The *Komape* litigation – ensuring effective remedies

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SUMMARY

The three *Komape* cases were spurred by the death of Michael Komape in 2014, when he drowned in a dilapidated pit toilet at his school in Limpopo. In the first judgment, the High Court recognised that the government had violated a host of rights – including the right to basic education and the rights of the children to have their best interests considered as paramount in any matter concerning them. However, the court refused to grant common law damages. This refusal was successfully appealed in the Supreme Court of Appeal. In the first judgment, the High Court also granted a structural order requiring the government to eradicate all pit toilets in the province. The plaintiffs did not appeal this part of the order.

Subsequently, the plaintiffs needed to return to court after the government did not adequately comply with the structural order. The High Court once again ruled that the government was violating the rights of children by not urgently eradicating pit toilets in schools. A more detailed structural order was granted, requiring the government to formulate a new plan on urgent timelines. However, the court refused to extend its supervisory role.

This article argues that structural orders have proved to be valuable tools in litigation for the right to basic education in the *Komape* case in particular. Further, the article argues that the High Court may have not fully understood the role of court-appointed agents in not granting a task team to monitor the government, as requested by the plaintiffs. The granting of a task team would have been appropriate in the case – given the gravity of the sanitation crisis, learners' right to basic education, and children's right to have their best interests be considered paramount in all matters concerning them.

1 Introduction

Learners' constitutional rights are, predominantly, children's rights. Therefore, these rights must be understood in a way that takes account of children's needs and vulnerabilities. In particular, these rights must

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give effect to the section 28(2) right and principle that the best interests of the child must be paramount in every matter concerning the child.[1]

It is trite that the right to basic education is closely intertwined with the best interests of the child principle. This has been repeatedly affirmed in South African scholarship and the developing jurisprudence on the right to basic education.[2]

Skelton has noted the importance of interpreting the right to basic education in a child-centred manner, in accordance with the principle in section 28(2) of the Constitution of the Republic of South Africa, 1996 (Constitution) which prioritises the best interest of the child. She states: "[I]t is clear that this principle – which has been a self-standing right – is a central feature in litigation relating to children's right to education".[3]

Regarding the case of *Juma Musjid,* in which the Constitutional Court (CC) held that the private owners of the land a school was situated on had a negative obligation not to interfere with learners' right to basic education,[4] Skelton notes that the best interests of children were a central consideration.[5]

Similarly, in *AB v Pridwin Preparatory School*[6] the CC had to decide whether an independent school had violated the right to basic education or considered the best interests (in terms of section 28(2) of the Constitution) of two children when excluding them from the school without due process;[7] the CC held:[8]

> In the context of this matter, section 28(2) requires that a fair process be followed by an independent school when it takes a decision that affects the rights of children to a basic education. A determination of what is in the best interests of a child, as provided for section 28(2), cannot be conducted in a discretionary and abstract manner.

In this article, we argue that if the principle of the best interests of the child is to prevail in matters relating to the right to basic education, it is not sufficient that the principle be applied only in the determination phase of the litigation. For the rights of children to be effectively

1 Kruger and McConnachie "Chapter 18: The Impact of the Constitution on Learners' Rights" in Boezaart (ed) *Child Law in South Africa* (2017) 537.
2 See, e.g., *Governing Body of the Juma Musjid Primary School v Essay* 2011 8 BCLR 761 (CC); *AB v Pridwin Preparatory School* 2020 5 SA 327 (CC); Ally and Linde "Pridwin: Private School Contracts, the Bill of Rights and a Missed Opportunity" 2021 *CCR* 286; Skelton "The Role of The Courts in Ensuring the Right to Basic Education in a Democratic South Africa: A Critical Evaluation of Recent Education Case Law" 2013 *De Jure* 6; Veriava and Paterson "The Right to Education" in *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (2020) 114.
3 Skelton 2013 *De Jure* 7.
4 *Juma Musjid Primary School v Essay* para 60.
5 Skelton 2013 *De Jure* 8.
6 2020 5 SA 327 (CC).
7 *AB v Pridwin Preparatory School* para 209.
8 *AB v Pridwin Preparatory School* para 153.

vindicated, careful consideration must be given to the best interest principle at the remedy phase as well.

Within this context, this article discusses the three judgments and the multiple remedies that have emanated from the case of *Komape v Department of Basic Education* ("*Komape*"),[9] which concerned the lack of safe and decent sanitation at schools in the Limpopo Province.[10] In the first judgment *("Komape I"*), the High Court awarded partial damages to the plaintiffs whose son and brother drowned in a pit toilet at school.[11] The Court further imposed a structural order on government requiring it to develop a plan to address the poor sanitation in schools and report back to the Court in respect of the implementation of the plan.[12] The High Court granted the structural order on the basis that it found that the right to basic education confers a duty on government to ensure there is safe and decent sanitation at schools.[13] The second judgment ("*Komape Appeal"*), emanated from the appeal by the plaintiffs to Supreme Court of Appeal (SCA) in respect of the damages claim.[14] Finally, the third judgment ("*Komape II"*) concerned the inadequacy of the government's compliance with the structural order in the first High Court judgment.[15] The focus of this article is to examine the structural order granted by the High Court to ensure that all school children in the Limpopo Province have safe and decent sanitation. Although the right to sanitation in schools is not expressly in the Constitution,[16] the Court interpreted it as being a component of the right to basic education.[17] While this is a notable aspect of the case, this article is focused on the question of the effective enforcement of court orders directing the government to take positive action to remedy the widespread violation of the right to basic education. Therefore, the article examines, first, the appropriateness of the High Court's decision to impose a structural order. Subsequently, the

9 *Komape v Minister of Basic Education* [2018] ZALMPPHC 18 ("*Komape I"*); *Komape v Minister of Basic Education* [2019] ZASCA 192 ("*Komape Appeal"*); *Komape v Minister of Education* (1416/2015) (High Court, Limpopo Division, Polokwane) ("*Komape II"*).

10 *Komape I* paras 1–3.

11 *Komape I* para 3.

12 *Komape I* para 2.1.

13 *Komape I* para 63.

14 *Komape Appeal* para 1.

15 *Komape II* para 5.

16 For an analysis of the judicial treatment of the right to decent sanitation in South Africa see Bilchitz "Is the Constitutional Court Wasting Away the Rights of the Poor – *Nokotyana v Ekurhuleni Metropolitan Municipality*" 2010 *SALJ* 591; Kamga "The Right to Basic Sanitation: A Human Right in Need of Constitutional Guarantee in Africa" 2013 *SAJHR* 615.

17 The right to basic education has been interpreted by the courts as constituting certain components necessary for the exercise of the right. Amongst other components, the courts have ruled that the right to basic education encompasses textbooks (*Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA)), safe infrastructure (*Equal Education v Minister of Basic Education* 2019 1 SA 421 (ECB)), decent sanitation (*Komape I*), and the provision of the National School Nutrition Programme (*Equal Education v Minister of Education* 2021 1 SA 198 (GP)).

article examines whether in *Komape II* the Court ought to have imposed a more intrusive structural order through the reliance on a court-appointed agent. Finally, the article comments on what the most appropriate court-appointed agent ought to have been in the case.

Accordingly, section two discusses each phase of the *Komape* litigation. Section three analyses the structural order in *Komape* against the principles that have been established within developing scholarship and jurisprudence on remedies in socio-economic rights litigation. Finally, the conclusory section provides a summary of the analysis of the *Komape* litigation.

2 *Komape v Minister of Basic Education*

2 1 *Komape I*

In 2014, at five years old, Michael Komape fell through a dilapidated plain pit toilet at his school and drowned.[18] His family, represented by Section27, sought damages from the government for its negligent failure to eradicate pit toilets at schools.[19] The purpose of seeking damages was two-fold. First, members of the Komape family sought to be compensated through traditional delictual damages for the death of Michael.[20] Second, the family sought separate compensation for grief or, alternatively, a claim for "constitutional damages".[21] to act as a deterrent for the government against similar rights violations.[22]

Equal Education (EE) represented by the Equal Education Law Centre (EELC) intervened as *amicus curiae* to present the court with additional evidence regarding the systemic nature of the problem of pit toilets and to support the claims for grief and/or constitutional damages.[23]

In terms of the delictual claims, damages were sought for funeral expenses, medical expenses, and loss of income.[24] Further, non-patrimonial damages were sought to compensate members of the Komape family for the emotional shock and trauma the family were subjected to.[25] The government admitted that it was liable in delict for all of these claims.[26] However, the government disputed the amount of money it was liable to pay for medical expenses, as well as for emotional trauma and shock.[27] Further, the government disputed the Komape

18 *Komape I* para 2.
19 *Komape I* paras 6–12.
20 *Komape I* paras 10 and 12.
21 *Komape I* para 11.
22 *Komape I* para 9.
23 Veriava *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (2019) 99–100.
24 *Komape I* para 12.
25 *Komape I* para 10.
26 *Komape I* para 11.
27 *Komape I* para 16.

family's separate claims for grief or constitutional damages in their entirety.[28] Finally, the government opposed a claim by the Komape family for the court to issue a declaratory order stating that the government had violated their constitutional obligations.[29]

Despite the government having conceded that it was liable for damages for emotional shock and trauma, the High Court refused to grant such damages.[30] This was due to evidentiary technicalities, in terms of which Muller J stated that the evidence was "obscurely presented".[31] For a claim for emotional shock and trauma to succeed, a plaintiff must prove that "recognisable psychiatric harm" has been suffered.[32] However, although the expert testimony in the case demonstrated that Michael's family suffered from symptoms of PTSD and depression, an unequivocal diagnosis had not been made.[33]

With regards to the claim for damages for grief, this required that the common law be developed in line with the Constitution.[34] Muller J rejected the call to develop the common law on the basis that it would lead to a "bogus and [...] unwarranted proliferation of claims".[35] Muller J further asserted that there were no policy considerations that would warrant developing the common law to allow claims for grief.[36]

Regarding the claim for constitutional damages, Muller J noted that it was common cause that the government had breached its constitutional obligations towards Michael and other children in the Limpopo province who attended schools with pit toilets.[37] The constitutional rights of learners to dignity,[38] equality,[39] life,[40] an environment that is not harmful to their wellbeing,[41] basic education,[42] and children's right to have their best interests considered as paramount in all matters concerning them,[43] were violated by the presence of plain pit toilets in schools in Limpopo.[44]

In light of this, Muller J stated that the Court was obligated to grant appropriate and effective relief.[45] However, Muller J stated that

28 As above.
29 As above.
30 *Komape I* para 1; Zitzke "Critiquing the *Komape* Decision" 2019 *TSAR* 816.
31 Zitzke 2019 *TSAR* 816.
32 *Komape I* paras 36 and 38.
33 *Komape I* paras 42–48.
34 *Komape I* para 9.
35 *Komape I* para 39.
36 As above.
37 *Komape I* para 55.
38 S 10 of the Constitution.
39 S 9 of the Constitution.
40 S 11 of the Constitution.
41 S 24 of the Constitution.
42 S 29(1)(a) of the Constitution.
43 S 28 of the Constitution.
44 *Komape I* para 63.
45 *Komape I* para 56.

constitutional damages would not be appropriate relief.[46] This was because such damages would lead to the Komape family being "overcompensated", would be "punitive", and would not be in the interests of broader society.[47]

Additionally, Muller J stated a declaratory order would be insufficient to protect the rights of learners.[48] Muller J stated that appropriate relief would be relief that is constructed to prevent rights violations, regarding which the common law or constitutional damages would not do.[49] Therefore, appropriate relief in the case would be the granting of a structural order.[50] According to the court, this would be the only way to compel the government to fix the school sanitation issues in the province.[51] While it was noted that minor efforts had been made to replace pit toilets in schools, Muller J stated that the government had shown that it "lack[ed] the will to act in the interest of learners".[52] The government was well aware that there was a dire problem but still "displayed a total lack of urgency or commitment".[53]

The Court thus envisaged it should play a "supervisory role" to ensure that the government fulfilled its constitutional obligations, which a structural interdict would enable.[54] The structural interdict required the government to replace every pit toilet in schools in Limpopo with an adequate number of toilets and sanitation facilities that are secure, provide privacy, and are easily accessible and hygienic.[55] To ensure that this would be achieved, government was required to place certain information before the court.[56] This included a list of all the schools with pit toilets[57] and the estimated period of time it would take to replace all

46 *Komape I* para 68.
47 *Komape I* para 68. This judgment may be compared to the arbitration award decision in *Families of Mental Health Care Users Affected by the Gauteng Mental Health Marathon Project v National Minister of Health of the Republic of South Africa* (Arbitration award, 19 March 2018). The case related to the violation by the government of its constitutional obligations towards mental healthcare users and their families through the movement of mental health patients from the Life Esidimeni facilities to ill-equipped non-governmental organisations, resulting in the death and neglect of many mental health patients. In determining a just and equitable remedy, retired Moseneke DCJ stated: "It would be strange if not bizarre if a claim under the supreme law would be denied vindication simply because it could not fit into the common law framework. If that were so, the constitutional remedies would be granted only subject to the common law. It is important to restate that the common law is subject to the Constitution and not the other way around."
48 *Komape I* para 69.
49 *Komape I* paras 67–68.
50 *Komape I* para 70.
51 As above.
52 As above.
53 *Komape I* para 25.
54 *Komape I* para 71.
55 *Komape I* paras 2.2 and 2.2.1.
56 *Komape I* para 2.3.
57 *Komape I* para 71.

those toilets with decent sanitation.[58] Further, the government was ordered to place before the court a detailed plan to replace the pit toilets, which was to be developed by "relevant experts", and an estimated starting date for the commencement of the plan.[59] The order also provided that the parties could set the matter down again before the court if there was a dispute in respect of the implementation of the structural order.[60]

Zitzke has stated that the High Court's order granting a structural interdict was clearly praiseworthy.[61] This is because from the outset the Court was cognisant of the fact that the case was not only about Michael Komape and his family – the case concerned the rights of all learners who attend schools with inadequate, unsafe sanitation facilities in Limpopo.[62] While damages in delict for the state committing constitutional wrongs is an important remedy and a means of enforcing state accountability,[63] the granting a structural interdict, alongside such damages, to prevent similar violations from occurring in future, is certainly an elegant way for the court to balance notions of corrective justice for an individual family with distributive justice for the wider community.[64]

On the other hand, Zitzke, in his critique of the initial High Court judgment,[65] stated that the Court's treatment of the claims for emotional shock and trauma, grief and constitutional damages, left the law of delict "undeveloped, devoid of constitutional spirit".[66] There was still a grave injustice in that the Komape family was denied even the standard common law damages for emotional shock and trauma.[67]

Attuned to this injustice, the Komape family appealed the refusal of the High Court to grant the declaratory order and damages for emotional shock and trauma, grief or constitutional damages. While the structural interdict did not form part of the initial relief sought, recognising its value for systemic relief, the Komape family did not appeal this part of the court order.

58 As above.
59 *Komape I* paras 2.3.1–2.3.3.
60 *Komape I* para 2.5
61 Zitzke 2019 *TSAR* 818.
62 *Komape I* para 3.
63 Price "State Liability and Accountability" in Bishop and Price (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) 327.
64 Zitzke 2019 *TSAR* 818. For a discussion on the tensions between distributive and corrective justice see Price (2015) 331–335.
65 Zitzke 2019 *TSAR* 814.
66 As above.
67 *Komape I* para 1.

2 2 *Komape Appeal*

The SCA was unequivocal in its criticism of the High Court's decision regarding damages. It stated that the dismissal of the claim for emotional trauma and shock was "somewhat startling to say the least".[68] The SCA reiterated that a claim for emotional trauma and shock requires the presence of a "detectable psychiatric injury".[69] A claim for grief where no detectable psychiatric injury was present, on the other hand, was not recognised in South African law.[70] It was argued on behalf of the Komape family that the presence of a detectable psychiatric injury was no longer a strict requirement in light of the SCA's judgment in *Mbhele v MEC for Health for the Gauteng Province* (*Mbhele*),[71] in terms of which the SCA awarded damages despite there being no clear agreement regarding the presence of psychiatric injury.[72] However, the SCA stated that *Mbhele* did not serve as authority for such a claim, because in that case there was sufficient evidence to show psychiatric lesions and previous authority had not been expressly overturned.[73]

The SCA stated that the first point to consider was whether the law, as it stands, provided for an appropriate remedy.[74] In this regard, the SCA stated that the common law remedy for damages for emotional shock and trauma was sufficient.[75] In terms of recognisable psychiatric injuries, the SCA stated that it could be garnered that the appellants were suffering from PTSD and depressive disorder from their particulars of claims and the government's concessions of liability.[76] The SCA thus rejected the formalistic approach of Muller J regarding the expert evidence on the presence of psychiatric lesions.

Regarding the separate claim for grief and the potential common law development, the SCA stated that common law development was not necessary because the family's grief could be considered when awarding damages for emotional trauma and shock.[77] This was because the claims for grief and for emotional shock and trauma were "intertwined".[78] According to the SCA, the appellants could be described as suffering from a "pathological grief disorder", which was encompassed by their psychiatric injuries.[79]

The SCA then considered the quantum for the claim for emotional trauma and shock, noting the severity of the anguish felt by the family,

68 *Komape Appeal* para 20.
69 *Komape Appeal* paras 25–27 and 32.
70 *Komape Appeal* para 35.
71 [2016] ZASCA 166.
72 *Komape Appeal* para 38.
73 *Komape Appeal* para 39.
74 *Komape Appeal* para 42.
75 *Komape Appeal* para 44.
76 *Komape Appeal* para 45.
77 As above.
78 *Komape Appeal* para 47.
79 *Komape Appeal* para 48.

in terms of which all members were suffering from PTSD and Michael's mother and father were suffering from depressive disorder.[80] The SCA noted that the conduct of government, in trying to "defend the indefensible" had prolonged the litigation unnecessarily – likely worsening the anguish felt by the family.[81] Taking all this into account, the SCA awarded Michael's parents R350 000 each, his older siblings R150 000 each, and his minor siblings R100 000 each.[82]

After this, the SCA considered whether to award constitutional damages on top of damages for emotional shock and trauma, in light of the egregious breach of rights.[83] The SCA stated that awarding constitutional damages would be punitive and would not necessarily act as a deterrent.[84] The SCA noted that inadequate sanitation in schools in Limpopo was widespread and systemic and held that constitutional damages may ultimately redirect state resources away from preventing future rights violations.[85] Therefore, the SCA refused to grant constitutional damages.[86]

The SCA also refused to grant a declaratory order, stating that such an order would likely be vague and not useful.[87] The SCA noted that it was not government policy to have poor sanitation at schools – the dire situation had arisen more from government incompetence than a misunderstanding on the part of the government of what their constitutional obligations were.[88] Further, the SCA noted that the High Court judgment itself had aptly criticised the government for its failures, regarding which the SCA agreed.[89]

Despite the refusal of constitutional damages and the declaratory order, Section27 recognised the judgment as a victory for the Komape family.[90] This is because some measure of corrective justice, that was missing in the High Court judgment, was provided.[91]

80 *Komape Appeal* para 52.
81 *Komape Appeal* para 55.
82 *Komape Appeal* para 56.
83 *Komape Appeal* para 57.
84 *Komape Appeal* para 59.
85 *Komape Appeal* para 63.
86 As above.
87 *Komape Appeal* para 67.
88 *Komape Appeal* para 66.
89 *Komape Appeal* para 65.
90 Section27 "Statement Re: The Case of *Komape v Minister of Basic Education And Others*" https://www.polity.org.za/article/statement-re-the-case-of-komape-v-minister-of-basic-education-and-others-2019-12-18 (last accessed 2022-08-18).
91 For a discussion on the corrective justice function of delict or tort law see Gardner "What is Tort Law for? Part 1. The Place of Corrective Justice" 2011 *Law and Philosophy* 45–46.

2 3 *Komape II*

Because the High Court's granting of the structural interdict was not appealed, it remained binding.[92] To fulfil its obligations in terms of the order, government filed an affidavit with the High Court on 31 August 2018 and, in response, the plaintiffs filed an affidavit in which they alleged the plan provided in the government's affidavit was unconstitutional.[93]

Alarmingly, the plaintiffs had looked at the government's [94] The data provided in the affidavit was inconsistent with the government's other data sets regarding the issue.[95] Additionally, Section27 conducted a sample study of 86 schools in Limpopo and found that there were at least 12 schools with unsafe sanitation on school grounds that were not included in the list.[96] EE also conducted a sample study of 16 schools in Limpopo and found that five schools with dangerous sanitation infrastructure were not included in the list.[97]

Because of the inadequacy of government's affidavit, the plaintiffs attempted to re-enrol the case in the High Court.[98] However, the Court ruled that the matter would only be re-enrolled after the appeal to the SCA was complete.[99]

Subsequently, on 13 May 2020, the government filed another affidavit – constituting a "progress report".[100] Again, the plaintiffs alleged the plan in the progress report,[101] together with the original plan was unconstitutional and, because the SCA judgment had been released, were able to re-enrol the matter at the High Court – resulting in a second

92 *Komape I* para 2.
93 Plaintiffs' Affidavit in Response to First and Second Defendants' Report Filed on 31 August 2018 ("Plaintiffs' Affidavit 2018") available at Section27 "*Komape v Minister of Education* (1416/2015) (High Court, Limpopo Division, Polokwane)" http://section27.org.za/wp-content/uploads/2018/10/Komape-Structural-Interdict-Report-1.pdf (last accessed 2022-11-17) paras 7–8.
94 Plaintiffs' Affidavit 2018 para 31.
95 Plaintiffs' Affidavit 2018 para 31.2.
96 Plaintiffs' Affidavit 2018 para 37.3.
97 Second *Amicus Curiae's* Affidavit available at EElawcentre "*Komape v Minister of Education* (1416/2015) (High Court, Limpopo Division, Polokwane)" https://eelawcentre.org.za/wp-content/uploads/equal-education-report-reply-1.pdf (last accessed 2022-11-20) para 59.
98 Plaintiffs' Supplementary Affidavit in response to First and Second Defendants' Report Filed on 31 August 2018 ("Plaintiff's Supplementary Affidavit") para 9.
99 Plaintiff's Supplementary Affidavit para 9.
100 Plaintiffs' Heads of Argument: Defendants' compliance with Structural Order ("Plaintiffs' Supplementary Affidavit") available at Section27 "*Komape v Minister of Education* (1416/2015) (High Court, Limpopo Division, Polokwane)" https://section27.org.za/wp-content/uploads/2020/10/Heads-of-Argument-Komape-Structural-Interdict-12-10-2020.pdf (last accessed on 2022-11-20) para 61.
101 Plaintiffs' Supplementary Affidavit.

High Court judgment dealing solely with compliance with the structural order.

The plaintiffs alleged that the plans contained in the affidavits filed by the defendants were unconstitutional, unlawful and not in compliance with the structural interdict.[102] The standard set by the CC for evaluating the constitutionality of plans put in place in pursuit of the progressive realisation of socio-economic rights is reasonableness.[103] The plaintiffs noted that the right to basic education (which encompasses decent sanitation facilities at schools),[104] is unqualified and immediately realisable,[105] and thus should be subject to a higher standard of scrutiny than reasonableness.[106] According to the plaintiffs, part of the reason why basic education is unqualified is because of the close link between the right to basic education and children's right to have their interests considered as paramount in all matters concerning them,[107] as well as the right to equality.[108]

The plaintiffs argued that the higher standard of scrutiny requires the government to conceptualise and implement reasonable plans with clearly allocated budgets in shorter timeframes.[109] Further, it places a burden of justification on the government to justify any failure to provide a facet of the right to basic education.[110] Where the government alleges it is unable to urgently meet the needs of the right to basic education it must essentially justify this in terms of section 36 of the Constitution.[111] However, the plaintiffs alleged that even in terms of the standard of reasonableness, the plans filed by the government would not pass constitutional muster.[112]

For a plan to be reasonable, it must be able to further the realisation of the right.[113] In this regard, it must be reasonable in "conception and implementation".[114] It must clearly allocate the responsibilities for different actors in relation to the plan.[115] The plan should be "balanced and flexible" and attend to "short, medium and long term needs".[116] People with the most urgent, desperate needs should be catered for in

102 Plaintiffs' Heads of Argument para 4.
103 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 ("*Grootboom*") paras 41–42; *Minister of Health v Treatment Action Campaign* ("*TAC*") 2002 5 SA 721 (CC) (*TAC*) para 38.
104 *Komape I* para 63.
105 *Juma Musjid* para 37.
106 Plaintiffs' Heads of Argument paras 24 and 33–35.
107 Plaintiffs' Heads of Argument para 41.
108 Plaintiffs' Heads of Argument para 44.
109 Plaintiffs' Heads of Argument para 49.1.
110 Plaintiffs' Heads of Argument para 49.2.
111 As above.
112 Plaintiffs' Heads of Argument para 52.1.
113 *Grootboom* para 41.
114 *Grootboom* para 42.
115 *Grootboom* para 54.
116 *Grootboom* para 43.

the plan,[117] and government merely demonstrating "a statistical advance in the realisation of the right" may not be sufficient.[118] Further, sufficient resources must be allocated for the realisation of the plan.[119] The government must make its budgetary decisions with a correct understanding of its constitutional obligations in mind,[120] and when justifying its budgetary decisions must not make "bald assertion[s] of resource constraints".[121]

The affidavits filed by the government listed several infrastructure programmes, implementing agents and funding sources but did not explain how these related to each other or would work in practice.[122] The plan was thus unclear and incoherent.[123] The required list of schools with sanitation needs contained in the 2018 plan did not state the criteria that were used to identify such schools, but in any event seemed to be based on inaccurate and insufficient data,[124] meaning that the plan was unreasonable in its conceptualisation.[125]

Further, the government indicated in their affidavits that the average start date they had planned for the eradication of pit toilets would be around 2026 to 2028, with the average end date being set at around 2028 to 2030.[126] This went against the structural order, in which the court had stated that the estimated period of time provided by the government must be the "shortest period of time".[127] It also went against the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (Regulations),[128] which state that pit toilets were meant to be eradicated by November 2016.[129] To justify this delay, the government proffered unsubstantiated claims of resource constraints.[130]

The plaintiffs thus requested that the Court declare the government's plan as unreasonable and invalid, order the government to file a constitutionally compliant plan and that the Court retain its supervisory jurisdiction until such a plan was fully implemented. [131] The plaintiffs

117 *Grootboom* para 44.
118 As above.
119 *Grootboom* para 39.
120 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 74.
121 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 88.
122 Plaintiffs' Heads of Argument para 16.
123 Plaintiffs' Heads of Argument para 54.
124 Plaintiffs' Heads of Argument paras 11.1 and 13.3.
125 Plaintiffs' Heads of Argument para 80.
126 Plaintiffs' Heads of Argument para 11.4.
127 *Komape I* para 71.
128 GN R920 in GG 37081 of 29 November 2013.
129 Regulation 4(1)(b)(i) of the Department of Basic Education "Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure" 2013.
130 Plaintiffs' Heads of Argument para 60.
131 Plaintiffs' Heads of Argument paras 109 and 112.

further requested that the Court order the government to form a "task team" to "verify, update and ensure the accuracy" of the information relied upon by the government in its plan and to ensure that a reasonable plan was implemented.[132] The task team was to be led by an independent expert and comprised of representatives from government and civil society.[133] The reason behind the request for the task force was to enhance the supervisory jurisdiction of the court to ensure the plan was implemented.[134] EE, acting again as an *amicus curiae*, argued that the supervisory jurisdiction of the court should be enhanced, but that this could be done through the appointment of a "special master" to supervise the implementation of the plan.[135]

The High Court largely granted what was requested by the plaintiffs. It stated that the government's proposed period of 14 years to remove the pit toilets was unjustifiably long.[136] In terms of the reasonableness of the plan, Muller J noted that while the CC in *Grootboom* had cautioned against the courts prescribing policies for government, the plans put in place by the government in pursuance of realising socio-economic rights must be capable of progressively realising the right and must be reasonable.[137]

Muller J placed particular emphasis on the plan's lack of urgency, noting the fact that a child's school career (from the beginning of primary school to the end of secondary school) is 12 years.[138] Muller J stated that children are "the most vulnerable members of society whose best interests are specifically protected by section 28 of the Constitution".[139] Further, Muller J noted that the plan was already more than one year old and that a new timeframe was needed for the plan to be reasonable.[140] Therefore, Muller J decided that the plan offered by the government was not reasonable.[141]

With regards to the government's argument of resource constraints, Muller J stated that such constraints are a "fact of life", but the government must make adequate funds available to remove pit toilets in schools.[142] This was stated in a context in which the Court noted the plight of pit toilets in schools in Limpopo was a "national emergency" and could not be seen as "business as usual".[143] The Court stated that

132 Plaintiffs' Heads of Argument para 112.3.
133 As above.
134 Plaintiffs' Heads of Argument paras 108–111.
135 Second *Amicus Curiae* Supplementary Affidavit, available at EElawcentre "*Komape v Minister of Education* (1416/2015) (High Court, Limpopo Division, Polokwane)" https://eelawcentre.org.za/wp-content/uploads/ees-supplementary-affidavit.pdf (last accessed 2022-11-20) para 43.
136 *Komape II* para 6.
137 *Komape II* paras 9–10.
138 *Komape II* para 11.
139 As above.
140 *Komape II* para 13.
141 *Komape II* paras 10–11.
142 *Komape II* para 17.
143 *Komape II* para 7.

urgent measures were necessary to end the violation of children's dignity and to avoid another child's death.[144]

Therefore, the Court ordered the government to file a new, comprehensive plan within 90 days of the judgment.[145] The Court listed a number of specific requirements for the new plan. For instance, the Court stated that the plan must have a new deadline with a "detailed justification",[146] criteria for establishing which schools will be prioritised,[147] a "detailed budget" for the plan's implementation,[148] as well as provision for emergency temporary measures for schools whose sanitation facilities pose immediate danger.[149] Finally, the Court maintained its supervisory jurisdiction and ordered the government to deliver detailed progress reports on the implementation of the plan every six months until the plan is fully implemented.[150]

In terms of granting an order for the appointment of a task team, the Court stated that the matter was not yet ripe for such an order.[151] Muller J quoted a paragraph from *Mwelase v Director-General Department of Rural Development* (*Mwelase*),[152] wherein the CC emphasised the importance of the courts' constitutional duty to make orders that are "effective, just and equitable", especially in cases where the parties are vulnerable and suffering due to government inaction or malfeasance.[153] The CC stated that where there has been an extreme violation of rights then the "ultimate boundary lies at court control of the remedial process".[154]

The High Court stated that, from its understanding, the purpose of the task team would be to "replace [the]".[155] Muller J stated that the government should be given another chance to fulfil its duty.[156] However, Muller J stated that if the government were to prove unable to comply with its constitutional duties and the structural order again in future, then the formation of a task team "may well be the final solution".[157]

144 *Komape II* paras 6–7.
145 *Komape II* para 2.
146 *Komape II* para 2.7.
147 *Komape II* para 2.9.
148 *Komape II* para 2.10.
149 *Komape II* para 2.11.
150 *Komape II* para 3.
151 *Komape II* para 14.
152 2019 6 SA 597 (CC) para 49.
153 *Mwelase* para 49.
154 As above.
155 *Komape II* para 16.
156 As above.
157 As above.

3 Analysing the structural order in *Komape*

Section 172(1)(a) of the Constitution provides that a court deciding a constitutional matter "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". Section 172(1)(b) states that it is within the discretion of a court to make any order that is "just and equitable". In *Fose v Minister of Safety and Security* (*Fose*),[158] the CC interpreted this provision to empower the courts to fashion new remedies where existing traditional remedies do not provide sufficient redress for rights violations.[159]

Within the context government's ongoing failure to implement court orders that seek to give effect to the government's positive obligations emanating from socio-economic rights, including the right to basic education, an ever-increasing repertoire of creative remedies is developing in our courts.[160] While this has occurred largely in the lower courts, in recent years more forceful remedies, such as structural orders, are becoming a more common feature in the CC,[161] despite a seemingly initial hesitancy in this regard. [162]

Underpinning this firmer stance is a growing awareness of the non-implementation of court orders as undermining South Africa's constitutional democracy. According to Taylor:[163]

> Where the government is required to take positive action to implement structural reform, non-compliance not only undermines the integrity of court orders and erodes respect for the rule of law, but also poses a systemic threat to rights. As non-compliance persists in these cases, court orders become increasingly detailed and prescriptive through each stage of the litigation, culminating in a resort to innovative remedial mechanisms to ensure accountability for full compliance. In short, non-compliance serves as a catalyst for remedial innovation.

Roach and Budlender, in their seminal article on remedies, developed a typology of reasons for government non-compliance and set out the circumstances when a structural order would be appropriate. According to them, the reasons for non-compliance include inattentiveness, incompetence and intransigence.[164] They suggest that structural orders are appropriate in instances of both incompetence and intransigence but add that, in respect of the latter, there is a need to "ensure that the court's order is detailed and specific enough to ensure that prosecution for

158 1997 3 SA 786 (CC) para 19.
159 *Fose* para 19.
160 Taylor "Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation" 2019 *Constitutional Court Review* 263–264.
161 As above.
162 See, for instance, *TAC* para 129.
163 Taylor 2019 *Constitutional Court Review* 250.
164 Roach and Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable?" 2005 *SALJ* 327.

contempt is a viable option should the government not obey the court".[165]

Taylor, while noting the soundness of the Roach and Budlender typology, makes the case for a more "refined" approach to remedies, instead of framing non-compliance in what she describes as "psychological terms".[166] She argues that such an approach must be "aimed at addressing institutional dysfunction and political blockages that threaten rights at a systemic level, rather than punitive measures targeting the recalcitrance of individual public officials".[167]

Taylor argues that structural orders themselves can serve a diagnostic function to assess and address the underlying causes of blockages.[168] They allow for progress in the implementation of court orders to be assessed and remedial plans adjusted if need be.[169] Taylor notes that, "reporting requirements can enhance transparency and accountability where there is a need for robust supervision over deadlines for implementing systemic relief."[170]

Taylor notes too that there is increasing reliance on court-appointed agents when imposing structural orders.[171] Her analysis of the different court-appointed agents suggests that the type of court-appointed agent is dependent on the nature of the violation that must be remedied.[172] Thus, in *Mwelase,* a special master was appointed to manage and process the backlog of land claims.[173] This was because the backlog created by the government's inaction had "triggered a constitutional near-emergency",[174] in terms of which, for almost 20 years, the government had "displayed a patent incapacity or inability to get the job done".[175]

Taylor compares the remedy in *Mwelase* to *Black Sash Trust v Minister of Social Development* (*Black Sash I*)[176] where a "high-level specialist committee", was appointed.[177] In *Mwelase*, the CC noted that the special master was to have "plan-drawing" or "budget-projection" abilities, while the high-level specialist committee's function in *Black Sash I* was to simply "oversee departmental performance".[178]

165 Roach and Budlender 2005 *SALJ* 350.
166 Taylor 2019 *Constitutional Court Review* 252.
167 As above.
168 Taylor 2019 *Constitutional Court Review* 262.
169 Taylor 2019 *Constitutional Court Review* 254.
170 As above.
171 Taylor 2019 *Constitutional Court Review* 253.
172 Taylor 2019 *Constitutional Court Review* 274.
173 *Mwelase* para 3.
174 *Mwelase* para 49.
175 *Mwelase* para 40.
176 *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) (*Black Sash I*).
177 *Black Sash I* para 76.
178 As above.

What justified the appointment of the specialist committee in *Black Sash I* was the inability of the Minister of Social Development and SASSA to comply with a structural order emanating from the CC and an assurance to the CC,[179] the failure to report this inability to the CC timeously,[180] and the exceptional circumstances of the case, which would constitute a "national crisis" if not remedied.[181]

Litigation in respect of the right to education has been characterised by its fair share of non-compliance with judgments, in several cases necessitating return trips to courts with applicants requesting more intrusive and detailed orders to ensure enforcement. These have included both punitive and structural orders.[182] Within the context of the structural remedy in *Komape*, the discussion below is confined to a discussion of the structural orders only.

In a case concerning the National School Nutrition Programme (NSNP), *Equal Education v Minister of Education* ("*NSNP* case"),[183] the applicants (EE and two school governing bodies represented by Section27 and EELC) challenged the incomplete roll-out of the NSNP, which affected millions of learners who were reliant on it.[184] The Court, in acknowledging the interdependency between children's rights and other rights,[185] found that the affected children's rights to basic nutrition and education had been violated and stated explicitly that this justified a structural order.[186] In granting the order, the Court quoted from *Mwelase*:[187]

> "In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is in crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in Black Sash I, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery."

179 *Black Sash I* para 11.
180 *Black Sash I* para 6.
181 *Black Sash I* para 51.
182 See Veriava (2019) 119–128. See too Brickhill and van Leeve "From the Classroom to the Courtroom: Litigating Education Rights in South Africa" in Fredman, Campbell and Taylor (eds) *Human Rights and Equality in Education* (2018) 157–165.
183 2021 1 SA 198 (GP). For a detailed discussion of the case see Veriava and Ally "Legal Mobilisation for Education in the Time of Covid-19" 2021 *SAJHR* 230.
184 *NSNP* paras 2–3.
185 *NSNP* para 55.
186 *NSNP* paras 88.1–88.2.
187 *Mwelase* paras 48–49.

Following this, the Court stated that, "[c]hildren are categorically vulnerable, [and] poor hungry children are exceptionally vulnerable. The degree of the violation of the constitutional rights are thus egregious."[188]

The structural order enabled Section27, EE and EELC to monitor the roll-out of the NSNP by analysing the reports from the government that were submitted to the Court. They determined that the uptake of the NSNP in many provinces remained poor.[189] They further identified that rotational timetables (where learners attended school on different days) under the pandemic were the main cause of the poor uptake because on the days learners were not at school they were not being fed.[190] Accordingly, the applicants returned to court for a more detailed court order requiring that the government provide food parcels and/or scholar transport and other measures to ensure that learners who were subject to rotational timetables continued to receive food on the days they were not physically at school during the school term.[191] The monitoring function of the structural order therefore served as an essential diagnostic tool for remedying the rights violation.

A further example of a structural order being granted in the High Court is the case of *Madzodzo v Minister of Basic Education* ("*Madzodzo*"),[192] which dealt with the systemic failure of government to provide desks and chairs to schools in the Eastern Cape.[193] In successive rounds to court to enforce furniture delivery throughout the province, the Court first imposed a structural order and, in a later round, an independent auditor since many schools were not part of the government's initial audit.[194] In an even later round of litigation, the court ordered the appointment of a furniture task team to ensure that furniture was timeously delivered to every school that formed part of the audit.[195]

Additionally, in *Linkside v Minister of Basic Education* ("*Linkside II*"),[196] a class action case that dealt with the ongoing failure of the Eastern Cape Provincial Department to appoint teachers to vacant posts at public schools throughout the province, the court ordered the appointment of a claims administrator to ensure the payment of R81 million in salaries to the 90 applicant schools.[197]

188 *NSNP* para 88.2. See too *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG); *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa* 2011 5 SA 87 (WCC).
189 See Section27 and EELC "Joint Statement: Return to Court for NSNP – July 2021" https://section27.org.za/2021/07/joint-statement-return-to-court-for-nsnp-july-2021/ (last accessed 2022-08-18).
190 As above.
191 Veriava and Ally 2021 *SAJHR* 13–15.
192 2014 3 SA 441 (ECM).
193 *Madzodzo* para 1.
194 Taylor 2019 *Constitutional Court Review* 255.
195 As above.
196 [2015] ZAECGHC 36.
197 *Linkside II* para 2.

In *Komape II*, while the High Court maintained its supervisory jurisdiction, it declined to impose either the appointment of a special master as requested by the *amicus curiae*,[198] or the task team as requested by the plaintiff.[199] However, the role of the task team appears to have been misunderstood by the High Court. While the High Court understood the purpose of the task team as being to substitute government officials,[200] what the plaintiffs requested would have been more akin to a monitoring body and would have actually included government officials.[201]

The plaintiffs argued for the task team to have the function of verifying, updating and ensuring the accuracy of the information relied on by government for its plan, monitoring the implementation of a government's new (reasonable) plan, and reporting back to the court on government's progress in this regard.[202] There was no policy formulating or budget projecting functions requested by the plaintiffs for the task team. The task team would also comprise government officials, alongside Section27, EE, independent experts and other parties, working co-operatively.[203] The reason for this was to facilitate a smoother dialogue between government and civil society and, through this, potentially obviate the need for further litigation.

As in the case of *Mwelase*,[204] and *Black Sash I*,[205] the situation in *Komape II* was also described by the Court as an "emergency".[206] Additionally, Muller J noted that the people whose rights were violated in the case were children – a categorically vulnerable group, whose best interests must be considered as paramount in all matters concerning them.[207] The remedy should have thus been more closely geared to what is at risk in the case – this being the death or harm of children at schools, "a catastrophe which should be avoided at all costs".[208] Further, the Court failed to note the special nature of the right to basic education, encompassing adequate school sanitation,[209] which is immediately realisable – as has been acknowledged by the CC.[210] The High Court thus refused to extend its supervisory jurisdiction through a task team,[211] which may have been the most appropriate, just and equitable relief.

198 Second Amicus Curiae Supplementary Affidavit para 43.
199 *Komape II* para 16.
200 As above.
201 Plaintiffs' Supplementary Affidavit paras 112.3–112.4.
202 As above.
203 As above.
204 *Mwelase* para 49.
205 *Black Sash I* para 36.
206 *Komape II* para 7.
207 *Komape II* para 11.
208 *Komape II* para 6.
209 *Komape Appeal* para 63.
210 *Juma Musjid* para 37.
211 *Komape II* para 16.

4 Conclusion

The multiple remedies doled out in the *Komape* case recognise the multiple violations in respect of the different rights holders and seek to address each of these accordingly. The claims for damages sought to provide restitution in respect of Michael and the members of his family. On the other hand, the structural orders sought to vindicate the persistent violations of the rights of the learners attending Limpopo schools with unsafe sanitation. In granting the structural orders, the High Court acknowledged that children are particularly a vulnerable group, whose best interests must be considered as paramount, and that the government's ongoing failure to provide safe and decent sanitation is egregious.

Where the High Court erred, however, was in not imposing a court-appointed agent in a case that may already be characterised as protracted litigation and despite other children having already died in circumstances almost identical to that of Michael.[212] We submit that the imposition of a task team would have been appropriate, as this would strengthen the monitoring function of the structural order – ensuring greater transparency and effectiveness.[213]

212 Michael died in 2014 and summons was issued in that year. Lumka Mkethwa died in almost identical circumstances at a school in the Eastern Cape in 2018. See Plaintiffs' Heads of Argument: Defendants' compliance para 92.

213 Taylor 2019 *Constitutional Court Review* 265.