

## To Sit and Learn: Furniture shortages and the struggle to see the right to education realised in South Africa's Eastern Cape

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### **The Right to Basic Education and the Current Situation in the Eastern Cape**

Twenty years since the establishment of constitutional democracy in South Africa there is still a long way to go in ensuring that the constitutional right to basic education in the country is realised. Schools in the Eastern Cape are some of the worst in the country, with hundreds of schools lacking the basic infrastructure needed to ensure that learners have access to a quality education, as is their legal entitlement. The Constitutional Court itself has acknowledged that '[t]he inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation, even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.'<sup>1</sup> For South Africa's children, the end of apartheid meant the end of codified raced-based disparities in education funding. However, twenty years into South Africa's constitutional democracy, the legacy of apartheid is tragically still clearly visible in many classrooms across the Eastern Cape.

Under section 29 of the Constitution, '[e]veryone has the right to a basic education...'. This right is unique amongst the other socioeconomic rights enshrined in the Constitution in that it is an immediately realisable, unqualified right.<sup>2</sup> The right of children to receive an education is not limited by

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<sup>1</sup> *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC), para 42.

<sup>2</sup> *Governing Body of the Juma Masjid Primary School and Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC); *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

the State's available resources nor is it satisfied through the implementation of reasonable legislative measures in order for the right to be progressively realised.<sup>3</sup>

The Legal Resources Centre believes, and the courts have confirmed, that desks and chairs are a crucial aspect of the realisation of the right to education. Currently, there are thousands of learners in the Eastern Cape who are required to attend schools lacking desks and chairs. The absence of adequate furniture constitutes a significant impediment to effective learning for such children. Schools affected by the shortage of furniture include primary schools, senior primary schools, junior secondary schools, and high schools. In these schools, the conditions of learning are deplorable. Whilst attempting to learn their lessons, these children either sit on cold, mud floors or share with their friends. These children are currently being deprived of their right to a basic education.

### **Litigating the Right to Education – Desks and Chairs for Learners**

The Legal Resources Centre has used a series of litigation to ensure the availability of desks and chairs for learners in the Eastern Cape. This litigation strategy has culminated in a series of orders, including a recent landmark High Court judgment in *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

In August 2012, the Legal Resources Centre on behalf of the Centre for Child Law and three affected public schools, filed an application in the High Court seeking an order directing the Eastern Cape Department of Education ('ECDOE') to undertake an accurate and comprehensive audit of all school furniture needs in the province, and deliver the required furniture by 30 June 2013.

On 29 November 2012, an order to this effect was granted by the High Court, on agreement between the parties. The ECDOE agreed, inter alia:

1. to ensure that every learner at the applicant schools has his/her own reading and writing space  
before the start of the 2013 school year;

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<sup>3</sup> Such rights, which are subjective to such progressive realisation, include the right to have access to health care services, sufficient food and water and social security under section 27 of the Constitution.

2. to conduct a comprehensive audit of all public schools in the Eastern Cape before 28 February 2013 and to issue a plan detailing when each learner at the schools will have a desk and chair;
3. to inform schools that they require furniture in accordance with the audit before 30 April 2013 and identify what furniture they will receive and when; and
4. to meet the furniture needs of all schools listed in the audit by 30 June 2013.

### **Non-Compliance with Court Orders**

Despite the 29 November 2012 order being made by agreement, there was substantial non-compliance with its terms on the part of the ECDOE. In addition to only a fraction of the required furniture being delivered to schools, there were significant concerns regarding the accuracy of the furniture audit. The audit omitted some schools entirely and there was a failure to verify the data from schools that were included. Data similarities across multiple schools resulted in strong suspicions of falsification.

On 23 August 2013 the Legal Resources Centre filed an urgent application to have the ECDOE declared in breach of the 29 November 2012 court order. Despite being required to deliver all furniture to the schools by 30 June 2013, at this date the majority of schools had not received their required furniture. Most schools were not even informed of the number of desks and chairs they would receive or when they would be receiving them. On the ECDOE's estimate (based on the questionable and seemingly understated data), the cost of providing the required furniture to schools in the province was approximately R360 million. However, in its 2013/14 budget the ECDOE allocated less than 10 per cent of that amount to procuring the furniture. Discussing the failure to budget and the ECDOE's ongoing failure to comply with various orders, the High Court recently stated:

'...the respondents have been well aware for a considerable time that proactive steps need to be taken to address this shortage and to fulfil the right to basic education as required by sections 7 and 29 of the Constitution, in these circumstances it is not good enough to state that inadequate funds have been budgeted to meet the needs and that the respondents therefore cannot be placed on terms to deliver the identified needs of schools within a fixed period of time. Nor is it good enough to state that the full extent of the needs is unknown...

... Learners in this province are entitled as of right to have immediate access to basic education. They are also entitled as of right to be treated equally and with dignity. The lack of adequate age and grade appropriate furniture in public schools, particularly public schools located in deep rural and impoverished areas, undermines the right to basic education and the persistent failure to deliver such age and grade appropriate furniture to public schools constitutes an ongoing violation of the right to basic education.'<sup>4</sup>

The August 2013 application also saw a further four schools added as applicants. These schools had been entirely left out of the ECDOE audit and were in desperate need of furniture. The application resulted in a further order by agreement, which provided that the ECDOE would, inter alia:

1. verify the furniture needs recorded in the original audit by appointing the Independent Development Trust to receive and record reports from any interested persons of inaccuracies and/or omissions in the audit on or before 15 November 2013; and
2. ensure the schools were visited to verify their furniture needs, and that the audit report would be completed by 17 December 2013.

The ECDOE's non-compliance with the court order, despite its stated agreement to the terms, reflects an ongoing problem experienced by the Legal Resources Centre and others in the Eastern Cape and South Africa generally. Thus, the approach of the Legal Resources Centre is now to frame any orders

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<sup>4</sup> *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM), para 35,36.

sought in a way that anticipates non-compliance, with as many enforcement mechanisms as possible built in to the order.

### **The Right to Education as Immediately Realisable**

The August 2013 application saw the eight applicant schools receive their required furniture. However, by early 2014 conditions at the majority of schools had hardly improved since the initial litigation commenced in 2012. With thousands of children still sharing desks or sitting on the floor, and the ECDOE in continued breach of court orders, a third round of litigation commenced.

Judgment in *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM) was handed down in February 2014. The judgment, which was scathing of the lack of action taken by the ECDOE, was important in developing the jurisprudence and substantive content to the constitutional right to a basic education. In this matter the court has confirmed that:

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

This has important implications for determining whether the state is in compliance with its constitutional obligations in respect of the right to basic education. In the first instance the nature of the right requires that the state take all reasonable measures to realise the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to education be provided.'<sup>5</sup>

It is now clear that the immediately realisable right to education necessitates a clear timetable for the provision of relief. In this latest case, it was ordered that the ECDOE provide all the required school

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<sup>5</sup> *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM), para 15, 17.

with furniture by 31 May 2013. If they were unable to comply with this deadline, the ECDOE would be required to make an application to the court setting out the steps they had taken to conduct the audit and provide the furniture, and full reasons for their non-compliance.

### **The Future of Furniture**

As at the date of writing, the furniture has not been delivered to all public schools in the Eastern Cape. As had been anticipated, at the end of May 2014 the ECDOE sought an extension of a further four months to provide the furniture. One of the primary reasons for this delay has been repeated, irregular procurement processes, which resulted in the suspension of the Superintendent General of the ECDOE. The assumption of procurement functions by the National Treasury meant that the ECDOE was no longer able to purchase furniture directly. Furniture orders have been left sitting in warehouses, whilst children continue to sit on the floor.

Distribution of the desperately needed furniture has now commenced, with the ECDOE anticipating that delivery of all furniture will be completed by the end of second term in 2015. They are asking the court to extend the deadline to this date.

Whilst there are now fewer learners without desks and chairs, this series of litigation highlights the need for ongoing efforts to implement court orders. It also exemplifies the stark contrast between the constitutional rights enshrined in the Constitution and the reality for many learners in the Eastern Cape.