

TWENTY YEARS OF CONSTITUTIONALISM
THE RIGHT TO EDUCATION: A TEXTBOOK CASE
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DRAFT

1. In South Africa, we are fortunate to have a movement of lawyers who are committed to providing legal services to those who cannot afford it – in order to enforce constitutional rights and duties. It is a generation of lawyers, younger and older, that have grown and been nourished by the examples set by the likes of the late Tatu-Arthur Chaskalson and Tatu-Pius Langa. We lost both within a short space of each other. I pay special tribute to them as we recognize twenty years of constitutionalism in SA.

2. In the past twenty years, our courts have generated some of the most-cited jurisprudence in socio-economic rights: *Soobramoney*, *Grootboom* and the *TAC* case being the first amongst these. In relation to the right to education, there are several organisations that have contributed to the public discourse and tentative jurisprudence regarding the right.

3. The jurisprudence thus far has only begun to grapple with the content and nature of the right to a basic education. Two cases in the High Court are instructive. The first was *Section 27 and Others v Minister of Education and Another* delivered on 17 May 2012, concerning the right of every learner to the prescribed textbooks.¹ This is the focus of my talk today. The second was *Madzodzo* – a case brought by the Legal

¹ 2013 (2) SA 40 (GNP).

Resources Centre regarding the right of every learner to appropriate furniture (Sarah).²

4. The textbooks case is actually more than one case. It involves a series of court forays – first in order to establish and enforce the duty of the state to deliver textbooks to learners in Limpopo in 2012: the Textbooks 1 judgment. Second, to enforce the Textbooks 2 judgment.³ Third to compel delivery of textbooks to schools in Limpopo in 2014.⁴ The latest is on appeal, and will eventually be heard by the Constitutional Court.
5. This presentation will consider the following:
 - 4.1 The strategic approach taken to this case, including a description of the facts of the case, choices and decisions that were made at relevant moments, the legal argument and the outcome;
 - 4.2 The inextricable relationship between the right to education and the right to equality;
 - 4.3 An approach to the content or ‘definition’ of the right to basic education as protected in the South African Constitution having regard to:
 - 4.3.1 Immediate v progressive realization;
 - 4.3.2 Budgets; and
 - 4.3.3 Accountability.

Textbooks case

² *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) (20 February 2014).

³ *Section 27 and Others v Minister of Education and Another* delivered on 23/12/ 2012 (Textbooks 2 or enforcement judgment).

⁴ *Basic Education For All and Others v Minister of Basic Education and Others* 2014 (4) SA 274 (GP) delivered on (5 May 2014).

6. In April 2012, SECTION27 approached the court for urgent relief on behalf of schools in Limpopo Province that had not yet received textbooks. It was already one third of the way through the school year, and mid-year examinations were to take place in June. There were 4 grades that were particularly affected: Grades 1,2,3 and 10. The school curriculum had been revised and the textbooks had been revised to reflect the new curriculum.
7. The litigation sparked a national discussion about the importance of the right to education. It was voted by the *Mail and Guardian* as the second biggest story of 2012 (second to the shooting of striking miners by police at the Lonmin mine in Marikana).
8. After a court victory, significant effort was required to ensure the implementation of the court order. Two years later, in 2014, SECTION27 was forced to return to court in a separate case for the delivery of textbooks in other affected grades (with some overlap in respect of the 2012 case). After a successful outcome at the High Court, the government respondents appealed to the Constitutional Court. Their argument is that the court's declaratory order that 'they are required to deliver all prescribed textbooks to every learner at the commencement of the school year' imposes an impossible standard on the government. That appeal is pending.
9. It is important to clarify at the outset why SECTION27 became an applicant in the first case. There are two reasons for the unusual intervention. First, in our preparation for the case the legal team met with nine schools and several teachers and principals. Our initial letters to the Department of Basic Education (DBE) named the schools where we had direct evidence of a failure to deliver textbooks. As preparation for the case progressed, many of our applicant schools received 'warnings' from department officials. As a result, while they worked closely with SECTION27, the schools were reluctant to be the named parties that brought the

case against the DBE. It became clear to SECTION27 that the schools needed to be protected by having an ‘institutional’ applicant who could represent the schools. This proved to be an important decision as the principals (including the only principal who took the risk of joining as an applicant) continued to be intimidated by officials.⁵

10. The second reason is that members of SECTION27 were the best placed to provide direct and credible evidence of the state of the textbooks shortages; the attempts that had been made to secure the books and the impact on the learners. The matter was urgent. It was a third of the way through the school year and many thousands of learners had yet to receive their books. Mid-year exams were imminent. Hence—

*the application is brought in the interests of learners, educators and parents throughout the Limpopo Province. Learners in Limpopo have the right to a basic education, which right includes the provision of textbooks by the Department and the DBE. The Department and the DBE are in breach of their corresponding obligations. The learners concerned cannot individually bring these proceedings against the Department and the DBE. They lack the necessary resources and knowledge of their rights. They are young and do not all have access to legal services. This application is being brought in their interests.*⁶

On short notice, the Centre for Applied Legal Studies generously agreed to serve as the attorneys of record.

Context 1

⁵ A formal complaint regarding the intimidation was lodged with the Public Protector on 8 March 2012. Founding affidavit, para 5.

⁶ Founding affid, para 29.2.

11. Important to understanding the context is section 100 of the Constitution. The Limpopo provincial department of education had been placed under national administration. This may occur only in exceptional circumstances. Section 100(1) of the Constitution provides:

“When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—

(a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and

(b) assuming responsibility for the relevant obligation in that province to the extent necessary to—

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) maintain economic unity;

(iii) maintain national security; or

(iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.”⁷

12. The national department had assumed responsibility under section 100(1)(b).

Context 2

13. Limpopo province is a vast, rural and poor province. At the time of the launch of the case there were approximately 1.7 million learners in Limpopo Province. School infrastructure is rudimentary; many classes are still conducted under trees.

⁷ Section 100(3) provides that national legislation may regulate the process of intervention. No such legislation has however been enacted to guide the implementation of s 100.

14. Added to this is the poor governance of the provincial education system: the national administrator described it as follows:

All done and said, Districts do not function optimally and gradually are becoming an impediment to the Limpopo Education Department, as morass and decay sets in compromising the tenets of education, public administration and public management, coupled with poor financial management and poor invoking of management principles, and thus these districts are being eroded and soon will not serve any tangible benefit to the education dynamics within the province.⁸

Context 3

15. The undelivered textbooks related to a new curriculum that was introduced by the DBE in 2012.⁹ The textbooks needed to be adapted to accommodate the change in curriculum. It was therefore not open to the learners or teachers to employ the books from previous years.

Context 4

16. Not only is the right to basic education given special articulation in the Constitution, education policy was (and remains) high on the agenda of the governing party. It was an essential aspect of its election manifesto- an express recognition of the centrality of education to the social and economic development of the country.

⁸Dr Karodia, founding affidavit, para 62. [add proper description of his report, and date].

⁹This was the fourth substantive policy shift since 1994. OBE was introduced in 1997. It was replaced by curriculum 2005, which applied in 2005 and 2006. In 2007, NCS (National Curriculum Statements) applied to secondary schools and RNCS (Revised National Curriculum Statements) was introduced to primary schools. CAPS was introduced in 2012

17. The DoE in its Annual Performance Plan for the year 2011 to 2012 articulates as one of its goals, “to ensure that every learner has access to a minimum set of textbooks and workbooks required according to National Policy”, and sets the percentage goal of learners that should have access to the required textbooks and workbooks for the entire school year at 100%.

18. The department’s own policy documents emphasized the specific value of textbooks and other learning materials, in its Curriculum Strategy when it states the following:

“The availability and retention of learning support materials is a vital ingredient in the delivery of quality learning and teaching ... When resources such as learner and teacher support materials are insufficient, teachers experience great difficulty in planning and conducting lessons even if there were enough of other resources. If one takes seriously the observation that in developing countries the availability of textbooks is associated with student performance and pass rate, then lack of learning materials in schools clearly points to our learners not performing well in their learning.”¹⁰

19. And so it was in this context that the intervention of the court was sought in order to give effect to the right to basic education.

The rights matrix

20. Socio economic rights are integral to the notion of substantive equality that has been embraced by the Constitutional Court. The protection and enforcement of socio-economic rights is especially obligatory given the standard of poverty and inequality in South Africa – one of the most unequal countries in the world.

¹⁰ Founding para 74 – add proper cite.

21. Gini co-efficient (which is a number between 0 and 1, where 0 indicates total equality and 1 indicates total inequality stands) at .65 (based on expenditure data) and 0.69 based on income data acc to national survey statistics in 2012.¹¹ Amongst the highest inequality in the world. Up there with DRC, Sierra Leone, Bolivia and Haiti. The UK is .34, just one below Switzerland at .33.7.

22. In 2011, 20.2% of population lived in extreme poverty (below the food line) ie R321 per capita per month.¹²

23. The right to education in particular is causally connected to reducing the inequality gap.

24. In 2011, 5.5% of people with education level **higher** than matric were living in poverty– 23.6% of people with matric only were living in poverty.

25. In stark contrast, those with little or no education live in significantly higher levels of poverty. 66 % of those with no schooling were living in poverty in 2011, 60.3% of those with some primary education and 44.4% of those with some secondary.¹³

26. I refer to these statistics because the socio-economic crisis in South Africa is not only about poverty it is about inequality. And a driver of inequality is the level of education acquired.

¹¹ Poverty Trends in South Africa, Stats SA, 2014 at 13.

¹² Id at 12. The FPL is the level of consumption below which individuals are unable to purchase sufficient food to provide them with an adequate diet.

¹³ Id at 30.

27. In this regard it is important to bear in mind the crucial nexus between the right to equality and social justice. In *Minister of Finance and Other v Van Heerden*, Moseneke DCJ said:

“Like other constitutions, [our Constitution] confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality. . .Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice.”¹⁴

28. And in *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, Mokgoro J made the point that “[e]quality in respect of access to socio-economic rights is implicit in the reference to ‘everyone’ being entitled to have access to such rights in section 27.”¹⁵

29. The right to basic education, unlike other socio economic rights in the South African Constitution, is formulated as follows:

“Everyone has the right—

(a) to basic education, including adult basic education.

(b) to further education, which the state through reasonable measures, must make progressively available and accessible”.

30. The obvious absence of the qualifiers of ‘available resources’ and ‘progressive realisation’ means that there are special obligations on the state to protect and promote this right. In *Juma Masjid*, the Constitutional Court observed:

¹⁴ 2004 (6) SA 121 (CC) at paras 24-5.

¹⁵ 2004 (6) SA 505 (CC) at para 42

It is important, for the purpose of this judgment, to understand the nature of the right to “a basic education” under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realizable. There is no internal limitation requiring that the right be “progressively realized” within “available resources” subject to “reasonable legislative measures”. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.”¹⁶

31. The High Court was called upon to give effect to the substantive content of section 29 for the first time in the textbooks case. Justice Kollapen, came to a firm conclusion that textbooks are an essential component of the right to a basic education:

“[T]he provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfillment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks.”¹⁷

32. In *Textbooks 1*¹⁸ Kollapen J held as follows:

In the South African context the comment is apposite, if regard be had to the history of an unequal and inappropriate educational system, foisted on millions of South Africans for so long, and the stark disparities that existed and continue

¹⁶ *Governing Body of the Juma Masjid Primary School and another v Ahmed Asruff Essay NO and others (Centre for Child Law and another, amici curiae)* 2011 (8) BCLR 761 (CC) at para 37.

¹⁷ *Textbooks 1* above n 1 at para 27.

¹⁸ *Textbooks 1* above n 1.

*to exist in so many areas and sectors of our society. Education takes on an even greater significance. It becomes at the makro (sic) level an indispensable tool in the transformational imperatives that the Constitution contemplates and at the micro level it is almost a sine qua non to the self determination of each person and his or her ability to live a life of dignity and participate fully in the affairs of society.*¹⁹

33. With these considerations in mind, Justice Kollapen ordered that the requisite textbooks be delivered by 15 June 2012.

34. What followed is a sorry tale of delay and obfuscation. All unfolding publicly in the media and in parliament. The textbooks case became the lightning-rod for all those who felt strongly about the importance of education in South Africa.

35. According to Chisholm:

“The issue became a metaphor for how government conducts its business. All levels of government, including the ruling party, responded. The national Minister apologised for what had happened, and together with Section27 appointed the Metcalfe Commission into the delivery of books, and pulled out all the stops to ensure delivery where it had not taken place. The Presidency appointed a commission into the dumping and shredding of books, and the provincial government also appointed a commission. The media and Section27 kept up a relentless pressure, providing commentary and new information on non-delivery on an almost daily basis. At the end of July, the ruling party at its lekgotla instructed the national and provincial departments to work closely with Treasury to ensure that 2013 saw no repeat of what happened in 2012, to pay special attention to logistics and to set up a hotline for principals to report undelivered textbooks. An interim report was handed to the Presidency on the dumping and

¹⁹ Id at para 5.

shred- ding of textbooks, but not made public.”²⁰

36. After broken promises and apologies, by October 2012 many books had been delivered but not all. The applicants were forced to return to court (‘Textbooks 2’) for the enforcement of the original declarator.²¹ On 4 October 2012, Kollapen J held as follows:

“While the applicants do not seek relief holding the respondents in contempt, they seek a declarator regarding non-compliance, both as a recording of a particular factual situation and as a basis for the other relief that is being sought, in particular the relief in respect of outstanding textbooks.

The respondents contend that such a declarator is not necessary and takes the matter no further. I respectfully disagree. The question of whether all textbooks required by the learners of Limpopo have been delivered is important for a number of reasons:

i. It goes to the heart of whether the right to basic education has been fulfilled”²² [Emphasis added.]

37. Fast forward to 2014: by now SECTION27 has established an almost daily relationship with officials in the department of basic education! But an important development has taken place since 2012. Due to the national attention that the textbooks case received, parents and teachers in Limpopo began to mobilise. Indeed, the monitoring of the first court order, the settlement order and the third court order were possible because teachers, principals and parents began to alert SECTION27 to shortages in delivery more systematically. In 2013, a movement of

²⁰ Chisholm, L, The Textbook Saga and Corruption in Education, *Southern African Review of Education*, volume 19, Issue 1, July 2013, page 8.

²¹ For a detailed timeline see Veriava.

²² Textbooks 2 at p5.

community members began – called Better Education for All (BEFA). The Association's principal objectives were outlined as follows:

- 37.1. To monitor the learning and teaching environment in public schools in Limpopo so as to ensure the provision of quality education for all;
- 37.2. To investigate allegations of violations of public school learners' right to education and other related rights, including but not limited to the provision of teachers, LTSM, classrooms and a sound and healthy built learning environment;
- 37.3. To participate in advocacy and training to empower local actors, such as learners, teachers and SGB members, at a grassroots level to vindicate their rights in the sphere of education;
- 37.4. To enforce the right to education of public school learners;
- 37.5. To engage with, to work with, and, where necessary, to hold to account the national and provincial governments in their obligation to provide a quality education for all learners;
- 37.6. To receive donations from other organisations, government and non-governmental agencies and from independent local and international donors; and
- 37.7. To conduct such fundraising activities from time to time including the selling of products or goods or services for purposes of raising funds to further advance any one or more of its objects stated in this Constitution.²³

38. With a gnawing sense of déjà vu, SECTION27 began alerting the DBE to textbook shortages that were being reported to it by schools in Limpopo. SECTION27 sent seven comprehensive reports of textbooks shortages to the DBE between 16 January 2014 and 20 March 2014.²⁴

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²⁴ Annexure "MS13" to founding affidavit, pages 86 – 92; annexure "MS16" to founding affidavit, pages 97 – 105; annexure "MS21" to founding affidavit, pages 132 – 159; annexure "MS24" to founding affidavit,

39. In response to each of these reports of textbooks shortages, the DBE undertook to “*verify and remediate*” these shortages as soon as possible.²⁵ The department, however, failed to provide information as to what plans and processes were in place to address these shortages and when the applicants could expect full delivery to take place.
40. In April 2014, BEFA and 22 schools, emboldened by Kollapen J’s judgment, applied to the high court to secure government compliance with its duty to provide textbooks under section 29(1)(a) of the Constitution.²⁶
41. In its court papers, the department admitted that at least 387,040 books remained outstanding. They attributed the delay in delivery to two factors: first, that schools had not timeously reported that they suffered shortages in January 2014 and second, that budgetary constraints meant that not all the required textbooks could be ordered.
42. This invited a multi-pronged response from the applicants. For present purposes, suffice it to say that the learned Justice Tuchten, affirmed Kollapen J’s interpretation of the content and nature of the right to a basic education. In his order he held—

“1. It is declared that the content of the right to basic education in s 29(1)(a) of the Constitution includes:

1.1. the right of every learner at a public school as contemplated in the

pages 164 – 193; annexure “MS27” to founding affidavit, pages 205 – 232; annexure “MS29” to founding affidavit, pages 237 – 268, annexure “MS34” to founding affidavit, pages 299 – 337.

²⁵ Annexure “MS12” to founding affidavit, page 85, annexure “MS17” to founding affidavit, pages 106 – 108; annexure “MS22” to founding affidavit, pages 160 – 162, annexure “MS25” to founding affidavit, pages 194 – 199; annexure “MS30” to founding affidavit, pages 269 – 275.

²⁶ The applicants also joined the SAHRC in its capacity as the monitor of enforcement of socio-economic rights in SA, and because they had a direct interest, having held a public inquiry into textbooks delivery after the first textbooks case.

Schools Act, 84 of 1996, in Limpopo to be provided with every textbook prescribed for that learner's grade;

1.2. the right of every such learner to be provided with every such textbook before the teaching of the curriculum for which such textbook is prescribed is due to commence.

43. This order is now the subject of appeal on the grounds that:

43.1. The judgment and order requires a standard of perfection. The failure to deliver a single textbook will then be a violation of a child's right to a basic education.

43.2. Perfection is not a standard for the provision of socio economic rights. In addition the judgment sets a minimum core obligation, which has already been rejected by the Constitutional Court.²⁷

43.3. The department's own policies and targets are not subject to judicial enforcement. Further that their policy speaks of access to a textbook for each subject not that a textbook for each learner in each subject must be delivered.

43.4. The test is whether reasonable measures have been taken to realise the rights of children to a basic education.

*matter is pending, so I will be constrained in setting out the intricacies of the dispute.

44. But at the heart of any case concerning the substance of the right to a basic education is the question of how the variant formulation affects the determination of the content of the right, the duties that are imposed on the state as primary duty-bearer, and the appropriateness of limitations of the right. It is to these matters of principle that I now turn.

Immediate vs progressive realization

²⁷ Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) at para 161.

45. As a matter of pure taxonomy, section 29 stands apart from sections 26 and 27 of the Constitution. The drafters of the Constitution saw fit to distinguish the right to basic education from further education, which is burdened by the traditional qualifiers. I have referred to the Juma Masjid. The difference was also noted by Cameron J in *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC):

. . . under the Bill of Rights, everyone has the right to a basic education. The right is given in unqualified terms and, in contrast to other socio-economic rights in the Bill of Rights, is not subject to progressive realisation.

46. In Juma Masjid, the Court was of the view that this entails, at a minimum, access to school:

access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right. (emphasis added) para 43

47. In SA, we have come a long way to making this a reality. According to the National Planning Commission we have reached near universal coverage.²⁸ But at the same time as we welcome the success in ensuring access to schools, we must ask the question whether a school without sufficient teachers, books or even toilets amounts to a basic education. But let me stick to textbooks. The centrality of learning material, including textbooks, has been accepted by the government (through the Schools Act, section 5A (2)(c), and policy documents). In these circumstances the court is informed by what the government itself has determined

²⁸ NPC <http://www.npconline.co.za/pebble.asp?relid=132> Although the overall percentage belies the high attrition that occurs at Grade 10.

to be an integral component of the right to a basic education. Indeed, as Kollapen J expressed, it is hardly controversial. In considering the content of the right, Kollapen J held that –

the provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of text books. [at para 25]

48. Given that the right may be claimed by ‘everyone’, it must also mean that where a learner does not have access to a textbook, that that learner does not enjoy a basic education. In this sense, then, the right to a basic education is no different from what are traditionally referred to as ‘civil and political’ rights. For example, an indispensable component, or *necessary condition* of the right to vote is that ballot papers must be made available to all voters. It is not subject to progressive realisation. Without ballot papers, the right to vote would be an empty right, as the right to a basic education would be without textbooks. Moreover, a learner who does have adequate learning materials in the year of study will be disadvantaged in the successive year [hence the relief sought for a ‘catch-up’ plan]. In the context of basic education the duty takes on a further dimension because, in public schools, the state is the custodian of the best interests of the learners.

49. The foundational nature of the right to a basic education, and its inextricable link with the right to equality and the achievement of social justice (as borne out by the stats presented above) also calls for a special burden on the state. In the case of a country as unequal as SA’s, and in a province such as Limpopo that bears the brunt of the inequality, the burden on the state falls heavily indeed. Learners in Limpopo are particularly vulnerable because the province is largely rural, has poor infrastructure and high levels of unemployment and poverty. The schools that form

part of this case are all 'no-fee' schools. The learners come from poor communities that are wholly dependent on the state for the provision of basic education.

50. What does this heavy burden mean? In my view it requires more than the reasonableness review standard developed by the Constitutional Court in relation to the qualified socio-economic rights. It requires instead a more exacting responsibility from those entrusted to fulfill the right. It requires the relevant authorities to do everything reasonably possible to realize the right.

Budget

51. This means that the state has to budget for textbooks. It must budget for textbooks for *every* learner. It must do so as both a constitutional duty and a statutory one. Even in respect of those other constitutional rights which are expressly linked to available resources, the Court has made clear that a failure to budget sufficient funds is not a valid constitutional defence:

52. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd) and Another*, the Constitutional Court held that:²⁹

This Court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the city to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfillment of its obligations.

²⁹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty (Ltd) and Another* 2012 (2) SA 104 (CC) paragraph 74.

53. Section 34(1) of the Schools Act stipulates that ‘the State must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision.’

54. While the courts have been understandably hesitant to make mention of budgets, it should not shy away from demanding that, at the very least, learners in LP should receive a proper budget for textbooks in the same way as Gauteng does. The very fact that LP is under national administration requires that extraordinary measures are taken to ensure that learners in LP are not unfairly disadvantaged compared to their peers in Gauteng. Or for that matter, so that they are not unfairly disadvantaged as compared with those public schools with a wealthier parent profile who contribute financially to ‘top-up’ the public funding. It is for this reason that the applicants deliberately included section 9 of the Constitution to the matrix of rights that are implicated in the case. Justice Kollapen made a finding that the failure to deliver textbooks was not only a violation of the right to a basic education, but also of the right to equality.

55. Where the budget for textbooks has been allocated, but the resources have been diverted through corruption, incompetence or poor planning (see Chisholm piece) – it is not the learners who should be saddled with the consequences. Nor can it mean that the vagaries of expenditure and the bureaucracy entails a corresponding diminution of the right. Instead these factors would have relevance for the remedy in such circumstances.

Accountability

56. The value of accountability is infused throughout the Constitution – not only in the bill of rights. Section 195, for example, places an obligation on the public service in the following manner:

*A high standard of professional ethics must be promoted and maintained.
Efficient, economic and effective use of resources must be promoted.
Public administration must be development-oriented.
Services must be provided impartially, fairly, equitably and without bias.
People's needs must be responded to, and the public must be encouraged to participate in policy-making.
Public administration must be accountable.
Transparency must be fostered by providing the public with timely, accessible and accurate information.
Good human-resource management and career-development practices, to maximize human potential, must be cultivated.
Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.³⁰*

57. Accountability is required at the budgeting and planning stages of providing for an equitable education system.
58. Too often, as with the textbooks case, accountability is wrung out of the state through litigation. With textbooks, it required more than one court order to ensure enforcement. And it continues to plague the education system in LP.
59. A more exacting accountability is required of the respondents than to simply provide a reasonable plan to the court as to how they intend remedying the violation. The respondents must make public what they have done now, including what budget is being allocated, to ensure that all the necessary books will be delivered by the first day of the school year in 2015, and every year after that.
60. The current position of the government – that they are not under a duty to ensure that every learner receives all prescribed textbooks at the commencement of the

³⁰ See also *President of the RSA v SA Rugby Football Union 2000 (1) SA 1 (CC)* at para 133.

school year – cannot meet that exacting standard; a standard that is immediate and not progressive.