 23 previous education districts in the Eastern Cape Province into 12 in order to improve efficiency in its provision and delivery of infrastructure. This allegation must be taken as being uncontroverted.

[76] These observations are relevant to the question whether this Court is institutionally equipped to make the factual and policy related determinations necessary to supervise the execution by the ECDOE of its Infrastructure Delivery Plan.

[77] While I accept the need for this Court to deter future violations of constitutional obligations by the state, it behoves me to guard against interfering with the functions of the ECDOE unless on the papers before me a factual basis has been established, after the provision of the list, that there has been a breach by the ECDOE, of its constitutional obligation towards the 2107 schools that still appear in the list as having overcrowded classrooms. As far as I understood the version of the applicants, they state that *“there are likely more schools in the four education districts which have also been excluded from the ECDOE’s Infrastructure Delivery Plan.”* The applicants also acknowledge the need for a systemic and effective way of identifying schools that are in critical need of infrastructure.

[78] From the ECDOE’s uncontroverted evidence that it requires to undertake a needs assessment at each school before including schools in its Infrastructure Delivery Plan, the issue that arises is the appropriateness of the order that this Court would grant as a remedy in the absence of the ECDOE’s needs assessment report.

[79] It may indeed be so that the ECDOE has taken too long a period of time to remedy the problem of overcrowding in the applicant schools in particular, however, the applicants have not established a factual basis for a constitutional breach in respect of the schools that appear in the list dated 06 November 2023 which the ECDOE provided them with. The applicants have not justified this Court’s supervisory jurisdiction that they contend for. This is what distinguishes *Madzodzo* from the present case on the facts.

[80] The ECDOE must be afforded the opportunity to conduct the required needs assessment at the schools contained in the list dated 06 November 2023 in order to determine which of them must be included in its Infrastructure Delivery Plan. This is all the more necessary when regard is had to the ECDOE’s contention which the

applicants have not pertinently traversed, that there are schools falling in districts other than the four that this application relates to, which also require urgent assistance with the provision of infrastructure. This Court is not institutionally equipped to make the factual and policy related determinations necessary to supervise the implementation by the ECDOE of its Infrastructure Delivery Plan.

Conclusion

[81] That the right to basic education is immediately realizable with no internal limitation requiring its progressive realization is incontrovertible. It has been described as an important socio-economic right directed, *inter alia*, at promoting and developing a child's personality, talents, mental and physical abilities to his/her fullest potential.¹² It is indeed undesirable that in the country's hard-earned constitutional democracy, the realization of this right receives the least urgent attention from the state.

[82] I readily accept that there needs to be more deliberateness on the part of the government actors who are entrusted with the task of ensuring that this and other constitutionally enshrined rights are not rendered illusory. That being so, the concessions that the ECDOE has made throughout the papers filed in this application indicate that there is no misconception on the part of its responsible actors pertaining to what the society of the schools in the Eastern Cape Province requires of the ECDOE.

[83] The list of schools that still experience overcrowding makes it abundantly clear that there is no longer room for the ECDOE to drag its feet in implementing its already existing policy on the procurement and delivery of infrastructure at the schools that still appear in the list.

[84] With that being said, to my mind, the ECDOE would, through the report that it offered to provide to the applicants' legal representatives, make known to the affected

¹² Madzodzo, fn 4 supra, para 19, GOOSEN J quoting from *Centre for Child Law and Others v Minister of Basic Education and Others (National Association of School Governing Bodies as Amicus curiae)* [2012] 4 All SA 35 ECG, para 32.

public which the applicant schools represent, its ongoing plans in implementing its Infrastructure Delivery Plan pertaining to the schools contained in the list dated 06 November 2023 which are still overcrowded. The applicant schools and those other schools in whose interest they act will, in turn, be able to raise their concerns with the ECDOE's report, when provided, at the government level and, if necessary, assert their rights through litigation.

[85] I am not persuaded that it is necessary in the circumstances of the present case for this Court to retain supervisory jurisdiction over the matter as contemplated by the applicants in the remaining portion of the systemic relief.

[86] There are a few matters that require remarking regarding how litigation in this matter was handled.

[87] The work that the applicants' legal representatives undertake in promoting and protecting the right to basic education can never be discounted. However, as the ones under whose supervision litigation in this matter took place, they, alongside with those representing the ECDOE, could have done better in facilitating an efficient pre-hearing management of this matter concomitantly with the curtailment of the issues that I have alluded to elsewhere in this judgment which unfolded since the granting of the court order dated 18 February 2020.

[88] By way of example, the papers and documents filed of record in this application span a few pages shy of one thousand (1000). The application was set down for hearing on 09 November 2023 by notice of set down dated 19 June 2023. It was only on 07 November 2023 that I was provided by the applicant schools' legal representatives with the chronology of relevant portions of the record for which I am grateful.

[89] I note that among the supplementary affidavits filed by the applicants is that of Mr Mzukisi Budaza titled "*founding affidavit regarding respondents' breach of 18 February 2020 order and replying affidavit*". In the same affidavit, the applicants ostensibly set out

facts regarding 'the respondents' breach of the already mentioned court order', and also replying to the ECDOE's answering affidavit. This was inappropriate and a flouting of procedure.

[90] At the risk of stating the obvious, the efficient disposal of litigation would be best served when those representing litigants in court proceedings diligently play their role of supervising litigation.

Costs

[91] The legal principle regarding costs in cases such as the present, where the failure of the state functionaries to fulfill their constitutional and statutory responsibilities provoked the litigation, was laid down in *Biowatch*¹³, when SACHS J said:

'I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfill its constitutional and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door - at the end of the day, it was the state that had control over its conduct.'

[92] The above quoted principle finds application in the instant matter, and a no-cost order is fair and just between the parties.

Order

[93] In the result, I make the following order:

¹³ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009), at para 56.

1. This Court's supervisory jurisdiction over the Eastern Cape Department of Education's implementation of its Infrastructure Delivery Plan in respect of the schools contained in the list dated 06 November 2023 of overcrowded public schools in the OR Tambo Inland, Chris Hani East and Alfred Nzo education districts of the Eastern Cape Province, is refused.
2. There shall be no order as to costs.

L. RUSI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants	:	<i>Adv. D Watson</i> <i>Adv N Soeke</i>
Instructed by	:	LEGAL RESOURCES CENTRE C/o Potelwa & Co 43 Wesley Street MTHATHA
Counsel for the respondents	:	<i>Adv. RP Quinn SC</i> CHANGFOOT VAN BREDA INC. C/o Jojo Incorporated 30 Wesley Street MTHATHA
Date heard	:	09 November 2023
Date delivered	:	13 August 2024