

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA

Case No: 2144/2012
Date Heard: 13 February 2014
Date Delivered: 20 February 2014

REPORTABLE

In the matter between

M MADZODZO obo PARENTS OF LEARNERS
AT MPIMBO JUNIOR SECONDARY SCHOOL

First Applicant

S MGCANYANA obo PARENTS OF LEARNERS
AT MBANANGA JUNIOR SECONDARY SCHOOL

Second Applicant

P VUKHAPI obo PARENTS OF LEARNERS
AT SIRHUDLWINI JUNIOR SECONDARY SCHOOL

Third Applicant

CENTRE FOR CHILD LAW

Fourth Applicant

S NOKUBELA obo PARENTS OF LEARNERS
AT PUTUMA JUNIOR SECONDARY SCHOOL

Fifth Applicant

R NOLUGXA obo PARENTS OF LEARNERS
AT GWEBITYALA SENIOR SECONDARY SCHOOL

Sixth Applicant

A ZITENA obo PARENTS OF LEARNERS
AT UPPER MPAKO SENIOR SECONDARY SCHOOL

Seventh Applicant

S SULWANA obo PARENTS OF LEARNERS
AT MILTON DALASILE SENIOR SECONDARY SCHOOL

Eighth Applicant

AND

THE MINISTER OF BASIC EDUCATION

First Respondent

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

Second Applicant

MEC FOR EDUCATION: EASTERN CAPE

Third Respondent

GOVERNMENT OF THE EASTERN CAPE PROVINCE

Fourth Respondent

ACTING SUPERINTENDANT GENERAL OF THE
EASTERN CAPE DEPARTMENT OF EDUCATION

Fifth Respondent

JUDGMENT

GOOSEN, J.

[1] This application marks a further round of litigation in this Division in which the fundamental right of children to basic education as provided by section 29(1)(a) of the Constitution is raised. In other litigation questions concerning the provision of educator posts¹ have been determined. This matter concerns the impact of an alleged failure to provide essential school furniture, in the form of desks and chairs, to public schools throughout the Province and in particular in impoverished rural areas.

[2] The application was commenced in October 2012 when the parents of learners attending three schools in the Province (the first to third applicants) brought an application for an order declaring the respondents to be in breach of the learner's rights to education, equality and dignity. These rights were violated, it was alleged, because of the respondents' failure to provide adequate, age and grade appropriate furniture at those schools. The applicants also sought further orders relating to all public

¹ *Centre for Child Law & Others v Minister of Basic Education & Others* [2012] 4 All SA 35 (ECG)

schools in the Province. These required the appointment of an independent firm of auditors to be tasked with establishing the furniture needs of all of the schools concerned; the submission within three months of a report by the independent auditors and within one month of the delivery of the audit report, the delivery to all schools identified in said report adequate, age and grade appropriate furniture which will enable each learner to have his or her own separate reading and writing space.

- [3] The application came before this court on 29 November 2012. On that occasion the parties entered into an agreement which was embodied in an order made by Griffiths J by consent.
- [4] The order granted by Griffiths J included orders that the respondents ensure that the three applicant schools receive adequate, age and grade appropriate furniture on or before 16 January 2013. It also provided that the respondents file a report by way of an affidavit to the attorneys of the applicant by 21 January 2013, indicating their compliance with this order. Paragraph 3 of the order provided that the respondents “*ensure that a comprehensive audit to assess the furniture needs at all public schools in the Eastern Cape is conducted and finalised on or before 28 February 2013.*”

- [5] The respondents were required to furnish a copy of the audit report to the applicant's attorneys before 14 March 2013 and the audit report was required to be combined with a comprehensive plan detailing when each child at the schools listed in the audit report will have his or her own separate reading and writing space delivered.
- [6] Provision was made in the agreed order for the establishment, by the respondents, of a "Furniture Task Team" by 10 December 2012; the publication and communication of a circular to all schools in the Eastern Cape on or before 1 December 2012 informing them of the audit and inviting schools to submit their furniture needs to the Department on or before 21 January 2013; that each school requesting furniture is visited and that the furniture needs of all schools visited be properly recorded and their furniture needs be verified. Paragraph 5 of the order contained an undertaking made by the respondents that they would "endeavour to ensure" that the furniture needs of all schools listed in the audit would be met by June 2013.
- [7] In August 2013 the applicants launched further proceedings founded upon the respondents' failure to comply with the terms of the order made by Griffiths J. The parent bodies of four further schools (the fifth to eighth applicants) were joined on the basis that these schools had been entirely omitted from an audit report made available by the respondents in May

2013. The applicants sought the appointment of an independent body to verify the results of the audit conducted by the Department of Education; and an order directing delivery of a comprehensive plan detailing when each learner at the schools listed in the audit report would receive his or her own separate reading and writing space. They also sought to compel the respondents to deliver the furniture needed within 90 days of that audit being filed at court.

[8] When the matter came before court on 26 September 2013 the parties had again reached agreement in respect of certain matters. The further applicants were joined by agreement and Makaula J granted a consent order which, *inter alia*, provided that:

8.1. The respondents would verify the furniture needs recorded in the Department audit dated May 2013 by appointing the Independent Development Trust within five days of the granting of the order to receive and record reports from any interested persons of inaccuracies and/or omissions in the May audit on or before 15 November 2013;

8.2. The schools would be visited to verify their furniture needs; and that the audit report would be completed by 17 December 2013.

[9] Provision was made for the delivery of furniture needed by the 5th to 8th applicant schools within 90 days of the date of the order.. The respondents were also required to publish a copy of the revised audit and to make same available for public inspection. Paragraph 9 of the court order provides as follows:

“The issue of when the furniture needs recorded in the revised audit must be delivered to schools will be argued by the parties before this court on 30 January 2014. In preparation for hearing:

9.1 Any respondents wishing to make submissions must file an answering affidavit on or before 20 December 2013;

9.2 The applicants will file a replying affidavit on or before 17 January 2014; and

9.3 Heads of argument will be filed on or before 22 January and 24 January by the applicants and respondents respectively.”

[10] It is this issue which is now before me, the application having been postponed on 30 January 2014 to 13 February 2014.

[11] The delivery of age and grade appropriate furniture to the schools represented by the first to third and fifth to eighth applicants is no longer an issue since in each of these instances the respondents have complied with the orders made requiring delivery of such furniture. It is also common cause between the parties that the IDT Audit has not yet been completed and that it is expected to be finalised only by 28 February 2014. The applicants therefore seek an order specifying that all

of the furniture required in the audit must be delivered to the identified schools within 90 days of the finalisation of the IDT audit, i.e. by 31 May 2014.

- [12] The respondents contend, however, for an open ended order. It is suggested that the best that the Department could offer, after a reconciliation of the budget and the requirements of the schools, would be a reasonable plan of action to provide furniture to learners within the shortest period of time. The applicants submit that this attitude of the respondents is untenable, by virtue of the fact that it is common cause that there is a crisis in respect of the availability of school furniture in Eastern Cape schools, which the Department recognises is a matter of extreme urgency as it constitutes an ongoing and serious violation of the learners' right to basic education. The applicants also contend that the Department has already reneged on the time frames that it itself proposed and committed to meeting in the two previous court orders. In this regard, so it was submitted, it has failed to take all reasonable steps to perform its constitutional obligations embodied in the terms of the court orders and in particular has failed to produce a comprehensive plan to address the furniture crisis as was required by the order granted on 29 November 2012. The applicants accordingly submit that when these factors are taken into account, it is necessary that the order granted in this matter be structured with concrete timeframes for

performance. In this regard it is submitted that a period of 90 days is a reasonable period for the delivery of the school furniture.

- [13] It is not in dispute that the state of public school education in the Eastern Cape Province is seriously and adversely affected by a failure to provide adequate furniture to a significant portion of schools in the Province. It is also not in dispute that the shortage of furniture in schools is a serious impediment for children attempting to access the right to basic education in the province. An audit of furniture needs conducted in the province in April/May 2011 indicates that the total cost of furniture needed for learners in the Province was then estimated at R274, 2 million. The audit also indicated that out of 5700 schools in the Eastern Cape, there were nearly 1300 schools in need of furniture, affecting 605,163 learners in the Province. A more recent report issued by the Department on 28 May 2013 estimates the cost of addressing learners' furniture needs in the Eastern Cape schools as being approximately R360 million. It is this ongoing state of affairs that prompted the first to fourth applicants to bring this application.
- [14] The applicants allege that the respondents' failure to provide adequate age and grade appropriate furniture to all public schools in the Eastern Cape constitutes a serious violation of the learners' right to basic education as guaranteed by the Constitution. It is also alleged that the

persistent failure to meet the furniture requirements of public schools constitutes a breach of the learners' right to equality and human dignity.

[15] The right to basic education provided for in section 29 (1) (a) of the Constitution is an unqualified right which is immediately realisable and is not subject to the limitation of progressive realisation, as is the case with other socio-economic rights guaranteed by the Constitution.

[16] The Constitutional Court in *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC), confirmed this characterisation of the right to basic education at para 37, where the court said:

"It is important, for the purpose of this judgement, to understand the nature of the right to "a basic education" under section 29 (1) (a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to 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, to reasonable measures, to make further education "progressively available and accessible".

[17] This has important implications for determining whether the state is in compliance with its constitutional obligations in respect of the right to basic education. In the first instance the nature of 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.

[18] In *Juma Masjid* the court recognised the right to education as an empowerment right (at para 43) and observed that:

“Indeed, basic education is an important social, economic right directed, amongst other things, at promoting and developing a child 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 work opportunities. To this end, access to school – an important component of the right to basic education guaranteed to everyone by section 29 (1) (a) of the Constitution – is a necessary condition for the achievement of this right.”

[19] Access to schools is, therefore a necessary condition for the achievement of the right to education. So too is the provision of teaching and non-teaching staff (see *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) at para 32) and the provision of adequate teaching resources. Our own history demonstrates the role that education plays in shaping social and economic development. Apartheid education has left a profound legacy, not only in the unequal and inadequate distribution of resources but in the appalling levels of literacy and numeracy still found in the general population as a consequence of decades of unequal and inadequate education. As noted in *Juma Masjid* (at para 42):

"The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners."

[20] The state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources:

- schools, classrooms, teachers, teaching materials and appropriate facilities for learners. It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education. In the supplementary founding affidavit the sixth applicant describes the effect of a shortage of furniture at the school in the following terms:

"Multiple learners are forced to share a desk, which means that the learners squashed together and struggle to concentrate on their work. Moreover, it is difficult for them to write on the desk space provided. In some instances, learners are even forced to stand throughout lessons, leaving them with no writing surface. The overcrowding around the desks also causes discipline problems, as children fight over the few available desks and chairs. These discipline problems can disrupt the lesson and inhibit learning.

"The lack of furniture results in an environment that is not at all conducive to teaching and learning. Learners are squashed together, and some students are forced to squat on their haunches, stand, or sit on the floor during the lessons. Sometimes the learners are forced to sit on each other's laps. This makes it virtually impossible for the learners to take part in lessons.

"Many learners bring their own plastic chairs to the school, while others use empty beer crates and furniture cobbled together with broken frames and loose planks of wood. This helps children to have somewhere to sit, but almost none of

the students have a desk to write on. This is completely unacceptable. Teachers are unable to give the students any writing exercises. The learners' dignity is seriously impaired when they are forced to sit on the floor or squashed into desks like animals."

- [21] The impact that a lack of adequate and age appropriate furniture has upon the learners' right of access to basic education is not denied by the respondents. It is not denied that this persistent lack of access to appropriate resources at public schools constitutes a violation of the right to basic education.
- [22] The respondents nevertheless contend that budget constraints and the availability of resources constrain the respondents in their ability to meet the basic requirements of the right to basic education immediately. In argument, reliance was placed on the National Norms and Standards for School Funding developed in terms of the South African Schools Act, Act 84 of 1996 which, so it was submitted, envisaged the progressive realisation of the provision of the basic requirements. The policy document was not furnished. In any event, it was not submitted that the norms and standards determined for public schools override the Constitutional imperative provided by section 29. It was however argued that the respondents are doing everything that can reasonably be done to achieve the right to basic education and that the respondents are committed to meeting the furniture requirements of schools in the province as speedily as possible. On this basis it was submitted that the

respondents are only able to provide a comprehensive plan for the delivery of school furniture to schools identified as requiring such furniture, when the results of the independent audit are known on 28 February 2014. Once the audit results are available appropriate steps may then be taken to determine the budget requirements to meet such needs. In the light of the fact that an amount of R30 million has been allocated in the budget for the forthcoming financial year, the respondents are not able to meet all of the furniture requirements of schools in the Province within the forthcoming financial year. Accordingly, the respondents argue that it would be unreasonable to impose upon them a fixed time period within which the identified furniture needs of public schools must be met.

- [23] The stance adopted by the respondents must be viewed against the backdrop of what has transpired since this application was first brought by the applicants in October 2012.
- [24] The order granted by Griffiths J required, inter-alia, the establishment of a Furniture Task Team to conduct an audit of the furniture needs of public schools in the Eastern Cape. In order to facilitate the task of the Task Team, the order required that the provincial Department communicate with schools by way of a circular notifying them of the audit and obtaining from them information regarding that furniture needs. It

was further required that in addition to the audit report to be produced by the Task Team that the Department provide a comprehensive plan which would specify when each of the schools' furniture needs would be met.

- [25] A Furniture Task Team was indeed established to conduct an audit of the furniture needs of public schools in the Eastern Cape. The applicants allege, however, that the respondents failed to comply with the provisions of the order requiring direct communication with schools in the province. Instead, it is common cause that the Department only addressed internal memoranda to district directors advising them of the furniture audit in January and February 2013. One of these memoranda was dispatched to school principals during the course of February 2013. The applicants further allege that the audit conducted by the Task Team was by no means comprehensive and that numerous schools with furniture shortages were omitted from the audit. It is this allegation, in particular in relation to the 275 schools in the Libode district that were omitted from the audit, which prompted the applicants to launch the further application in August 2013. The result of the inadequate communication with schools and the omission of a large number of schools resulted in the submission of an audit report in March 2013, which was incomplete. Two entire districts, namely East London and Mount Frere were omitted from the audit, while a third of the districts, namely eight of the 23 educational districts, only submitted a "priority list"

of schools requiring furniture and did not record the furniture needs at all schools in the district. Furthermore, no comprehensive plan setting out the envisaged delivery of school furniture to schools accompanied that audit report. As a result of this non-compliance the applicants gave the Department a period of 14 days to update the audit report and to produce its delivery plan. This was only furnished at the end of May 2013. Upon receipt of the May audit, the applicants highlighted a number of inaccuracies as well as instances where the report is incomplete. As indicated, it was these irregularities and omissions which prompted the launch of further proceedings in August 2013.

- [26] The allegations of non-compliance with the order of Griffiths J are not seriously disputed. In fact it is conceded that the respondents did not 'fully comply'. Significantly the respondent's admit in the answering affidavits filed in respect of the August proceedings that the May audit was deficient in many respects. In seeking to explain why this occurred the respondents have sought to suggest that responsibility for the deficiencies was the responsibility of schools as well as the very limited timeframes within which the respondents were operating.
- [27] The audit report of May 2013 was also not verified as required by the terms of the order made by Griffiths J, nor were the affected schools visited and therefore furniture needs properly recorded. As already

indicated no comprehensive plan for the delivery of the required furniture has been produced. The respondents allege in the answering affidavits that this was impossible within the time constraints since the school furniture needs had to be assessed against the budget and the furniture required had to be sourced and costed. The respondents' reliance upon the alleged limited time constraints is extraordinary in light of the fact that the terms of the order made by Griffiths J were negotiated between the parties and were accepted by the department's officials as reasonable at the time that Griffiths J granted the order.

- [28] The order granted by Griffiths J also included an undertaking made by the respondents that they would endeavour to ensure that the furniture needs of all public schools in the Eastern Cape Province would be met by June 2013. The applicants allege that the respondent's have failed to comply with this undertaking. It is apparent from the May 2013 audit that an amount of R360 million was estimated as needed to satisfy the school furniture requirements of the learners at public schools in the province. By August 2013 when the applicants returned to court no budgetary measures had been taken to give effect to this identified need. In the Department of Education's 2013/2014 budget only R30 million was allocated to addressing furniture needs in schools in the Eastern Cape. In seeking to explain this, the respondents submitted that the Department had requested the National Treasury to allocate an amount

of R120 million but received only R30 million. In doing so it sought to suggest that responsibility for the limited budget available to the provincial Department falls to be placed at the door of the National Treasury.

- [29] The order granted by Makaula, J on 26 September 2013 made provision for the engagement of independent auditors to verify the results of the May audit undertaken by the Department and to verify the needs of schools for furniture. That report was to be produced by 17 December 2013. The respondents were then again ordered to produce a comprehensive plan, together with the audit, detailing when each of the schools could expect delivery of the furniture identified as needed by such school in the audit report. In the case of the 265 schools in the Libode district the order required that their furniture needs be identified and that the required school furniture be delivered to those schools by 16 January 2014.
- [30] It is not in dispute that the respondent's have again failed to comply with the terms of the court order of 26 September 2013. In this regard the answering affidavit states that the furniture needs at 27 schools in the Libode district out of a total of 265 have been identified and met with deliveries. It is common cause that the comprehensive plan and independent audit due by 17 December 2013 has not been completed.

In the supplementary answering affidavit the Superintendent General states that by 16 January 2014 the IDT had completed a mere 8% of the audit by that date. The revised plan for completion of the auditing process indicates that the audit and verification process will only be completed by 28 February 2014. Furthermore, no comprehensive delivery plan has yet been produced. According to the Superintendent General, the Department obtained only R30 million for school furniture from National Treasury in April 2013, which was the start of the 2013/2014 financial year. These funds were directed at securing furniture for 25 schools and that tenders for the delivery of furniture were received on an expedited procurement process in May and June 2013. The Superintendent General further avers that in September 2013 the Chief Financial Officer of the Department applied to National Treasury for a special allocation of R60 million for school furniture. This allocation was obtained on 30 October 2013 and a three-year tender for the provision of school furniture has been advertised. In his supplementary answering affidavit, deposed to on 16 January 2014, the Superintendent General explains that the tender process has been delayed as a result of queries addressed to the Department. No indication has been given as to when this tender process would be finalised.

- [31] In argument before me, counsel for the respondents conceded that the respondents had not complied with the terms of either of the two court

orders. This non-compliance, it was submitted, was not wilful. It reflected the fact that the Department was not able to meet the impossibly short timeframes and that the Department remains hamstrung by serious budgetary constraints in dealing with the furniture shortage in public schools in the Eastern Cape Province.

- [32] Counsel for the respondents was unable to give any indication as to when the respondents would be able to address the admitted furniture shortage in public schools in the Eastern Cape Province. The respondents appeared to adopt the stance that since the IDT audit has not yet been completed they are unable to determine the extent of the furniture shortage in public schools in the Province and therefore are unable to make appropriate plans to address that furniture shortage. This stance is surprising in the light of the fact that a May 2011 audit conducted by the Department had already identified a furniture need estimated in the amount of R274 million. The subsequent audits conducted by the Department pursuant to the present application, reflect that at May 2013 the furniture shortage is estimated in the amount of R360 million. It is also simply quite incorrect to conceive the IDT audit as being an original audit to determine the extent of the furniture needs of public schools in the Eastern Cape Province. The order granted on 26 September 2013 making provision for the IDT audit sought to ensure verification of the results of the May 2013 audit. In other words, the IDT

audit was envisaged as a further and additional verification exercise to ensure accuracy of the results already having been obtained in the May 2013 audit. The stance adopted by the respondents therefore that the extent of the problem is unknown is simply untenable. It is apparent that the respondents have been well aware of the nature and extent of the furniture crisis for a period well in excess of two years. What flowed from this stance adopted by respondent's counsel in argument was that no practical steps could be taken to address the furniture crisis until after the IDT audit is available. Furthermore, no time periods for addressing the furniture crisis could therefore be determined by the respondents at this stage. It was therefore submitted that the best that could be hoped for was the formulation of a comprehensive plan to address the shortage, once the extent of the shortage is determined by the IDT audit.

- [33] In my view this is wholly inadequate. The approach suggested offers learners at public schools in the Eastern Cape Province no prospect of achieving access to basic resources required in order to access the right to basic education. In the light of the fact that the respondents have determined the budget allocation for the forthcoming year, in an amount of R30 million, there is, on the respondent's stance, no prospect that the dire furniture shortage across public schools in the province will be adequately and appropriately addressed until at least the next budget year, namely 2014/2015. Furthermore, in the light of the amount of

money actually budgeted to address the furniture shortage in the province and the admitted problems associated with the so-called three-year tender, which is yet to be awarded, the approach favoured by the respondents offers little or no prospect that the furniture crisis will be addressed in the foreseeable future. This is the effect of the open ended approach that the respondents sought to urge upon this court.

- [34] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 74, the court addressed an argument advanced by the City of Johannesburg that it was not obliged to go beyond its available budgeted resources to deal with emergency housing needs, in the following terms:

This court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, 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.

- [35] These remarks, made in the context of evaluating the reasonableness of steps taken to realise a progressively realisable right of access to housing are apposite to this matter. As already indicated the respondents have been aware since at least May 2011 that there is a very serious shortage of furniture in public schools and that this lack of furniture constitutes a serious impediment to the enjoyment of the right

to basic education that the Constitution guarantees. Accordingly, the respondents have been well aware for a considerable time that proactive steps need to be taken to address this shortage and to fulfil the right to basic education as required by sections 7 and 29 of the Constitution. In these circumstances it is not good enough to state that inadequate funds have been budgeted to meet the needs and that the respondents therefore cannot be placed on terms to deliver the identified needs of schools within a fixed period of time. Nor is it good enough to state that the full extent of the needs is unknown. The information available to the respondents from 2011 was such that reasonable estimates of the funding required could be made and reasonable steps taken to plan for such expenditure.

[36] In my view the open ended approach urged by the respondents is unreasonable. Learners in this province are entitled as of right to have immediate access to basic education. They are also entitled as of right to be treated equally and with dignity. The lack of adequate age and grade appropriate furniture in public schools, particularly public schools located in deep rural and impoverished areas, undermines the right to basic education and the persistent failure to deliver such age and grade appropriate furniture to public schools constitutes an ongoing violation of the right to basic education. This court, in the exercise of its jurisdiction, is obliged to give effect to the fundamental rights enshrined in the

Constitution and to make appropriate orders to vindicate those rights where such orders are required. In the circumstances of this matter this court is called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with responsibility for ensuring the right of access to basic education act reasonably to fulfil their constitutional obligations.

[37] The applicants argued for a time period of 90 days after the date on which the IDT audit becomes available as a reasonable period within which to expect delivery of furniture needed to all public schools. In support of this it was pointed out that the respondents have available to them Treasury Regulation 16A.6.4, which regulates procurement in circumstances of an emergency.

[38] The applicants also point to the fact that in response to both the 29 November 2012 and 26 September 2013 court orders, the respondents were able to procure furniture within a very short space of time and to provide for the furniture needs of the first to third and fifth to eighth applicant schools without any apparent difficulty. This, the applicants suggest, reflects a welcome response to an emergency situation and that there is no reason why a similar approach could not be adopted more broadly to address the furniture needs of public schools across the province, particularly those in remote rural and impoverished areas.

[39] To ameliorate the effect of imposing a fixed time period for the delivery of furniture it was argued that provision should be made for the respondents to apply for an extension of time.

[40] I am mindful of the fact that the extent of the furniture needs in public schools in the province appears, on anyone's version, is very substantial. The most recent estimate of the projected costs associated with those needs is in the order of R360 million. Securing an appropriate level of budget allocation for the Department from the National Treasury will no doubt take some time and require significant commitment by both the Provincial and National Treasuries. When the budget funds are available the process of procurement of the furniture required will also take time. This much is self evident. It was suggested by the respondents that this cannot be achieved within a period of 90 days. The respondents however, could not and did not suggest how long it might in fact take. This court is therefore left without guidance from the respondents as to what they consider would be a reasonable period. In the light of this, I am compelled to conclude that a period of 90 days is indeed a reasonable period within which it may be expected that the identified furniture needs of public schools in the Eastern Cape Province can be met. To the extent however, that the exigencies of executing so significant a project may give rise to legitimate delays and therefore a

legitimate inability to meet that projected time period, it will be appropriate to order that the time period may be extended at the instance of the respondents, subject to full disclosure as to the steps already taken to meet the deadline and the projected time period within which the needs will indeed be met.

[41] In the circumstances I make the following order:

1. Declaring that the respondents are in breach of the constitutional right of learners in public schools in the Eastern Cape Province to basic education as provided by section 29 of the Constitution, by failing to provide adequate, age and grade appropriate furniture which will enable each child to have his or her own reading and writing space;
2. Declaring that the respondents are in breach of paragraphs 3.1, 3.2.2, 3.2.3, 3.2.4, 4, 5 and 7 of the order granted by Griffiths J on 29 November 2012 under case number 2144/2012;
3. The respondents are ordered to file at court and to provide the applicants' attorneys with a copy of the completed Independent Development Trust (IDT) audit of all learner furniture needs at Eastern Cape public schools on or before 28 February 2014;

4. The respondents are ordered to ensure that on or before 31 May 2014, (i.e. 90 days after the filing of the audit referred to in paragraph 3 above), all schools identified in the said audit as having furniture shortages shall receive adequate age and grade appropriate furniture which shall enable each child at the identified schools to have his or her own reading and writing space;

5. In the event that the respondents envisage that they will not be able to comply with paragraph 4 above, the respondents must make an application on notice to the applicants and supported by an affidavit of the first respondent and / or such of the respondents as may be authorised to depose thereto, seeking an extension of time within which to comply. The affidavit shall deal with:
 - a. All steps taken up until the time of signing the affidavit to comply with the terms of this order;

 - b. The nature and extent of the non-compliance;

 - c. The reasons for the non-compliance;

d. The steps taken or proposed to be taken to remedy the envisaged non-compliance; and

e. The date on which full compliance will be achieved.

6. The respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved, and such costs are to include the costs of two counsel where employed.



PP G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

**For the Applicants
Mr. T. Ngcukaitobi
Instructed by Legal Resources Centre**

**For the Respondents
Ms. S. Collet
Instructed by the State Attorney**