



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

CASE NO. 873/2024

In the matter between:

KHULA COMMUNITY DEVELOPMENT PROJECT

First Applicant

**THE SCHOOL GOVERNING BODY OF MNEKETSHE
JUNIOR SECONDARY SCHOOL**

Second Applicant

**THE SCHOOL GOVERNING BODY OF
SEAVIEW SENIOR SECONDARY SCHOOL**

Third Applicant

**THE SCHOOL GOVERNING BODY OF TOYISE
SENIOR SECONDARY SCHOOL**

Fourth Applicant

and

MEC FOR EDUCATION: EASTERN CAPE

First Respondent

ACTING HOD FOR EDUCATION: EASTERN
CAPE

Second Respondent

MEC FOR TRANSPORT: EASTERN CAPE

Third Respondent

HOD FOR TRANSPORT: EASTERN CAPE

Fourth Respondent

GOVERNMENT OF THE EASTERN CAPE
PROVINCE

Fifth Respondent

MINISTER OF BASIC EDUCATION

Sixth Respondent

MINISTER OF TRANSPORT

Seventh Respondent

GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA

Eighth Respondent

SOUTH AFRICAN HUMAN RIGHTS COMMISSION: *AMICUS CURIAE*

JUDGMENT

MOLONY AJ:

INTRODUCTION

'Education is the most powerful weapon which you can use to change the world.'

Nelson Mandela – speech, Madison Park High School, Boston, 23 June 1990

- [1] The above-mentioned quote, thirty-four years later, remains apposite.
- [2] But in order to get an education, one must be able to get to school in the first place.
- [3] Thousands of learners in the Eastern Cape, particularly in impoverished and rural areas, have to travel long distances, often over perilous terrain, to get to school. Their families do not have the means to find sustainable solutions to this challenge.
- [4] The negative ripple effect of this obstacle is obvious.
- [5] The first applicant is a community based non-profit organization, whose primary objective is to ensure that every child from a poor community attends school every day.
- [6] The second, third and fourth applicants are the governing bodies of three different schools.

- [7] The first to seventh respondents are cited due to their various official obligations in regard to the issues raised in this application.
- [8] The applicants seek: a mandatory interdict, declaratory relief and supervisory relief, all of which relates to the provision of scholar transport in the Eastern Cape for those learners who qualify for such transport.
- [9] The first to fourth respondents have opposed the application.

URGENCY

- [10] The application was originally launched on 1 March 2024 on an urgent basis, requesting that the matter be heard on 2 May 2024.
- [11] On 14 May 2024 an interim order was granted by agreement between the applicants and the first to fourth respondents, pursuant to an interim application launched by the applicants.
- [12] The interim order stated that:

12.1 The Department of Education would, in respect of all scholar transport applications relating to the second and fourth applicants:

12.1.1 Issue decisions in relation to such applications by no later than 30 May 2024.

12.1.2 Furnish reasons and explanations for any declined applications by 30 May 2024.

12.1.3 Provide explanations for the appeal processes, and the timelines for submitting and deciding appeals also by 30 May 2024.

12.2 The Department of Transport would make scholar transport available to all approved learners at the second and fourth applicants within fifteen days of the decisions having been communicated (i.e. fifteen days from 30 May 2024).

12.3 The Department of Education would:

12.3.1 Assist the third applicant to upload scholar transport applications in respect of learners at the third applicant on the SA-SAMS system by no later than Friday 10 May 2024.

12.3.2 Assess and consider all of the third applicant's applications, and issue decisions (including reasons and explanations for declined applications and explanations as to the appeal processes) by no later than 14 June 2024.

12.4 The Department of Transport would make scholar transport available to approved learners at the third applicant within fifteen days after 14 June 2024.

12.5 The remainder of the relief in the main application was postponed for hearing to a date to be determined by the Registrar, and the costs of the hearing on 14 May 2024 were reserved.

[13] It appears that there has been substantial compliance with the above-mentioned order thus far.

[14] The above-mentioned order essentially did away with the relief sought in paragraph 3 of the notice of motion, save that the relief sought in that paragraph did not just apply to the second to fourth applicants, but to all Eastern Cape schools with similar issues relating to scholar transport.

[15] The remaining paragraphs of the notice of motion take the matter further by requesting declaratory relief relating to the failure to provide scholar transport, as well as supervisory relief in regard to assisting those who did not receive transport with catching up in terms of schoolwork missed, as well as the provision of scholar transport in future.

[16] The notice of motion had annexed to it the names of various scholars from the second to fourth applicants, who it was alleged required transport. This list

was later amended to bring it up to date (and an amended notice of motion was filed on 17 July 2024).

[17] The applicants, in a letter to the Registrar of this court dated (23 April 2024) requested a preferential court date for the remaining relief to be dealt with, on the basis that the matter remained urgent insofar as the needs of the thousands of unnamed qualifying learners in the Eastern Cape (who were not receiving scholar transport) were concerned.

[18] The South African Human Rights Commission ('SAHRC') applied to be admitted as *amicus curiae*, which order was granted on 6 August 2024.

[19] The SAHRC was permitted to file a 2014 investigation report, and the findings based on that report.

[20] The matter had been set down to be heard on 12 September 2024 (in the ordinary course), which the applicants contended would be unlikely to be of assistance in the 2024 academic year. Despite these concerns no preferential date was forthcoming and the matter was duly heard on 12 September 2024.

LEGISLATIVE AND POLICY FRAMEWORK

[21] Section 29(1)(a) of the Constitution states that everyone has the right to basic education, including adult basic education.

[22] It is not in dispute that the right to basic education is immediately realizable, and not subject to any qualifications (such as being progressively realizable depending on available resources).

[23] The challenges faced in regard to scholar transport in the Eastern Cape are not novel.

[24] The 2014 report filed by the SAHRC reflects the following:

24.1 On or about 3 May 2012 the Eastern Cape office of the SAHRC received a written complaint from MP Lindiwe Mazibuko, who was acting in the interests of scholars at a particular school in Queenstown (Komani).

24.2 The above-mentioned learners were required to walk long distances on foot in order to get to school.

24.3 During the 2011/2012 financial year, scholar transport services were provided to these learners.

24.4 Without warning or reason, the above-mentioned transport ceased in the 2012/2013 financial year.

24.5 The challenges faced by the learners in the relevant school were challenges faced by most learners, particularly those residing in rural areas.

- 24.6 The provincial office of the SAHRC visited an additional six (6) schools as part of its investigation.
- 24.7 The investigation revealed that for the 2013/2014 financial year, the Department of Transport budgeted R 340 million for scholar transport, and was, at the time, transporting about 54 471 learners. The need for transport affected almost 120 000 learners.
- 24.8 At the time the National Learner Transport Policy (2010) was still in draft form. It was referenced in the report when the following was stated (in paragraphs 9.10 and 9.11 thereof):

'The draft policy makes provision for affordable and safe transport at the cost of the state for all learners with additional needs and vulnerabilities, including very young learners, learners with disabilities, and children living in rural areas who are vulnerable to the dangers of travel over long distances.

This suggests therefore that any failure and/or neglect of the Respondents¹ to provide adequate transportation to learners of the schools listed in Paragraph 5.2 cannot possibly be said to be a reasonable and justifiable limitation within the meaning of section 36. An explanation advanced by the Respondents to the

¹ In that instance being the Department of Education, Eastern Cape and the Department of Transport, Eastern Cape.

effect that there is insufficient financial resources to provide such transport is unacceptable.'

24.9 It was found that the above-mentioned failures constituted a violation of the relevant learners' right to basic education (section 29(1)(a) of the Constitution) and amounted to an infringement of the duty of the State to consider the best interests of the learners (section 28(2)(i) of the Constitution).

24.10 The recommendations of the report set out a proposed manner in which these issues could be addressed under the oversight of the SAHRC.

[25] Directives of the SAHRC, as contained in the report, are not binding upon the respondents in that matter,² however a response to such recommendations was required, yet was not forthcoming.

[26] The matter of Tripartite Steering Committee and Another v Minister of Basic Education and Others 2015 (5) SA 107 (ECG) followed in 2015, and succinctly summarized the importance and need for scholar transport:

[12] It is a notorious fact, detailed in the papers before me, that in this province large numbers of scholars of all ages live far from

² See The South African Human Rights Commission v Agro Data CC and A (Afriforum, Centre for Applied Legal Studies and Commission for Gender Equality intervening as Amici Curiae) (39/2023) [2024] ZASCA 121 (15 August 2024) at paras 39 to 73.

the schools they attend and, if they are not provided with transport to and from their schools by the state, they have to walk, come rain or shine, to and from school each day.

[13] *Not only are the distance and the time taken to walk it each day a problem. Issues of safety, implicating the fundamental right to freedom and security of the person, including the right to be 'free from all forms of violence from either public or private sources' also loom large in our shockingly violent, and often predatory, society.*

[14] *The result is that a great burden, both physical and psychological, is placed on scholars who are required to walk long distances to school. They are often required to wake extremely early, and only get home late, especially if they engage in extramural activities at school, with the result that less time than would be desirable is available for study, homework and leisure. That, in turn, has a knock-on effect on performance at school, attendance at school, particularly during periods of bad weather, and it increases the dropout rate.*

[15] *In Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995 the court, in dealing with the interim Constitution's right to basic education, held that 'a positive right that basic education be provided for every person' by the state was created, and 'not merely a negative right that*

such a person should not be obstructed in pursuing his or her basic education'.

[16] *The importance of the right to basic education was highlighted in Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* ^[7] in which Nkabinde J stated:

'Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and world opportunities. To this end, access to school — an important component of the right of basic education guaranteed to everyone by section 29(1)(a) of the Constitution — is a necessary condition for the achievement of this right.'

[27] At the time of the above-mentioned judgment a provincial scholar transport policy from 2003 appears to have been in place, with various draft amendments in the works.³

[28] It is not in dispute that the state's constitutional obligation to provide scholar transport is codified in the National Land Transport Act 5 of 2009, and that this is implemented on a national level by the National Learner Transport Policy,

³ *Supra* at paras 20 and 59.

published in the Government Gazette on 23 October 2015, and on a provincial level by the Eastern Cape Provincial Learner Transport Policy ('the Provincial Transport Policy'), adopted on 28 November 2016.

[29] Notable in relation to the National Learner Transport Policy is that it *inter alia* recognizes that the provision of scholar transport where required is critical to fulfilling the right to basic education.⁴

[30] The Provincial Transport Policy, in section 10.2 thereof, *inter alia* sets out the criteria used to determine who qualifies for scholar transport, the requirements being:

30.1 The scholar must be a needy learner from grade R to 12.

30.2 The scholar must be a South African citizen (and have the necessary documentation in this regard).

30.3 The scholar must be a walking distance of five (5) or more kilometres from the nearest appropriate public ordinary school, and parental choice of schools will not be accommodated.

30.4 The five (5) kilometre requirement will be waived where the conditions in which the scholar must walk to school are hazardous.

⁴ See page 8 thereof.

30.5 Priority is afforded to learners with disabilities (depending on the nature thereof), and primary school learners who walk long distances to school.

[31] The Provincial Transport Policy further recognizes several challenges faced in the past, including a lack of funding, lack of co-ordination and planning between the various authorities involved, and lack of clarity in regard to the roles and responsibilities of the Department of Education and the Department of Transport.

[32] The Provincial Transport Policy ostensibly contains provision to address the above, and various other challenges.

[33] A further attempt to provide clear guidelines in relation to the implementation of the Provincial Transport Policy is found in Circular 6 of 2020 (issued by the Department of Education on 3 March 2020) – ‘the Circular’.

[34] The Circular *inter alia* points to challenges posed by the poor management of data, and refers to the required use of the South African School Administration Management System (‘SA-SAMS’), which provides for an online facility to capture the details of learners in need of transport (with backup being supplied by hardcopy forms).⁵

[35] Whilst the applicants appear to view the Provincial Transport Policy and the Circular as an imperfect solution, the applicant’s actual complaint relates to a

⁵ See sections 2, 3 and 5 thereof.

failure properly to implement the Provincial Transport Policy and Circular, which has led to learners receiving transport services in some years and not in others, or never at all.

THE FACTS

- [36] The applicants provide various examples (with supporting affidavits) from learners and parents of the second to fourth applicants in regard to the challenges faced getting to school when transport has not been provided, the implication being that this represents a microcosm of the crisis faced by learners across the entire province in this regard.
- [37] The first to fourth respondents have not taken issue with most of these facts, which portray a desperate, often dangerous, and inequitable situation.
- [38] Reference is made to children being required to walk for hours to reach school, arriving late and exhausted, with the same pattern being repeated when going home. Many have to cross rivers (which cannot be crossed at all when overflowing) and walk in isolated areas or areas with terrain that is difficult to navigate.
- [39] It appears that learners' parents attempt to pay for transport on their own periodically, or send the learners to live with family or friends closer to the relevant schools, but this is not sustainable financially, and comes with the hardship to the child of being away from home for extended periods.

[40] Some children, understandably, simply stop going to school because it is too difficult to get there.

[41] The legal representatives for the applicants (the Legal Resources Centre) have addressed extensive correspondence over the last few years to the various respondents in this matter, relating to the second to fourth applicants, and all qualifying learners in the Eastern Cape, and the challenges faced in trying to apply for them to be provided scholar transport.

[42] The applicants point to various reasons for the respondents' failure to comply with their obligations, including:

42.1 There is an ongoing budgeting shortfall (in that the number of learners to which the budget applies is far less than the number who in fact qualify for transport). The deponent to the founding affidavit, based on available documentation, points to some 50 000 learners without transport during the 2024 school year.

42.2 Based on past experience, including the Eastern Cape Department of Education's school rationalization program (which led to the closing or merging of many schools that were considered small or non-viable) which identified scholar transport as a particular challenge to implementation, the need for scholar transport was foreseeable. The multiple court cases faced by the respondents (which included the first applicant in this matter launching applications in regard to scholar transport on behalf of specific

learners in 2016 and 2019) would also have led to the current issues being readily foreseeable.

[43] On 5 February 2024 a media statement was issued on behalf of the Eastern Cape Executive Council, stating that interim budget relief had been approved in the amount of R 90 370 million, in order to assist in the provision of scholar transport in the Eastern Cape. It is unclear what the impact has been of the additional funding.

[44] To add insult to injury, section 3 of the South African Schools Act 84 of 1996 makes school attendance compulsory for children of certain ages (referred to in section 1.2.9 of the National Learner Transport Policy and section 5.5 of the Provincial Transport Policy).⁶

FIRST TO FOURTH RESPONDENTS' GROUNDS OF OPPOSITION

[45] The first to fourth respondents, in opposing the application, refer to the following:

45.1 Section 172(1) of the Constitution requires that any relief granted in a constitutional matter must be just and equitable.

⁶ Stringent consequences for non-attendance feature in the Basic Education Laws Amendment Act 32 of 2024, which has yet to be put into operation by proclamation.

- 45.2 The Department of Transport is presently reviewing the Provincial Transport Policy, in order to address various issues in the existing policy.
- 45.3 The Eastern Cape, in particular, contains the largest number of learners who require scholar transport in the country, and numerous schools in the Eastern Cape are located in remote and inaccessible areas.
- 45.4 There is allegedly a 'concerning tendency' in certain areas for headmasters to 'recruit' learners in order artificially to boost the schools' numbers, thus making the school less likely to be closed or merged with other schools. This in turn increases scholar transport requirements (thus leading to the abuse of the Provincial Transport Policy). No further detail is provided in this regard aside from those allegations.
- 45.5 The Department of Transport (through the Department of Education) plans for the provision of scholar transport on a three-year cycle. Despite this the budget sought is adjusted annually and is based on principles set out in the Provincial Treasury Guidelines.
- 45.6 If the amount budgeted is exceeded by the actual demand (as in recent years) then additional funds are sought from the Provincial Treasury.

45.7 The Provincial Treasury, more recently, has not been in a position to provide additional funding due to financial constraints applicable throughout the country.

45.8 The Department of Transport, due to financial constraints, will not be able to provide and meet the increasing demands for scholar transport in accordance with the existing model.

[46] Despite alleging financial constraints, the first to fourth respondents acknowledge in their answering papers that budgetary constraints are not regarded as a 'defence' in regard to the provision of constitutional rights, especially when those rights require immediate fulfilment.

[47] The first to fourth respondents nonetheless submit that the relief sought is unnecessary and unduly prescriptive, as the process of reviewing the Provincial Transport Policy is underway, and they should be provided with a reasonable opportunity to engage in this process.

ANALYSIS

[48] The grounds of opposition raised by the first to fourth respondents are clearly not sustainable.

- [49] The defence of budgetary constraints is not viable in regard to an immediately realizable right, such as the right to basic education.⁷
- [50] Even if such a defence were valid the broad overview, absent any real detail, provided by the first to fourth respondents in regard to how the necessary budget is calculated, what enquiries have been made in regard to additional funds from Provincial Treasury and when they were made, is insufficient. No information is provided in regard to any further attempts to obtain funding from other sources, such as National Treasury, and little detail is provided in regard to how and based on what information the budgeted amounts were determined.
- [51] No further information is provided to validate the information contained in the annexures to the answering affidavit, and the content of the 'recent presentation' by the Department of Transport (annexure 'DOT3' to the answering affidavit) is allegedly 'self-explanatory', and entirely unhelpful.
- [52] The issue of scholar transport has been one of concern since, at the very least, the report by the SAHRC in 2014 and was raised repeatedly in litigation thereafter. The fact that the budgeted amount, from the outset, did not meet the actual demand in 2024, was therefore readily foreseeable.

⁷ See City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) at para 74.

- [53] This court, in the matter of Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM) was of a similar view in regard to the provision of school furniture:

*'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 ss 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.'*⁸

- [54] The request that the first to fourth respondents be provided with a reasonable opportunity to finalize their review of the existing Provincial Transport Policy is, similarly, without merit.

- [55] The new draft policy (annexed to the answering papers as 'DOT1'), for the most part, repeats the contents of the current Provincial Transport Policy. Whilst there is reference to a 'National Learner Transport Grant' as a source of funding, there is no further detail provided in this regard. Despite

⁸ At paras 35 – 36.

complaining of a lack of 'means' testing in the current Provincial Transport Policy (which does in fact refer to means testing in regard to the definition of a 'needy learner')⁹, the new draft policy has removed such reference in the definition of a 'needy learner'.

- [56] What is notable in regard to the 'recent presentation' prepared by the Department of Transport is that it states that the National Policy for Scholar Transport is currently under review, and that the revision of the Provincial Transport Policy will only commence on completion and ratification of the National Policy.
- [57] The above suggests that it will still be some time before the review of the Provincial Transport Policy will be finalized. No specific completion date has been provided in this regard.
- [58] The 'defence' of a pending new Provincial Transport Policy was raised in the Tripartite Steering matter as well, yet almost ten (10) years later, the same problems persist and the same unacceptable excuses are advanced.
- [59] It is clear that the ongoing problem of scholar transport has yet to be addressed in a meaningful way by those tasked with its oversight, implementation and administration, despite extensive opportunity to do so. In this instance, the relevant respondents have, in a nutshell, failed to do what they have undertaken to do in accordance with their own policy.

⁹ It refers to the means test utilized by the Department of Social Development for a child-support grant.

[60] The notion of allowing the first to fourth respondents time to 'get their house in order', is therefore unlikely to achieve the desired result.

[61] In regard to an order which is just and equitable, the matter of Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC) provided the following guidance:

[96] *The power to make such an order derives from s 172(1)(b) of the Constitution. First, s 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this court decides a constitutional matter within its power it 'may make any order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.*

[97] *It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation*

or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution.'

[62] The first to fourth respondents contend that a structural interdict in these circumstances would not be compatible with the doctrine of the separation of powers. This aspect was addressed in the matter of Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC), where the following was stated:

'[98] This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the

others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that Courts cannot or should not make orders that have an impact on policy.

[99] The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the State to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'. Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of State can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.

And:

'[106] We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.'

[63] The bulk of the learners who require scholar transport not only fall amongst the most disadvantaged socio-economically, but are also children, meaning that they are vulnerable and have little power against the respondents. This court as the upper guardian of all minors within its area of jurisdiction is also required to promote their best interests, and has a wide discretion in this regard.

[64] It is self-evident at this point that the requirements for a final interdict have been met by the applicants, and that the relief sought by the applicants must be granted if the issue of scholar transport is ever to receive the appropriate attention and concomitant action. It can only be hoped that the relief to be granted will assist (particularly with the gathering of the necessary information

from the 2024 academic year) and better equip the relevant respondents in the 2025 academic year.

[65] Contrary to the first to fourth respondents' concerns about the proposed structural interdict being inflexible, my view is that it does in fact provide the required flexibility in that it permits the parties to return to court on the same papers to seek further relief if necessary.

[66] It was submitted (correctly) on behalf of the applicants that this court has the discretion to amend any time periods requested in the notice of motion. The order will also need to be tailored to cater for the time of year when the matter was heard and judgment delivered, bearing in mind the contents of the interim order granted on 14 May 2024.

COSTS

[67] There is no reason why costs (including the reserved costs of the hearing of 14 May 2024) should not follow the result in this matter. The costs of two counsel are clearly warranted, given the far-reaching impact of the relief sought. The *amicus curiae* has, quite properly, not requested any form of costs order.

ORDER

[68] In the result, the following order is made:

68.1 It is declared that any failure by the first to fourth respondents to provide scholar transport to all learners in the Eastern Cape (including those attending the applicant schools) who qualify for such transport under the Eastern Cape Learner Transport Policy 2016, read with the Eastern Cape Department of Education's Circular 6 of 2020, is unconstitutional and invalid.

68.2 The first to fourth respondents are directed to provide scholar transport to qualifying learners at Eastern Cape schools (including the applicant schools) that have indicated (on the SA-SAMS system or by hard copy applications) that those learners require scholar transport ('the requesting schools'). In doing so the first, second and third respondents are directed to take the following steps:

68.2.1 Decide all applications/requests made by any requesting schools (which have not already been decided) for the provision of scholar transport for the 2025 academic year, by the end of January 2025.

68.2.2 Communicate the decisions regarding those requests to the second to fourth applicants and their attorneys, and to the relevant requesting schools, in writing:

68.2.2.1 within 10 days of taking the decisions; or

68.2.2.2 if the decisions had already been taken prior to this court's order, within 20 days of this court order.

68.3 If any request is/was denied, the following must be provided in writing to the relevant school when the decision is communicated:

68.3.1 Reasons for the refusal;

68.3.2 An explanation of the appeals process; and

68.3.3 The timeline for submitting and deciding appeals. The time for deciding appeals (by the relevant state officials) should not be longer than 10 days from the date the appeal was submitted.

68.4 Implement the decisions in paragraph 68.2 above:

68.4.1 Within 10 days of taking the decision; or

68.4.2 In cases where the request has been denied and successfully appealed, within 10 days of the appeal decision being taken; or

68.4.3 In cases where the original decision or appeal decision predated this court's order, within 20 days of this order.

[69] The first and second respondents are directed to develop the following for Eastern Cape learners who qualified for scholar transport and for whom transport was requested, but who did not receive scholar transport for one school week or more during the 2024 academic year:

69.1 A plan for extra support (in collaboration with the relevant requesting schools) that will be provided to those learners to help them to, during the school holidays, catch up with the school work covered

during the schools days which they missed due to the lack of transport; and

69.2 A timeline for when that extra support will be provided.

[70] Directing the first to fourth respondents to report back to the court on affidavit (or affidavits), within thirty-five (35) days of the order of this court. The reporting affidavit(s) must also be served on the applicant's attorneys. The reporting affidavit(s) must include the following:

70.1 A table indicating:

70.1.1 All the schools in the Eastern Cape that indicated a need for scholar transport for the 2024 school year (on the SA-SAMS system or by hard copy applications);

70.1.2 The number of learners that each of these schools indicated needed transport;

70.1.3 The status of each of those learners' scholar transport applications (i.e. whether they were approved/denied/left undecided);

70.1.4 The number of learners whose applications were denied, if any, who then submitted an appeal to the decision on their eligibility for scholar transport;

70.1.5 The status of each appeal (i.e. whether it was upheld/dismissed or left undecided);

70.1.6 The number of learners receiving transport at each school, as at the date that the reporting affidavit is due (i.e. 35 days from the date of this court's order).

70.2 If any requests in 69.1.2 were refused:

70.2.1 Individualised reasons for each refused request; and

70.2.2 Confirmation that all schools whose requests for scholar transport were refused were provided with (i) the reasons for the refusal, (ii) an explanation of the appeals process and (iii) the timeline for submitting and deciding appeals.

70.3 A full account of all of the steps taken to provide scholar transport to all learners in the Eastern Cape for whom transport was approved for the 2024 school year.

70.4 If any learners for whom transport was approved were, nonetheless, not receiving transport for more than one school week of the 2024 academic year:

70.4.1 The plan (referred to in 68.1) for the extra support that will be provided to those learners to help them to catch up with the school work covered during the school days that they missed due to the lack of transport; and

70.4.2 The timeline (referred to in 68.2) for when that extra support will be provided.

[71] The first to fourth respondents are directed to file a reporting affidavit (with the court and after service on the applicants' attorneys) every thirty (30) days after

the initial reporting affidavit has been filed, for a period of 7 months. These reporting affidavits should set out the following:

71.1 The table described in 69.1, with updated information as at the date at which the reporting affidavit is due. The table should clearly identify any new requests for scholar transport that have been received on the SA-SAMS system or in hard copy applications, or any new appeals lodged, since the date on which the previous affidavit was filed.

71.2 If, in the time since the previous reporting affidavit was filed, there have been any new refusals of scholar transport requests:

71.2.1 Individualised reasons for each refused request; and

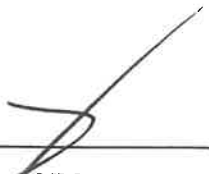
71.2.2 Confirmation that all schools whose requests for scholar transport were refused were provided with (i) the reasons for the refusal, (ii) an explanation of the appeals process and (iii) the timeline for submitting and deciding appeals.

71.3 If, in the time since the previous reporting affidavit was filed, any more qualifying learners have not received scholar transport for one school week or more during the 2025 academic year, confirmation that the steps set out in 68 above have been taken with regard to those learners.

71.4 The steps taken to ensure that all qualifying learners are transported from the first day of the 2025 academic year.

[72] Any party is permitted to re-enroll this matter, on reasonable notice to all parties and on duly supplemented papers, to seek further relief arising from the implementation of this order.

[73] The first, second and third respondents are directed to pay the costs of this application (including the costs of the hearing on 14 May 2024) jointly and severally, the one paying the other to be absolved. These costs include the costs of two counsel.



N MOLONY

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv E Webber with Adv N Soekoe *instructed by*
The Legal Resources
MAKHANDA

For the First to Fourth
Respondents: Adv RG Buchanan SC with Adv Z Zito *instructed by*
The State Attorney
GQEBERHA

For the *Amicus Curiae*: Adv SA Sephton *instructed by*
South African Human Rights Commission
c/o Rhodes University Law Clinic
MAKHANDA

Heard on: 12 September 2024

Judgment delivered: 17 December 2024