DRAFT

Mobilising the right to a basic education in South Africa:

What has the law achieved so far?

Yana van Leeve

Key words: School Governing Body (SGB), Head of Department (HOD), Member of the Executive Council (MEC), Department of Basic Education (DBE), learners are the term for pupils and students, I used these terms interchangeably.

Introduction

The South African education system is faced with a myriad of intractable problems. Overcoming these is essential if the Constitutional goal of *"establishing a society based on democratic values, social justice and fundamental human rights"* is to be advanced.[1] A sound education system is central to the development of the capabilities of individuals and for the inclusive advancement of society as a whole. Conversely, a failing education system stunts the development of human personality and the individual's sense of dignity. It weakens democratic participation and the possibility for equitable social economic transformation.[2]

Education is the primary vehicle by which economically disadvantaged and marginalised people can lift themselves out of poverty and participate meaningfully in society.[3] Yet, today in South Africa, millions of students and teachers are doomed to education in under resourced; unhealthy, unsafe environments which deprive students of their right to quality and equal education. This is undoubtedly the consequence of a fragmented education system based on racial segregation in which the resources of the State were directed towards

[1] Constitution of the Republic of South Africa Act of 1996, Premable.
[2] E L Glaeser (2007) ' Why does democracy need education?' J.EconGrowth 12: 77-99 [Available Online : http://scholar.harvard.edu/shleifer/files/democracy_final_jeg.pdf] Accessed : 5 November 2014.
[3] Yoliswa Dwane, Founding Affidavit, Equal *Education & Others v Minister of Basic Education & Others* 81/2012 (ECB), para 34.

providing quality education only for the white minority. The legacy of apartheid on education undoubtedly left the post-1994 democratic government with a deeply entrenched crisis to resolve.[4]

Perhaps surprisingly, during this period, South African courts have had few opportunities to adjudicate upon the constitutionally enshrined right to a basic education. This is a fascinating observation in light of the rich socio economic rights jurisprudence generated by the Constitutional Court in cases dealing with the rights to housing, health care and water, among others, in cases such as *Grootboom*[5], *Treatment Action Campaign*[6], *Mazibuko*[7], *Joe Slovo*[8] *and Bluemoonlight Properties*.[9] All the while, a broad-based social movement directed towards advancing quality and equality in South African education has been growing since 2008, alongside which an increasing number of learners, school governing bodies, and civil society organisations are resorting to the courts to facilitate school reform. Few attempts of the resulting cases have yielded judgments, but some of these efforts have enabled important pronouncements on the nature of the right to a basic education, particularly in relation to the physical resources required to realise access to the right. In cases that have not been heard, significant out of court settlement agreements have been reached.

This paper provides a review of selected education related cases that have been instituted since 2008. Beginning with an examination of the historical lens through which the constitutional right to a basic education has been interpreted ('the right to redress'), second the paper provides a brief overview of the cases that have been instituted ('litigating the right

[4] *Id*
[5] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19
[6] *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) [2002] ZACC 16; *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC)
[7] *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28.
[8] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16.
[9] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33

to basic education'), organised into two themes. The first theme looks at the implementation of court orders (and settlement agreements) directing the State to take positive measures to improve school management as a requisite of quality education, deliver textbooks, furniture and infrastructure; the second assesses the balance between the obligation of *provincial* education departments to provide education to all students and the micro needs of *individual schools*. In examining the litigation, particular analytical focus will be applied to how the courts respond to weaknesses in institutional capacity and the role of public participation in holding the State accountable.

An organising principle

Literature emanating from South Africa and the United States alike overwhelmingly regards the law as an effective tool for social change when employed together with, or complimentary to, social mobilisation and movement building.[10] Through social mobilisation, rights claimants are able to breathe life and detail into the normative claims facilitated by the Constitution. Thus the characterisation of cases in the context of the daily experience of learners, teachers and parents can yield significant bargaining power in the moral and political battle that takes place outside of the court, in the media and on the streets.[11] In this way, the legal and concomitant extra curiae process opens up space for *dialogue* between the State (as a responding litigant) and rights claimants. This dialogue occurs either through compelling an intransigent State to respond to demands brought to the 'negotiating table' or

[10] Scott L. Cummings & Deborah L Rhode, 'Public Interest Litigation: Insights from Theory and Practice' *Fordham Urban.* 603, 604 (2009); Gilbert Marcus & Steven Budlender, 'A strategic evaluation of public interest litigation in South Africa' Report produced for Atlantic Philanthropies (2008); Jackie Dugard and Malcolm Langford, 'Art or Science, Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism', *South African Journal on Human Rights* Vol. 27, pp. 39-64 (2011)

[11] For analysis of the intersection between law and politics in the *TAC PMTCT* case, see Mark Heywood, 'Preventing Mother-to-Child HIV Transmission in South Africa; Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health'*South African Journal On Human Rights* Vol. 19 No. 3 (2003) 278 – 315. See also "An overview and history of the Equal Education Norms and Standards Campaign" [Available Online: http://www.equaleducation.org.za/campaigns/minimum-norms-and-standards] Accessed 29 October 2014.

where the State is already at the table, in which case a dialogue represents a fundamental shift in the traditional top down form of paternalistic governance through shifting the power dynamic of the all-powerful state and the arguably less powerful governed. Viewed in this way, the Courts could be conceived of as an equalising mechanism through which the State cannot dictate the content and form of negotiation and through which litigation itself can act as a loudhailer or boombox for the demands of rights claimants. The characterisation of the courts in this way is consistent with remarks by Justice Albie Sachs in *Port Elizabeth Municipality*[12], where it was remarked that:

> *The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make.*[13]

This dialogue also ensures that the State is obliged to listen directly to those its decisions affect. Here litigation serves to turn up the volume button for citizens who could otherwise be feeling disillusioned and muted. In the context of addressing systemic problems, viewing the legal process as a form of dialogue can have the effect of strengthening citizens' substantive participation in democratic life by calling upon the State to provide explanations for the persistence of unacceptable conditions and to demand effective responses.[14]

[12] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7.
[13] Id, para 36.
[14] For a helpful theoretical analysis of this principal, see S Liebenberg's characterisation of deliberative democracy in "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 7

Directed to advance reform, social mobilisation in public interest litigation recognises the political nature through which rights claimants seek shifts in policy or budgetary allocations emanating from decisions of elected political leaders.[15] Moreover, public participation, which of necessity ought to include rights claimants actively participating in the legal proceedings, is an element that dilutes the counter majoritarian arguments that seek to undermine the legitimacy of courts' occupied by unelected judges, to review the decisions of elected leaders.[16] However, this is only possible when lawyers understand their role as the facilitator of a claim that has been formulated and birthed by the movement (or individual rights claimants). It is only when rights claimants are the drivers of the litigation, and play an active role in shaping the content and strategies of cases without *total* deference to the qualified practitioner, that a meaningful outcome, reflecting the demands of rights claimants are effectively sustained.

The right to redress

Prior to 2008, there had not been any major cases in which the courts pronounced on the nature and scope of the right to a basic education provided for in section 29 of the Constitution. This was acknowledged by Deputy Chief Justice Moseneke in 2007 when he expressed *"…surprise that we haven't had one case on the right of access to education in this [constitutional] court in 13 years … nobody has come to me and said, "my son is studying*

[15] See S Liebenberg's characterisation of deliberative democracy in "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 African Human Rights Law Journal 7

[16] M Du Plessis 'The legitimacy of judicial review in South Africa's new constitutional dispensation : insights from the Canadian experience' *Comparative and International Law Journal of Southern Africa*, v33 n2 (Jul 2000): 227-241; Moseneke DCJ, 'Constitutional balancing act' *Mail & Guardian* [Available Online: http://mg.co.za/article/2010-02-01-constitutional-balancing-act] Accessed 5 November 2014; Devenish G, 'Judges v The Masses' *Business Day* [Available Online : http://www.bdlive.co.za/articles/2010/03/30/george-devenish-judges-vs-the-masses] Accessed 5 November 2014.

under a tree, there is no chalk, there's no black board, the teachers don't come to school every day…".[17]

Recognising the inadequate conditions in thousands of South Africa's schools and the nature of the right to education as instrumental to individual and social progress, this comment by the DCJ is indicative of a Constitutional Court eagerly waiting on the opportunity to play a part in giving effect to this right.

This is evidenced by the strong sentiments that have been expressed in the few education, cases where the Constitutional Court has been asked for an opinion, including *Hoerskool Ermelo*, where education was recognised as "*the engine of any society. And therefore, an unequal access to education entrenches historical inequity as it perpetuates socio-economic disadvantage*".[18] Thus the transformative nature of the right to a basic education is characterised as a function of human and social development which has been distorted through years of racial oppression:

Per Deputy Chief Justice Moseneke:[19]

> *Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequality are still with us.*

[17] Barron, Chris 'From the courtroom to campus, this is a man in his element', *Sunday Times* (1 April 2007)
[18] *Head of Department: Mpumalanga Department of Education & Another v Hoerskool Ermelo & Two Others* [2009] ZACC 32, para 2.
[1919] *Head of Department: Mpumalanga Department of Education & Another v Hoerskool Ermelo & Two Others* [2009] ZACC 32

Per Justice Nkabinde:[20]

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

Through this historical lens, the Constitutional Court has emphatically affirmed the unqualified nature of the right to basic education as "immediately realisable" and not subject to the progressive realisation of the right within the State's available resources.[21] This exception signals its significance in the pursuit of social justice and equality but similarly poses a challenge to public interest lawyers and the State alike because the nature of the obligation is not defined (or limited) as it is in other socio-economic rights. It also reflects a paradox in the construction of education-related cases, which by their nature cannot be magically realised immediately, but which are so critical to advancing equality, human dignity and freedom that it requires the maximisation of resources.

Litigating the right to basic education

Since 2008, approximately[22] thirty seven applications have been instituted to vindicate the right to basic education. The overwhelming majority have been against the State[23], which

[20] *Governing Body of Juma Musjid Primary School and Others v Essay N.O and Others* 2011 (8) BCLR 761 (CC) para 43.

[21] See *Governing Body of Juma Musjid Primary School and Others v Essay N.O and Others* 2011 (8) BCLR 761 (CC) para 37and *Madzodzo & Seven Others v The Minister of Basic Education & Four Others* 2144/2012 [Reportable] para 15

[22] The scope of this paper has sought to include a discussion of cases that have been settled out of court, as well as those that have yielded a judgement. To locate the papers of the former, a thorough search was

bears the primary responsibility of providing education to 12.5 million students in 25 826 schools across South Africa. From the High Courts, seven substantive judgments have interpreted the nature of the State's obligations in relation to:

- access to textbooks[24] and furniture,[25],
- the remuneration of temporary teachers in the Eastern Cape Province,[26]
- the provision of hostels in the North West Province[27] and
- access to funding from the Western Cape Education Department for schools providing education for students with severe cognitive disabilities.[28]

Five cases have reached the Constitutional Court in the past seven years and have dealt with an array of issues including discrimination on listed grounds in section 9 of the Constitution[29], security of tenure[30], the State's obligation to fulfil an undertaking to provide independent schools with subsidies[31] and, most dominantly, the relationship of power and responsibility between school governing bodies and provincial education departments.[32]

---

conducted by a conscientious intern. As far as we have been able to ascertain, we have taken note of vast majority of settlements, if not all.

[23]Cases litigated against private institutions have included eviction applications against private landowners; however the extent of privatisation in and of education is only beginning to be explored in the South African context.

[24] *Section 27 and Others v Minister of Education and Another* [2012] 3 All SA 579 (GNP); *Basic Education For All and Others v Minister of Basic Education and Others*.

[25] *Madzodzo and Others v Minister of Basic Education and Others* 2014 (3) SA 441 (ECM).

[26] *Centre for Child Law and Others v Minister of Basic Education and Other 2013* (3) SA 183 (ECG).

[27] *Fedsas v MEC of Department of Education And Training, N.W. Province and Another* (1133/13) [2014] ZANWHC 17

[28] *Western Cape Forum for Intellectual Disability (WCFID) v Government of the Republic of South Africa and another* 2011 (5) SA 87 (WCC).

[29] *HOD Department of Education, Free State v Harmony High School & Another; Welkom High School and Another v Head, Department of Education, Freestate Province and Another* [2013] (CC).

[30] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC).

[31] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC)

[32] *Rivonia Primary case: MEC for Education in Gauteng Province & Another v Governing Body of Rivonia Primary School & Others 2013 (CC), HOD Department of Education, Free State v Harmony High School & Another;*

Formidable settlement agreements have been reached in relation to school infrastructure[33], unpaid teacher salaries[34], transport for learners in the North West Province[35], the State's obligations towards a severely underperforming school[36] , individual school admissions[37] and the rights of refugee children to basic education.[38]

Litigation compelling the provision of physical resources required for access to education has not been about whether students (and teachers) are entitled to furniture, textbooks, stationery, safe sanitation and infrastructure, but the manner and the extent to which this is to be achieved.[39] While the litigation reveals a State that admits to serious inadequacies in relation to systems management and leadership, it is often unwilling to set specific plans, deadlines and targets to *"achieve the ambitious accomplishment of reversing the situation they have inherited"*.[40] This lack of detail in planning for the actual realisation of the right may not even meet the standard of the reasonableness review adopted by the Constitutional Court for adjudicating fulfilment of positive obligations to realise qualified socio-economic rights and could thus be subject to challenge even at this level.

Welkom High School and Another v Head, Department of Education, Freestate Province and Another [2013] (CC), *Head of Mpumalanga Department of Education and Other v Hoerskool Ermelo and Others 2010* (2) SA 415 (CC).

[33] *Centre of Child Law and Others v Government of Eastern Cape Province and Others* 2010 ECB, *Equal Education & Others v Minister of Basic Education & Others* 2012 (ECB)

[34] *Linkside and Others v Minister of Basic Education and Others 2*014 (ECG).

[35] *Adam Leogale & 36 Others v MEC for Education, North West High Court*, Mafikeng, case no : 499/11, unreported

[36] *Manyokole & Others v District Director: Maluti District Eastern Cape Department of Basic Education & Others* case No 603/2012 (ECB)

[37] *Dean Carelse v MEC, Western Cape Education Department & Others* [WCHC] 21602/2012; *Michelle Saffer v HOD, Western Cape Education Department & Five Others* (WCHC) 18775/13

[38] *BM and 7 Others v The Minister of Home Affairs & 5 Others* Case No, 72342/2012 (GNP)

[39] See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), para 20 "Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case."

[40] Answering Affidavit, Head of the Department of Basic Education, *Eastern Cape, Centre for Child Law & Five Others v The Minister of Basic Education & Three Others Case No*. 1749/2012

The critiques of the judicial review model introduced by the constitutional framework to uphold the principle of the rule of law often cite the 'counter majoritarian dilemma' as a basis to give deference to elected political leaders who are supposed to be part of an accountable legislature.[41] The risk is often explained as that of courts acting in a manner which is contrary to the so called homogenous 'will of the people', ignoring the fact that even the 'will of the people' is subject to scrutiny in a constitutional democracy.[42] More pertinent and incisive critiques of judicial review focus on the extent to which the courts are *actually* able to increase the capacity of the State and whether they are well positioned to obtain and properly interrogate evidence that will provide just and equitable relief to rights claimants.

If the period under review (2008 – present) can be a considered a 'first wave' of education litigation in South Africa (upon which we continue to surf), it is worthwhile to pause and take stock of the nature of the relief obtained. I have placed these into two broad themes, as *(a)* physical resources required for access to a basic education, and *(b)* power relations between school governing bodies and the State. While a complete exposition of each court case is not possible within the confines of this paper, key judgments and settlement agreements have been selected on the basis of the systemic issue the relief sought to address.

(a) Physical resources required for access to a basic education

State litigants have vividly described the challenges of institutional capacity by education departments. A senior official in the national Department of Basic Education described the breadth of the break down in the Eastern Cape Province, one of the poorest and most rural provinces with some of the most broken education systems in the country, as "*a failure of the [department] to discharge its obligations effectively in respect of policy compliance, effective*

[41] *Supra*, n 9, 299.
[42] *S v Makwanyane and Another* [1995] ZACC 3, para 87 – 89.

and efficient budgeting, planning and expenditure, and effective support of the pedagogic and administrative process in schools." These challenges were further elaborated and explained as "*effective and credible allocation of educators to schools, scholar transport, provision of learner and teacher support materials, implementation of the schools nutrition programme and the eradication of mud and unsafe schools.*"[43]

The conditions described above provide some of the contours of the arguably arid terrain upon which judgments and settlement agreements are implemented and expected to bear fruit. The legal settlements described below show that some capacity is being produced through the court process particularly in respect of the allocation of budgets, as was the case in litigation to replace inadequate schools in the Eastern Cape. Out of court settlements have also spurred on the prioritisation by government of certain education essentials (where these formed the subject matter of the settlement), as was the case in access to textbooks, furniture and school governance. However, these positive spin offs cannot be overstated as successful implementation remains. The limitations of litigation is evidenced by litigants having to return, sometimes more than once, to court on the basis of noncompliance or to refine the relief sought in light of additional information during the course of (non)compliance.

Mud Schools

The ground breaking 2010 Settlement Agreement reached between the Centre for Child Law and the Department of Basic Education in the *Mud Schools* case[44] prompted the creation of the Accelerated School Infrastructure Delivery Initiative (ASIDI) intended to ensure the eradication of inappropriate schools by replacing 496 mud schools and installing basic services like water, sanitation and electricity. R8.2 Billion was allocated to the grant by the

[43] Director General Soobrayan, Answering Affidavit, *Makaziwe Maqhelana obo Parents of Learners at Samson Senior Primary & Five Others v The Government of the Republic of South Africa & Four Others* 007/2014 (ECG).
[44] *The Centre for Child Law & Seven Others v The Government of the Eastern Cape & Two Others* (ECG)

national sphere of government in view of the incapacity of provincial departments of education to effectively plan and prioritise schools that have languished unattended since their initial construction, often with the limited resources of rural communities, many decades ago. However, significant under expenditure of this grant by the national Department of Basic Education[45] (the DBE) reveals a lack of capacity to build according to target resulting in a reduction of the ASIDI grant from R8.2 Billion in 2010 to R1.95 Billion in the 2014/2015 financial year. Practically, this means that a mere 49 schools that were earmarked for completion in the 2011/12 financial year were completed by March 2014. The DBE's reasons for delay included poor weather conditions, difficult terrain, procurement problems and non performing contractors.[46] The failure to spend according to target and the consequent reduction of the grant by the National Treasury risks a self-filling prophesy that the DBE is unable to comply with the grant obligations because it lacks the capacity to do so, and is thus unable to effectively plan around the anticipated difficulties described above. While there has been a failure to meet the targets of the grant, ASIDI may have come a lot later had the need for its existence not been propelled forward by the litigation. Thus the conditions could have been a lot worse than what they are today. At the very least one can observe a sense of prioritisation of school infrastructure on the DBE agenda emanating from the *Mud school's* case.

Weaknesses in planning and implementation evident in poor and conflicting data collection and the woefully slow delivery described above resulted in the Centre for Child Law returning to court for refined relief demanding a comprehensive plan setting out what every school should receive in terms of infrastructure improvements and a mechanism for those

[45] 89.13% of the ASIDI budget was under spent in the 2011/12 financial year and 58.4% in the 2012/13 financial year.
[46] Department of Basic Education 'The ASIDI Brief: Helping to restore dignity in education' : http://www.education.gov.za/Programmes/ASIDI/tabid/841/Default.aspx

schools that were erroneously omitted from the ASIDI list to motivate for their inclusion into the programme. This matter, commonly referred to as *Mud Schools 2*[47] was settled by agreement in July 2014. The settlement requires the DBE to publish the criteria used to assess all schools' infrastructure needs. The publication of this information in turn means that schools will be able to participate in the provincial department's work of capturing infrastructure deficits and monitoring the implementation of plans. Moreover, if adhered to, the settlement agreement in *Mud Schools 2* will allow for individual schools to be aware of what they can expect to receive and to engage with provincial education departments to try to secure compliance.

Despite the struggle for implementation, the settlement agreements have begun to lay an accountability framework, incorporating public participation as an element that can assist in monitoring compliance. Moreover, the litigation has resulted in commendable, albeit conflicting, reporting from the DBE as to how it is progressing, giving interested parties valuable information that informs their monitoring systems.

Norms and Standards for School Infrastructure

The promulgation of uniform norms and standards for school infrastructure,[48] achieved as a result of a proactive political and legal challenge mounted by the social movement Equal Education, represented by the Legal Resources Centre (LRC), is a victory for public accountability and thousands of rural and township schools. The display of complacency on the part of the State cried out for legally binding standards, together with timeframes, to meet the physical infrastructure needs of all schools across the country; however the discretionary

[47] *Makaziwe Maqhelana obo Parents of Learners at Samson Senior Primary School & Five Others v The Government of the Republic of South Africa & Four Others* Case No 7/2014.
[48] Regulations relating to the uniform minimum norms and standards for public school infrastructure, Government Notice 37081.

language of the law[49] authorising the national Minister to promulgate executive legislation was contested by the State during the course of the legal proceedings. The State contended that the Minister had a prerogative to adopt Regulations and had elected to publish 'guidelines' for school infrastructure instead. Thus, intense public mobilisation through representations to the Legislature, pickets, a march including 20 000 people, coupled with a sophisticated media campaign highlighting the plight of thousands of schools, was undertaken to ensure that it was morally and politically indefensible to refuse the relief sought in *Equal Education*.[50]

The massive political campaign which ran complimentary to the legal strategy exemplifies how progressive outcomes can be achieved when the combination of law and social mobilisation is used effectively. Most significantly, that the State conceded, dramatically days before the matter was due to be heard in court, was a victory for democracy in which political leaders acceded to the demands of thousands of learners, parents and Equal Education who had led a campaign for over three years for a legally binding State plan to fix and replace all unsafe and inappropriate schools.

The legislative process in drafting the Regulations included widespread public participation, most significantly through public hearings, organised by Equal Education across South Africa, to ensure that the views of students and parents themselves were considered in formulating the content of the right in relation to school infrastructure. The Regulations are an enforceable accountability mechanism aimed at resolving the systemic infrastructure problems in the education system but which hinges on civic involvement which would in turn serve to deepen a culture of democratic participation.

---

[49] Section 5A, South African Schools Act 84 of 1996.

[50] *Equal Education & Others v Minister of Basic Education & Others* 81/2012 (ECB); Equal Education ' Overview and history of Norms and Standards for school infrastructure' [Available online: http://www.equaleducation.org.za/campaigns/minimum-norms-and-standards] Accessed 6 November 2014.

Textbooks

The northern Limpopo Province is similar, in its rural nature, to the Eastern Cape Province on the south east coast of South Africa. In 2012 the Province was rocked with the salacious textbook scandal after the Limpopo Provincial Education Department failed to deliver a substantial number of textbooks for the academic year. The Limpopo Department's failure prompted the well-publicised litigation launched by public interest organisation Section27 following reports in the media that the Limpopo Provincial Education Department had failed to deliver textbooks because of an alleged 'unscrupulous' tender.[51] Throughout 2012 and into 2013 the State failed to comply with a judgment and court orders for the delivery of outstanding textbooks, found by the Court to be an essential component of basic education.

Once again, in January 2014, Section27 received reports of schools in Limpopo that had not received their textbooks for the year. The Limpopo Provincial Education Department was immediately contacted with the information of the outstanding books. Initially a constructive correspondence between the State and Section27 ensued until further reports of non-delivery were received and the State contended that it did not consider itself responsible for complete 100% delivery of all textbooks. The defences it raised, as in other cases, pointed to budgetary constraints and poor systems management in the retrieval of books at the end of the academic year.

The latest effort for delivery, described above, prompted further litigation by social movement Basic Education for All, which was established in large part through the efforts of Section27 in consequence of the first round of litigation in 2012. The State's basic contention was that the 39 Applicant schools were not entitled to relief primarily because of a

[51] *Section 27 and Others v Minister of Education and Another* [2012] 3 All SA 579 (GNP); *Basic Education For All and Others v Minister of Basic Education and Others* Case No 23949/14.

lack of funding, which it had requested but was refused by Parliament because of its own poor budgetary planning.

The ire of budgetary constraints raised its head again; however the case highlights two elements of strategic litigation. First, that litigation can propel movement building as was exemplified in the establishment of Basic Education for All, thus it is not always the case that social movements precede litigation. Instead, litigation itself can provide the impetus to galvanise a movement force. Secondly, the successful media campaign conducted by Section27 elevated the issue of textbooks to national concern prompting mass public outcry and a change in government policy in the management of learner and teacher support materials.

School Furniture

Difficulties in implementing orders of the systemic nature described above has also been experienced in relation to the provision of school furniture, held by the Eastern Cape High Court as an essential component of the right to basic education.[52]

In 2012, the Centre for Child Law, through their attorneys, the LRC, secured a Settlement Agreement for the provision of adequate age- and grade-appropriate furniture for three Applicant schools. The systemic relief they sought was for *"a comprehensive audit to assess the furniture needs at all public schools in the Eastern Cape"*.[53] The audit was to detail when delivery of the furniture was to be made at each school.

In August 2013 the Centre for Child Law, together with four School Governing Bodies, launched further proceedings founded upon the State's failure to comply with the terms of the settlement agreement. However, just before the matter was to be heard, the parties reached an

[52] *Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441* (ECM), para 20.
[53] *Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441* (ECM), para 4.

agreement which included the appointment of an independent body to verify the results of the province wide furniture audit which was to include specified dates for delivery of the furniture needs at each audited school.[54] Predictably, the State resisted the imposition of specified dates for delivery of furniture prompting a further round of litigation with yielded a judgment interpreting the immediately realisable nature of the right as "*[requiring] the state to 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 be provided."*[55] [emphasis added].

However, whether the court is able to determine that all reasonable measures are taken is subject to the evidence that is placed before it, thus "*counsel for the respondents were unable to give any indication as to when the [State] would be able to address the admitted furniture shortage… [t]his court is therefore left without guidance from the [State] as to what they consider a reasonable period…."* In the absence of a rebuttal from the State, the court was thus obliged to grant the 90 day time period requested by the Applicants with the proviso that "*[t]o the extent that exigencies of executing so significant a project may give rise to legitimate delays and therefore a legitimate inability to meet that projected time period, it will be appropriate to order that the time period may be extended at the instance of the [State] subject to full disclosure of the steps already taken to meet the deadline…"*[56]

The 90 day deadline was not met by the state and expired on 31 May 2014. This resulted in further litigation and refinement of the relief sought in earlier rounds. Despite three court orders directing the Eastern Cape Department of Education and the national Minister of Basic

[54] This on the basis that the LRC sought the joinder of four further schools on the basis that the schools had been omitted from the audit report made available by the respondents in May 2013.
[55] *Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM)*, para 17
[56] *Ibid*, paras 40 -41.

Education to address the shortages as a matter of urgency, the State has been unable or unwilling to comply with the court orders.

While there remains an on-going struggle for school furniture, the litigation has elevated the prioritisation of school furniture through the intervention of the National Treasury, which again would likely not have happened without the litigation. The difficulties in compliance may be due to the little social mobilisation through public awareness campaigns and the involvement of learners calling for the relief themselves, as was in the case for the Norms and Standards and Textbooks cases. However, constantly returning to court for compliance ought not to be considered a complete failure or weakness in the public interest strategy: it is through returning to court for refined relief that systems of accountability have, in the instance of this particular case, been incrementally established. At the same time, however, the constant returning to court risks a demobilising and desensitising effect on the public and can cause despondency in the ability of the court to provide effective relief. It may, under these circumstances, be appropriate to employ a range of strategies such as drawing in the Legislature through making representations to Parliament, raising public awareness through the media, staging 'sit ins, in the absence of a seat' and other various extra curia pressure points to raise the moral outrage at the conditions of learners in poor rural and township schools.

The examples noted above concern the delivery of physical resources required for a basic education and show how litigation does open spaces for engagement though the public exchange of pleadings explaining government priorities, budgeting and procedures - information not ordinarily or easily available in the public domain. Moreover, orders requiring that the DBE publish detailed plans could have a ripple effect of enabling individual schools, not necessarily directly part of the litigation, to participate in enforcing compliance with court orders. This type of litigation, pursued in relation to *Mud Schools* and *Furniture*

can thus serve as a broader platform for engagement on the realisation of the fundamental right to basic education. The challenge for lawyers, institutional clients and the pool of affected schools usually comprising the Applicants is to work with the larger pool of affected school communities not part of the litigation, often in far flung parts of the country, to generate an understanding of the nature of the entitlement and obligation created through settlement agreements and to find appropriate avenues through which to exert the necessary public pressure. Education, Education and more Education on the right to a basic education and the entitlements arising from litigation is thus key to realising the right.

Using the courts to access information and compel the State to develop detailed plans can generate frameworks for accountability, as achieved for school infrastructure. However, more often than not, litigation yields symbolic victories which are difficult to implement and which ultimately require sustained political pressure to ensure that the demands of the poor to safe school buildings are given effect. This was clearly illustrated in *Equal Education*[57]. The nature of the defences provided by the state relating to budget and institutional incapacity have proved to be inconsistent with the judgements in *Juma Musjid* and the tough stance taken in *Madzodzo* for failing to abide by earlier court decisions and rejecting budgetary constraints as a justification for non-compliance with a fundamental right. In responding to conditions of scarcity, the courts, rights claimants and the State all require innovative and creative remedies which are currently held to ransom by poor management systems highlighted by the cases above and those beyond those discussed in this paper.[58]

(b) Power relations between school governing bodies and provincial education departments

[57] *Equal Education & Others v Minister of Basic Education & Others* 81/2012 (ECB)
[58] Linkside and Others v Minister of Basic Education and Others 2014 (ECG);

The South African Schools Act 84 of 1996 sought to reorganise the education system along two central concepts: democratic governance and equity. The overarching design of public schools involves the cooperation between three partners: the national government, which sets broad norms and standards for all public schools; the provincial education departments, which exercise executive control over public schools; and parents and members of communities, who exercise defined autonomy over the local affairs of the school.[59] This devolved model of school governance was primarily achieved through the establishment of school governing bodies (SGBs) with significant powers and functions, including the ability to set admissions policy, codes of conduct, compulsory fees[60] and the power to hire additional teachers to supplement the number provided for by the State.[61]As will be demonstrated below, broad functions, of which not all are listed here, are often (mis)used as part of opaque excuses which obfuscate progressive challenges to historical and class privilege.

This is most obviously demonstrated in the first case on the issue to reach the Constitutional Court in the period of review. The legal question for consideration was whether the provincial government, acting through the Head of Department (HOD), had the power to lawfully revoke the functioning of an SGB to determine a school's language policy. On the facts, the school's language policy, which it was lawfully permitted to adopt, had committed the school to Afrikaans as its only medium of instruction. However, the consequence of this was to exclude some learners, who in this particular case were exclusively black who wanted to be taught in English.

[59] Ermelo, para 56.
[60] Unless granted an exemption in terms of a school's exemption policy.
[61] In wealthy public schools parents can afford to pay fees to the extent that the school is able to double the amount of teachers provided for by the State and thus reduce class sizes and top up the salary of teachers employed by the State.

While the Constitutional Court confirmed that the HoD did have the power to revoke the functioning of a SGB, it did not have the power to appoint an alternative committee to determine the school's language policy. It found that the HoD's lawful revocation of the functioning of the SGB was contaminated by an incorrect reliance on his power to appoint sufficient persons to perform the functions of a SGB because the latter power relied upon circumstances in which an SGB has ceased to perform the functions allocated to it. Which on the facts of this case, the SGB had not ceased to perform its functions.

To leave the matter there would have resulted in substantial injustice to the interests of the community within which the school is located and the needs of other learners wanting to be taught in English. The Court, having regard to the disempowering legacy of apartheid and the inequality in resources allocated to white and black schools for decades, had to balance the rights of learners to be taught in a language of their choice[62], the need for sufficient spaces in schools for all learners, and the interests of the community. In so doing, the Court concluded that it would be just and equitable to order the SGB to review its language policy in line with the transformative imperatives of the Constitution.

Five years later, in 2013, the Constitutional Court was seized with two cases concerning the power of provincial departments of education in relation to policies adopted by school governing bodies. The first to be dealt with concerned the exclusionary effect of two schools' pregnancy policies on pregnant female learners.[63] In the circumstances the HoD viewed the schools' pregnancy policies to be unconstitutional and instructed the respective principals to ignore the schools' policies and re-admit learners who had been excluded from the school on the basis of pregnancy. Both the High Court and the Supreme Court of Appeal

[62] To the extent that it is fair, practicable and acknowledges historical redress, *Ermelo*, para 61.
[63] *HOD Department of Education, Free State v* ***Harmony*** *High School & Another;* ***Welkom*** *High School and Another v Head, Department of Education, Free State Province and Another* [2013] (CC)

found that the HoD did not have the legal authority to compel a school principal to act in a manner contrary to an adopted policy of the SGB and consequently to act in contravention of such policy.[64]

In examining the respective powers of the SGB and provincial education department, the Court opined that an SGB is best placed to formulate a pregnancy policy for a particular school and that neither the national Minister nor the provincial education department was appropriately situated to adopt pregnancy policies for a particular school.[65] In considering the circumstances in which SGB policies might, in the opinion of the HoD, offend the Constitution and the South African Schools Act, the HoD is obliged to consult with the SGB before exercising his power to withdraw the functions of the SGB to the extent permitted by the South African Schools Act[66] or to approach the courts for appropriate relief.

This finding placed too much of the spotlight on the relationship between SGBs and the State and too little in its examination of the nature of the oversight function and broad perspectives that provincial education departments bring in the governance of all schools in their respective provinces. This would have been an approach consistent with *Ermelo* discussed above. Indeed *Ermelo* stressed the importance of schools not operating as islands but responding to the overall provisioning of education. Arguably, in deferring to the SGB, the Constitutional Court could have placed more emphasis on the substantive issue of female learners' rights to basic education, gender and sex inequalities in society, the disproportionate impact of pregnancy and its consequences on males and females and possibly missed an

[64] *Id*, para 24.
[65] *Id*,para 67 – 70.
[66] Section 22.

opportunity to bring resounding systemic relief to female learners across the country who suffer unfair discrimination on the bases of pregnancy and sex.[67]

Moreover, the Constitutional Court could have invoked its broad power under section 172(1) (b) of the Constitution to grant just and equitable relief, to declare the SGB pregnancy policies unconstitutional. Instead, it referred the policies back to the SGB's for review. This decision possibly dilutes the Constitutional Court's own reasoning that the nature of the right to basic education is immediately realisable and not subject to progressive realisation, implied in the deferent manner in which it chose to deal with *Welkom.*[68] While the Constitutional Court did not reverse the instruction of the HoD to readmit the learners, it could have gone much further to address the policy question before it which would have been consistent with giving 'immediate' effect to the right to basic education in the circumstances of the case.

As in *Ermelo* discussed above in relation to language policies, the Constitutional Court in *Welkom* placed considerable weight on procedural fairness in assessing the conduct of the provincial education department, finding the conduct of the provincial education departments unlawful in both instances because they failed to follow due process, in particular, that the provincial education departments failed to consult with the offending SGBs. While procedural fairness in the exercise of public power is critical in the context of a constitutional democracy, also at stake was the direct and substantial interest of the individual learners most affected by the impugned policies which the HoD is constitutionally obliged to respect.[69] In the context of *Welkom* the offending policies discriminated against learners on the basis of pregnancy and sex to the extent that only female learners, and not their male counter parts,

[67] See by way of example Sisipho Xhaxha 'Pregnant girls must be allowed in class', *GroundUp* [Available Online: http://groundup.org.za/article/pregnant-girls-must-be-allowed-class_2399] Accessed 9 November 2014.
[68] Op cit n59.
[69] Constitution, 7(2).

were excluded from school. However, the Court deferred to the SGB despite finding "*serious concerns regarding the constitutionality of the policies*."[70] The impact of exclusionary pregnancy policies is most palpably explained by learners themselves, a point of view that was absent in the proceedings and recently described as follows:

> *When we see pregnant learners being excluded from class and victimised in schools, it affects our education, especially as young women. We see pregnant learners being denied their rights to education, to dignity and to equality. It is clear; to exclude pregnant girls from school in any way is gender discrimination. It sends the message that it is okay for boys to do whatever they want and take no responsibility, while girls are humiliated and made to feel ashamed. Even worse, only 34% of girls who leave school because of pregnancy ever finish their matric. Our schools need to stop discriminating against pregnant learners and start providing as much support as possible to make sure that teen pregnancy doesn't ruin the lives of pregnant learners.*[71]

While the Constitutional Court found that the conduct of the provincial education department was not authorised by the South African Schools Act and was therefore not lawful, in both instances it exercised its powerful supervisory jurisdiction to review the offending policies and give effect to the underlying relief sought by the provincial education departments.

The last of the two more recent cases to reach the Constitutional Court on this particular issue sought to determine the extent to which the South African Schools Act[72] vests power in the

[70] *Welkom*, para 110.
[71] Equal Education, 'Memorandum on Educational Inequality', 31 October 2014 [Available Online: http://www.equaleducation.org.za/article/2014-10-31-equal-education-memorandum-on-educational-inequality-to-mec-debbie-schafer31-october-1]
[72] 86 of 1996.

government and SGBs to determine the admission and capacity of public schools.[73] As in *Ermelo*, the applicant SGB represented a historically privileged school in a wealthy suburb, with a parent body that was able to provide additional capacity to the school through fees with the purpose of maintaining small class sizes.[74]

The effect of the nature of this inequality is powerfully explained by learners in township schools who recognise that:

> *[p]arents in these [wealthy] areas can afford to pay school fees, while parents in our schools mostly cannot. These funds are used to pay teachers more, to ensure that sanitation and security infrastructure is maintained, to stock libraries, labs and computer centres, and to provide quality sports and cultural programmes for learners at those schools. This means that most of the best teachers end up at these rich schools; there is no plan from the provincial or national education departments to help bring the best teachers to schools in townships and rural areas.*[75]

In this case, the provincial education department similarly ignored the admissions policy of the school and as in *Ermelo* and *Welkom*, the court found that the provincial education department did not act in a procedurally fair manner. However the Court contextualised the policy of the individual school in the context of the overall provision of education and confirmed that the conduct of SGBs is subject to the transformative prescripts of the Constitution and the State's obligation to ensure an equitable access to quality education beyond the remit of individual schools. In other words, the interests of individual schools are measured in light of the constitutional scheme as a whole.

---

[73] *Rivonia*
[74] *Rivonia*
[75] Equal Education, 'Memorandum on Educational Inequality', 31 October 2014 [Available Online: http://www.equaleducation.org.za/article/2014-10-31-equal-education-memorandum-on-educational-inequality-to-mec-debbie-schafer31-october-1]

Each of the cases dealing with the balance between SGBs and provincial education departments discussed above; have involved wealthy, historically privileged schools. Although exercised in an unlawful manner which can never be excused by a State litigant, the *effect* of the decisions (not the decisions themselves) of the HoDs was substantively equitable and arguably constitutional because they sought to remedy the *effect* of an exclusionary policy by an SGB.

However, thousands of rural and township schools do not have the professional and resourced parent bodies to fill their SGBs and supplement the resources of the State, such as those involved in the cases above. For an impoverished, deeply rural school in the Eastern Cape, wholly reliant upon the resources of the State, the relationship between provincial education departments and individual schools has a different slant.[76] In Queens Mercy, a village approximately the size of a three football stadia, is where Moshesh Senior Secondary is found. It is characterised by the most severe case of neglect and underperformance, prompting a group of justly frustrated learners, represented by the Equal Education Law Centre, to approach the courts to compel the provincial and national education departments of education to take urgent steps to improve the quality of teaching and learning at the school.[77]

In November 2013, the case for Moshesh Senior Secondary was settled by agreement which included an extensive order requiring a replacement in the leadership of the school from the principal to the SGB, and the development of subject and school improvement plans to respond to the poor teaching and learning outcomes and conditions. The former was quickly

[76] Victoria John *Mail & Guardian* 'Poorly Performing School Slips through the Cracks' [Available Online: http://mg.co.za/article/2012-07-13-poorly-performing-schools-slip-through-the-cracks] 'In Queens Mercy, pupils pull back from the brink' [Available Online : http://mg.co.za/article/2012-07-13-poorly-performing-schools-slip-through-the-cracks] 'Eastern Cape pupils picket against shoddy school' [Available Online: http://mg.co.za/article/2014-05-01-eastern-cape-pupils-picket-against-shoddy-school] Accessed 9 November 2014.

[77] *Manyokole & Others v District Director: Maluti District Eastern Cape Department of Basic Education & Others* case No 603/2012 (ECB).

resolved; as a new principal and election for a new SGB was held very soon after the court order was granted. However the incumbent SGB, comprised of members who themselves were products of a defunct apartheid education or without any formal education, have received very little training and support from the provincial education department, despite their repeated pleas. There is no clear admissions policy, porous financial controls and a highly politicised form of school governance and administration. As a result of the weak leadership at the centre, teachers often arrive at school late; have refused to teach classes and provided false academic reports to learners. The effect of this at the classroom level is that very little teaching and learning has taken place.

These conditions describe non-compliance of the court order and explain that despite new leadership, social mobilisation on the ground, direct participation of rights claimants and media strategy, the school remains vulnerable to the same difficulties. In the context of the relationship between the SGB and the provincial education department, the lack of equitable support to the school, also shows a failure to fully consider the needs of the surrounding community as was argued by the State litigants in *Ermelo*, *Welkom* and *Rivonia* discussed above, and so inadequately considered in Moshesh Senior Secondary.

Conclusion

This paper has illustrated the extent of non-compliance of court orders and judgments in realising the right to basic education, and characterised this in the context of inequality embedded in South Africa's past and current lack of basic systems to manage available resources.

While the State does not dispute the poor conditions in South Africa's schools, there is a concerning defensive and recalcitrant attitude evident in the litigation. This is a

misunderstanding of the nature of constitutional democracy and a conception of the courts advanced in this paper.

Cases relating to the physical inputs required for access to education have shown that social mobilisation, as was the case for the delivery of textbooks and the promulgation of regulations for norms and standards, but not for the provision of school furniture, often yields better compliance with court orders. The reason for this is likely to be two fold. In the first instance, social mobilisation puts significant additional pressure on decision makers to accede to the demands of rights claimants. Secondly, it enables a greater possibility for monitoring because there is broad public investment in seeing court orders implemented. The cases reviewed also show that litigation, even in the absence of large scale public campaigns, can also lead to revised prioritisation within government, which can also have a mobilising effect on the public.

In respect of the second theme pertaining to the politics within education, the Courts have not been consistent in dealing with the 'separation of powers' between provincial education departments and SGBs. In *Rivonia* and *Ermelo,* the Constitutional Court was clear that the exercise of the SGB's power is subject to the wider interests of the community and the imperatives of the constitution. In *Welkom*, however, the Constitutional Court placed too much emphasis on the domestic needs of schools and not enough on the wider considerations of equality for pregnant women.

The overview of the cases discussed provide an insight into the nature of the challenges that have started to find their way into the priorities of the State, recognising that "*courts do more than simply resolve disputes between parties on the basis of legal norms, but also shape and*

are shaped by broader political discourse."[78] The capacity that has been created has formidable obstacles but through on-going litigation to compel planning and information and indeed legislation, we are some way in building the accountability framework for effectively mobilising the right to basic education and a better education for all.

[78] S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 African Human Rights Law Journal 10