

**The Role of the Courts in the Interpretation and Implementation
of the Right to Basic Education in Section 29(1)(a) of the South
African Constitution**

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ABSTRACT

The right to education in section 29(1)(a) of the Constitution was meant to signal a break between an education system divided along racial lines, and a new democratic education system based on equity, equality, and opportunity for all learners. In reality, the South African education system still remains deeply divided along racial lines, with poor, mostly black learners, being under-resourced by the state, while their richer, mostly white, counterparts are being taught in schools that have access to all the resources necessary to realise the right to basic education. As a result, the right to education in section 29(1)(a) of the Constitution has been heavily debated, and between 2010 and 2022, the South African courts have often been called on to interpret the right. In the process, a rich jurisprudence has developed on the core content of the right to basic education, with findings by the courts that the right includes an entitlement to a number of educational resources. These include access to school infrastructure, learner-teacher support materials, desks and chairs, scholar transport, teaching and non-teaching staff, and nutrition.

This study examines the way South African courts, between 2010 and 2022, have interpreted and implemented the right to basic education to give effect to section 29(1)(a) of the Constitution. While South African courts have historically shied away from interpreting socio-economic rights to contain a minimum core content and have rather opted for a reasonableness approach, the same is not entirely true for section 29(1)(a). As stated above, courts have been willing to find that the right entails a minimum basket of goods and services without which the right cannot be realised. By examining some of the most important education rights cases during this period, the study proposes that there are five factors that have guided the courts' interpretation of the right and has assisted in the courts finding that the right contains a minimum core content.

These factors are the historical context of the right to basic education; the textual formulation of the right to basic education in section 29(1)(a) of the Constitution; the interrelatedness of the right to basic education and other rights within the Bill of Rights; subsidiary education policies, legislation, and regulations, and lastly, the role of international law. This study seeks to consider the extent to which each of these factors have played a role in courts' interpretation of section 29(1)(a). The study also considers the implementation of these judgments and the role that the courts have played in realising the right to education for learners on ground-level.

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LIST OF ACRONYMS

CRC - Convention on the Rights of the Child

ECDOE - Eastern Cape Department of Education

ECPLT - Eastern Cape Provincial Scholar Transport Policy

EEA – Employment of Educators Act

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICERD - International Convention on the Elimination of All Forms of Racial Discrimination

LDOE - Limpopo Department of Education

MOBE - Minister of Basic Education

NEPA – National Education Policy Act

NDOE - National Department of Basic Education

NLTP - National Learner Transport Policy

NSNP - National School Nutrition Programme

SASA – South African Schools Act

UDHR - Universal Declaration of Human Right

CHAPTER 1

INTRODUCTION

1.1 Background to the Research Problem

The political transition in 1994 heralded a new democratic dispensation based on a supreme Constitution that aimed to transform South Africa and provide equal and equitable opportunities for all its people. The decades of systemic segregation and legislated racial exclusivity under the apartheid government had marginalised black South Africans, depriving them of many of the essential resources necessary to live a dignified and fulfilling life. Nowhere was this discrimination more pronounced than in the education system. Under apartheid there were multiple racially defined departments of education, each of which provided very different types and qualities of education based on the perceived role of that race-group in the apartheid society.¹ Given the centrality of education to the maintenance of the apartheid ideology, it is unsurprising that this area of social policy was highlighted for systemic reform in the post-apartheid years.

This proved to be an enormous undertaking. Changes in laws, regulations, and policies saw the adoption of an integrated education system for all racial groups, run by a national education department. However, despite these efforts, the reality of changing the social dynamics of education on ground level, proved to be more difficult. It has been 28 years after the formal abolition of apartheid in South Africa, however, the post-apartheid public basic education system replicates distinctive patterns of inequality that are still premised on the grounds of race and class. The legacy of the colonial and apartheid government in the unequal provisioning of basic education has persisted beyond the democratic regime change of 1994.

A bifurcated education system is operative in South Africa's contemporary public-school domain. Spaul² argues that this is evidenced by the explicit divide between former Model C

¹ N Spaul "Poverty and Privilege: Primary School Inequality in South Africa" (2013) 33 *International Journal of Educational Development* 436 at 437.

² N Spaul "Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap" in De Lannoy A *et al South African Child Guage* (2015) 37-38. I deliberately avoid the term "previously disadvantaged schools"

(former white) schools which are mostly fee-paying and adequately resourced, and disadvantaged (former black) schools, many of which are still entrenched in abject poverty and completely dependent on the state for education funding. The magnitude of the inequalities that continue to persist is shocking. An analysis of the National Senior Certificate results in 2014 illustrated that the top 200 schools in the country, have more students achieving distinctions (80%+) in Mathematics or Physical Science than the remaining 6 476 schools combined.³ Of these schools, 185 are former white-only schools that charge school fees, and while these schools are legally deracialised, 57% of the matriculants in the top 200 schools were white.

It therefore comes as no surprise that the 2016 Progress in International Reading Literacy (PIRLS), an international benchmark test, showed that 78% of South African grade 4 learners cannot read for meaning in any language.⁴ By 2021, the PIRLS results were even worse, with 81% of South African grade 4 learners were not able to reach the lowest benchmark.⁵ This means that they have spent at a minimum three years in a South African school without acquiring the skill to understand what they are reading. Spaul⁶ opinions that when one considers the colour of a child's skin, the province of their birth, and the wealth of their parents, one can, before a child's seventh birthday, predict with some precision whether the child will inherit a life of chronic poverty and sustained unemployment, or a dignified life and meaningful work.

At the heart of the democratic education system, is section 29(1)(a) of the Constitution. It provides everyone with a right to a basic education. Section 29(1)(a) was meant to transform

as many of these schools are currently trapped in disadvantage. See also J Jansen & N Spaul *South Africa Schooling: The Enigma of Inequality, A study of the Present and Future Possibilities* (2019).

³ N Spaul "Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)", available at https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/#_ftnref1 [accessed on 15 December 2022].

⁴ N Spaul "Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)", available at https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/#_ftnref1 [accessed on 15 December 2022]. For more information on this topic, I suggest N Spaul & E Pretorius (eds) *Early Grade Reading in South Africa* (2022).

⁵ Department of Basic Education. (2023). *PIRLS 2021: South African Preliminary Highlights Report*. Department of Basic Education: Pretoria.

⁶ N Spaul "Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)", available at https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/#_ftnref1 [accessed on 15 December 2022].

the South African education system to provide equal and equitable opportunities for all learners in the country, despite their race, class, or social origin. Basic education was meant to be provided in a way that did not discriminate against certain learners and provide each of them with an opportunity to further their education and realise their potential. While some progress has been made to secure universal access to education for learners in South Africa, section 29(1)(a) of the Constitution has also become a heavily debated and litigated right, with South African courts routinely being called upon to clarify the content of the right and define its parameters.

In recent years, a slew of litigation has seen the courts play an active role in interpreting and implementing the right to basic education and ensuring that learners are able to access the necessary resources to realise their educational rights. These cases have often been very specific as to what is required by the state to ensure that the right to education is realised and have mostly been premised on the state's failure to comply with its own legislation, regulations, and policies on education resource provisioning. This study seeks to consider the role that courts have played in interpreting and implementing the right to basic education in section 29(1) of the Constitution.

The study will focus on jurisprudence and scholarly debate between the years 2010 and 2022 related to the right to a basic education. To date, there have been a number of reported judgments pertaining to a failure by the state to perform its constitutional obligation to providing a basic education to learners. The basics needed in public schools, which the state has failed to provide, include the following: (i) learner and teacher support materials such as textbooks, stationery, and school furniture, that in certain cases were not provided at all, or if provided, were procured belatedly and fell short in catering for all learners,⁷ (ii) provision of educators and failing to appoint on time in vacant, full time and temporary posts by the moving and placement of excess educators,⁸ (iii) adequate schooling facilities in cases where schools have been built with steel or mud, learners are taught under trees, and dilapidated prefabricated classrooms without water, electricity and toilets,⁹ (iv) school nutrition,¹⁰ and (iv) quality,

⁷ *Section 27 v Minister of Education* 2013 (2) BCLR 237 (GNP); *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP); *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

⁸ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG).

⁹ *Centre for Child Law v Government of the Eastern Cape Province* ("Mud Schools" Litigation in the Eastern Cape Province 2012).

¹⁰ *Equal Education v Minister of Basic Education and Others* 2021 (1) SA 198 (GP).

adequate and equal education where efforts to raise the quality of education for poor children has largely failed.¹¹

While the South African courts have historically rejected the notion of a minimum core obligation in socio-economic rights litigation, it has been more than willing to interpret the right to education as containing a minimum core content. The study will suggest and consider five factors that the courts use when interpreting and implementing the right to basic education and clarifying its content. Firstly, the historical context of the right to basic education is an important consideration that courts have used to justify the interpretation and implementation of the right to basic education. The right needs to be understood within Mureinik's¹² framing of the Constitution as "a historic bridge between the past of a deeply divided society (...) and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans." Kollapen J verbalised the role of education in the Constitution and society in *Section 27*¹³ as follows:

"As an empowerment right, education is the primary vehicle by which economically and socially, marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.

(...)

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 to exist in so many areas and sectors of our society. Education takes on an even greater significance. It becomes at the makro 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."

¹¹ *Centre for Child Law v Government of the Eastern Cape Province* ("Mud Schools" Litigation in the Eastern Cape Province 2012).

¹² E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *South African Journal of Human Rights* 1 at 31.

¹³ *Section 27 v Minister of Education* 2013 (2) BCLR 237 (GNP) paras 4-5.

Secondly, the nature of the right to basic education and its textual formulation in the Constitution impacts on how the courts have interpreted the right. The right to basic education in the Constitution is an unqualified socio-economic right.¹⁴ This means that there are no internal qualifiers, and the right is immediately realisable. The Constitutional Court confirmed this in *Governing Body of the Juma Masjid Primary School*¹⁵ where Nkabinde J held that, as opposed to some of the other socio-economic rights, section 29(1)(a) is unqualified and immediately realisable. The unqualified nature and the immediate enforceability of the right to basic education has served as the foundation for courts to compel the state to take immediate steps to ensure that learners have access to the education resources that are necessary to realise their right to education.¹⁶

In contrast to section 29(1)(a), the other socio-economic rights are progressively realisable within the available resources. This limits the extent to which courts can realise and implement socio-economic rights as they are bound by an analysis of the steps that the state takes in achieving its obligations and the extent to which the state is hamstrung by its resources. The drafters of the Constitution deliberately framed basic education as an unqualified right to which learners must have immediate access.¹⁷ The reason for this can likely be found in the nature of education itself. Education is a continuous process that builds on prior knowledge.¹⁸ A child whose right to education is not being fulfilled is denied the right every single day that they are not in schools, or the education they receive is not of sufficient quality.¹⁹ The infringement of the right therefore is continuous as long as the child is deprived of whatever resource or service is necessary in order to provide them with quality education.²⁰

A third factor that courts consider when interpreting and implementing the right to education is the interaction between the right to education and other rights in the Constitution. The right

¹⁴ C Simbo “A Hexagon Right: The Six Dimensions of the South African Right to Basic Education” (2018) *Obiter* 126 at 130.

¹⁵ *Government Body of the Juma Masjid Primary Schools v Essay NO 2011 (8) BCLR 761 (CC)* para 37.

¹⁶ C Simbo “The Right to Basic Education, the South African Constitution and the *Juma Masjid* Case: An Unqualified Human right and a Minimum Core Standard” (2013) 17 *Law Democracy & Development* 477 at 491.

¹⁷ *Ibid.*

¹⁸ Simbo 2013 *LLD* 496.

¹⁹ *Ibid.*

²⁰ *Section 27 v Minister of Education and Another* 2013 (2) SA 40 (GNP) para 20.

to education is not a stand-alone right but it is a means through which other rights are realised.²¹ The courts often link education to the right to equality (section 9), dignity (section 10), the best interest of the child (section 28(2)) and even the right to nutrition (section 28(1)) in the Constitution²² as the rights are mutually dependent²³ and must be considered when the right to education is interpreted. For example, in the *Section27* case, Kollapen J specifically found that the failure to provide learners with textbooks, violated not only the right to education, but also the right to dignity and equality.²⁴ The violation of the right to education is therefore compounded by its link to other rights in the Bill of Rights and as will be proposed in this study, has guided the courts when interpreting the right to education and giving content and meaning to section 29(1)(a) of the Constitution.

Fourthly, subsidiary legislation, regulations, and policies have played an important role in the courts' interpretation of the right to basic education. The principle of subsidiarity encapsulates the notion that that a litigant who avers that a right protected by the Constitution has been infringed must rely on the legislation enacted to protect the right and may not rely on the Constitution directly.²⁵ The proviso to the principle is that the litigant may rely on the Constitution directly when the enacted legislation is being challenged for being inconsistent with the Constitution.²⁶ The cases on the right to basic education have been largely influenced by legislation and policies that provide for goods and services on the right to basic education. While they have been framed as cases related to the right to education, the specific goods and services that the state must provide is often derived from the state's own laws, regulations, and policies and have guided the courts' interpretation of section 29(1)(a).

²¹ *Ibid* para 4.

²² *Section27 v Minister of Education* 2013 (2) BCLR 237 (GNP); *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG); *Linkside v Minister of Basic Education* [2015] ZAECGHC 36 and *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB).

²³ C Churr "Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany" (2015) 18 *Potchefstroom Electronic Law Journal* 2405 at 2418.

²⁴ *Section27 v Minister of Education* 2013 (2) BCLR 237 (GNP) para 4.

²⁵ AJ van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Constitutional Court Review* 77.

²⁶ *Ibid*.

In *Makaziwe v The Government of the Republic of South Africa*²⁷ (known as the *Mud school case*) which involved the failure by the Department of Basic Education to provide adequate school infrastructure, the court referred to the government's National Policy for an Equitable Education Provision, which provides that infrastructure is critical to the provision of education and that it is inevitable that inadequate school infrastructure impacts on learner performance.²⁸ The Court established a nexus between the state of the infrastructure and the learners' performance, and thus held that adequate infrastructure was a necessary element for the provision of adequate education.²⁹

*Equal Education v Minister of Basic Education*³⁰ involved a dispute regarding the regulations formulated in response to the powers given to the Minister of Education to prescribe minimum norms and standards for school infrastructure in terms of section 5A(1)(a) of the South African Schools Act (SASA). Regulations were formulated, which provided that the right to basic education is progressively realisable on the availability of government resources.³¹ The regulations were challenged and declared to have the potential to eliminate government accountability.³² The Court in this regard held that basic infrastructure was fundamental in the realisation of basic education.³³

Reliance was placed on the SASA which provided that as a minimum standard, school infrastructure should be provided to realise the right to basic education.³⁴ The same is true for the provisioning of scholar transport in the *Tripartite Steering Committee* case, where the court placed reliance on the Eastern Cape Provincial Scholar Transport Policy in order to determine the entitlement that learners have to be transported to schools. In *Equal Education*³⁵ the court

²⁷ *Makaziwe v The Government of the Republic of South Africa* (2017). A similar case is (the mud schools' case) of 2010 referred to in *Centre for Child Law v The Government of the Eastern Cape* (ECHC, Bisho) unreported case no 504 / 2010.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) para 4.

³¹ *Ibid.*

³² *Ibid* p422.

³³ *Ibid* para 181.

³⁴ *Ibid* para 185.

³⁵ *Equal Education v Minister of Basic Education and Others* 2021 (1) SA 198 (GP) para 40.

drew the conclusion that nutrition formed part of the right to basic education, based on the Department of Basic Education's own documentation. It stated that:

“On the Departments own documents, the stance that the nutritional aspects of the NSNP is just a by-product of their duty to educate is simply wrong. The Department's own policy statements reflect basic nutrition as component to basic education. State policy is instructive on the content of the right to education and in the policies the provision of basic nutrition is inextricably linked to the fulfilment of basic education.”

Case law illustrates that subsidiary provisions make it easier for courts to find that there is a basket of goods and services for basic education as some of these goods have already been provided for in the subsidiary provisions. Courts rely on subsidiary provisions in interpreting and implementing the right to basic education.

Lastly, the role of international law must be considered. The Constitution requires that international law be used to interpret rights in the Bill of Rights.³⁶ Carter³⁷ argues that international treaties, conventions, and other instruments may provide guidance on how to give content to the rights of children where domestic legislation has been lacking or unable to do so. There are a number of international law instruments that address the right to basic education, including the Universal Declaration of Human Rights, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the UNESCO Declaration Against Discrimination in Education and other regional instruments such as the African Charter on the Rights and Welfare of the Child and the African Charter on Human and People's Rights.

While there has been some reference to international law in cases dealing with education in South Africa, the courts have not relied heavily on international law when interpreting and implementing the right. For example, in *Section 27*,³⁸ *Centre for Child Law*,³⁹ and *Equal Education*⁴⁰ the courts make passing reference to the duty under international law to provide education to all children in South Africa, but do not use the available instruments to develop the right, rather relying on some of the other factors mentioned above. In many of the other

³⁶ The Constitution of the Republic of South Africa, 1996 s39(1)(b).

³⁷ EI Carter *Access to Justice for Children with Disabilities in South Africa* (Doctoral thesis, UP, 2015) 42.

³⁸ *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) para 4.

³⁹ *Ibid* para 87.

⁴⁰ *Equal Education v Minister of Basic Education and Others* 2021 (1) SA 198 (GP).

education rights cases, reference to international law is entirely absent, which does impact on the richness of the courts' interpretation of the right.

The study will also consider the extent to which the litigation between 2010 and 2022, have contributed to changes in the South African education system. This will include a discussion on the outcomes of individual cases, as well as the role that some of the litigation has played as precedents for further education rights cases.

1.2 Research Question and Objectives

The question that this study seeks to answer is: what role have the courts played in interpreting and implementing the right to basic education in South Africa?

To this end, the objectives of this study are 1) to provide an overview of the constitutional, legislative, regulatory, and policy framework that governs the right to basic education in South Africa; 2) to provide an overview of the jurisprudence on the right to basic education in section 29(1)(a) of the Constitution as provided by courts between 2009 and 2022; 3) to analyse the factors that the court considered when interpreting the content of section 29(1)(a) of the Constitutions; and 4) to analyse how the court's interpretation of the legal scope and content of the right to basic education has been implemented and the impact this had on learners in South Africa.

1.3 Methodology

This thesis employed a desktop-based research methodology. This includes the use of primary and secondary sources of law. The primary sources being the Constitution, relevant South African legislation, and case law dealing with the right to education. The secondary sources are academic articles, textbooks, reports, and news articles. This study benefits from a range of approaches, including doctrinal legal research, socio-legal research, and a critical analysis of *inter alia*, case law, education legislation and policies. The study also refers to fundamental education treaties under international law to which South Africa is a signatory.

1.4 The Focus on Litigation Between 2010 and 2022

It is necessary for purposes of this thesis to explain why the period between 2010 and 2022 has been chosen as the focus of this study. As a point of departure, it is important to understand that the litigation on the right to education post-1994, can in some ways be divided into three distinct phases.

1.4.1. The First Phase

Immediately following the promulgation of the Interim Constitution, the Constitutional Court had to take its first steps towards defining the right to basic education. As will be discussed more fully below, the court in the case of *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*⁴¹ was the first to pronounce on the nature of the right to basic education. This was still during the Interim Constitution where the right to basic education was contained under section 32(c). The Constitutional Court held that section 32(a) creates a positive right that basic education be provided for everyone and not a negative right that is premised on the notion that a person should not be obstructed in pursuing his or her basic education.⁴² While the case confirmed that the state had a duty to take positive steps to realise the right to education, the courts were not provided with an opportunity to further pronounce on the implications of this finding for the provisioning of education resources.

Fifteen years later, the Constitutional Court was again afforded the chance to more fully define the nature of the right to education. The Constitutional Court case of *Juma Masjid*⁴³ provided further conceptual clarity on the nature of section 29(1)(a). The case dealt with the obligations of a private property owner who sought to evict a public school established on its property.⁴⁴ The court seized the opportunity to distinguish the unqualified right to basic education from the qualified socio-economic rights.

The Court stated that:

“It is important, for the purpose of this judgment, to understand the nature of the right to a basic education under s 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’, and ‘within available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in s 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

⁴¹ *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

⁴² *Ibid* para 9.

⁴³ *Governing Body of the Juma Masjid Primary School v Essay* 2011(8) BCLR 761 (CC).

⁴⁴ While the eviction went ahead because the learners had been successfully placed at alternative schools, the Constitutional Court nevertheless acknowledged the principle that private entities have an obligation to respect the right to basic education of learners on their property.

freedom. This right is therefore distinct from the right to 'further education' provided for in s 29 (1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.⁴⁵

Furthermore, the Constitutional Court confirmed that the state bears the primary responsibility to provide basic education.⁴⁶ The judgment will be discussed more fully below, but the importance of the judgment is in the finding that the right to education is immediately realisable. As will become clear during this study, the finding laid the foundation for the education cases that followed between 2010 and 2022. The period between 1994 and 2008 saw very limited education litigation, and the litigation that was undertaken did not specifically deal with the core content of the right to education. It did however establish two critically important legal principles in relation to the nature of the right to education that has become the bedrock of education litigation in South Africa.

1.4.2 The Second Phase

McConnachie and Brener⁴⁷ argue that the second significant phase of education litigation in South Africa occurred between 2009 and 2013. This overlaps in some respects with the third phase of the litigation that forms the focus of this study but was primarily aimed at addressing the struggle for power between the school governing bodies (SGBs) and the state. Three important Constitutional Court judgments were heard during this time and considered the extent to which heads of the provincial education departments may intervene in respect of, or override, policies of SGBs in the areas of language, pregnancy, and admissions.

The first judgment in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*⁴⁸ concerned the constitutional right to be taught in the official language of one's choice and the power of the head of department to withdraw the function of a governing body to

⁴⁵ *Governing Body of the Juma Masjid Primary School v Essay* 2011(8) BCLR 761 (CC) para 37.

⁴⁶ The court found that the state incurred a positive obligation in terms of section 7(2) & 8(1) of the Constitution to provide basic education. Section 7(2) of the Constitution provides: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." Section 8(1) provides: "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

⁴⁷ C McConnachie & S Brener "Litigating the Right to Basic Education" in J Brickhill *Public Interest Litigation in South Africa* (2018) 286.

⁴⁸ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo* 2010 (2) SA 415 (CC).

determine the language policy of the school.⁴⁹ Section 6(2) of the SASA states that “[t]he governing body of a public school may determine the language policy of the school subject to the Constitution, this Act and any applicable provincial law.” At the beginning of the 2007 school year there was a shortage of space in the Ermelo area for learners wanting to be taught in English.⁵⁰ Hoërskool Ermelo’s language policy was Afrikaans medium, which meant that the school could only accommodate additional learners if they were willing to be taught in Afrikaans.⁵¹ The effect of this policy was that black learners from the nearby township were unable to attend the school. In the Constitutional Court Moseneke DCJ found that the SASA does give the head of department the power to withdraw the powers of a governing body as long as there are reasonable grounds to do so.⁵² The court however found that in this case the head of department had acted unlawfully as he did not follow the correct procedure when exercising this power.

The second significant case during this period is *Head of Department, Department of Education Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School*.⁵³ In 2008 and 2009 respectively, the governing bodies of Welkom High School and Harmony High School adopted pregnancy policies for their respective schools.⁵⁴ In terms of the policies learners who fall pregnant had to leave the school for a certain period of time before they could be readmitted.⁵⁵ Two pregnant learners approached the Department of Education after they were excluded in terms of the policies.⁵⁶ The head of department issued instructions to the principals of the schools compelling them to readmit the learners.⁵⁷ Again, the Constitutional Court found in

⁴⁹ *Ibid* para 1; Section 6(2) of the South African Schools Act 84 of 1996.

⁵⁰ *Ibid* para 11.

⁵¹ *Ibid* para 10.

⁵² This power derives from section 29(2) of the Constitution read with section 22 of the South African Schools Act 84 of 1996.

⁵³ *Head of Department, Department of Education Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC).

⁵⁴ *Ibid* para 6.

⁵⁵ *Ibid* para 7.

⁵⁶ *Ibid* para 8 & 15.

⁵⁷ *Ibid* para 11.

favour of the schools, as the head of department had not exercised his powers correctly. Despite this, the schools were instructed by the court to review the policies.

The third case is *Member of the Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School*⁵⁸ The facts of the *Rivonia* case are similar to those of *Ermelo* and *Welkom* in that they deal with a decision of an HOD that sought to override a policy of the governing body of Rivonia Primary School. In 2010 a Grade 1 learner, residing within the feeder area of the school, was refused a place for the 2011 academic year and placed on a waiting list.⁵⁹ The school argued that it had reached its capacity of 120 learners as determined by the admission policy.⁶⁰ The head of department issued an instruction to the principal to admit the learner and overturned the decision of the school to refuse the learner admission to one of its Grade 1 classes.⁶¹ Again, the Constitutional Court found that the actions of the head of department was procedurally unfair and it set aside the head of department's decision.

While these cases established important principles related to the powers of the different functionaries that are responsible for education in South Africa, the litigation focussed primarily on the power dynamics between the state and SGBs. It provided little insight into the content of the right to education and was only around 2010, that the third phase of education litigation commenced.

1.4.3. The Third Phase

As will be discussed more fully in this study, the period between 2010 and 2022 saw the development of the core content of the right to education in section 29(1)(a). The focus shifted to litigation that was aimed at addressing the lack of resources in public education and the systemic inequality that still characterised the education system. It coincided with the rise of a number of public interest organisations who focussed on the right to education and the continued failure by the state to provide sufficient education resources to realise the right to

⁵⁸ *Member of the Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC).

⁵⁹ *Ibid* para 9.

⁶⁰ *Ibid* para 9.

⁶¹ *Ibid* para 12.

education. In particular, the Legal Resources Centre (LRC), Section 27, Equal Education (EE), and the Centre for Child Law became important actors during this phase of litigation, often acting on behalf of SGBs, learners, or institutional clients whose right to education had been infringed.

This phase was chosen as the focus of this study as it is the first litigation of its kind to specifically clarify the core content of the right to education. Much of the litigation during this phase has been very specific as to what the right to education in the Constitution entails, setting a standard that the state must meet to realise the right. This includes a basket of goods and services that are necessary for the right to be realised. It is important to understand how the court's arrived at these interpretations and what mechanisms were used to justify its findings. Unlike the other socio-economic rights, where the courts have been loath to attach a minimum core obligation to the right, the right to education seems to be outlier in this regard. This study therefore seeks to understand what role the courts have played in interpreting the content of the right to basic education between 2010 and 2022, and why the right has developed in this manner.

1.5 Outline of the Thesis

Chapter 2 embarks on an analysis of basic education legislation,⁶² regulations,⁶³ and policy⁶⁴ that govern basic education in South Africa. The purpose of this chapter is to provide an overview of the legal framework that provide for basic education and how the content of the right has been clarified in the various legal instruments.

Chapter 3 provides an overview of basic education jurisprudence in South Africa between 2009 and 2022. This is premised on the litigation on the right to basic education and the manner to which the courts have interpreted the right in exercising their powers in terms of

⁶² South African Schools Act 84 of 1996; Employment of Educators Act 76 of 1998 and the National Education Policy Act 27 of 1996.

⁶³ South African Schools Act, 1996 (84 of 1996): Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure.

⁶⁴ Education White Paper 1: Education and Training (1995); Education White Paper 2: Education and Training; Learning and Teaching Support Material (LTSM) Policy, National Learner Transport (NLT) Policy (2015), Eastern Cape Provincial Learner Transport (ECPLT) Policy (2016).

section 39(1) of the Constitution.⁶⁵ This chapter illustrates that a slew of litigation has seen the courts playing an active role in interpreting and developing of the legal scope and content of the right to basic education as well as ensuring that the right is implemented. These cases have often been very specific as to what is required from the government in securing the realisation of the right to basic education and the chapter will consider what goods and services the courts have considered to form part of section 29(1)(a) of the Constitution.

Chapter 4 develops from chapter 3, and it analyses the factors that the courts have considered in their interpretation and implementation of the right to basic education in South Africa. The government's failure to make provision for basic education is connected to these factors. Therefore, this chapter illustrates the manner which these factors influenced the courts and how they have been utilized in clarifying and developing the legal scope and content of the right to basic education. This will include a discussion of the nature of the right to basic education and its textual formulation in the Constitution impacts on how the courts have interpreted the right; the historical context of the right to basic education is an important consideration that courts have used to justify the interpretation and implementation of the right to basic education; the interaction between the right to education and other rights in the Constitution; subsidiary legislation, regulations, and policies have played an important role in the courts' interpretation of the right to basic education; and the role of international law.

Chapter 5 discusses the way the courts' jurisprudence on the right to basic education has been implemented. The chapter outlines the tangible outcomes for South African learners as a result of the courts' interpretation of the right to basic education and the consequent clarification on the goods and services guaranteed by the right. The chapter also provides an overview of the role that legal precedent can play in ensuring access to socio-economic rights. It finally discusses some overall insights into the litigation between 2010 and 2022. The purpose of this discussion is to determine what can be learnt from the existing litigation on the right to education that could potentially be implemented in future litigation on the right to education, or any of the other socio-economic rights in the Constitution.

Chapter 6 provides the conclusion and the dissertation's contribution towards education law and the overarching transformative constitutionalism goal.

⁶⁵ The Constitution of the Republic of South Africa, 1996.

CHAPTER 2

THE LEGAL FRAMEWORK THAT GOVERNS THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA

2.1 Introduction

This chapter provides an overview of the legal framework that governs basic education in South Africa. It will depart by providing a theoretical framework on the right to basic education and proceed to the constitutional framework, as well as the policies, laws, and regulations that give effect to the right in section 29(1)(a) and have clarified the core content of the right to basic education. As will be illustrated in Chapter 4, the legal framework on the right to education has often been used by courts to guide their interpretation of section 29(1)(a) of the Constitution. The chapter will also provide a brief overview of the international law obligations that South Africa has in relation to the right to education, and, how these documents clarify the content of the right to basic education.

Based on this analysis of the legal framework on the right to education, the chapter will conclude with a discussion on the minimum core content of the right to education as it has been clarified by the executive and the legislature. This discussion will form an important background to chapter 3, where the judicial interpretation of the content of section 29(1)(a) will be analyzed.

2.2 Section 29(1)(a) of the Constitution

Before embarking on a discussion of the legislative, regulatory, and policy framework governing education in South Africa, it is important to provide brief definitions to inform the understanding of section 29(1)(a) of the Constitution. The section provides that “[e]veryone has a right to a basic education”. This begs the questions: who is “everyone”, and what is a “basic education”?

2.2.1 “Everyone” in section 29(1)(a) of the Constitution

“Everyone” in the Constitution has generally been interpreted to refer to all people within South Africa’s borders, which means the right is not restricted to only South African citizens.⁶⁶ Already in 2003, the Supreme Court of Appeal (SCA) confirmed the wide application of ‘everyone’ in its judgment in *Minister of Home Affairs v Watchenuka*.⁶⁷ The court connected the right to an education with the right to human dignity in the Constitution:

“Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. ... ‘The freedom to study is ... inherent in human dignity; for without it, a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education.’”⁶⁸

Here, the Court emphasises that everyone has a right to human dignity, citizens and non-citizens alike. Since education is essential to a life with dignity, it is also not limited to citizens.

In December 2019, the High Court in Makhanda (previously Grahamstown) again confirmed this wide application of “everyone” in the Constitution. In *Centre for Child Law v Minister of Basic Education*⁶⁹ the court had to consider whether children without birth certificates, immigration permits, or passports had a right to education in terms of section 29(1)(a) of the Constitution. These learners had been excluded from school and denied education funding as they were undocumented, and included both South African children as well as non-national children. The court found as follows:

“The right to education extends to “everyone” within the boundaries of South Africa; the nationality or immigration status is immaterial. Emphasising the ambit of

⁶⁶ C McConnachie, A Skelton & C McConnachie “The Constitution and the Right to Basic Education in South Africa” in F Veriava *et al Basic Education Rights Handbook: Education Rights in South Africa* (2017) 22.

⁶⁷ *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) para 36.

⁶⁸ *Ibid* paras 25 and 36. See also: C McConnachie, A Skelton & C McConnachie “The Constitution and the Right to Basic Education in South Africa” in F Veriava *et al Basic Education Rights Handbook: Education Rights in South Africa* (2017) 12.

⁶⁹ *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG).

“everyone” contained in sections 12 and 35(2) of the Constitution in *Lawyers for Human Rights*⁷⁰ the Constitutional Court held:

“. . . . The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. . .

Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why ‘everyone’ in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2). It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country.”

With reference to the dictum in *Lawyers for Human Rights and another v Minister of Home Affairs*, the High Court in *Makhanda* found that “everyone” includes both citizens and non-citizens, as well as non-citizens who may not have the requisite documentation or legal status to be present in South Africa. This extended the scope of the right to include every single person in South Africa.

2.2.2 What is a basic education?

While the Constitution refers to a “basic education”, it does not define the term itself. It has been suggested that the term “basic education” can either refer to a period of time in school (the time-based approach), or an education of an appropriate standard (the adequacy-based approach).⁷¹ The adequacy-based approach seem to be favoured by the courts. Firstly, it reflects the reference in section 29(1)(a) of the Constitution, to “adult” basic education, moving the

⁷⁰ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at paras 26 - 27.

⁷¹ C McConnachie, A Skelton & C McConnachie “The Constitution and the Right to Basic Education in South Africa” in F Veriava *et al Basic Education Rights Handbook: Education Rights in South Africa* (2017) 12.

scope of the right beyond a specific period or age category. Secondly, it is suggested that the adequacy-based approach best fits the purpose of the right to education.⁷² It was accepted by the Constitutional Court in *Juma Masjid*⁷³ that education must be capable of achieving goals of individual and societal development and help eradicate the effects of apartheid. To achieve this, an education must have a certain content and quality.⁷⁴ An education system that was only concerned with the time a learner spent in school would not have the capacity to achieve these societal goals.

The adequacy-based approach is also supported in international law.⁷⁵ The phrase ‘a basic education’ has its origins in the 1990 World Declaration on Education for All. Article 1 of the World Declaration explains that the right to a basic education is a guarantee that:

*“Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.”*⁷⁶

In this understanding of a basic education, the process of defining the content of this right involves three stages. First, we need to identify the purposes that an education should serve, which include individual and societal development.⁷⁷ Second, we need to identify learners’ basic learning needs in light of these purposes, such as literacy, numeracy, problem-solving skills, and so on. Third, we need to identify the materials and resources required to meet these basic learning needs, such as adequately trained teachers, textbooks, classrooms, and adequate school furniture.⁷⁸ The content of a basic education is not fixed. As Article 1 of the World

⁷² *Ibid.*

⁷³ *Juma Masjid* para 42.

⁷⁴ C McConnachie, A Skelton & C McConnachie “The Constitution and the Right to Basic Education in South Africa” in F Veriava *et al Basic Education Rights Handbook: Education Rights in South Africa* (2017) 12.

⁷⁵ C McConnachie, A Skelton & C McConnachie “The Constitution and the Right to Basic Education in South Africa” in F Veriava *et al Basic Education Rights Handbook: Education Rights in South Africa* (2017) 13.

⁷⁶ World Declaration for All, 1990.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

Declaration goes on to say, “basic learning needs and how they should be met’ will vary with the context and will ‘[change] with the passage of time”.⁷⁹

While the litigation between 2010 and 2022 was primarily concerned with education resources necessary to achieve a basic education, courts seem to have accepted that the provision of education resources aid in achieving an adequate level of basic education. The Constitutional Court has also provided some guidance on what grades form part of the basic education system that falls within the scope of section 29(1)(a) of the Constitution. In *Moko v Acting Principal Malusi Secondary School*⁸⁰ the court had to consider whether a final matric examination written in grade 12, fell within the scope of basic education as set out in section 29(1)(a) of the Constitution. In this case, the acting principal of a school had prevented Mr Moko from writing one of his exam papers, and he challenged the constitutionality thereof on the basis that it infringed his right to basic education. A debate then ensued as to whether basic education included grades 10 to 12, or whether this fell under the right to a further education in section 29(1)(b).

With reference to previous Constitution Court judgments, Khampepe J stated as follows:

“Section 29(1) of the Constitution distinguishes between basic education and further education. The right to the former is immediately realisable, whereas the state is merely obliged to take reasonable measures to make further education progressively available and accessible. 14 But where does basic education end and further education begin? In Juma Musjid, Nkabinde J accepted that basic education, at the very least, comprised education from Grades 1 to 9, which were the grades taught by the school in that matter.”⁸¹

In Pridwin, Nicholls AJ stated the following regarding basic education in her minority judgment:

‘While it is difficult to establish where the line should be drawn between basic education and further education, it cannot be disputed that basic education includes what is commonly known as primary education. . .

⁷⁹ *Ibid.*

⁸⁰ *Moko v Acting Principal of Malusi Secondary School* 2021 (3) SA 323 (CC).

⁸¹ *Ibid* para 27.

Accordingly, it is clear that every institution, elite or non-elite, that provides non secondary or non-tertiary education is necessarily simultaneously engaged in providing those attending it a basic education.”

The majority judgment in Pridwin, per Theron J, did not define basic education with reference to a person’s age or school-grade. Instead, having considered the international law position in relation to the right to education, it held that basic education ought to be described by reference to the content of the education provided. It noted that basic education is—

‘a flexible concept which must be defined so as to meet the ‘learning needs appropriate to the age and experience of the learner, whether child, youth or adult . . .’ and should also provide access to nationally recognised qualifications.’⁸²

In my view, school education culminating in the “nationally recognised qualification” of the National Senior Certificate is basic education under section 29(1)(a). This includes Grade 12 and the matric examinations. Besides, the Ministry of Basic Education bears the responsibility for the entire educational regime that cannot be properly classified as tertiary or higher education. Grade 12 is part of that regime.⁸³

To limit basic education under section 29(1)(a) either to only primary school education or education up until Grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right. For example, it would be highly problematic for our school system, and dare I say for our society as a whole, if section 29(1)(a) only required the state to provide desks for learners at primary and not secondary schools, or only up until Grade 9. Or if the state could plead “insufficient resources” for providing sufficient Grade 10-12 teachers because those grades fell under further education in section 29(1)(b), the right to which is not immediately realisable, but must be made “progressively available and accessible”.⁸⁴

It is clear that the right to basic education is not confined to a specific age category but encompasses the entire period of education to include a National Senior Certificate.

⁸² *Ibid* para 30.

⁸³ *Ibid* para 31.

⁸⁴ *Ibid* para 32.

2.3 The Constitutional Framework on the Right to Basic Education

In this chapter, the study set out how the terms “everyone” and “basic education” in section 29(1)(a) has been interpreted. It is however important for purposes of the study to also understand the nature of the right to education and the obligations that the Constitution places on the state in respect of the provisioning of basic education. Through the lens of section 7(2) of the Constitution, such an obligation entails that the state has the duty to respect, protect, promote, and fulfil the right to basic education, and such a duty consists of positive and negative obligations. Hence, section 7(2) of the Constitution provides a holistic framework for the realisation of the state’s duties, which allows for a contextual and substantive approach when adjudicating human rights, in this instance, the right to basic education.⁸⁵

As set out above, one of the first cases to address the right to basic education under the constitutional dispensation was *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*.⁸⁶ This case specifically addressed the state’s duties in respect of the right to education, and while it was decided under the Interim Constitution, it has become instructive in how courts understand the relationship between sections 7(2) and 29(1)(a) of the Constitution. The finding in *Gauteng Legislature* clarified the nature of the state’s obligation in respect of the right to basic education, namely an obligation to take positive action to realise the right. The Constitutional Court held that section 32(a) of the Interim Constitution creates a positive right that basic education be provided for everyone and not a negative right that is premised on the notion that a person should not be obstructed in pursuing his or her basic education.⁸⁷

This interpretation of the right to education equates with how we understand the state’s duties in respect of section 7(2) of the Constitution. The state’s duty to respect the right to basic education requires the state not to interfere with the enjoyment of the right towards right bearers, either directly or indirectly.⁸⁸ This means that measures that hinder or prevent an

⁸⁵ S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 87.

⁸⁶ *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

⁸⁷ *Ibid* para 9.

⁸⁸ “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” para 6; Brand “Introduction” in Brand & Heyns *Socio-Economic Rights* (2005) 9; C Fenwick “Minimum obligations with respect to article 8 of the International Covenant on Economic, Social and Cultural Rights” in AR Chapman & S Russell *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) 69; CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health 2000 (Article 12, para 33, of

individual from realising this right, should be avoided for this duty to be fulfilled.⁸⁹ However, the state's duty to respect does not mean that there is absolute non-interference with the right to basic education. The right to basic education may be interfered with when it is necessary and such an interference is justified in terms of section 36 of the Constitution.⁹⁰

The state's duty to protect, relates to the enjoyment of rights and their protection – those already in existence and those that can be enhanced and accessed.⁹¹ The duty to protect means that measures should be taken that protect against the interference of an individual's right to basic education.⁹² Protection from human rights abuses forms the basis of the duty to protect.⁹³

This obligation is placed on all spheres of government and requires of government to protect learners against any infringement of their education rights. In some ways, the courts play perhaps one of the most important roles in protecting the right to education. As will be illustrated by the discussion of the litigation below, it is often only through the intervention of the courts that the violation of the rights is addressed and the right to education is safeguarded. The development of effective education rights remedies and the implementation of court orders also aid in the protection of section 29(1)(a).⁹⁴

Notably, the state's duty to promote and fulfil a right are closely related and may be difficult to distinguish from each other.⁹⁵ The state's duty to promote a right requires the state to

the Covenant) ; United Nations Human Rights Office of the High Commissioner "International Human Rights Law" available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [accessed 14 June 2022].

⁸⁹ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 47 of the Covenant).

⁹⁰ Since section 36 of the Constitution allows for a justifiable limitation of rights in the Bill of Rights.

⁹¹ Brand "Introduction" in Brand & Heyns *Socio-Economic Rights* 10.

⁹² "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" para 6; S Russell "Minimum State Obligations" in "Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives" (2003) 137 *South African Law Journal* 18; CESCR General Comment No. 13: The Right to Education 1999 (Article 13, para 47 of the Covenant; CESCR General Comment No. 14: The Right to the Highest Attainable Standard of health 2000 (Article 12, para 33 of the Covenant); Fenwick "Minimum obligations" in *Core obligations* 70.

⁹³ UN Human Rights Office of the High Commissioner "International Human Rights Law" available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [accessed 28-08- 2018].

⁹⁴ Brand "Introduction" in Brand & Heyns *Socio-Economic Rights* 10.

⁹⁵ This was also noted in CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health 2000 (Article 12, para 33, of the Covenant), which included promotion as an element of the obligation to

promote a culture of human rights and thereby promoting support for the right to basic education.⁹⁶ Promoting the right to basic education may take three forms. The first form is premised on informing children about their existent right to basic education, thus creating awareness on the right to basic education.⁹⁷ The second form is premised on human rights education, which involves the school curriculum including education on human rights which will include the right to basic education.⁹⁸ Where the curriculum involves a child being taught about the right to basic education and what it entails, it acts to promote the right to basic education in a constitutional democracy.

The third form is premised on the state taking positive action in promoting the right to basic education by allocating resources to it.⁹⁹ This is perhaps the state's most important role in the sphere of education. As will be illustrated by the discussion of the case law on the right to education, most of the rights violations in these cases resulted from a failure by the state to provide resources. In this regard, an understanding of the specific obligations engendered by the right to basic education requires an understanding of the scope and content of the right.¹⁰⁰ This form of promotion, ties in the duty on the state to fulfil the right to education. The duty to fulfil requires states to actively participate in the realisation of rights and take positive action in ensuring the realisation of the right to basic education and its enjoyment.¹⁰¹ This means that the state must take appropriate measures, such as adopting legislation, making the necessary

fulfil; Brand "Introduction" in Brand & Heyns *Socio-Economic Rights* 10; See also S Liebenberg "The Interpretation of Socio-Economic Rights" in S Woolman & M Bishop *et al Constitutional Law of South Africa* Chapter 33.5 as cited in Brand "Introduction" in Brand & Heyns *Socio-Economic Rights* 10.

⁹⁶ ESCR-Net "The Obligation to Promote" available at <https://www.escr-net.org/resources/obligations-promote> [accessed 14 June 2022].

⁹⁷ ESCR-Net "The Obligation to Promote" available at <https://www.escr-net.org/resources/obligations-promote> [accessed 14 June 2022].

⁹⁸ ESCR-Net "The Obligation to Promote" available at <https://www.escr-net.org/resources/obligations-promote> [accessed 14 June 2022].

⁹⁹ L Arendse "The Obligation to Provide Free Basic Education in South Africa: An International Law Perspective" (2011) 14 *Potchefstroom Electronic Law Journal* 115.

¹⁰⁰ *Ibid.*

¹⁰¹ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 47, of the Covenant); UN Human Rights Office of the High Commissioner "International Human Rights Law" <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [accessed 28 August 2022].

budgetary and administrative allocations, and implementing judicial measures.¹⁰² It is clear from the above discussion, that a clear pronouncement on the positive nature of the right to education in *Gauteng Legislature*, brings with it a host of obligations on the state.

However, while this was an important first step in establishing the foundation for the litigation between 2010 and 2022, the judgment in *Juma Masjid* provided further context on how the right, as textually formulated in the Constitution, should be read, and interpreted. Before 2008, much uncertainty existed as to the approach that should be followed when interpreting section 29(1)(a) of the Constitution. It was unclear if courts could interpret the right to basic education as a directly enforceable right, and in a substantive manner.¹⁰³ This required a court to determine varying components that altogether form the legal scope and content of the right to basic education, and which the state is required to provide.¹⁰⁴ Such an approach is contrary to what is applied in relation to qualified socio-economic rights, which focuses on the reasonableness and efficacy of a government programme in facilitating the realisation of a right in question.¹⁰⁵

Others predicted that such a substantive approach was inadequate, and that courts might limit it by placing the burden on parents, by allowing for limitation of the right in certain circumstances or through remedies that allow for extended time frames for the realisation of the right.¹⁰⁶ The Constitutional Court case of *Juma Masjid*¹⁰⁷ can, therefore, be described as a

¹⁰² “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” para 6; Russel 2003 *SALJ* 18; CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health 2000 (Article 12, para 33 of the Covenant); Brand “Introduction” in Brand & Heyns *Socio-economic Rights* 10.

¹⁰³ For example, see: F Veriava & F Coomans “The right to education” in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2005) 57–83; M Seleane “The right to education: Lessons from Grootboom” (2003) 7 *Law, Democracy and Development* 137; and S Liebenberg *Socio-Economic Rights* 167.

¹⁰⁴ *Ibid.* See also: **Chapter 3** on the litigation on the right to basic education on the development of the legal scope and content of the right to basic education.

¹⁰⁵ This was developed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 44.

¹⁰⁶ See: S Woolman & M Bishop “Education” in S Woolman & M Bishop *Constitutional Law of South Africa* ch.57 pg.58. See also: S Woolman & B Fleish *The Constitution in the Classroom: Law and Education in South Africa 1994–2008* (2009) 120–126. For an analysis of the different scenarios suggested by Woolman & Bishop, see A Skelton “How far will courts go in ensuring the right to basic education?” (2012) 27 *South African Public Law* 392.

¹⁰⁷ *Governing Body of the Juma Masjid Primary School v Essay* 2011(8) BCLR 761 (CC).

watershed moment in ending such speculation. As set out above, the case dealt with the obligations of a private property owner who was trying to evict a school from the property that the school was leasing from the owner of the land.¹⁰⁸

The court had to consider the nature of the right to education under section 29(1)(a). It found that unlike some of the other socio-economic rights, this right is immediately realisable. The right contains no internal limitation requiring that the right be ‘progressively realised’, and ‘within available resources’ subject to ‘reasonable legislative measures’. As a result, right to a basic education in s 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’.

Furthermore, the Constitutional Court confirmed that the state bears the primary responsibility to provide basic education.¹⁰⁹ This equated with the finding in *Gauteng Legislature* and reflects the duties imposed by section 7(2) of the Constitution. Nkabinde J provided some broad parameters in understanding the content of the right to basic education. She held that access is a necessary condition for the achievement of the right,¹¹⁰ and that the state has a duty to ensure the availability of schools.¹¹¹ Whereas the *Juma Masjid* judgement has provided some broad principles in guiding what the right to basic education entails, later judgments have been more specific in providing the exact content of the right to basic education, albeit on an incremental basis. The judgments in the *Gauteng Legislature* and *Juma Masjid* cases have been confirmed in nearly all the judgments that address the core content of the right to education. According to Skelton, subsequent courts “have begun to spell out, in case after case, what makes up the right

¹⁰⁸ While the eviction went ahead because the learners had been successfully placed at alternative schools, the Constitutional Court nevertheless acknowledged the principle that private entities have an obligation to respect the right to basic education of learners on their property.

¹⁰⁹ The court found that the state incurred a positive obligation in terms of section 7(2) & 8(1) of the Constitution to provide basic education. Section 7(2) of the Constitution provides: “The state must respect, protect, promote and fulfil the rights in the Bill of Rights.” Section 8(1) provides: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

¹¹⁰ The court held that “[...] access to school is a component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the constitution...” *Juma Masjid CC* para 43.

¹¹¹ Sections 7(2) & 8(1) of the Constitution read with section 12 of the SASA imposes a duty on the state “to provide public schools for the education of learners.” *Juma Masjid CC* para 45.

to basic education”.¹¹² Similarly, Veriava argues that the High Courts and SCA have been engaged in developing a “rich jurisprudence” based on the principles established in *Juma Masjid*.¹¹³

While the constitutional legal framework is an important point of departure in understanding how the right to education should be interpreted, the state has given effect to this right in policies, laws, and regulations that have been promulgated to address various aspects of education provisioning in the country. Some of these documents provide specific clarity on the core content of the right to education and specifies exactly what the state needs to do in order for the right to be realised. In what follows, the study provides a broad overview of some of the most important legal instruments that have been promulgated in South Africa to give effect to section 29(1)(a) of the Constitution.

2.4 Policy Framework: The Right to Basic Education

The policy framework that governs the right to education in South Africa can be divided into two categories. Firstly, there are policies that are instructive as to the state’s overarching mission and vision for education in South Africa. These overarching policy frameworks, which was largely developed between 1994 and 1996, was a direct response to the establishment of democratic rule and signaled a definite break between apartheid education policy and the manner in which education will function in a constitutional democracy. As will be discussed below, Education White Paper 1 and Education White Paper 2, were important policy documents in this regard and in broad terms provided the framework for how education will function under democratic rule.

The second type of policy frameworks are those related to specific aspects of education provision. These policies were often developed much later than the overarching policy framework and in response to specific needs that may arise within the education system. The policies in relation to learner-teacher support material, scholar transport, and school nutrition will be discussed more fully below.

¹¹² Skelton “Strategic Litigation Impacts: Equal Access to Quality Education”, (2017), available at <https://files.eric.ed.gov/fulltext/ED606082.pdf> [accessed 5 July 2022].

¹¹³ F Veriava *The Contribution of the Courts and of Civil Society to the Development of a Transformative Constitutionalist Narrative for the Right to Basic Education* (LLD thesis, UP, 2018) 14.

2.4.1 Education White Paper 1: Education and Training (1995)

Although there are multiple legislative, regulatory, and policy instruments that govern basic education in South Africa, the first and perhaps the most important policy is the Education White Paper 1: Education and Training (1995).¹¹⁴ A White Paper in the context of education is a document that describes the first steps in policy formation by the Ministry of Education in the Government of National Unity.¹¹⁵ It was the first education policy under democratic rule and set the tone for how education will function after 1994. White Paper 1 provides for basic education as a legal entitlement to which every person has a claim, and which children access through school facilities that are sufficient to enable every child to begin and complete a basic education programme of acceptable quality.¹¹⁶

The policy strives to build a system of education and training that is founded on equity and non-discrimination and respects diversity, honour learning, and strives for excellence.¹¹⁷ The paper provides that “for the first time in South Africa’s history, a government has the mandate to plan the development of the education and training system for the benefit of the country as a whole and its entire people”. It also acknowledges that the challenge the government faces is to create a system that will fulfil the vision to open the doors of learning and culture to all.¹¹⁸ This paper suggests a just and equitable educational system which will give all learners of South Africa education of good quality. White Paper 1 set the tone for further policy, legislative, and regulatory developments in education in South Africa and forms the backbone of the state’s approach to education. All subsequent policies, legislation, and regulations must be read in light of the overarching goals that White Paper 1 seeks to achieve.

2.4.2 Education White Paper 2: Education and Training (1996)

The second important education policy is the Education White Paper 2: Education and Training (1996). White Paper 2 establishes broad principles on how schools should be governed, organised, and funded.¹¹⁹ The policy aims to have a new structure of schooling system that eliminates the ongoing apartheid legacy of unequal provision of basic education based on race

¹¹⁴ White Paper 1 on Education and Training.

¹¹⁵ White Paper 1, Chapter 1, para 1.

¹¹⁶ White Paper 1 on Education and Training, Chapter 6, page 37 para 11.

¹¹⁷ White Paper 1 on Education and Training.

¹¹⁸ White paper 1 on Education and Training, Chapter 6, page 11 para 1.

¹¹⁹ White paper 2 on Education and Training.

and class.¹²⁰ The new schooling system should eradicate inequalities through the equal distribution of education resources that are essential for teaching and learning.¹²¹ This means that in achieving adequate education for all, provision of education resources should be equal for all learners, irrespective of where they attend school. Furthermore, the task of implementing a new school organizational structure and governance system is embedded with the national and provincial government's constitutional and legal obligations.¹²² The negotiated change in the school system is likely to be achieved through a new structure of school organization, governance, and funding.¹²³ This is premised on the overarching goal of securing the provision of adequate basic education for everyone in South Africa.

2.4.3 Learning and Teaching Support Material Policy (LTSM)

The LTSM policy has been developed to ensure increased access to education resources. It is aimed at ensuring that there are sound systems to manage the available resources and to assist to improve learners' performance in all schools, through the provision of quality education to all learners.¹²⁴ The policy pronounces the government's plan of improving the provisioning of education resources in schools in line with the principles of equity, quality, redress and access as stated in the Bill of Rights in the Constitution.¹²⁵ As one of its primary missions, the policy seeks to ensure that all learners have a textbook for every learning area from the first day of an academic year.¹²⁶

This will ensure that all learners are given an equal opportunity for their right to education and to make the best use of their capabilities, irrespective of their socio-economic background. The policy goes further to classify education resources that form part of the LTSM, and these

¹²⁰ White paper 2 on Education and Training.

¹²¹ White paper 2 of Education and Training Chapter 1, page 10, para 1.2 – 1.3.

¹²² White paper 2 on education and training Chapter 6, page 39, para 6.3. see also: section 7(2) of the Constitution of the Republic of South Africa, 1996.

¹²³ White paper 2 on Education and training Chapter 1, page 11, para 1.7.

¹²⁴ E L Phakathi *The Management of Learning and Teaching Support Materials in Public Schools: A Comparative Study* (M.ed thesis, UKZN, 2015) 11.

¹²⁵ "Department of Basic education", 01 July 2018, available at <https://www.msmonline.co.za/wp-content/uploads/2018/07/Learning-and-Teaching-Support-Material-Policy-LTSM> [accessed 10 May 2022]. See also: Chapter 2 of the Bill of Rights in the Constitution of the Republic of South Africa, 1996.

¹²⁶ "Department of Basic education", 01 July 2018, available at <https://www.msmonline.co.za/wp-content/uploads/2018/07/Learning-and-Teaching-Support-Material-Policy-LTSM> [accessed 10 May 2022].

include *inter alia* textbooks, stationery, consumable materials such as chemicals for science learners, and non-consumables such as pianos for music learners.¹²⁷ Therefore, through the LTSM policy the executive recognises education resources that are required for the realisation of every child's right to basic education. It will be illustrated in the following chapter which discusses the litigation on the right to basic education, that courts also pronounce that education resources such as those mentioned in the LTSM policy are essential components of the right to basic education.

2.4.4 National Learner Transport Policy & Eastern Cape Provincial Learner Transport Policy

The National Learner Transport Policy (NLTP) was formulated to respond to the challenges faced by school children (especially in rural areas) in accessing schools as a result of long distances between their places of residence and their nearest available school.¹²⁸ Furthermore, the policy was enacted to address the issue of safety that is accompanied with school children having to walk long distances to access basic education.¹²⁹ Subsidiary to the National Policy on the provision of scholar transport is the Eastern Cape Provincial Learner Transport Policy (ECPLT), which had set out more specific guidelines for stakeholders on the provision of scholar transport within the Eastern Cape province.¹³⁰ In particular, the policy makes it clear that where a child has to travel more than 5km to and from school, transport should be provided to them on a daily basis.

Both policies on scholar transport illustrate the executive's recognition of scholar transport as essential in enabling children to access schools. The devastating effects anticipated by the executive due to the lack of scholar transport provision, which are likely inclusive of physical

¹²⁷ "Department of Basic education", 01 July 2018, available at <https://www.msmonline.co.za/wp-content/uploads/2018/07/Learning-and-Teaching-Support-Material-Policy-LTSM> [accessed 10 May 2022].

¹²⁸ Foreword of the Department of Basic Education & Department of Transport 'National Learner Transport Policy' 2015 (GN 997/2015). See also: Foreword of the GN 997/2015. See also: L Mgushelo *The Scholar Transport Programme in the Eastern Cape: A case study of the beneficiaries at a secondary school in the Idutywa district* (MA Sociology, University of Pretoria, 2018) 28.

¹²⁹ Foreword of the Department of Basic Education & Department of Transport 'National Learner Transport Policy' 2015 (GN 997/2015).

¹³⁰ Section 4 (1) of the Eastern Cape Provincial Learner Transport Policy. See also: *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 22.

and psychological suffering faced by learners walking long distances to schools, could promptly be prevented or remedied through the provision of scholar transport. Threats to life of learners in this situation worsens the situation. Therefore, the executive binds itself to make provision for scholar transport as an education resource that is essential in the children's right to basic education. As it will be illustrated in the following chapter, courts take a similar stance, that transport is an essential component of the right to basic education, therefore, enforces the provision of scholar transport for every deserving learner.

2.4.5 School Nutrition Policy: National School Nutrition Programme (NSNP)

The National School Nutrition Programme (NSNP) is a government intervention programme aimed at enhancing the educational experience of the needy learners.¹³¹ The programme was introduced in 1994 for poverty alleviation, specifically initiated to uphold the rights of children to basic food and to contribute to learning in schools.¹³² In response to the call by the Minister of Basic Education (MOBE) to improve school access, learner retention and education outcomes, the NSNP is thus intended to address barriers to learning associated with hunger and malnutrition by providing nutritious meals to learners on all school days.¹³³ In essence, the objectives of the NSNP are to provide daily nutritious meal to enhance learning capacity and promote healthy lifestyles through nutrition education.¹³⁴

Therefore, in this regard the government commits itself to providing basic nutrition to impoverished school learners since it is necessary to make basic education available to needy learners. The litigation on the right to basic education in chapter 3 illustrates that learning is not possible when learners are not provided with a daily meal while expected to participate in the learning process.

¹³¹ “National School Nutrition Programme (NSNP) 2013/2014 Annual Report”, 01 April 2013 – 30 March 2014, available at <https://www.education.gov.za> [accessed 16 August 2022].

¹³² “National School Nutrition Programme (NSNP) 2013/2014 Annual Report”, 01 April 2013 – 30 March 2014, available at <https://www.education.gov.za> [accessed 16 August 2022].

¹³³ “National School Nutrition Programme (NSNP) 2013/2014 Annual Report”, 01 April 2013 – 30 March 2014, available at <https://www.education.gov.za> [accessed 16 August 2022].

¹³⁴ “National School Nutrition Programme (NSNP) 2013/2014 Annual Report”, 01 April 2013 – 30 March 2014, available at <https://www.education.gov.za> [accessed 16 August 2022].

2.5. Legislative Framework: The Right to Basic Education

Apart from the policy framework, the legislature has also enacted specific legislation to give effect to section 29(1)(a) of the Constitution.

2.5.1 National Education Policy Act 27 of 1996 (NEPA)

Together with the South African Schools Act, the NEPA was introduced to address the transformation from apartheid to a democratic education system. The preamble of the NEPA states that it aids in the adoption of legislation aimed at facilitating the democratic transformation of the national education system.¹³⁵ It was enacted to provide the MOBE with some power to enact education policies. The NEPA, like the SASA, acknowledges the need to address the effects of apartheid on the education system. Section 3 of the NEPA provides for a host of policy issues in education. It grants the MOBE the power to make policy on education management, admission of learners, the curriculum, language, and discipline of students. While the NEPA does not provide specific content to the right to basic education but rather the determination and regulation of national policy,¹³⁶ it nevertheless sets out the directive principles of national education policy in section 4.

Section 4 provides the state with a long list of educational factors, and rights¹³⁷ to which it should direct the development of policy. Examples include protection from discrimination in education,¹³⁸ the right of everyone to basic education,¹³⁹ instruction in the language of one's choice,¹⁴⁰ and also the right to freedom of religion, conscience, thought, belief, opinion,

¹³⁵ Act 27 of 1996.

¹³⁶ s2 of the NEPA sets out the objectives of the Act:

“2. The objectives of the Act are to provide for -

- (a) the determination of national education policy by the Minister in accordance with certain principles;
- (b) the consultations to be undertaken, prior to the determination-of policy, and the establishment of certain bodies for the purpose of consultation; 20
- (c) the publication and implementation of national education policy;
- (d) the monitoring and evaluation of education.”

¹³⁷ See: ss 2(a)(i) to (viii) of the NEPA.

¹³⁸ S 4(a)(i) of the NEPA.

¹³⁹ S 4(a)(ii) of the NEPA.

¹⁴⁰ S 4(a)(v) of the NEPA.

expression, association and culture.¹⁴¹ The NEPA thereby confirms the right to basic education as a right that is linked to other rights, which in turn also acknowledges the concept of rights to, in, and through basic education. As will be discussed in Chapter 4, the provisions of legislation, including the NEPA have been utilised by the courts when giving content to the right to basic education.

2.5.2 South African Schools Act 84 of 1996 (SASA)

The SASA was the second piece of legislation that came into effect in 1996 as part of the effort to transform education in South Africa. SASA is aimed at doing away with the apartheid educational system and focus on an equal and uniform high-quality education.¹⁴² SASA also wants to empower schools and communities to make a difference.¹⁴³ The Preamble of the SASA provides that the new education system must lay the foundation for the development of all people's talents and capabilities and advance the democratic transformation of society, combat racism, sexism, unfair discrimination, and eradicate poverty. Section 3(1) of SASA makes provision for compulsory school attendance and provides that "subject to this Act and any applicable provincial law, every parent must cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which such learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of fifteen years or the ninth grade, whichever occurs first".¹⁴⁴ The Act further provides that

¹⁴¹ Ss 4(a)(vi) and (viii) of the NEPA.

¹⁴² The preamble of the South African Schools Act provides that "this country requires a new national system for schools which will redress past injustices in educational provision, provide an education of progressively high quality for all learners and in so doing lay a strong foundation for the development of all our people's talents and capabilities, advance the democratic transformation of society, combat racism and sexism and all other forms of unfair discrimination and intolerance, contribute to the eradication of poverty and the economic well-being of society, protect and advance our diverse cultures and languages, uphold the rights of all learners, parents and educators, and promote their acceptance of responsibility for the organisation, governance and funding of schools in partnership with the State".

¹⁴³ SASA's framework includes Making nine years of schooling compulsory (grade 1 to 7), Localizing power in school community. As a result, governing bodies could develop their own admissions policy, language policy (subject to the constitution), code of conduct for learners (excludes corporal punishment) and determine fees. At the same time the Act prevented schools from excluding learners on the basis of entrance tests and being unable to afford the set fee. Offering greater powers to schools that applied for and were accepted for section 21 status. This meant that these schools could purchase their own textbooks or pay for services.

¹⁴⁴ See section 3 (1) of the South African Schools Act 84 of 1996.

“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”.¹⁴⁵ Importantly, the SASA also provides the legal framework for the governance of schools by making provision for the appointment of a school governing body that manages the school.

In terms of section 61 of the SASA, the MOBE is also empowered to make regulations on various aspects of the education system. Section 61 states that “[t]he Minister may make regulations on any matter which must or may be prescribed by regulation under this Act and any manner which may be necessary or expedient to prescribe in order to achieve the objects of this Act”. Since 1996, a number of regulations have been published in terms of the SASA, including Regulations for Safety Measures at Public Schools to provide for safety, violence and drugfree public schools; Regulations to Prohibit Initiation Practices in Schools to not allow any practice which involves initiation practices or may cause or contribute to the humiliation or maltreatment of learners; and Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure, which ensure that there is compliance with the minimum uniform norms and standards in the design and construction of new schools, additions and improvements, as well as providing for time frames within which school infrastructure backlogs must be eradicated.¹⁴⁶

Some of these regulations will be discussed below, as it contains provisions that have assisted the courts in giving content to the right to education. In particular, the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure have provided a framework for the infrastructure entitlements that are necessary in order to provide learners with a basic education. In this sense, the SASA, together with the regulations promulgated in terms of the SASA, have played an important role in guiding the court’s interpretation of section 29(1)(a) of the Constitution.

¹⁴⁵ See section 34 (1) of the South African Schools Act 84 of 1996.

¹⁴⁶ MJ Merabe *The Core Content of Public School Learners’ Right to a Basic Education in terms of Section 29(1)(a) of the Constitution* (LLM thesis, UFS, 2015) 95.

2.5.3 Employment of Educators Act (EEA)

The SASA must be read in conjunction with the EEA. The EEA regulates the employment of educators by the state, the conditions of service, discipline, retirement, and discharge of educators and for matters connected therewith.¹⁴⁷ Section 5(1) of the EEA allows for the employment of educators where there are vacant posts.¹⁴⁸ The EEA formed an important part of providing content to the right to education and assisted the court in interpreting section 29(1)(a) of the Constitution. As will be discussed more fully below, the courts have found that the provision of an educator is part of the content of the right to a basic education, and that the state carries a constitutional and statutory obligation to provide educators to schools.

2.6 Regulatory Framework: The Right to Basic Education

As set out above, the MOBE has the power to enact certain regulations or norms and standards to give effect to certain aspects of education in South Africa. The regulatory framework on the right to education is complex, but there are a number of regulations that give specific content to the right to education and places an obligation on the state to take specific action to ensure that certain resources that are critical for the realisation of the right is provided to learners. In particular, the regulations on school infrastructure have been instrumental in clarifying the content of the right to education. In Chapter 3 the historical development of these regulations through litigation will be discussed, and how it has aided courts in the interpretation of the core content of section 29(1)(a).

2.6.1 Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure

The Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure formulated in terms of section 5A(1)(a) of the SASA was first published for comment in 2014.¹⁴⁹ These Minimum Norms and Standards are regulations that define the infrastructural conditions that make a school a functional educational institution.¹⁵⁰ They

¹⁴⁷ See Preamble of Act 76 of 1998.

¹⁴⁸ Act 76 of 1998.

¹⁴⁹ “South African Schools Act: Minimum Uniform Norms and Standards for Public School Infrastructure”, 29 November 2013, available at www.gov.za/sites/default/files/gcis_document/201409/37081rgon920.pdf [accessed 11 June 2022].

¹⁵⁰ School Infrastructure - Equal Education, 19 June 2016, available at <https://equaleducation.org.za/campaigns/school-infrastructure> [accessed 27 March 2022].

stipulate the basic level of infrastructure that every school must have in order to function properly.¹⁵¹ This provides a standard for national and provincial education departments to work towards, and against which the state can be held accountable in cases where they fail to meet this standard.¹⁵² The Norms and Standards apply to all public schools in South Africa.¹⁵³ This is of great significance because it means that all learners in South Africa, regardless of race and class, must learn in environments with adequate infrastructure. The legally binding norms and standards in this regard are specific in respect of the infrastructure that is required for a school to be regarded as a school and they provide that schools must have water, electricity, internet, functioning sanitation facilities (toilets), libraries, laboratories, sporting facilities and securities.¹⁵⁴ Therefore the development of regulatory framework premised on the provision of school infrastructure and which is specific as to the resources that are essential for a functioning school, recognises school infrastructure as an essential educational input or component for realising basic education.

2.7 The State's Obligation to Realise the Right to Basic Education Under International Law

Section 39(1)(b) of the Constitution states that when interpreting the rights in the Bill of Rights, the court must consider international law. There are various international law instruments that address the right to education and seek to give content to the right. As will be discussed more fully in Chapter 4, the courts do consider international law when interpreting the content of the right to education, but the role of international law in education rights jurisprudence has to date been somewhat limited. Despite this, the international legal framework on education, contain valuable provisions that courts can utilise to guide their interpretation of the content of section 29(1)(a).

¹⁵¹ "South African Schools Act: Minimum Uniform Norms and Standards for Public School Infrastructure", 29 November 2013, available at www.gov.za/sites/default/files/gcis_document/201409/37081rgon920.pdf [accessed 11 June 2022].

¹⁵² School Infrastructure - Equal Education, 19 June 2016, available at <https://equaleducation.org.za/campaigns/school-infrastructure> [accessed 27 March 2022].

¹⁵³ School Infrastructure - Equal Education, 19 June 2016, available at <https://equaleducation.org.za/campaigns/school-infrastructure> [accessed 27 March 2022].

¹⁵⁴ School Infrastructure - Equal Education, 19 June 2016, available at <https://equaleducation.org.za/campaigns/school-infrastructure> [accessed 27 March 2022].

Importantly, section 29(1)(a) does not specify that education should be provided on an equitable, or equal basis. In this regard, the international law instruments are particularly instructive on the question of equality and equity in education.

2.7.1 Universal Declaration of Human Rights (UDHR)

The Universal Declaration of Human Rights (UDHR) was the first instrument at an international level to provide for the right to education.¹⁵⁵ The UDHR was adopted and proclaimed by the General Assembly Resolution 217 A(iii) on 10 December 1948. Article 26 is relevant to regulating the provision of education. Article 26 provides that everyone has the right to education and provides for the compulsory provision of education.¹⁵⁶ Secondly, the provision provides that education shall be directed to the full development of the child's personality and enhance the respect for human rights and fundamental freedoms.¹⁵⁷

2.7.2 United Nations Convention on the Rights of the Child (CRC)

This key instrument entered into force on 2 September 1990,¹⁵⁸ and South Africa signed and ratified the CRC on 29 January 1993 and 16 June 1995, respectively.¹⁵⁹ Articles 28 and 29 are of importance in relation to the provision of education. Article 28 (1)(a) and (d) provides:

Article 28 (1)(a) and (d) provides:¹⁶⁰

1. The State Parties recognize the right of the child to education, and with a view to

¹⁵⁵ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 11 January 2023].

¹⁵⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 11 January 2023].

¹⁵⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 11 January 2023].

¹⁵⁸ Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, p3, available at https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf [accessed:15 March 2022].

¹⁵⁹ Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, p3, available at https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf [accessed:15 March 2022].

¹⁶⁰ Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, p3, available at https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf [accessed:15 March 2022].

achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all; and
- (d) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Further, Article 29 (1)(a) to (b) provides:¹⁶¹

1. The State Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; and
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations.

Although South Africa ratified the CRC, it in regulating the provision of education domestically, framed the provision of education to be immediately realisable.¹⁶² This is contrary to what Article 28 of the CRC provides, where it envisions that the right will be progressively realised. In this sense the Constitution affords more protection to the right than the CRC envisioned. Article 28 of the CRC does however speak of the need for education to be accessible on an equal basis and for everyone to have equal opportunity to have access to education.

¹⁶¹ Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, p3, available at https://un.org/doc/Treaties/1990/09/1990909%2003-14%AM%20AM/Ch_IV_11p.pdf [accessed:15 March 2022].

¹⁶² See section 29(1)(a) of the Constitution, which provides the textual formulation of the right to basic education, which is a Constitutional right that regulates the provision of basic education in South Africa; Merabe *The Core Content of Public School Learners' Right to a Basic Education in terms of Section 29(1)(a) of the Constitution* 30.

2.7.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR is undoubtedly the most significant treaty which entrenches the right to education.¹⁶³ The South African government signed and ratified the ICESCR on 3 October 1994 and 12 January 2015, respectively.¹⁶⁴ Article 13(1) of the ICESCR provides that member states to the covenant recognize the right of everyone to education and agree that education shall be directed to the development of the full human personality, its sense of dignity and respect for human rights and fundamental freedoms.¹⁶⁵ Furthermore, the provision provides that member states recognize that, with the view to achieving the full realization of the right to education, primary education shall be compulsory and made available to all.¹⁶⁶

General Comment No. 13, published by the Committee on Social, Economic and Cultural Rights (CESCR), provides the most comprehensive description of the content of the right to basic education in international law.¹⁶⁷ Professor Katarina Tomasevski, the former UN Special Rapporteur on the Right to Education, formulated what is known as the 4A framework, which sets out the scope and nature of states' obligation in providing basic education.¹⁶⁸ This framework speaks to the fulfilment of the right to basic education as guaranteed by international law.¹⁶⁹ The 4A framework provides that to meet the legal standards, measures that are taken by a state in providing for basic education, should ensure that education is made

¹⁶³ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, 993, p3, available at <https://www.refworld.org/docid/3ae6b3c0.html> [accessed: 17 March 2022].

¹⁶⁴ D Petherbridge "South Africa's Pending Ratification of the International Covenant on Economic, Social and Cultural Rights: What are the implications?" available at <http://blogs.sun.ac.za/.../South-Africas-pending-ratification-of-theICESCR.pdf>. [accessed on 14 March 2022]. See also: Section 27, Equal Education, Centre for Child Law, Legal Resources Centre, Equal Education Law Centre.

¹⁶⁵ D Petherbridge "South Africa's Pending Ratification of the International covenant on Economic, Social and Cultural Rights: What are the implications?" available at <http://blogs.sun.ac.za/.../South-Africas-pending-ratification-of-theICESCR.pdf>. [accessed on 14 March 2022].

¹⁶⁶ D Petherbridge "South Africa's Pending Ratification of the International covenant on Economic, Social and Cultural Rights: What are the implications?" available at <http://blogs.sun.ac.za/.../South-Africas-pending-ratification-of-theICESCR.pdf>. [accessed on 14 March 2022].

¹⁶⁷ Merabe *The Core Content of Public School Learners' Right to a Basic Education in terms of Section 29(1)(a) of the Constitution* 30.

¹⁶⁸ Para 50 of the Report by the Special Rapporteur on the right to education E/CN.4/1999/49. The General Comment requires that the best interest of the child guides the application of these principles. See also para 7.

¹⁶⁹ *Ibid.*

available, accessible, acceptable, and adaptable.¹⁷⁰ The CESCR explains what is meant by each of these factors, further clarifying what obligations member states have in relation to the right to education.

In respect of “availability”, the CESCR provides that education institutions (schools) that are functional must be made available in sufficient quantity.¹⁷¹ If the learning environment does not provide functional schools, the CESCR is of the view that basic education is not available. This requires the state to provide a government-funded education system which ensures that schools are available to all children.¹⁷² This entails the provision of school infrastructure, and learning and teaching resources at all educational institutions, sanitation facilities for all sexes, safe drinking water, trained teachers, teaching materials, libraries, computer laboratories, and information technology.¹⁷³ However, it is acceptable for the state to provide more than the essential educational inputs in achieving a maximum provision for basic education.

The CESCR provides that accessibility has three dimensions, namely non-discrimination, physical accessibility, and economic accessibility.¹⁷⁴ It firstly requires an education system that is accessible to all, and does not discriminate against marginalised or vulnerable groups on any of the prohibited grounds, including race, sex, and social origin. Physical accessibility means that education must be within safe physical reach. The CESCR is of the view that where children walk long and often unsafe distances to school, it makes basic education inaccessible.¹⁷⁵ Economic accessibility means that education must be affordable for all

¹⁷⁰ CESCR General Comment No.13: The Right to Education 1999 (Article 13 of the Covenant).

¹⁷¹ General Comment 13: The Right to Education 1999 (Article 13, para 6 (a) of the Covenant).

¹⁷² CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 6(a) of the Covenant); R Joubert “Incorporating International Standards into National Education law in South Africa: The Accountability of the State (2014) 29 *South African Public Law* 1 at 5; Veriava & Coomans “Right to Education” in *Socio-Economic Rights* 66; S Pendlebury *et al South African Child Gauge* (2008/2009) 20.

¹⁷³ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 6(a) of the Covenant); L Arendse “The Obligation to Provide Free Basic Education in South Africa: An International Law perspective” (2011) 14 *Potchefstroom Electronic Law Journal* 112; Joubert (2014) *SAPL* 5; Merabe *The Core Content of Public School Learners’ Right to a Basic Education in terms of Section 29(1)(a) of the Constitution* 30.

¹⁷⁴ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 6 (b) of the Covenant).

¹⁷⁵ CESCR General Comment No. 13: The Right to Education 1999 (Article 13, para 6 (b) of the Covenant).

learners. The ICESCR already provides that primary school education must be free for all, but it also requires the members states to ensure that secondary and tertiary education is affordable.

The third requirement of acceptability means that the content of school education, the delivery methods, assessments, and the curriculum must be of good quality, relevant, and culturally aligning with the quality required by various international instruments.¹⁷⁶ The curriculum must be tailored in such a way that it is inclusive, free from any stereotypes including those based on gender or ethnic groups. Acceptable teaching and assessment methods must view children as agents of their own change and masters of their own destiny.¹⁷⁷ Acceptability in this instance does consider the primary objective of basic education, which is to empower children and equip them to reaching their full potential in society.¹⁷⁸

Lastly, adaptability requires that school education must be flexible enough to adapt to the needs of the society and communities to which it is provided.¹⁷⁹ This obligation is perceived from the

¹⁷⁶ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 6 (b) of the Covenant).

¹⁷⁷ A Das *Right to Education* 2 ed (2010) 40-41.

¹⁷⁸ *Section 27 v Minister of Basic Education* 2013 (2) SA 40 (GNP) paras 4 -5. See also: Article 29(1) of the Child Rights Convention, which provides—

“States Parties agree that the education of the child shall be directed to:

1. The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
2. The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
3. The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
4. The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

The development of respect for the natural environment.”

¹⁷⁹ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 6 (d) of the Covenant).

perspective of school education being able to accommodate every child irrespective of his or her capabilities.¹⁸⁰ Learners with disabilities are often segregated into separate schools and denied education altogether.¹⁸¹ This is contrary to the aspirations of the CESCRC regarding the provision of basic education.¹⁸² The provision of basic education should be inclusive through adapting to being available and accessible to all children. General Comment 13,¹⁸³ provides that if education does not exhibit the above essential features, it cannot qualify to be called education.

The 4A framework is incredibly helpful in determining the core content of the right to education. Not only is it instructive for member states to understand their obligations, but it can also act as a useful guide for the courts when interpreting the content of the right to basic education. As will be discussed in the remainder of this study, some features of the 4A framework have already been incorporated into South African laws and policies and have been given effect to through some of the judgments on section 29(1)(a).

2.8 The Concept of a Minimum Core Obligation

By way of background to the study, it is important to consider how we understand the theoretical framework of a minimum core obligation in relation to socio-economic rights in South Africa. In South Africa, the idea of a judicially imposed minimum core obligation has been rejected by the Constitutional Court in the landmark *Grootboom* judgment in favour of a reasonableness approach. Our courts therefore do not apply the concept of a minimum core obligation to socio-economic rights disputes and while it may interpret rights, courts are cautious of advancing the argument that a specific socio-economic right should be interpreted to contain a minimum core entitlement to which the bearer of the right is entitled.¹⁸⁴

¹⁸⁰ K Tomaševski “Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable”, 2001, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf [accessed 16 June 2022].

¹⁸¹ K Tomaševski “Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable”, 2001, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf [accessed 16 June 2022].

¹⁸² CESCRC General Comment No.13: The Right to Education 1999 (Article 13 of the Covenant).

¹⁸³ CESCRC General Comment No.13: The Right to Education 1999 (Article 13, para 6 of the Covenant).

¹⁸⁴ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

However, as will be illustrated in chapter 3, the South African courts have approached the right to education somewhat differently, never shying away from finding that the right has a specific core content that the state must provide. As set out above, much of the content of the right to basic education has already been clarified in policies, legislation, and regulations, and as will be illustrated in Chapter 4, courts have often relied on these subordinate provisions as a means to giving content to section 29(1)(a). Therefore, before embarking on an analysis of the most important education rights cases that have interpreted the right to education to contain a minimum content, it is important to consider where the concept came from, and how our courts have historically dealt with it. This will form the background for the discussion of education jurisprudence as it will illustrate how differently education rights cases have been handled by our courts.

2.8.1 Definitional Elements of a Minimum Core Obligation

The concept of a minimum core content of socio-economic rights originated from the work of the CESCR.¹⁸⁵ The CESCR described the minimum core obligation in its General Comment No.3. General Comment No.3 states that:

“The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter, and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être.”¹⁸⁶

The CESCR aims to set a minimum legal content for such rights, that must be realised by state parties to the ICESCR, that South Africa has ratified.¹⁸⁷ The CESCR developed this model to serve as a benchmark in assessing whether or not a state has discharged its obligations under

¹⁸⁵ O Fuo & A Du Plessis “In the Face of Judicial Deference: Taking the Minimum Core of Socio-Economic Rights to the Local Government Sphere” (2015) 19 *Law, Democracy and Development* 1 at 5.

¹⁸⁶ CESCR General Comment No.3: The Nature of States Parties Obligations 1990 (Art.2, Para.1, of the Covenant).

¹⁸⁷ *Ibid*, (South Africa ratified the ICESCR on 12 January 2015).

the ICESCR.¹⁸⁸ Over the past decades the CESCR has further developed the minimum core content of various socio-economic rights provided under the ICESCR in its general comments.¹⁸⁹

The minimum core content represents the floor of immediately enforceable entitlements.¹⁹⁰ These are minimum essential elements such as goods and services that are deemed to be guaranteed by a socio-economic right.¹⁹¹ The minimum core content of a socio-economic right determines the resources that are necessary and sufficient for a human being to maintain their survival.¹⁹² An obligation is placed upon government to do whatever it takes within its power to provide these resources.¹⁹³ The minimum core requires a rigid stance to be taken due to the fact that it is unacceptable for humans to live without having the necessary resources to maintain their survival.¹⁹⁴ A differentiation can be drawn between the legislative-, executive-, and judicial minimum core obligation.

2.8.2 Legislative Minimum Core Obligation

The legislative minimum core obligation refers to the warranties for socio-economic provision made by the legislature which are stipulated in legislative framework or regulations made in terms of enabling legislation.¹⁹⁵ In this regard the legislature defines and determines the core content of a socio-economic right.¹⁹⁶ The goods and services that the legislature warrants are

¹⁸⁸ *Ibid.*

¹⁸⁹ Fuo & Du Plessis 2015 *LDD* 6.

¹⁹⁰ JA Mavedzenge “Revisiting the Role of the Judiciary in Enforcing the State’s Duty to Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya” (2020) 7 *Journal of Comparative Law in Africa* 60 at 63.

¹⁹¹ Mavedzenge 2020 *JCLA* 70.

¹⁹² D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 *South African Journal on Human Rights* 1 at 15.

¹⁹³ *Ibid.*

¹⁹⁴ Bilchitz 2003 *SAJHR* 15.

¹⁹⁵ “A guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa”, 30 August 2019, available at <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf> [accessed 10 May 2022].

¹⁹⁶ “A guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa”, 30 August 2019, available at <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf> [accessed 10 May 2022].

viewed by the legislature as necessary to realise the right. The legislative minimum core allows the public to insist that the goods and services be provided as stipulated in the legislation. As will be demonstrated in Chapter 4, this makes the roles of the courts much easier as the content of the right has often been defined in the legislation. To some extent the NEPA, SASA, and the Norms and Standards on Public School Infrastructure are reflective of the legislative minimum core obligation as the state committed to providing certain goods and services for learners. This includes access to schools, school funding, infrastructure, and goods and services such as LTSM.

2.8.3 Executive Minimum Core Obligation

The executive minimum core obligation refers to the warranties for socio-economic provision made by the executive and are usually formulated in policies.¹⁹⁷ Defining and determining the core content of a socio-economic right via formulated policy guides the executive on how it will realise the right to education. Although policies are not always binding law, it is nevertheless the responsibility of the executive to implement policy and to be held accountable for the failing to implement it.¹⁹⁸ In South Africa, White Paper 1 and 2, as well as subsequent policies dealing with specific goods and services can be viewed as determining certain executive minimum core entitlements that learners can insist be provided to them to realise section 29(1)(a) of the Constitution.

2.9 The Constitutional Court's Approach to Socio-Economic Rights Adjudication

While it is accepted that the executive and the legislature can make policies, laws, and regulations to give content to a particular socio-economic right, the court's role in defining the core content of a socio-economic right is not that clear in South Africa. As stated above, the Constitutional Court has rejected the notion of a judicially determined minimum core obligation in South African law and have rather opted for a reasonableness approach.¹⁹⁹ In

¹⁹⁷ "A guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa", 30 August 2019, available at <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf> [accessed 10 May 2022].

¹⁹⁸ P De Vos *et al* *South African Constitutional Law in Context* (2014) 196-197. See also: section 92(2) of the Constitution.

¹⁹⁹ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC).

*Minister of Health v Treatment Action Campaign*²⁰⁰ (*TAC*), the Constitutional Court declined to determine the minimum core content of the right to health. This case dealt with a devised programme by the government to deal with the transmission of HIV from mother to child during pregnancy.²⁰¹ It was argued that the programme was unreasonable as it placed restrictions on the provision of Nevirapine, a drug that prevented the transmission of HIV from mother to child during birth. It was argued that this was a violation of sections 7(2) and 8(1) of the Constitution²⁰² because the application of the programme did not promote sections 27 and 28 of the Constitution.²⁰³ The *amicus* in this case requested the court to make a declaration the right to health care imposes a minimum core, which is an obligation placed upon the state to provide the drug to pregnant mothers.²⁰⁴ The Constitutional Court also referred to section 26 as another implicated socio-economic right and thus held that:

*‘Evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the State are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under s 26(2), and not as a self-standing right conferred on everyone under s 26(1). A purposive reading of ss 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the State, is that it act reasonably to provide access to the socio-economic rights identified in ss 26 and 27 on a progressive basis.’*²⁰⁵

The second rationale for rejecting a judicially determined minimum core obligation is illustrated in *Government of the Republic of South Africa v Grootboom*²⁰⁶ (*Grootboom*), where

²⁰⁰ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 34.

²⁰¹ *Ibid* para 4.

²⁰² Section 7(2) provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 8(1) provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the Judiciary and all organs of state.

²⁰³ Section 27 provides the right to health care, food, water and social security.

Section 28 provides the right of children.

²⁰⁴ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 28-34.

²⁰⁵ *Ibid* para 34.

²⁰⁶ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 32.

the court stated that it lacked the technical competence and democratic legitimacy to define the core content of a socio-economic right. This case dealt with the eviction of inhabitants from their informal homes situated on a private land earmarked for low-cost housing.²⁰⁷ An application was made to court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation.²⁰⁸ It was contended that the minimum core obligation placed upon the state in terms of section 26(1), entitled all the evicted inhabitants, including those without children, to shelter.²⁰⁹ Furthermore, that the children's unqualified right to shelter as provided in section 28(1)(c) placed the right of children to that minimum core obligation beyond doubt.²¹⁰ In this regard the Constitutional Court held that:

‘The determination of a minimum core in the context of ‘the right to have access to adequate housing’ presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a Court to determine in the first instance the minimum core content of a right.’²¹¹

²⁰⁷ *Ibid* para 4.

²⁰⁸ *Ibid* para 4.

²⁰⁹ *Ibid* para 18.

²¹⁰ *Ibid* para 18.

²¹¹ *Ibid* para 33.

The Constitutional Court found that it lacked the technical competence to determine a minimum core obligation in relation to the right to housing, as it required knowledge and understanding of a vast array of factors to which the court had no access.

*Mazibuko v City of Johannesburg*²¹² provides the third rationale behind the Constitutional Court's rejection of a minimum core content of a socio-economic right, namely the possibility of violating the separation of powers doctrine.²¹³ The court held that:

*‘[...]ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice.’*²¹⁴

The Constitutional Court has rather opted for a reasonableness analysis. The reasonableness test for assessing the efficacy of government programmes to promote socio-economic rights was adopted in the *Grootboom* case. In terms of this approach, the reasonableness of a programme is assessed on its effectiveness in responding to the interests of rights-bearers. It requires that for a programme to realise a socio-economic right, it must be coherent, balanced,

²¹² *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 61.

²¹³ The separation of powers is one of the oldest constitutional principles in politics and constitutional law. The fundamental value of the separation of powers lies in its constitutional checks and balances in government to ensure that state authority is constitutionally controlled and not exercised arbitrarily. One of the oldest dicta on restricted authority (the doctrine of the separation of powers) entails that the freedom of the citizens of a state can be ensured only by a division of centralised institutionalised power, because the centralisation of power can potentially lead to abuse. This division of authority is achieved by a structural and functional separation of government's authority into legislative, executive and judicial branches. The legislature has the power to make legislation governing the citizenry and other matters in the like. The executive consists of the President and his cabinet which includes Ministers and has the power to formulate and implement policy. The judiciary consists of the courts and serve as a watchdog on the exercise of power by the legislature and executive. The judiciary applies the law in ensuring the legitimate exercise of government power.

²¹⁴ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 61.

comprehensive and workable.²¹⁵ The court provided that in order for a measure to be reasonable, it should immediately respond to those whose needs are urgent and those whose ability to enjoy all rights are most in peril.²¹⁶ People in such positions should not be ignored by the programmes aimed at promoting the right.²¹⁷ The reasonableness approach essentially requires courts to analyse laws, regulations, policies, and government action that is aimed at fulfilling a particular socio-economic right based on its ability to reasonably be able to fulfil the specific socio-economic right in question, and respond to the needs of the most vulnerable.

The approach adopted by the Constitutional Court to the minimum core obligation has been criticised by some academics. From an international law perspective, the CESCR has used the minimum core to give substance to the Covenant's enumerated rights to food, health, housing, and education.²¹⁸ Commentators have proposed that the utilization of the minimum core concept could guard and advance socio-economic rights that are protected in international human rights instruments.²¹⁹ It has also been proposed that a minimum core approach to socio-economic-rights would make it easier for claimants to enforce their socio-economic rights, as well as provide clarity to the state on what its obligations are in relation to specific rights. The minimum core sets a lower burden of proof for the claimants and a higher one upon the state in socio-economic rights claims. In the case of a minimum core good or service being denied, an individual would succeed in establishing a *prima facie* violation if they can demonstrate:

1. That they lack access to the subsistence requirements; and
2. That these basic needs are neither physically nor economically accessible to them.²²⁰

²¹⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 38.

²¹⁶ *Ibid* para 44.

²¹⁷ *Ibid*.

²¹⁸ See, for example: CESCR General Comment No.13: The Right to Education 1999 (Article 13 of the Covenant) and CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health 2000 (Article 12 of the Covenant).

²¹⁹ KG Young "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale Journal of International Law* 113 at 120.

²²⁰ S Liebenberg "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty" (2002) 6 *Law, Democracy and Development* 159 at 177.

Thereafter, the burden shifts to the state that carries a strong burden of justification to show that it is unable to provide direct assistance due to a shortage of resources.²²¹ The standard of scrutiny would be high, and the court would not accept pre-existing budgetary allocations as an excuse for failing to meet the minimum core.²²² The state is required to provide more justification for its failure to meet the minimum core obligation.²²³ In short, the minimum core obligation makes it clear what is required by all spheres of government, and makes it clear what goods and services people are entitled to receive from the state. The minimum core obligation offers the state a starting point by providing specific targets that the state should meet.²²⁴ This allows claimants in socio-economic rights claims, who are in vulnerable positions and in desperate need of basic services, to be able to insist on those targets that the state may be failing to fulfil. Liebenberg²²⁵ argues that the minimum core obligation is useful since socio-economic rights are given content which removes the ambiguity on what the rights entail. She states that having the courts defining and determining minimum core obligations imposed by socio-economic rights, has the potential of reducing the social discourses and debate around the conceptual and value-based underpinnings of socio-economic rights.²²⁶

A further criticism of the court's failure to adopt a minimum core obligation is that the court missed an opportunity to give social rights the teeth it requires to live up to their transformative potential.²²⁷ Roux²²⁸ criticised the court's failure to encourage the state to prioritise the basic needs of the most vulnerable in society. He argues that the court failed to engage in "priority-setting" in the strict sense in that basic needs of the most vulnerable in society shall be provided for first, before providing resources to groups that are more well-off, and are able to provide for themselves.²²⁹ Furthermore, although the court²³⁰ held that a reasonable government

²²¹ Liebenberg 2002 *LDD* 188.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ Young 2008 *YJIL* 121.

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ S Liebenberg "Socio-Economic Rights. Adjudication Under a Transformative Constitution" (2013) 24 *European Journal of International Law* 739 at 739.

²²⁸ T Roux "Understanding Grootboom – A Response to Cass R Sunstein" (2002) 12 *Constitutional Forum* 41 at 47.

²²⁹ Roux 2002 *CF* 46.

²³⁰ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 44.

programme shall be one that provides for the needs of the most vulnerable in society, Roux argues that this standard is merely a matter of inclusion:

*“Nothing is said about how the State ought to apportion its efforts between competing significant segments or, more importantly, between significant and not so significant segments of society.”*²³¹

In this regard Roux argues that the judicially determined minimum core, encourages the state to prioritise appropriately in its socio-economic rights provision. It would be meaningless to have the state responding to everyone’s economic needs (including the privileged group) in society, or adopting reasonable programmes for a maximum socio-economic provision, yet there is a group of individuals that remain destitute. The purpose of the entrenching socio-economic rights would have a hollow ring.²³² Socio-economic rights give people access to certain basic needs (resources, opportunities and services) necessary for human beings to live a dignified life.²³³ Therefore, it is vital for the state to make adequate socio-economic provision (and this includes provision of essential education resources in respect of the right to basic education) in order to put into practice the Constitution’s aspirations for a decent society.

Bilchitz²³⁴ on the other takes issue with the way the court in *Grootboom*²³⁵ characterised the minimum core obligation as involving complex questions in relation to the diverse needs of a society, and enjoyment of socio-economic rights by different groups. He argues that the court fails to differentiate between universal standard that shall be adhered to in order for an obligation to be fulfilled, and the different measures that may be adopted to fulfil this standard, thus giving effect to the constitutional obligation.²³⁶ He provides that the minimum core does not entail a particular means by which a socio-economic right may be realized, rather it refers to a set standard upon which socio-economic provision is necessary to meet people’s basic

²³¹ Roux 2002 *CF* 49.

²³² The purpose of entrenching socio-economic rights was to have some form of economic equality since political equality alone was insufficient. See: Bilchitz 2002 *SALJ* 501.

²³³ S Khoza *Socio-Economic Rights in South Africa* 2 ed (2007) 20.

²³⁴ Bilchitz 2002 *SALJ* 487.

²³⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 33.

²³⁶ Bilchitz 2002 *SALJ* 487.

needs.²³⁷ Such needs are to be understood generally as the universal preconditions that are vital for human survival and those means that are necessary for the achievement of more ultimate aims, where there is an absence of special circumstances to prevent the achievement of those aims.²³⁸

Hence, the obligation to ensure the provision of these needs speak for the universal constitutional standard that is required of the state.²³⁹ The difference merely lies in the ability of different groups in society to access these needs, and thus the measures required by the state to fulfil its obligation in concrete cases.²⁴⁰ Therefore, Bilchitz states that wide sources of information are not a prerequisite in the determination of a minimum core, such information may become necessary in the deciding on the particular actions that a state is required to take in promoting a socio-economic right.²⁴¹

2.10 The Core Content of the Right to Basic Education Under Section 29(1)(a) of the Constitution

As will be illustrated below, the litigation between 2010 and 2022 on the right to basic education has developed somewhat differently to the other socio-economic rights in the Constitution. While the idea of a judicially imposed minimum core was rejected in other socio-economic rights litigation, the right to education has been interpreted by South African courts to contain a minimum basket of goods and services that are necessary for the realisation of the right. Drawing on the executive's and the legislature's policies, laws, and regulations, courts have interpreted the right to education in such a way that gives it a minimum core content to which learners in public schools are entitled.

As will be discussed in chapter 3, the courts have determined that at a minimum, the right to education includes an entitlement to learner and teacher support materials such as textbooks,

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ Woolman & Bishop *Constitutional Law* ch33-p29.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

stationery, and school furniture,²⁴² educators and non-educators,²⁴³ adequate schooling facilities,²⁴⁴ school nutrition,²⁴⁵ and scholar transport. Interestingly, the litigation on the right to education has never specifically referred to the minimum core obligation and has not engaged in any debates that surround the adoption of the minimum core obligation. The cases have almost exclusively been framed in the form of a declarator that the right to education has been violated because a certain good or service not being provided to learners, and a finding that section 29(1)(a) of the Constitution includes an entitlement to the specific good or service. This approach seems to circumvent some of the controversy around the minimum core obligation and its adoption into South African law. It rather seems to accept that where the state itself (either the executive or the legislature) have adopted policies, laws, or regulations that define the minimum core of the right, the courts should give effect to that and accept that it is part of the core content of the right. And in cases where the right has not been clearly defined in policies, laws, and regulations, the courts have interpreted and clarified the right and the entitlement under the right.

2.11 Conclusion

This chapter provided an overview of the legal framework that governs education in South Africa as well as the international law on the right to education. It provides the background against which the case law on the right to education must be understood. The chapter also provided a brief discussion on the minimum core obligation in South African law. The discussion on the minimum core obligation is necessary to frame the analysis of the courts' interpretation of the content of section 29(1)(a) of the Constitution.

²⁴² *Section 27 v Minister of Education* 2013 (2) BCLR 237 (GNP); *Basic Education for All v Minister of Basic Education* 2014 (4) SA 274 (GP); *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

²⁴³ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG).

²⁴⁴ *Centre for Child Law v Government of the Eastern Cape Province* (“Mud Schools” Litigation in the Eastern Cape Province 2012).

²⁴⁵ *Equal Education and Others v Minister of Basic Education and Others* 2021 (1) SA 198 (GP).

CHAPTER 3

SOUTH AFRICAN JURISPRUDENCE ON THE RIGHT TO BASIC EDUCATION

3.1 Introduction

This chapter sets out the development of the South African jurisprudence on the right to basic education. Between 2010 and 2022 courts have utilized their interpretive role in basic education litigation and provided a core content to the right which seeks to frame the right as consisting of a minimum basket of goods and services that are necessary for the right to be fulfilled. This chapter will provide an overview of the most important education rights cases in South Africa between 2010 and 2022. The chapter will provide an overview of the judgments and the rationale that the court used in arriving at its findings.

The chapter will commence with a discussion of the cases related to infrastructure in schools. While the early infrastructure litigation did not always result in judgments, but rather settlements with the relevant state departments, many of the arguments advanced by the applicants were accepted by the courts and incorporated into the settlement agreements, which agreements will be considered. The focus will then shift to those judgments dealing with textbooks, stationery, teaching staff and non-teaching staff, as well as scholar transport, and nutrition within the school context.

3.2 Infrastructure as a Component of the Right to Basic Education

As stated above, much of the litigation considering the content of the right to education, started with litigation around the link between proper and safe school infrastructure and its impact on section 29(1)(a) of the Constitution. While the early cases on infrastructure that started in 2010 did not necessarily result in judgments, the subsequent settlement agreements entered between the state and the applicants, laid the foundation for the court's approach to interpreting the right and a willingness to ensure that the content of the right is clarified and properly defined. The lack of adequate infrastructure at schools in South Africa is to a large degree a remnant of the inadequate resourcing of the apartheid years, and in 2004 during his State of the Nation Address, then-president Thabo Mbeki committed the national government to ensuring that

there would be “no learner and student learning under a tree, mud-school or any dangerous conditions that expose learners and teachers to the elements” by the end of the financial year.²⁴⁶

By 2010, a large number of schools in the Eastern Cape still consisted of inappropriate structures made from mud, corrugated iron, or crumbling brick.²⁴⁷ These structures posed a threat to the health and safety of learners in the province and made teaching and learning difficult. This in turn affected the academic performance of learners in the schools and compromised their ability to fully engage in the educational process.²⁴⁸ The circumstances at these schools consequently prompted the first case in South Africa that was specifically aimed at giving content to the right to education. It was also the start of a series of cases that sought to entrench infrastructure as a core component of the right to education and eradicate inappropriate school infrastructure across South Africa.

3.2.1 Centre for Child Law and Seven Others v Government of the Eastern Cape Province and others

The LRC launched this case in 2010 in what the Grahamstown High Court in the Eastern Cape was then.²⁴⁹ The case became colloquially known as the “mud schools” litigation. The applicants were the Centre for Child Law who acted as an institutional client in the litigation, as well as seven schools that have struggled for many years to garner the attention of the provincial department of education in the Eastern Cape, regarding their severe infrastructure problems.²⁵⁰ The complaints included dilapidated mud buildings (in some cases roofs missing and lessons being held in neighbourhood dwellings), no running water or sanitation, and inadequate chairs and desks for the number of learners attending the schools.²⁵¹ The schools often consisted of clusters of round mud huts, or in some cases rectangular classrooms made

²⁴⁶ T Mbeki “State of the Nation Address” *SA History* 21 May 2004, available at <https://www.sahistory.org.za/archive/2004-president-mbeki-state-nation-address-21-may-2004-after-national-elections> [accessed on 15 January 2023]; C McConnachie & S Brener “Litigating the Right to Basic Education” in J Brickhill *Public Interest Litigation in South Africa* (2018) 288.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ The court was renamed to the Makhanda High Court in 2022.

²⁵⁰ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bhisho, case no 504/10.

²⁵¹ *Ibid.*

from mud.²⁵² These mud schools were old and dilapidated.²⁵³ The roofs, often constructed from corrugated iron, had holes, causing children and classroom equipment to get wet when it rains.²⁵⁴ Books could be left in the classrooms, and when it rained, children simply could not attend school. Mud schools also lack electricity, running water and sanitation, and most have old and insufficient classroom furniture.²⁵⁵ The architecture of mud schools meant the learning and teaching process was conditional on weather conditions due to the state of the buildings. This condition impedes the adequate provision of basic education.

The applicants argued that the inadequate school infrastructure compromised the right to basic education in section 29(1)(a) of the Constitution as it effectively deprived teachers of the ability to teach and learners of the ability to learn. This resulted in a breach of the right to education, that can only be remedied with adequate infrastructure that does not compromise the health and safety of the learners and ensures that their right to education is realised. The matter was settled out of court, resulting in a far-reaching memorandum of understanding signed on 4 February 2011.

The memorandum of understanding eventually resulted in the Accelerated Schools Infrastructure Development Initiative (ASIDI) where a total of R8.2 billion was pledged for a three-year period and specific amounts earmarked for the seven schools.²⁵⁶ The department undertook to replace the seven schools with temporary structures while it used the ASIDI programme to fund the building of proper infrastructure at the schools as well as other affected schools across the country. The ASIDI was funded by two conditional grants from the National Department of Basic Education, which provided two major dedicated funding streams for the eradication of mud schools: the Education Infrastructure Grant (EIG) and the School Infrastructure Backlogs Grant (SIBG). As will be discussed more fully in chapter 5, the ASIDI programme has resulted in a total of 266 schools being built, but immediately following the agreement, implementation proved to be problematic.²⁵⁷

²⁵² A Skelton “Leveraging Funds for School Infrastructure: The South African ‘Mud Schools’ Case Study” (2014) *University of Pretoria Institutional Repository* 1 at 2.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

²⁵⁷ A Skelton “Strategic Litigation Impacts: Equal Access to Quality Education” (2017) *Centre for Child Law* 52-53.

McConnachie and Brener²⁵⁸ point out that inadequate planning and underspending hampered the implementation of the ASIDI programme which resulted in funds being “rolled over” to subsequent years and many mud schools still needing to be replaced. In 2014, the LRC and the applicants consequently returned to court to address the state’s continued failure to implement the programme and eradicate all the mud schools. The case was aimed at forcing the state to better plan and improve its budgeting processes, as well as the spending of its budgets in relation to infrastructure. This litigation was also settled, with no judgment being handed down. However, an order by agreement between the parties established timeframes for the implementation of the ASIDI programme and required the department to receive submissions from schools left off the list but seeking to be included. It also provided clear timeframes for the replacement and refurbishment of mud schools.

Since a settlement was reached in both cases, the court did not explicitly find that infrastructure is a component of the right to basic education. However, it may be deduced from government’s commitment to provide appropriate infrastructure in schools in terms of the ASIDI program, that infrastructure is considered a key component of the content of the right to basic education as provided in section 29(1)(a) of the Constitution. The willingness to enter into settlement agreements of this nature effectively pointed to the state’s acceptance and acknowledgment that it had, until that point, been failing in its duties to provide adequate infrastructure and eradicate mud schools.²⁵⁹ The settlement agreements reflected the state’s obligation to protect the right to basic education, as required by section 7(2) of the Constitution.

The litigation did however lay the foundation for a large-scale campaign, and subsequent litigation, to compel the state to develop binding norms and standards to address the infrastructure crisis in South African schools.

3.2.2 Norms and Standards Litigation

In 2012, following the settlement agreement in the first mud schools’ case, the LRC again approached the court. Representing Equal Education as the institutional client, and two schools in the Eastern Cape, it sought an order directing the MOBE to enact binding norms and standards to regulate adequate infrastructure for schools in the country. At this stage, no

²⁵⁸ McConnachie & Brener “Litigating the Right to Education” in J Brickhill *Public Interest Litigation in South Africa* (2018) 288.

²⁵⁹ *Ibid.*

binding norms and standards, regulations, or policies set out what infrastructure standards schools needed to comply with in South Africa.

Again, the state opted to settle the case. The MOBE undertook to publish draft regulations and adopt binding norms and standards by a set date. The draft norms and standards were published in line with the settlement agreement, but it was weak and heavily criticised during the public participation process. The MOBE missed the deadline for the final publication of the norms and standards and as a result the parties again approached the court to compel the MOBE to issue a revised draft and publish a final version by 30 November 2013. The MOBE ultimately complied with this order and published the Norms and Standards were eventually published.

As set out in Chapter 2 above, the Norms and Standards for School Infrastructure require amongst other things, the staged provisioning of various resources, and the eradication of unacceptable conditions in schools. It also sets strict deadlines and determines that within three years after the publication of the Norms and Standards, no school should be made from inappropriate material, and every school should have a source of water, electricity, and working toilets. Within seven years of the publication of the Norms and Standards, schools must have secure fencing around the school, safe classrooms with a maximum of 40 learners per class, and access to internet connectivity. School laboratories and libraries must be provided within ten years, while the Norms and Standards determine that sports facilities must be provided within 17 years. The Norms and Standards also make it compulsory for the provincial education departments to report to the MOBE and to properly plan for the implementation of the Norms and Standards.

The Norms and Standards have been effective in setting a benchmark for provincial education departments to achieve and provides an effective instrument that can be used to hold the state to account. Despite the clear deadlines, many of them have been missed, and a number of schools in South Africa continue to struggle with inadequate infrastructure. While there was no judgment that specifically interpreted or clarified the content of the right to education in this case, it is argued by mcConnachie and Brener²⁶⁰ that the settlements that the state were willing to enter in these cases, reflected an acknowledgement by the state that they indeed bore a responsibility to provide adequate infrastructure. In this sense it established, at least at some

²⁶⁰ *Ibid.*

level, the principle that in order for the right to education to be fulfilled, it required adequate infrastructure.

As will be discussed more fully in Chapter 5, the ASIDI programme was partially effective in addressing some of the infrastructure problems at schools in the country. However, as has already been mentioned, many of the deadlines that were set out in the Norms and Standards had been missed, and by 2016, the issue of inappropriate school infrastructure again appeared in front of the courts.

3.2.3 *Equal Education v Minister of Basic Education*

On the back of repeated failures to meet the deadlines in the Norms and Standards, *Equal Education*²⁶¹ again approached the courts in 2016 to address a shortcoming in the Norms and Standards that was being used by the state to absolve itself of the responsibility to comply with the deadlines. In this case, the court had to determine whether the Norms and Standards were in accordance with the Constitution, the South African Schools Act and the prescribed court order.²⁶² In the Norms and Standards, the fulfilment of the basic education amenities was subjected to the availability of government funds and the co-operation of government officials and other relevant stakeholders. It effectively provided the government with a getaway strategy to justify its non-compliance with its constitutional duty.²⁶³

Regulation 4(3)(a) of the Norms and Standards also stated that schools completely constructed from materials such as 'wood, metal, asbestos and mud' require 'prioritisation'.²⁶⁴ The applicant questioned whether the latter regulation implied that schools built partially from these materials were to be excluded from the Department's list of prioritisations. A similar argument was made in respect of Regulation 4(3)(b) that provided that schools with no access to electricity, water, and sanitary services must receive 'prioritisation'.²⁶⁵ Again, did the regulation imply that schools with limited access to power, water, or sanitation would not be prioritised? In response to the applicant's concerns, the MOBE contended that she has the discretion to publish the regulations in the form that she chooses and that, therefore, she can prioritise certain schools

²⁶¹ Amatolaville Primary School was the second applicant in the case.

²⁶² *Equal Education and Another v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016 para 46.

²⁶³ *Ibid* para 61.

²⁶⁴ *Ibid* para 118.

²⁶⁵ *Ibid* para 136.

over others.²⁶⁶ In her view, this preference is dependent on 'budgetary constraints'.²⁶⁷ Furthermore, she claimed that the provision of water, sanitation, and electricity falls 'outside her scope of services'.²⁶⁸

The court ordered that sub-regulations of the Regulations in contention are inconsistent with the Constitution, unlawful, and accordingly invalid insofar as they had hindered the realisation of the right to basic education.²⁶⁹ The court further held that:

*“Basic school infrastructure played a significant role in the delivery of basic education. The s29(1)(a) right to basic education was distinguishable from the other constitutional socioeconomic rights in that, unlike those rights, it contained no internal qualifiers stating that ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights’. The right to basic education was therefore unarguably immediately deliverable.”*²⁷⁰

The court rebuffed the MOBE’s contention that the implementation of the Norms and Standards may be subject to budgetary constraints and to the co-operation of other state entities.²⁷¹ Mzizi AJ correctly pointed out that the latter claim contradicts the immediate nature of the right to basic education.²⁷² Furthermore, the court held that the MOBE’s argument that she was thwarted to earmark resources for infrastructure was rejected by the court as it should have been justified in terms of section 36 or section 172(1)(a) of the Constitution.²⁷³ The MOBE was unable to justify the limitation of the right in this case.

The judgment is significant for the interpretation and the development of the content of section 29(1)(a). The court’s declaration that infrastructure is essential to the delivery of basic education, confirms that infrastructure is a core component of the right to basic education.

²⁶⁶ *Ibid* para 132.

²⁶⁷ As above. Various role players are involved in the budget process as it pertains to the sphere of public basic education. See, eg, D McLaren “Funding Basic Education” in F Veriava *et al Basic Education Rights Handbook: Education Rights in South Africa* (2017) 37.

²⁶⁸ *Equal Education and Another v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016 para 140.

²⁶⁹ *Ibid* para 209 (1)-(8).

²⁷⁰ *Ibid* para 170.

²⁷¹ *Ibid* paras 180-185.

²⁷² *Ibid* para 185.

²⁷³ *Ibid*.

Furthermore, the impact of rendering the amendment of the Regulations as ordered by the court, allows for the provision of basic education to a wider range of learners who would have otherwise not benefited had the Regulations not been revisited. The findings made by the court allows for the fulfilment of the right to basic education by the state. The proactive action to be taken by the state that gives effect to Regulations made in terms of legislation,²⁷⁴ ensures the fulfilment and availability of basic education. School children are to be provided with functioning schools that are appropriately built and have basic services such as sanitation facilities, water, and power supply. These are all prerequisites for effective teaching and learning, without which the provision thereof, hinders the learning process.

3.3. School Furniture as a Component of the Right to Basic Education

3.3.1 *Madzodzo v Minister of Basic Education*

At the time that the mud school litigation was ongoing, another crisis in education was brewing the Eastern Cape. By 2011, it became clear that large numbers of learners across the province did not have desks and chairs in their classes. Part of the shortfall in school furniture was the fact that the Eastern Cape Department of Education simply did not know what the furniture needs were in the province, which meant that it could not adequately plan or budget to address it.²⁷⁵ In 2011, the LRC approached the court in an effort to address the furniture shortages in the province.²⁷⁶ The represented seven schools in the province as well as the Centre for Child Law who acted as the institutional client in the matter. The applicants argued that the learners' rights to education had been violated by the government, including their constitutional rights to equality and dignity.²⁷⁷

The application came before the court on 29 November 2012. On that occasion the parties entered into an agreement which was embodied in an order of court.²⁷⁸ The order granted by the court included orders that the respondents ensure that the applicant schools receive adequate, age and grade appropriate furniture on or before 16 January 2013.²⁷⁹ It also provided

²⁷⁴ See: Section 5A of the South African Schools Act 84 of 1996.

²⁷⁵ McConnachie & Brener "Litigating the Right to Education" in J Brickhill *Public Interest Litigation in South Africa* (2018) 292.

²⁷⁶ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 1.

²⁷⁷ *Ibid* para 2.

²⁷⁸ *Ibid* para 3.

²⁷⁹ *Ibid* para 4.

that the respondents file a report by way of an affidavit to the attorneys of the applicants by 21 January 2013, indicating their compliance with this order. Paragraph 3 of the order provided that the respondents “ensure that a comprehensive audit to assess the furniture needs at all public schools in the Eastern Cape is conducted and finalised on or before 28 February 2013.”²⁸⁰ This purpose of this part of the order was to force the department to determine the furniture needs of learners in the province.

The respondents had failed to provide the requested school furniture to the selected schools in the province by the agreed deadline.²⁸¹ As a consequence, it had failed to take all the reasonable measures as per the court orders. In addition, they failed to construct a concise strategy to remedy the furniture crisis at schools in the province.²⁸² Other failures by the government that contributed to the lack of delivery, were the irregularities and omissions in compiling an audit on the money required to respond to the furniture shortages, the failure to communicate directly with schools regarding their furniture needs, and delays in tender process to procure the furniture.²⁸³

The failure by the state to comply with the order, resulted in the applicants again approaching the court in 2014. They argued that schools still struggled with insufficient desks and chairs and that the right to education continued to be violated. Goosen J captured the extent of the problem as follows:

“It is not in dispute that the state of public school education in the Eastern Cape Province is seriously and adversely affected by a failure to provide adequate furniture to a significant portion of schools in the Province. It is also not in dispute that the shortage of furniture in schools is a serious impediment for children attempting to access the right to basic education in the province. An audit of furniture needs conducted in the province in April/May 2011 indicates that the total cost of furniture needed for learners in the Province was then estimated at R274, 2 million. The audit also indicated that out of 5700 schools in the Eastern Cape, there were nearly 1300 schools in need of furniture, affecting 605,163 learners in the Province. A more recent report issued by the Department on 28 May 2013 estimates the cost of addressing

²⁸⁰ *Ibid.*

²⁸¹ *Ibid* para 2.

²⁸² *Ibid* para 12.

²⁸³ *Ibid* para 25.

learners' furniture needs in the Eastern Cape schools as being approximately R360 million. It is this ongoing state of affairs that prompted the first to fourth applicants to bring this application."

The department argued that following the assessment of its budget for the requested merchandise, it had insufficient resources to provide these amenities at once.²⁸⁴ Goosen J dismissed the budgetary constraints argument.²⁸⁵ Rather than allowing the government to rely on this argument as a justification for not complying with the previous court orders, he found that the government had failed to budget pro-actively for furniture shortages even though it ought to have based its budget on relevant information that was available at the time the budget was decided.²⁸⁶ Failure by the government to budget pro-actively indicates the government's breach of its constitutional obligation to fulfil the right to basic education,²⁸⁷ which requires pro-active budgetary and administrative steps to enhance the availability of basic education.²⁸⁸

Following the court's rejection of the budgetary constraints' argument, the court proceeded by describing in detail the harmful effect that a scarcity or complete lack of furniture has on learners and teachers. The court emphasised that learners are either "forced to sit on the floor", "compelled to stand throughout lessons with no writing service" or be "squashed into desks like animals."²⁸⁹ Learners become entangled in fights over the limited furniture available, which in turn leads to a struggle on the part of the teacher to maintain discipline in class.²⁹⁰ Furthermore, due to the limited writing space, teachers are not able to provide learners with writing exercises.²⁹¹ The deplorable physical environment, "not at all conducive to teaching and learning", inevitably results in learners not being able to concentrate on the work before

²⁸⁴ *Ibid* para 27.

²⁸⁵ *Ibid* para 35.

²⁸⁶ *Ibid* para 30.

²⁸⁷ As per section 7(2) of the Constitution.

²⁸⁸ "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" para 6; Russel 2003 *SALJ* 18; CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health 2000 (Article 12, para 33 of the Covenant); Brand "Introduction" in Brand & Heyns *Socio-economic Rights* 10.

²⁸⁹ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 20.

²⁹⁰ *Ibid*.

²⁹¹ *Ibid*.

them.²⁹² It therefore comes as no surprise that Goosen J described this poor situation as an impairment of the dignity of the affected learners.²⁹³ The court subsequently found that:

“The state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of education resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners. It is clear from the evidence presented by the applicants that inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermine the right of access to basic education.²⁹⁴ And that 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.”²⁹⁵

Furthermore, it may be inferred from Goosen J's judgment that the court rejected the government's interpretation of the right to basic education as a right to be progressively realised over time.²⁹⁶ Instead, he reaffirmed the developing jurisprudence on the right to basic education by saying that the "state must take all reasonable measures with immediate effect" to realise the right.²⁹⁷

In this case the court interpreted the provision of school furniture as part of the state's obligations to provide education resources which include schools, classrooms, teachers, teaching materials and appropriate facilities for learners.²⁹⁸ *Madzodzo* is therefore significant to the extent that the court went further than merely declaring that the state has a duty to provide desks and chairs to learners. The court expanded the content of the right by interpreting section

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid* para 36.

²⁹⁶ See: para 22, where it is stated that the respondents (government) relied on the National Norms and Standards for School Funding developed in terms of the South African Schools Act, and to which the respondents envisaged the progressive realisation of the basic education resources.

²⁹⁷ *Ibid* para 17.

²⁹⁸ *Ibid* para 20.

29(1)(a) as a right to school infrastructure and the various education resources referred to above.

The court's decision encourages the state to discharge its duty to fulfil the right to basic education through the provision of school infrastructure in the form of classrooms that are equipped with appropriate age and grade furniture. When this education resource is provided, basic education is made available because children can attend functional schools and teachers are able to conduct lessons without any hinderances. The court's decision brings it to the attention of the government that school infrastructure (appropriate age and grade school infrastructure) is a specific target that should be met in realising the right to basic education.

In respect of the *Madzodzo* judgment Veriava²⁹⁹ provides that the judgment elaborated on the content and meaning of the right. The judgment noted that the state's obligation to provide basic education is not confined to making places available in schools for learners, and that the providing for basic education includes a range of education resources including furniture.³⁰⁰ By recognising furniture as an essential resource for basic education, the judgment in effect elaborated on the developing jurisprudence that is beginning to define the basket of resources necessary for adequate basic education.³⁰¹ She refers to the Limpopo textbook case (discussed below) where Kollapen J held that textbooks were an essential component of the right to basic education and that their provision is inextricably linked to the fulfilment of the right.³⁰² Veriava³⁰³ argues that both the Eastern Cape furniture case and the Limpopo textbook case illustrate the manner in which poor governance and mismanagement are contributing to the education crisis in its various manifestations.

3.4 Textbooks as a Component of the Right to Basic Education

3.4.1 *Section 27 v Minister of Basic Education (Textbook I Judgment)*

Textbooks as a component of section 29(1)(a) was the main issue in a trio of judgments between 2010 and 2022.³⁰⁴ In 2010, the Limpopo Department of Education (LDOE) appointed Edu Solutions to provide learner-teacher support material to schools in Limpopo. The contract was

²⁹⁹ "Our Courts are Schooling the State" *Mail & Guardian* 14 March 2014.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.* see also: *Textbook I Judgment* para 23.

³⁰³ "Our Courts are Schooling the State" *Mail & Guardian* 14 March 2014.

³⁰⁴ See: *Textbook I, II & III Judgments.*

worth R320 million and a large portion of the contract was for the delivery of textbooks.³⁰⁵ At the beginning of 2012, Section 27 initiated an investigation into the non-delivery of textbooks at schools in the Limpopo province after receiving complaints from several schools that their books had not been delivered for the new standardised curriculum that was introduced that year.³⁰⁶ Each of the schools visited confirmed that textbooks had not yet been delivered, and that there was no indication as to when delivery would occur because schools had received no communication from the Limpopo Department of Education (LDOE) in this regard.³⁰⁷ Poor communication between the LDOE and schools would feature strongly throughout the Limpopo textbook case. There were numerous disclosures linking what became known as ‘the textbook debacle’ with corruption.³⁰⁸ A report was produced by a dismissed administrator that contained details about fraud, corruption, mismanagement, and maladministration within the department, which ultimately led to the non-delivery of textbooks.

Following a series of broken promises made by the National Department of Basic Education (NDOE) that textbooks would be provided to affected schools, Section 27 launched an urgent application in the North Gauteng High Court on 4 May 2012 on behalf of an affected school and parents of learners denied access to textbooks.³⁰⁹ The urgent application sought; (1) a judicial declaration that the matter is urgent and that the Limpopo Department of Basic Education (LDOE) and Department of Basic Education’s failure to provide textbooks to schools in Limpopo violated the rights of the affected learners;³¹⁰ (2) an order directing the LDOE or NDOE to provide textbooks to learners in grades 1, 2, 3 and 10 who had not been provided the requisite textbooks on an urgent basis no later than 31 May 2012;³¹¹ and (3) a directive requiring the LDOE or NDOE to develop a catch-up plan for affected learners.³¹²

³⁰⁵ F Veriava *The 2012 Limpopo Textbook Crisis* (2013) 6.

³⁰⁶ The investigation was initiated following media reports that schools in the province had not received their textbooks at the beginning of the academic year.

³⁰⁷ *Textbook I Judgment* paras 16-17.

³⁰⁸ L Chisholm “The Textbook Saga and Corruption in Education” (2013) 19 *South African Review of Education* 1 at 8.

³⁰⁹ *Textbook I Judgment* para 18.

³¹⁰ *Ibid* para 12.1.

³¹¹ *Ibid* para 12.2.

³¹² *Ibid* para 12.3.

The North Gauteng High Court considered the question of whether the government's failure to provide textbooks to public schools in the Limpopo province constituted an infringement of the rights to basic education, equality, and dignity.³¹³ In the end the court did not make any pronouncements on the rights to equality and dignity. However, it focussed on the question of whether the right to basic education includes an obligation on the government to provide textbooks. Kollapen J answered in the affirmative by having recourse to policy statements and policies of the national executive itself, which, as articulated by its head, require that each learner be timeously provided with a minimum set of textbooks and workbooks.³¹⁴

Examples of the policy statements and policies that the court referred to, include former President Jacob Zuma's declaration in the 2011 State of the Nation Address that the Administration must ensure that every child has a textbook on time.³¹⁵ Furthermore, the Court referred to the Limpopo Education Department's Annual Performance Plan for 2011-2012 which indicates as one of its objectives to ensure that every learner has access to a minimum set of textbooks and workbooks required according to National Policy.³¹⁶ Finally, Kollapen J highlighted the Limpopo Education Department's Curriculum Strategy which essentially states that effective teaching and learning are impossible without learning support materials.³¹⁷ The

³¹³ *Textbook I Judgment* para 21. This case was instituted by section 27 as a direct result of the so-called 'Limpopo textbook crisis'. The root of this crisis was found in the government's decision to implement a new curriculum, called Curriculum and Assessment Policy Statements (CAPS) in 2012. As a result of the change, new textbooks were required to implement the curriculum. The Department of Basic Education made the decision to introduce CAPS on a grade-by-grade basis: grades 1 to 3 and 10 in 2012; grades 4 to 6 and 11 in 2013; and grades 7 to 9 and 12 in 2014. Due to resource constraints the NDOE decided to prioritise the procurement of textbooks for the grades in which CAPS would be implemented in 2012. The Department subsequently ran out of funds which resulted in some schools not receiving textbooks. Limpopo was particularly affected by the non-delivery of textbooks due to 'the general fraud, maladministration, corruption and incompetence in the provincial government'. In January 2012 the national executive exercised its section 100 constitutional mandate to intervene in the Limpopo government by taking over the obligations of the province. See: F Veriava "The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism" (2016) 32 *South African Journal on Human Rights* 321 at 321-323.

³¹⁴ *Textbook I Judgment* para 13.

³¹⁵ *Textbook I Judgment* para 23.1.

³¹⁶ *Ibid* para 23.2.

³¹⁷ *Ibid* para 23.3. The Department of Basic Education categorises textbooks as part of the broader Learner Teacher Support Materials (LTSM). See: National Department of Basic Education "Draft National Policy for the Provision and Management of Learning and Teaching Support Material" (2014) 3.

court reasoned that the government has taken an unambiguous stance that textbooks are an essential and vital component in delivering quality learning and teaching.³¹⁸ Drawing on the above, Kollapen came to the following conclusion:

“*[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 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 textbooks.*”³¹⁹

The government fulfils the right to basic education when it provides textbooks as provided in its policies.³²⁰ This refers to the government’s positive action in securing the enjoyment of the right to basic education. Furthermore, the availability of textbooks allows for the availability of basic education as one of the obligations placed upon states under international law.³²¹ This stems from the fact that every learner with a textbook will be provided with the opportunity of being able to read texts to facilitate teaching and learning.

3.4.2 *Basic Education for All v Minister of Basic Education (Textbook II Judgment)*

After the order in the *Textbook I Judgment*, government failed to effect complete delivery of textbooks to all the affected schools in Limpopo. As a result, two more settlement agreements in terms of which the government undertook to deliver the textbooks by specified dates were reached.³²² When government failed to comply with the later time frames, another case in the continuous textbook litigation saga was instituted, namely, *Basic Education for All v Minister of Basic Education (Textbook II Judgment)*.

This litigation was again aimed at compelling the delivery of textbooks to protect the learners’ rights to education, equality, and human dignity. By March 2014, around 39 schools had not

³¹⁸ *Ibid* para 23.3.

³¹⁹ *Ibid* para 25.

³²⁰ In relation to the fulfilment of the right to basic education, the state is required to take positive action, and this includes enacting and implementing legislation and accompanying policies.

³²¹ See: General Comment 13: The Right to Education 1999 (Article 13, para 6 (a) of the Covenant).

³²² K Paterson “Constitutional Adjudication on the Right to Basic Education: Are We Asking the State to do the Impossible?” (2018) 34 *South African Journal on Human Rights* 113-114.

yet received their books for the 2014 academic year and were forced to study from books that contained an outdated curriculum or rely on photocopies of the books that educators had borrowed from other schools.³²³ Regarding the continued failure to deliver textbooks in some of the schools in Limpopo the NDOE raised two primary defences: firstly, that they had insufficient funds to purchase all the required textbooks; and secondly, that the principals of schools in Limpopo had failed to follow the prescribed mechanisms for reporting textbook shortages.³²⁴ The Department knew about the shortages, however, argued that it was excused from acting on these reports since the principals failed to report on these shortages in line with the rigid processes prescribed.³²⁵

At the time when the application was launched, the NDOE had made significant strides in delivering textbooks to schools in Limpopo.³²⁶ On the government's version, it had already delivered approximately 97 per cent of textbooks in the province at the time litigation was instituted.³²⁷ The NDOE therefore argued that their failure to provide textbooks to the remaining schools did not amount to a violation of section 29(1)(a) because most of the textbooks had been delivered when litigation had commenced.³²⁸

The court held that the question of whether there was a violation of rights “does not really seem to be controversial anymore”.³²⁹ The starting point of the judgment was therefore that ‘the Constitution requires that every learner have every textbook that he or she requires before the teacher begins with that part of the curriculum to which the textbook relates.’³³⁰ Thus, the court was faced with the question of whether a violation of the right to basic education had occurred in respect of the remaining learners who had not received their quota of textbooks.³³¹

³²³ McConnachie & Brener “Litigating the Right to Education” in J Brickhill *Public Interest Litigation in South Africa* (2018) 291.

³²⁴ *Textbook II Judgment* para 44.

³²⁵ *Ibid.*

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid* para 40.

³³⁰ *Ibid.*

³³¹ *Ibid* para 44.

Tuchten J confirmed the finding in *Textbook I* that textbooks are an essential component of the right to basic education.³³² He rejected the government's argument that delivering textbooks to most schools in the Limpopo province meant that they had complied with their section 29(1)(a) obligations. The court held as follows:

*“The delivery of textbooks to certain learners but not others cannot constitute fulfilment of the right. Section 29(1)(a) confers the right to a basic education to everyone. If there is one learner who is not timeously provided with her textbooks, her right has been infringed. It is of no moment at this level of the enquiry that all the other learners had been given their books.”*³³³

3.4.3 Minister of Basic Education v Basic Education for All (Textbook III Judgment)

The NDOE subsequently appealed the *Textbook II Judgment* to the Supreme Court of Appeal and argued, *inter alia*, that the requirement of a 100 per cent delivery record is a 'standard of perfection' that they were not able to meet.³³⁴ In other words, they “insisted that the right to a basic education did not mean that each learner in a class has the right to his or her own textbook.”³³⁵ NDOE and other respondents asserted that the order of the High Court imposed an incorrect standard for NDOE to satisfy in order to discharge its constitutional responsibilities with respect to the right to basic education.³³⁶ They contended that the standard should not be so high as to require NDOE to deliver every textbook to every affected learner and that the standard had to take into account other circumstances such as lack of co-operation on the part of other stakeholders, budgetary constraints, and mitigating measures such as availability of old textbooks and other materials.³³⁷

The Supreme Court of Appeal per Navsa JA rejected this argument and made the following pronouncement in the *Textbook 3* judgment:

³³² *Textbook I Judgment* para 5.

³³³ *Ibid* para 52.

³³⁴ *Textbook III Judgment* para 33.

³³⁵ *Ibid* para 41.

³³⁶ *Ibid*.

³³⁷ *Ibid*.

“The NDOE did not only set itself a 'lofty' ideal but ... its policy and actions, as set out in the affidavits filed on its behalf, all indicate that it had committed to providing a textbook for each learner across all grades. The content of the s 29(1)(a) right is also determined in the NDOE's 'Action Plan to 2014 - Towards the Realisation of Schooling in 2025'.³³⁸ That certainly is what it achieved in pursuit of its own policy in respect of the other eight provinces and on its version of events for almost 98 per cent of learners in Limpopo.”³³⁹

Furthermore, the court held that, section 29(1)(a) of the Constitution entitled every learner at public schools in Limpopo to be provided with every textbook prescribed for her/her grade before commencement of the teaching of the subject for which the textbook is prescribed.³⁴⁰ The Supreme Court also declared that it is the duty of the state, in terms of section 7(2) of the Constitution, to fulfil this section 29(1)(a) right, and that the NDOE and the LDOE violated the right, as well as the right to equality (section 9 of the Constitution) and dignity (section 10 of the Constitution) by failing to provide the prescribed textbooks.³⁴¹

Navsa JA clearly endorsed Kollapen J's interpretive approach by deriving the content of section 29(1)(a) from policy statements. The court also went further than merely confirming the now uncontroversial stance that the right to basic education includes a right to a textbook.³⁴²

Veriava provides that the SCA in the *Textbook III Judgment*³⁴³ regards the enjoyment of the right to basic education as being necessary for the broader transformation of South African society.³⁴⁴ She argues that it confirms the immediate realisation principle that has been adopted by the High Courts in respect of the provision for basic education.³⁴⁵ This compels the government to act promptly in the providing basic education for the marginalised and in urgent

³³⁸ The 2014 Action Plan' referred to here by the Court has been replaced by a new policy titled: Action Plan to 2019: Towards the Realisation of Schooling 2030'.

³³⁹ *Textbook III Judgment* para 42.

³⁴⁰ *Ibid* para 53.

³⁴¹ *Ibid*.

³⁴² *Ibid* para 41.

³⁴³ *Textbook III Judgment*.

³⁴⁴ F Veriava “The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism” (2016) 32 *South African Journal on Human Rights* 321 at 331.

³⁴⁵ *Ibid*.

need of government assistance to realise the right to basic education. Furthermore, Veriava confirms that the SCA's pronouncement that textbooks are an essential component of the right to basic education is indicative of the adoption of a normative or substantive approach to the interpretation of the right to basic education.³⁴⁶ This may be viewed as a partial triumph of transformative constitutionalism and as such the judgment opens new frontiers for the normative development of the right to basic education.³⁴⁷ Veriava³⁴⁸ provides that the judgment entrenches the principle of the duty to budget in the evolving socio-economic jurisprudence of our courts. As such this precludes the government from making bold claims of budgetary constraints, but instead requires government to engage in rational planning and allocations in respect of education provisioning.

While a textbook was clearly pronounced as part of the right to education, the same was not true of stationery. As will be set out below, initial efforts to include stationery as part of basic education was already made in 2010, but it would only be in 2022, that the Eastern Cape High Court in Makhanda would find that stationery forms part of the right to education in section 29(1)(a) of the Constitution.

3.5 Stationery as a Component of the Right to Basic Education

3.5.1 *Freedom Stationery v MEC for Education, Eastern Cape*

In 2010 the Eastern Cape Department of Education (ECDOE) advertised a tender for the manufacturing and supply of stationery for various schools (Grades R-12) in the Eastern Cape. The two applicants, Freedom Stationery Pty Ltd and Afro Pulse 46 Pty t/a Power Stationery, submitted applications and were notified by the ECDOE that an official recommendation was made that they, together with other suppliers, be awarded the tender.³⁴⁹ In January 2011, shortly before the start of the new school year, the ECDOE published a notice in which it cancelled the tender process. Shortly thereafter, and without a new tender process, the contracts were awarded to the third and fourth respondents (two other companies which had applied for the same tender as the applicants).³⁵⁰ Freedom Stationery (Pty) Ltd requested reasons for the

³⁴⁶ *Ibid.*

³⁴⁷ Veriava 2016 *SAJHR* 342.

³⁴⁸ *Ibid.*

³⁴⁹ *Freedom Stationery v MEC for Education, Eastern Cape* (59/2011) [2011] ZAECELLC 1, para 11.

³⁵⁰ *Ibid* para 14.

ECDOE's decision to award the contracts to the third and fourth respondents in the absence of a regular tender process, but no reasons were furnished.³⁵¹ The applicants therefore sought a review of the decisions. The applicants also sought either fresh adjudication on the tender or the re-advertising of the tender.³⁵² In addition, the applicants applied for an interim interdict seeking an order prohibiting the ECDOE from concluding any agreements with the third and fourth respondents from performing the tender contracts.³⁵³ It is the interim interdict which forms the subject of the judgment indicated above.

The applicants contended that the ECDOE had not complied with section 10(4) of the Preferential Procurement Policy Framework Act 5 of 2000 and its regulations. These provisions permit the cancellation of tenders only if the goods initially required are no longer needed; or there is a lack of available funds; or a lack of acceptable tenders.³⁵⁴ To justify the cancellation of the tender, the ECDOE argued that no acceptable tender was received, as the applicants and the other bidders were disqualified for not having valid tax certificates.³⁵⁵ The cancellation of the tender took place without the applicants being informed about the problems with their tax certificates and without them being given an opportunity to respond to this allegation.³⁵⁶ The applicants were for the first time informed of the reason for their disqualification during the process of the litigation.³⁵⁷ Upon being so informed, the applicants contacted the South African Revenue Services, who established that the tax certificate of the applicants had been erroneously withdrawn; and issued a new tax compliance certificate which was attached to the documentation submitted by the applicants.³⁵⁸

The Centre for Child Law was admitted as *amicus curiae* and raised concerns that the interim relief sought by the applicants - the prohibition of the ECDOE from concluding any agreements with the third and fourth respondents for performing the tender contracts - might violate the constitutional rights of children.³⁵⁹ The *amicus* put forward two arguments: first, that the court

³⁵¹ *Ibid* para 15.

³⁵² *Ibid* para 1.

³⁵³ *Ibid* para 3.

³⁵⁴ *Ibid* para 16.

³⁵⁵ *Ibid* para 17.

³⁵⁶ *Ibid* para 19.

³⁵⁷ *Ibid* para 17.

³⁵⁸ *Ibid* para 18.

³⁵⁹ *Ibid* paras 6 & 8.

had an obligation to consider the interests of the learners in balancing the rights of the parties to the dispute;³⁶⁰ second, that access to stationery is an essential part of the right to basic education protected in section 29(1) of the Constitution. The *amicus* also relied on the consideration of the best interests of the child as protected in section 28(2) of the Constitution.³⁶¹

The Centre indicated that the schools potentially affected were amongst the poorest in the province, and that 688 482 children would be deprived of stationery pending the finalisation of the litigation.³⁶² It argued that ordering the ECDOE not to enter a contract with the third and fourth respondents would result in a delay in the supply of stationery to the schools. This would constitute a severe prejudice to the right to education of the children concerned, as protected by section 29(1)(a) of the Constitution.³⁶³ The *amicus* therefore sought either the dismissal of the urgent application or an order compelling the Department to appoint any of the bidders to deliver stationery to schools in terms of the contract/tender.³⁶⁴

The interim interdict was granted.³⁶⁵ In making the decision, the court had to balance the children's right to education against the applicants' right to just administrative action; and the need to protect those contracting with the government, in order to ensure that the process is "fair, equitable, transparent, competitive and cost effective", as required by section 217(1) of the Constitution.³⁶⁶ The court indicated that in order for the rights of the applicants to be given priority over the right to education in this urgent application, their prospect of success in the review application had to be strong.³⁶⁷

The court then analysed the arguments of the *amicus*. The position of the *amicus* was that the children's right of access to education was so important that a speedy delivery of stationery was necessary despite the procedural defects in the process. The *amicus* requested that the application for an interim interdict be rejected; alternatively, that the ECDOE appoint any of

³⁶⁰ *Ibid* para 31.

³⁶¹ *Ibid*.

³⁶² *Ibid* para 7.

³⁶³ *Ibid* para 8.

³⁶⁴ *Ibid* para 33.

³⁶⁵ *Ibid* para 2.

³⁶⁶ *Ibid* para 9.

³⁶⁷ *Ibid* para 10.

the bidders to provide the stationery to the schools in terms of the contract.³⁶⁸ It was thus implied in the submission of the *amicus* that the right to education (as a right of the children *in casu*) trumps the constitutional rights of the applicants.

The court rejected the arguments of the *amicus* based on the fact that to accept them would unduly benefit some parties at the expense of others.³⁶⁹ Furthermore, the court provided that to compel performance by the first and second respondents to appoint either of the competing bidders or a third party to perform in terms of the tender, offends one of the most logical and basic principles in our law.³⁷⁰ This principle is one on that courts should not write contracts for the parties before it.³⁷¹

The court indicated that to secure the rights of the learners it was not necessary to disregard the rights of the applicants. The court admonished the government for creating a situation characterised by the lack of stationery, transport and food in the Eastern Cape schools, and rejected the contention that the litigation which was commenced by the applicants was the cause of the potential violation of children's right to education.³⁷² The court indicated that interim plans could be made for the learners to be provided with stationery, such as appealing to charities for support or by searching the government depots for stationery stock.³⁷³

In granting the interdict, the court stated that it would not be possible fully to protect the rights of all of those involved. Granting the interim order would give satisfaction to the applicants' rights, whilst the learners would need to wait a little longer for their stationery. Setting strict timeframes for dealing with the review application would, however, ensure that no undue delay in the provision of stationery would occur, and the tender could be granted after being properly organised.³⁷⁴ The respondents would then be able to award the tender contract lawfully.³⁷⁵

³⁶⁸ *Ibid* para 33.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid*.

³⁷¹ *Ibid*.

³⁷² *Ibid* para 34.

³⁷³ *Ibid* para 35.

³⁷⁴ *Ibid* para 36.

³⁷⁵ *Ibid*.

The court acknowledged that the realisation of the right to education was dependent on the execution of the contractual obligations arising from the tender contract. The court remarked that the scholar transport for the affected schools, as well as feeding schemes have collapsed and that many of these schools are without teachers.³⁷⁶ The court seems to have endorsed the argument of the *amicus* that the lack of stationery in the poorest schools in the province would be an obstacle to the realisation of children's right to education. Although the court did not engage in an extensive analysis of the legal content of the right to basic education, the reasoning of the court implies that the government has the positive obligations to hire enough teachers, and to provide food, transport to/from school, and stationery, where such support is necessary for children to access education.

It was only in 2022 that the courts substantively dealt with stationery as a component of the right to education again. Although the remedial relief granted did not give effect to the provision of stationery to learners that were in need, the 2011 litigation hinted that the provision of stationery is part of the right to basic education.

Regarding the *Freedom Stationery*³⁷⁷ case, Skelton³⁷⁸ provides that the court seemed to have been satisfied with a lower level of compliance with the constitutional standard regarding the provision of stationery. This emanates from the interim interdict granted by the court that did not enforce the immediate provision of stationery by the government to learners that were in urgent need.³⁷⁹ According to Skelton,³⁸⁰ the judgment on the interim relief failed to properly balance the public interests (that is the children's interest) separately from the government's interest. The court could have followed a more creative approach and ensured that the children received their stationery immediately rather than having to wait for the outcome of the tender review.³⁸¹

³⁷⁶ *Ibid* para 32.

³⁷⁷ *Freedom Stationery v MEC for Education, Eastern Cape* (59/2011) [2011] ZAECCELLC 1.

³⁷⁸ A Skelton "The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of the Recent Case Law" (2013) 46 *De Jure Law Journal* 1 at 9.

³⁷⁹ *Freedom Stationery v MEC for Education, Eastern Cape* (59/2011) [2011] ZAECCELLC 1, para 1.

³⁸⁰ Skelton 2013 *De Jure Law Journal* 9.

³⁸¹ *Ibid*.

Quinot³⁸² argues that the interim relief was not necessary and that the court should have followed the approach of the SCA in *CEO of the South African Social Security Agency v Cash Paymaster Services*³⁸³ and *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd.*³⁸⁴ In these cases the court made it clear that not every error in the tender process will cause the courts to set decisions aside: “considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not”.³⁸⁵ If the interim order had not been made government's contract to provide the stationery would have remained in place and the children would have received their stationery far sooner than they in fact did. This would not have prevented the irregularities from being investigated and dealt with. In essence, Skelton³⁸⁶ provides that this case illustrates that engagement of the courts may be ineffective unless the courts take a transformative, rights driven, and child-centred approach.³⁸⁷ As the Constitutional Court had explained, when it comes to issues relating to children the courts should not see their role as merely resolving a dispute between parties, but as safeguarding the best interests of the child or children involved.³⁸⁸

3.5.2 Khula Community Project v Head of Department Eastern Cape Department of Basic Education

Nearly ten years after the first litigation on stationery, the courts finally made a clear pronouncement on stationery as a core component of the right to education. This case resulted from a failure by the ECDOE to provide stationery at the commencement of the 2022 academic year.³⁸⁹ Since 2012, the ECDOE has been using a centralized system of procurement of LTSM.³⁹⁰ The process did not always run smoothly and there had been allegations that the time

³⁸² G Quinot "Juta's Quarterly Review of South African Law Public Procurement" 2011 *Juta Quarterly Review*.

³⁸³ *CEO of the South African Social Security Agency v Cash Paymaster Services* [2011] ZASCA 13 (2011-03-20).

³⁸⁴ *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 4 SA 359 (SCA).

³⁸⁵ *CEO of the South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13 (2011-03-20) par 29.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*

³⁸⁸ Per Sachs J in *AD v DW (Centre for Child Law as amicus curiae)* 2008 3 SA 183 (CC) par 55.

³⁸⁹ “Eastern Cape Judgement Reaffirms that Textbooks and Stationery are Essential to Basic Education” *Daily Maverick* 8 May 2022.

³⁹⁰ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 13.

for delivery and the quantity of the LTSM received by schools seldomly met the needs of the schools.³⁹¹ In 2022, the academic year began with an unprecedented failure to provide schools with LTSM. The Head of Department (HOD) of the ECDOE raised bold claims of budgetary constraints as a reason behind its failure to deliver LTSM timeously and indicated that it would only be able to deliver all the stationery by the end of May 2022.³⁹² The Applicants requested detailed information regarding the respondents' plans and progress on the provisioning of stationery and textbooks and they did not receive satisfactory or detailed response.³⁹³

Following two letter of demands to the HOD of the ECDOE, and without any constructive response, this matter was brought on urgent basis.³⁹⁴ The applicant was a group of concerned education rights activists, supported by parents, who recognize that the failure to ensure that learners receive stationery for the 2022 academic year, is unconstitutional, untenable and requires urgent attention to remedy the situation.³⁹⁵ The applicants relied on section 34(1) of the SASA,³⁹⁶ which requires 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."

The purpose of the case was to recognize stationery and textbooks, referred to as LTSM, as components of the right to basic education.³⁹⁷ The case was simplified because courts already recognised textbooks as part of the right to education and this court was left to declare whether stationery is also a component of the right to basic education as a new development of the right. It was argued that without stationery, the teaching and learning process is compromised. Learners are unable to effectively follow and record lessons, study using prescribed texts, complete homework assignments, obtain information from textbooks and prepare for tests and examinations.³⁹⁸ Importantly, the affected learners were from no-fee paying schools and generally unable to buy their own stationery. As a result, very little teaching and learning were

³⁹¹ *Ibid* para 14.

³⁹² *Ibid*.

³⁹³ *Ibid* para 12.

³⁹⁴ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 1.

³⁹⁵ *Ibid* para 8.

³⁹⁶ Act 84 of 1996.

³⁹⁷ *Ibid* para 9.

³⁹⁸ *Ibid* para 10.

taking place in the classrooms as learners simply did not have the resources to participate in the education process.

The court again affirmed the immediate realisability of the right to basic education and the right only being limited by a law of general application. It also recognised the interconnectedness of the right to education and the best interests of the child.³⁹⁹ Consequently, the court held that there is no doubt that the constitutional entitlement extends to all essentials of stationery to make learning achievable, and that it may not be limited by budgetary constraints, being a right that is immediately realisable and without internal limitations.⁴⁰⁰ In this regard the court made a new pronouncement that further developed the content of the right to basic education, in that stationery is an immediately enforceable entitlement which is guaranteed by the right. If the state were to attempt to justify a limitation of the right to basic education it would need to do so in terms of section 36 of the Constitution.⁴⁰¹ Therefore, while it would be unacceptable for the state to justify non-delivery of any basic services with unsubstantiated claims of resource constraints, it is particularly objectionable in the context of justifying a violation of the right to basic education.⁴⁰²

The court declared that the failure by the ECDOE to provide stationery was a complete violation of the learners' right to basic education.⁴⁰³ The court thus ordered the department to deliver all textbooks and stationery to schools by 31 March 2022. Therefore, the provision of school stationery timeously (at the beginning of the academic year) enables government to sufficiently fulfil basic education which in turn allows the right to education to be realised. This case gave finality on the inclusion of stationery as part of section 29(1)(a) of the Constitution and finally clarified its role in realising the right to education.

While education resources are incredibly important in the achievement of the right to education, the role of human resources cannot be overstated. Unfortunately, some learners in South Africa, and in particular the Eastern Cape province, do not always have access to a

³⁹⁹ *Ibid* par 40.

⁴⁰⁰ *Ibid* para 42.

⁴⁰¹ The Constitution of the Republic of South Africa, 1996 s36(1).

⁴⁰² *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 47.

⁴⁰³ *Ibid* para 43.

teacher in the classroom, or non-teaching staff to attend to the administration, and general upkeep of their schools.

3.6 Teaching and Non-Teaching Staff as Components of the Right to Basic Education

The process of determining the allocation for educators in schools is governed by the Personnel Administrative Measures Document (PAM Document). The PAM Document determines that the provinces have their teacher post-establishments determined by the Member of the Executive Council, which is a declaration of the number and provincial allocation of teacher posts. Once the provincial number of posts have been determined, the posts are allocated to each school based on the number of learners in the school, as well as the nature of the subjects provided by the school, the language-medium of the school, and whether the school provided education to learners with disabilities. Once the posts are allocated to the schools, teachers should generally be appointed in those positions to teach the learners.

Since 2010, the Eastern Cape province struggled with the allocation of educators to the schools and the filling of vacant posts on the school establishments. McConnachie and Brener⁴⁰⁴ ascribe this to the geographical circumstances of the province, as well as the rapid depopulation of rural areas, which resulted in lower enrolment of learners in rural schools, while urban schools became overprescribed. While the learners moved, the teachers did not necessarily follow, which resulted in some schools having too many teachers for the number of learners, and others having too few. Despite efforts by the provincial department to reallocate the posts, teachers at ground level were resistant to moving schools.

By 2012 there were 4000 vacant teacher posts in the Eastern Cape, while at the same time there were 7000 teachers “in excess” – that is teachers employed at the wrong schools.⁴⁰⁵ The failure by the department to effectively reallocate posts, move teachers between schools, and fill those 4000 vacant posts, had a devastating effect on both the learners and the finances of the provincial education department. The teachers in excess were being paid their salaries, but not teaching in the correct schools, while the vacant posts were mainly filled by temporary educators who were also drawing government salaries.⁴⁰⁶ As a result, the department was reluctant to permanently fill the vacant posts as it would mean even more money being spent

⁴⁰⁴ McConnachie & Brener “Litigating the Right to Education” in J Brickhill *Public Interest Litigation in South Africa* (2018) 293.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

on salaries. By 2012, the department was spending 90% of its annual budget on educator salaries, neglecting other important education resources such as infrastructure, learner-teacher-support-material, and scholar transport.⁴⁰⁷ At school level, some schools tried to mitigate the impact of the lack of educators on the learners by appointing teachers themselves and paying them a rudimentary stipend to teach the learners. The majority of the schools were no-fee paying schools which meant that they had to fundraise to pay for the educators. However, the majority of the schools were unable to make these plans and the learners were simply left without an educator to teach them. Principally, the lack of adequate number of teachers per subject hinders the learning process. This in turn is detrimental to the acquisition of knowledge and impacts on educational outcomes such lack of information, repetition of school grades due to poor performances which ultimately violates the right to basic education.

The same was true for the non-educator staff establishments, which included administrative and cleaning staff, as well as groundkeepers and gardeners. By 2012 it seemed that the department had placed a moratorium on the appointment of any non-teaching staff in the province and many schools were either left without these resources or were forced to employ their own cleaners, secretaries, and gardeners to tend to the needs of the school. The lack of ancillary support staff places a burden on the teaching staff to perform administrative and other related duties outside of teaching.

3.6.1 *Centre for Child Law v Minister of Basic Education*

In 2012, several schools in the Eastern Cape approached the LRC, for assistance with their teacher shortages and the problem of vacant substantive posts in the province. The LRC began by writing to the ECDOE to request that the problem be addressed, and that the posts be filled. The department was unresponsive.⁴⁰⁸

The LRC launched an urgent application on behalf of a group of named schools and the Centre for Child Law, which acted in the interests of all schools in the Eastern Cape.⁴⁰⁹ The applicant sought orders to compel the respondents to implement the 2012 educator post establishment, which had already been declared, by making appointments to vacant posts by a specified date; to pay the salaries of temporary teachers who had not been paid by a specified date; to employ and pay teachers appointed by school governing bodies to vacant posts; to declare the 2013

⁴⁰⁷ *Ibid.*

⁴⁰⁸ S Sephton “Post Provisioning” in F Veriava *et al Basic Education Rights Handbook* 256.

⁴⁰⁹ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) para 3.

educator post establishment, which would include non-teaching staff, by specific dates; to make appointments to all vacant substantive posts in respect of teachers and non-teaching staff, such as cleaners, administrators and office staff; and to report to the court on progress in the implementation of these orders, and to make the reports available for inspection at district offices and to the parties.⁴¹⁰

The central issue in this case, was whether the respondents were under a statutory obligation to declare a post establishment for teaching and non-teaching staff at public schools in the province for 2013 and, if so, to fill the posts so declared.⁴¹¹ As a point of departure, the court referred to the South African Schools Act: National Norms and Standards for School Funding (Norms and Standards).⁴¹² Section 20 of the Norms and Standards provides that the national department's personnel policy for schools embodies the following principles:

- “(a) schools must be supplied with an adequate number of educator and non-educator personnel;*
- (b) such staff members must be equitably distributed according to the pedagogical requirements of the schools; and*
- (c) the cost of personnel establishments must also be sustainable within provincial budgets.”⁴¹³*

The court further referred to section 21 of the Norms and Standards,⁴¹⁴ section 5(2) of the Employment of Educators Act,⁴¹⁵ and sections 1, 3(7), 8(1)(a) & 8(1)(b) of the Public Service

⁴¹⁰ *Ibid* para 2.

⁴¹¹ *Ibid* para 23.

⁴¹² “South African Schools Act: National Norms and Standards for School Funding: Amendment”, 31 August 2006, available at https://www.gov.za/sites/default/files/gcis_document/201409/29179 [accessed 30 June 2022].

⁴¹³ “South African Schools Act: National Norms and Standards for School Funding: Amendment”, 31 August 2006, available at https://www.gov.za/sites/default/files/gcis_document/201409/29179 [accessed 30 June 2022].

⁴¹⁴ Sets a policy target which is based on local and international evidence that 'personnel: non-personnel spending in ordinary public schools should be in the order of 80:20'; and s 23 provides that within the total personnel allocation in provincial departments 'teaching personnel costs should be targeted at 85%, to allow for the appointment and proper distribution of administrative and support staff'.

⁴¹⁵ Which provides that the head of a provincial department determines the educator establishment of public schools in a province, but it makes no mention of non-teaching staff. Their situation is governed by the Public Service Act, 1994.

Act,⁴¹⁶ and finally two sections of the SASA, which are sub-sections 20(1)(i) & (j) and sub-sections 20(4) & (5),⁴¹⁷ which all regulate the determination of post establishments and the consequent appointment of teaching and non-teaching staff. The court concluded that the respondents are obliged to declare post establishments for both teaching staff and non-teaching staff for 2013 for public schools in the province, and that they are required to fill those posts which, after all, they would have budgeted to do.⁴¹⁸ Notably, the matter was settled out of court on all issues (except for that of non-teacher posts). The settlement agreement was made an order of court.⁴¹⁹

However, the department largely failed to comply with the court order, except in respect of the appointment and payment of temporary teachers in 2012.⁴²⁰ Due to the matter being pursued

⁴¹⁶ Section 1 contains definitions of three key terms. 'Establishment' is defined as 'the posts which have been created for the normal and regular requirements of a department'. A department is defined to include a provincial department. A post means 'a post on the establishment *for which financial provision exists*'. Section 3(7) provides: '(7) An executive authority has all those powers and duties necessary for — (a) the internal organisation of the department concerned, including its organisational structure and establishment, the transfer of functions within that department, human resources planning, the creation and abolition of posts and provision for the employment of persons additional to the fixed establishment; and (b) the recruitment, appointment, performance management, transfer, dismissal and other career incidents of employees of that department, including any other matter which relates to such employees in their individual capacities, and such powers and duties shall be exercised or performed by the executive authority in accordance with this Act.' Section 8(1)(a) provides that the public service consists of persons who are employed 'in posts on the establishment of departments and s 8(1)(b) includes posts 'additional to the establishment of departments.

⁴¹⁷ Sub-sections 20(1)(i) & (j) empower governing bodies to recommend to the head of the provincial department 'the appointment of educators at the school, subject to the Employment of Educators Act', and 'the appointment of non-educator staff at the school, subject to the Public Service Act'. Sub-sections 20(4) and (5) empower governing bodies to create posts additional to the establishment for both teachers and non-teaching staff. They state:

'(4) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3(1) of the Educators' Employment Act, 1994.

(5) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for non-educators and employ non-educator staff additional to the establishment determined in terms of the Public Service Act, 1994 (Proclamation 103 of 1994).'

⁴¹⁸ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) para 34.

⁴¹⁹ S Sephton "Post Provisioning" in F Veriava *et al Basic Education Rights* 256.

⁴²⁰ *Ibid.*

in the public interest, most of the schools affected in the province were nameless, and it was very difficult to assess the impact of the department's failure to adhere to the terms of the court order on those schools who were not parties to the original litigation.⁴²¹ The LRC decided that the best approach going forward was to enforce the order regarding approximately ten schools with which the LRC had a relationship, and where the implementation of the order could be monitored properly.⁴²² The impact on these schools due to the department's failure to comply with the first court order by agreement, was that schools had to appoint teachers out of their own budgets.⁴²³ In enforcing this court order the court was approached and requested to compel the department to appoint teachers who had been teaching at the schools and pay their salaries from the beginning of that year (1 January 2013).⁴²⁴ A second court order was granted by consent. This meant that the department agreed to the court order, and teachers were furnished with letters of appointment.⁴²⁵ However, the department failed to pay the teachers in accordance with the order.⁴²⁶ In response, the LRC applied to court for an order that the failure to pay a teacher in terms of a letter of appointment was a debt owed by the government to the teacher in question, in terms of the State Liability Act.⁴²⁷ In response to the failure to pay, government assets could be attached in repayment of the debt. This technique was successful in forcing the department to pay the schools.⁴²⁸

Because the case was initially settled by agreement between the parties, we do not have the benefit of a reasoned judgment on the role of educators as part of the right to education.

Sephton⁴²⁹ however argues that litigation on post provisioning considers the provision of teachers and non-teaching staff as part of the right to basic education. The willingness by the court to grant the orders by agreement and the state's acceptance of its duty point to a recognition that these human resources are necessary for the right to education to be realised.

⁴²¹ *Ibid.*

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

⁴²⁹ S Sephton "Post Provisioning" in F Veriava *et al Basic Education Rights Handbook* 249. Government, arguably artificially, creates shortages of teachers in schools by misallocating them, resulting in an imbalance, i.e. some schools are at surplus demand, and other schools are correspondingly under-staffed

As a result of this case, the legal position on short-term post provisioning is that teachers may be appointed temporarily for the short-term, but permanently thereafter to ensure access to basic education by keeping posts filled.⁴³⁰ The court also established that ancillary support staff needed to be appointed to fulfil the right to basic education.⁴³¹

3.6.2 *Linkside v Minister of Basic Education (Linkside I case)*

In the aftermath of the *Centre for Child Law* case, there remained a serious problem with post provisioning in the Eastern Cape. As stated above, compliance with the orders were limited and while it provided some relief for the applicant schools, it did not address the problem at a systemic level.

Once again, the LRC launched proceedings in the Grahamstown High Court, this time on behalf of Linkside High School and approximately 35 other schools.⁴³² The name of the case is *Linkside v Minister of Basic Education*,⁴³³ (known as *Linkside I*). The schools that were represented in this case, had all taken steps to appoint educators and pay them a stipend in order to minimise the impact of a lack of a teacher in the classroom. They had often incurred large expenses in order to fulfil a duty that was actually meant to be filled by the provincial education department. Once again, the LRC wanted vacant posts to be filled on a temporary basis in the short term, and permanently in the long term. However, in addition it also wanted the department to reimburse the schools for all payments made by schools (R28 million), in the three preceding years, to teachers who should have been appointed and paid by the government.⁴³⁴

Due to the lack of compliance in the *Centre for Child Law* case, the order in *Linkside I* was formulated to include deeming clauses. This meant that if the department failed to appoint recommended teachers to the posts after a specified period, the appointments would be deemed to have been made. The order was granted, and the appointments were made in terms of the deeming clauses.⁴³⁵ However, the department failed to reimburse the schools in compliance

⁴³⁰ *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG) para 32; see also: S Sephton “Post provisioning” in F Veriava *et al Basic Education Rights Handbook* 256.

⁴³¹ *Ibid* para 35; Sephton (*ibid*).

⁴³² S Sephton “Post Provisioning” in F Veriava *et al Basic Education Rights Handbook* 257.

⁴³³ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36.

⁴³⁴ S Sephton “Post Provisioning” in F Veriava *et al Basic Education Rights Handbook* 257.

⁴³⁵ *Ibid*.

with the order. Due to the way the LRC had structured the court order, this debt could be recovered through the State Liability Act.⁴³⁶ The MOBE and the MEC's assets at both national and provincial level were attached by the Sheriff to pay off the debt. This technique was successful in forcing the department to reimburse the schools.⁴³⁷ The final important element of this case was that the LRC applied for certification of an opt-in class action, which was granted by the court.⁴³⁸

3.6.3 *Linkside v Minister of Basic Education (Linkside II case)*

Knowing that many more schools were affected by the failures of the post provisioning process, following *Linkside I*, the LRC went ahead with a class-action court case in order to address teacher shortages throughout the Eastern Cape.⁴³⁹ A class action is a legal procedure which enables the claims (or part of the claims) of a number of persons against the same defendant to be determined in one suit.⁴⁴⁰ In this case, a class action was brought on behalf of schools in the Eastern Cape who had substantive vacant posts that had not been filled from 2012 to 2014. This was an 'opt-in' class action, which can be contrasted with an 'opt-out' class action.⁴⁴¹ In an opt-in class action, only the parties who expressly indicate that they want to be a part of the class action are included, whereas those who do not express an interest in joining the action are excluded.⁴⁴² The LRC decided on an opt-in class action, because this allowed the schools that wanted representation to approach the LRC with details of their problems.⁴⁴³ This avoided the problem that was faced in the *Centre for Child Law* case where the case was brought in the public interest, but the LRC did not know the exact details of the schools they represented, and so the order was difficult to enforce.⁴⁴⁴

⁴³⁶ *Ibid.*

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid* para 2.

⁴⁴⁰ See: *Trustees for the time being of Children's Resource Centre Trust v Pioneer Foods* 2013 (2) SA 213 (SCA); J Rooney "Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives" (2017) 33 *South African Journal on Human Rights* 406 at 409. See also: T Broodryk "The South African Class Action vs Group action as an Appropriate Procedural Device" (2019) 30 *Stellenbosch Law Review* 1 at 1-9.

⁴⁴¹ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36, para 2.

⁴⁴² S Sephton "Post Provisioning" in F Veriava *et al Basic Education Rights Handbook* 257.

⁴⁴³ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36, para 2.

⁴⁴⁴ S Sephton "Post Provisioning" in F Veriava *et al Basic Education Rights Handbook* 257.

The opt-in approach allowed the LRC to have all the necessary details of the schools they represented, and to know exactly which teachers needed to be appointed where, and (where proper records had been kept) how much was owed to each school.⁴⁴⁵ About 80 schools in the Eastern Cape chose to opt into the class action.⁴⁴⁶ The order in *Linkside II* was constructed similarly to that in *Linkside I* – with deeming clauses, and that government assets could be attached to enforce reimbursement to schools.⁴⁴⁷ This was crucial for effective enforcement of the order. The outcome of the case was that all the named teachers were appointed to the vacant posts in terms of section 6 of the Employment of Educators Act,⁴⁴⁸ and about R82 million was paid out to the schools.⁴⁴⁹ The only outstanding part of the court order, with which the department failed to comply, was the publishing of an open teacher-post bulletin advertising the vacant positions at schools.⁴⁵⁰ The LRC then went back to court to institute contempt of court proceedings. The bulletin was finally published on 1 April 2016. This was the first open teacher-post bulletin published in the Eastern Cape since 2012. Most of the provinces publish teacher-post bulletins on a regular basis. One interesting aspect of *Linkside II*, and a novel approach in South African law, was to ask the court to order that the department appoint a “claims administrator.”⁴⁵¹

The court ordered that a registered chartered accountant act as a claims administrator to receive the R82 million from the department and distribute the amounts payable to individual schools.⁴⁵² The claims administrator had to verify each school’s claim and then pay them the appropriate amount.⁴⁵³ This meant that no claim was paid unless the school had the paperwork to confirm that they had the vacancy on their post establishment, that the teacher had been appointed, and had been paid by them. Overall, *Linkside II* was a resounding success; but it did

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36, para 1.

⁴⁴⁸ *Ibid.* See also: Act 76 of 1998.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid* para 10.

⁴⁵¹ *Ibid* para 1.

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

not benefit poorer schools that were not able to join the class action or did not have the paperwork to support their claims.⁴⁵⁴

In this decision, the High Court held that, by failing to appoint educators in vacant substantive posts at applicant schools and to remunerate the educators appointed by the schools, the NDOE was in breach of its constitutional and statutory responsibilities in respect of the provision for basic education and the administration and funding of public schools.⁴⁵⁵ By agreeing with the applicants on all counts, Robeson J ordered the NDOE to reimburse applicant schools for payments made to school-appointed educators and to temporarily appoint school educators serving in vacant posts, and as stated in the aforementioned paragraph, an administrator was appointed to oversee the payments.⁴⁵⁶

This decision underscores the significance that courts attach to protecting the constitutional right to basic education. It emphasises that the violation of the constitutional right to education, through the repeated government failure to appoint teaching staff to vacant school posts and to remunerate them, constitutes exceptional circumstances empowering the courts to substitute their own plans of action for that of the government's functionaries. In doing so, the court has emphasised the significance of having enough teachers in schools and that the failure to appoint them is detrimental to the overall realisation of the right to basic education. Therefore, government is required to act promptly in filling vacant teaching posts in discharging its duty to fulfil basic education. Furthermore, the filling of vacant teaching posts enables the availability of basic education since an adequate number of teachers allows for effective teaching and learning process. Teachers would be able to facilitate their lessons to their maximum level with manageable number of learners to teach, and learners would be able to participate and receive more attention within classes with a smaller number of learners.

3.7 Transport as a Component of the Right to Basic Education

3.7.1 Tripartite Steering Committee v Minister of Basic Education

The transport system is one of the mechanisms used by the government to ensure that schools are accessible. Not all learners live within walking distance of their nearest school or have the financial resources to afford transport to their nearest school. Accordingly, the National

⁴⁵⁴ S Sephton "Post Provisioning" in F Veriava *et al Basic Education Rights Handbook* 257.

⁴⁵⁵ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36, para 26.

⁴⁵⁶ *Ibid* para 1.

Learner Transport Policy (NLTP) was enacted in October 2015 to address the safety of learners and their struggle to access schools across South Africa.⁴⁵⁷ It ensures that learners from deep rural areas and disadvantaged communities have access to schools by making provision for government funded scholar transport to transport learners between their home and the school and back.⁴⁵⁸ It should be noted that the NLTP left the planning and provisioning of learner transport in terms of the policy, to be developed by the respective provinces.⁴⁵⁹ The implementation of these plans and strategies would have to be developed by the provinces in line with the NLTP.⁴⁶⁰

This led to the Eastern Cape Provincial Learner Transport Policy (ECPLTP) which was challenged in this matter. The ECPLTP set out much more specific guidelines for stakeholders, thus ensuring accessibility to educational institutions in the Eastern Cape through transportation services. The policy provides that eligibility for the subsidised transport services is limited only to learners who reside and attend schools within the province.⁴⁶¹ Additionally, it is intended for learners who walk at least 5 kilometres to and 5 kilometres from school daily, and provides preference to learners who walk much longer distances.⁴⁶² Furthermore, the ECPLTP recognises that finances can hinder access to schools and it therefore makes provision for a transport system to be made available to learners in different categories: that is, learners who did not receive their boarding allowances, learners whose parents earn less than the stipulated minimum wage, learners who attend the nearest school from their place of residence (which can sometimes be located far away), learners who were forced to attend schools that are far from the nearest school, and learners who are orphans.⁴⁶³

⁴⁵⁷ Foreword of the Department of Basic Education & Department of Transport “National Learner Transport Policy” 2015 (GN 997/2015).

⁴⁵⁸ Foreword of the Department of Basic Education & Department of Transport “National Learner Transport Policy” 2015 (GN 997/2015). See also: L Mgushelo *The Scholar Transport Programme in the Eastern Cape: A case study of the beneficiaries at a secondary school in the Idutywa district* 28.

⁴⁵⁹ Department of Basic Education & Department of Transport “National Learner Transport Policy” 2015.

⁴⁶⁰ Department of Basic Education & Department of Transport “National Learner Transport Policy” 2015.

⁴⁶¹ Section 4 (1) of the Eastern Cape Provincial Learner Transport Policy. See also: *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 22.

⁴⁶² Section 4.2.1 & Section 4.2.2 of the Eastern Cape Provincial Learner Transport Policy. See also: *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 22.

⁴⁶³ Section 4 (3) – 4(8) of the Eastern Cape Provincial Learner Transport Policy.

As has become a theme in the Eastern Cape, it became clear around 2014 that the policy was not being properly applied. In the 2014 academic year, the provincial education department in the Eastern Cape was only providing transport to 60% of the 94 938 learners identified as eligible for state funded scholar transport.⁴⁶⁴ The remaining 37 762 learners were forced to walk to school over long distances or pay for private transport. This meant that learners were often tired when they reached the school or were subjected to violence on their way to school. It was unsafe and unattainable and impacted directly on the ability of learners to enjoy the right to basic education.

The LRC approached the court on behalf of a number of parents and learners from schools in uMdantsane in the Eastern Cape, as well as the school governing body of Masivuyiswe Secondary School. They had been denied scholar transport at their respective schools. In this matter, the manner in which the ECPLTP was applied, and the determination of qualifying learners was deemed to be arbitrary as it denied learners the enjoyment of their right to basic education. A blanket decision was taken in this matter, without verification of information, to refuse the applications of every scholar from the applicant schools that applied for scholar transport.⁴⁶⁵ They formed part of the 40% of learners who were not receiving transport in 2014. A total number of 146 learners at the schools were denied scholar transport after applying in terms of the ECPLTP.⁴⁶⁶

The applicants sought an order that scholar transport should be provided to the learners that were denied within a period of 30 days.⁴⁶⁷ They argued that the failure to provide them with scholar transport constituted a violation of their constitutional rights to equality, human dignity, safety and security of the person, and basic education. The ECDOE argued that they did not have the money to provide the learners with transport. However, by the time the case came before the court, the MEC no longer relied on the argument that there were insufficient funds

⁴⁶⁴ Auditor-General of South Africa “A Performance Audit of the Learner Transport Scheme in the Eastern Cape Department of Transport” AGSA February 2016, available at https://www.agsa.co.za/Portals/0/PA_Audit/A%20performance%20audit%20of%20the%20learner%20transport%20scheme%20at%20the%20Eastern%20Cape%20Department%20of%20Transport.pdf [accessed on 22 September 2022].

⁴⁶⁵ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 44.

⁴⁶⁶ *Ibid* para 35.

⁴⁶⁷ *Ibid* para 9.

to provide scholar transport to the affected learners.⁴⁶⁸ Hence, the fundamental legal question that the court had to deal with in this case was whether scholar transport is a right which is within the scope of the constitutional right to basic education.

The court recognised that there were many learners that walked long distances to and from schools, even during times of unpleasant weather conditions.⁴⁶⁹ These learners also walk in dangerous conditions that serve as a threat their lives, and this places a physical and psychological burden upon scholars.⁴⁷⁰ Furthermore, the court referred to the Constitutional Court's decision in *Juma Masjid* on the importance of basic education, where the court held that:

*“Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and world opportunities. To this end, access to school — an important component of the right of basic education guaranteed to everyone by section 29(1)(a) of the Constitution — is a necessary condition for the achievement of this right.”*⁴⁷¹

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid* para 14.

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Governing Body of the Juma Masjid Primary School v Essay* 2011(8) BCLR 761 (CC) para 43. See Also: Article 29(1) of the Child Rights Convention, which provides—

“States Parties agree that the education of the child shall be directed to:

1. The development of the child's personality, talents and mental and physical abilities to their fullest potential;
2. The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
3. The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

Consequently, the court held that, the right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn, and transport to and from school at government's expense in appropriate cases.⁴⁷² Put differently, in instances where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the state is obliged to provide transport to them in order to meet its obligations, in terms of section 7(2) of the Constitution, to promote and fulfil the right to basic education.⁴⁷³

It is important to note that after this application was launched, the department engaged the services of Mr Ewan Harris, the chief executive officer of Socio-Econometrics Services, to conduct an ex post facto verification of the scholars at the schools who had applied for scholar transport.⁴⁷⁴ The Harris report provides the results of that process. It verified the distance, taken from a central point, from each village or settlement where applicant scholars lived, to their schools, as well as that the scholar attended the school mentioned in the application.⁴⁷⁵ This report was a rough guide in determining who did and did not qualify for learner transport since distance was not measured from the exact place of residence of learners but rather at a central point,⁴⁷⁶ which leads to inaccurate results in the determination of how far the learners lived from their closest schools.⁴⁷⁷

The court held that, it was an arbitrary decision since a blanket decision was taken without a consideration of the merits of each applicant's application.⁴⁷⁸ No attempt appears to have been made, to even ascertain who lived further than five kilometres and who lived closer than that

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4. The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

The development of respect for the natural environment.”

⁴⁷² *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 18.

⁴⁷³ *Ibid* para 19.

⁴⁷⁴ *Ibid* para 30.

⁴⁷⁵ *Ibid*.

⁴⁷⁶ *Ibid* para 32.

⁴⁷⁷ Section 4.2 of the Eastern Cape Provincial Learner Transport Policy.

⁴⁷⁸ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 45.

distance to their schools.⁴⁷⁹ The MEC sought to justify the decision based on the fact that a substantial number of scholars that applied in terms of the ECPLTP and who formed part of this matter did not qualify.⁴⁸⁰ However, there were two problems with that reasoning.⁴⁸¹ First, it was only when Harris was engaged that any form of verification occurred: the decision-maker did not know, when taking the decision, who qualified and who did not.⁴⁸² The information in the Harris report came to light after the fact and so could not be relied upon as a reason.⁴⁸³ Secondly, even those who did qualify, on the MEC's version, were refused scholar transport, a further indication of arbitrariness.⁴⁸⁴ Therefore, the court deemed the decision to deny learners transport as invalid.

The court went further by holding that the distance requirement of five kilometres from school is arbitrary, but understandably and unavoidably so: a distance had to be settled upon and it could just as easily have been four or six kilometres.⁴⁸⁵ This element of arbitrariness is one reason why the policy must be applied flexibly. Otherwise deserving scholars may live 4,9 or 4,8 km from their schools; or a very young scholar who is no longer in Grade R may only live 4,7 km from school.⁴⁸⁶ In the court's view the distance requirement is a guideline which must be applied flexibly in order to achieve the ultimate purpose of providing scholar transport to all of those who need it.⁴⁸⁷ Precisely the same considerations apply to all of the other aspects of the policy. The court opined that the ECPLTP should not be viewed as the last resort to the learner transport matter and should accordingly be considered as a legal instrument used by the department to fulfil its duties as it is mandated by section 29 of the Constitution.⁴⁸⁸ Therefore,

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Ibid* para 57.

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*

it may be deduced that the statutory protection is in accordance with international requirements on availability, accessibility, and adaptability.⁴⁸⁹

The court's decision extended the constitutional right to basic education to include the means necessary by which scholars are able to access education, by finding that, where scholars' access to schools is hindered by distance and an inability to afford the costs of transport, the state is obliged to provide transport to them in order to meet its obligations in terms of section 7(2) of the Constitution, to promote and fulfil the right to basic education. It underscores that it is the government's prerogative to develop and implement policies determining the criteria in terms of which learners could qualify for state paid school transport. However, the policies must consider a variety of benchmarks and be applied flexibly in order to ensure that the fulfilment of the constitutional right to basic education is protected. The courts had the right to scrutinise those policies for their constitutional compliance.

This refers to accessibility in international law, which places an obligation on the state to consider that education provisioning is not limited to the provision of functioning schools. It should also consider that although there may be functioning schools, there may be learners that may not be able to access those schools and require scholar transport.

3.8 School Nutrition as a Component of the Right to Basic Education

3.8.1 *Equal Education v Minister of Basic Education*

While infrastructure, textbooks, scholar transport, and school furniture had long been recognised as part of the right to education, the role of nutrition as a component of section 29(1)(a) was only established in 2020. The provision of school nutrition has long been recognised as one of the state's more effective means of ensuring that learners have enough to eat at school, and for many learners it is the only meal that they receive during a day. As with many other aspects of life, the corona virus pandemic that hit the world towards the end of 2019, also destabilised the school nutrition programme, ultimately resulting in some

⁴⁸⁹ K Tomaševski "Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable", 2001, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf [accessed 16 June 2022].

progressive legal developments, including the recognition of nutrition as part of the right to education.

By March 2020, the disease had been spreading rapidly in South Africa and as a result President Cyril Ramaphosa called for a national lockdown in South Africa with the aim of preventing the spread of the virus. The national lockdown began during late March 2020 and forced schools to close down. The national lockdown impacted on the longstanding National School Nutrition Programme (NSNP) of the state.⁴⁹⁰ Under the NSNP, learners who do not receiving regular meals at home, are provided with at least one meal per day at their school.⁴⁹¹ With the eventual easing of the lockdown a phased return to school was planned. Grades 7 and 12 were the first to return, followed by a staggered return for the other grades. The MOBE also decided that a phased reimplementing of the NSNP would be followed, with grades 7 and 12 to be its first recipients on their return, and other grades, as they progressively returned.⁴⁹² Equal Education and the School Governing Bodies of Vhulaudzi Secondary School and Mashao High school (applicants), had sought an order that the NSNP be rolled out to all learners regardless of whether they had returned to school or not.⁴⁹³

The applicants sought declaratory orders against the MOBE and the MEC's of Education of eight provinces of South Africa declaring that they were in breach of their constitutional and statutory duty to ensure that the NSNP provides a daily meal to all qualifying learners, whether they are attending school or studying away from school as a result of the Covid-19 pandemic.⁴⁹⁴ The breach in this application is from 8 June 2020, the date the schools were to be reopened and not for the entire period the schools were closed,⁴⁹⁵ and the constitutional duty was in terms of section 28(1)(c) of the Constitution, which provides that every child has a right to basic nutrition, shelter, basic health care services and social services.⁴⁹⁶ and the statutory duty was in terms of the National Health Act, which protects, respects, promotes and fulfil the rights of children to basic nutrition and basic health care services contemplated in section 28(1)(c) of

⁴⁹⁰ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 33.

⁴⁹¹ *Ibid* para 28.

⁴⁹² *Ibid* para 76 and 78.

⁴⁹³ *Ibid* 78.

⁴⁹⁴ *Ibid* para 2.

⁴⁹⁵ *Ibid*.

⁴⁹⁶ The Constitution of the Republic of South Africa, 1996.

the Constitution.⁴⁹⁷ No relief was sought against the MEC of the Western Cape, because the Western Cape provincial government had publicly committed to immediately provide a daily meal to all qualifying learners, whether they have returned to class as Grade 7 or 12 learners or not.⁴⁹⁸

The applicants also sought an order against the MOBE and the eight MEC's that they without delay ensure that the NSNP is implemented in such a manner that it provides a daily meal to all qualifying learners.⁴⁹⁹ The applicants further sought a supervisory interdict effectively seeking judicial supervision over the MOBE and the MEC's with a step-by-step plan as to how the NSNP will be implemented. The plan had to be submitted to the court within 5 days of the order and with follow up reports every fifteen days until the order is discharged by the court.⁵⁰⁰ The applicants had also sought an order that on the same papers, supplemented, if necessary, they may approach the court again on whether the plans comply with the respective duties and whether there was compliance with this court order.⁵⁰¹ The applicants submitted that the MOBE and MEC's had failed to fulfil their duty in terms of section 29(1)(a) of the Constitution,⁵⁰² and section 28(1)(c) regarding a child's right to basic nutrition,⁵⁰³ read with section 27(1)(b),⁵⁰⁴ by suspending the NSNP.

The question before the court was whether the MOBE and MEC's have a constitutional duty in terms of section 29(1)(a) of the Constitution to provide basic nutrition.⁵⁰⁵ The court accepted that the suspension of the NSNP had a devastating effect on some nine million learners; overnight a reliable source of food/nutrition came to an end.⁵⁰⁶ The court further recognised that the state is a bearer of positive obligations in respect of the rights contained in the Bill of Rights,⁵⁰⁷ however, the Constitution also creates a negative obligation not to impair the right

⁴⁹⁷ Act 61 of 2003.

⁴⁹⁸ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 2.

⁴⁹⁹ *Ibid* para 3.

⁵⁰⁰ *Ibid* para 4.

⁵⁰¹ *Ibid*.

⁵⁰² Which provides that everyone has the right to basic education, including adult basic education.

⁵⁰³ The Constitution of the Republic of South Africa, 1996.

⁵⁰⁴ Which provides that everyone has the right to have access to sufficient food and water.

⁵⁰⁵ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 36.

⁵⁰⁶ *Ibid* para 34.

⁵⁰⁷ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 44.

of access to the rights in the Constitution.⁵⁰⁸ The state accordingly has a duty to respect and protect the entitlement to basic nutrition and education as fulfilled by the NSNP.⁵⁰⁹ Therefore, the court ordered the MOBE and the MEC's to resume the NSNP for all qualifying learners, whether they were studying from home or attending school.⁵¹⁰ This order was essential since the suspension of the NSNP breached the obligation to respect and protect the right to basic education. The suspension of the NSNP compromised the learning process on which realising the right to basic education is premised.

Notably, the NSNP⁵¹¹ as provided by the Department of Basic Education started with these two goals:

“To contribute to the improvement of education quality by enhancing learning capacity, school attendance and punctuality and to contribute to general health development by alleviating hunger.”⁵¹²

It may be deduced from the goals of the NSNP program, that realising basic education is contingent upon the provision of basic nutrition to school learners in the form of a meal during school hours. Furthermore, in a policy plan a promise was made that school nutrition shall be provided to the impoverished learners, where it was stated that:

“Poverty targeting in our school nutrition programme. The Primary Schools Nutrition Programme (PSNP) will be transferred from the Department of Health to the Department of Education during 2004. Preparations for this transfer began in 2002, and we are confident that Government will be in a position to move closer to its target of providing nutritious lunches to all poor learners on every school day. During 2004, we will realise our target of providing a nutritious meal to 20% of learners on a pro-poor basis on every school day. These learners will be all the learners in schools which

⁵⁰⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 34.

⁵⁰⁹ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 44.

⁵¹⁰ *Ibid* para 103.

⁵¹¹ Department of Basic Education, 13 January 1994, available at <https://education.gov.za/Programmes/NationalSchoolNutritionProgramme.aspx> [accessed 16 August 2022].

⁵¹² White paper on Reconstruction and Development 1994.

*offer any of the grades in the Grade R to Grade 7 range, and targeting will start from the poorest schools and cover 20% of learners.”*⁵¹³

Therefore, the judgment builds on a vibrant and incremental jurisprudence identifying different components of the unqualified right to basic education. These include teachers, decent school infrastructure, textbooks, scholar transport for learners for poor learners living far distances from schools, and desks and chairs. The NSNP judgment now has confirmed that nutrition is also a component of the right to basic education. School feeding schemes enhance the learning capacity of children while at school and is crucial to the provision of basic education. As stated above in the discussion of the judgment, the court based this finding on the NDOE’s own policies, practices, and statements. The judgment notes that the Department’s own policy statements reflect basic nutrition as a component of the right to basic education. The policy is instructive on the content of the right to education and in the policies the provision of basic nutrition is inextricably linked to the fulfilment of basic education.⁵¹⁴

Veriava⁵¹⁵ and Liebenberg⁵¹⁶ comment on the basic nutrition judgment and provide that the judgment confirms the status of the rights to basic education and to basic nutrition as unqualified socio-economic rights. The judgment emphasises that the obligation on government to ensure the fulfilment of these unqualified rights is immediate, unless these rights are limited in terms of a law of general application, where it is reasonable and justifiable to do so.⁵¹⁷ Veriava⁵¹⁸ further provides that in addition to affirming nutrition as a component of the right to basic education, the judgment simultaneously acknowledges that children have a self-standing and independent right to basic nutrition.⁵¹⁹ In so stating, the judgment acknowledges that right are indivisible, interdependent, and interrelated. This was one of the statements made by Liebenberg on the legal issues that this case raised. She provided that one of the legal issues

⁵¹³ South African Government, *A Plan of Action: Improving Access to Free and Quality Basic Education for All*, 14 June 2003, available at www.gov.za/documents/plan-action-improving-access-free-and-quality-basic-education-all [accessed 11 May 2022].

⁵¹⁴ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 40.

⁵¹⁵ F Veriava “Legal Mobilization for Education in the Time of Covid-19” (2021) 37 *South African Journal on Human Rights* 230 at 239.

⁵¹⁶ “Resuming the National School Nutrition Programme is a Vital Test for Children’s Socio-Economic Rights” *Daily Maverick* 20 June 2020.

⁵¹⁷ Veriava 1996 *SAJHR* 239. See also: The Constitution of the Republic of South Africa, 1996 s36(1).

⁵¹⁸ Veriava 1996 *SAJHR* 241.

⁵¹⁹ Veriava 1996 *SAJHR* 242.

raised in this case was on the relationship between the right to basic education in section 29(1)(a) of the Constitution, and the right to basic nutrition in section 28(1)(c).⁵²⁰ Furthermore, that in addition to being an essential programme to fulfilling children's right to basic nutrition in section 28(1)(c), can the NSNP also be regarded as an essential component of the right to basic education in section 29(1)(a).⁵²¹

Based on this legal issue, Liebenberg⁵²² provided that government's own conception of the NSNP is clearly that it enhances children's learning capacities, thereby fostering quality education. This legal question raised the interdependence between rights as integral to a substantive, transformative interpretation of the Bill of Rights.⁵²³ It implied that when it is not possible to protect one right in the Bill of Rights without also protecting elements of other rights, then those elements should also be regarded as essential components of the relevant right.⁵²⁴

3.9 The Minimum Core of the Right to Basic Education as Clarified by the Courts

The litigation on the right to basic education between 2010 and 2022, clarified that there are certain components that make up the right to basic education and are essential for the enjoyment and realisation of the right. These educational inputs consist of school infrastructure; desks and chairs, school nutrition; scholar transport; textbooks, stationery, teaching and non-teaching staff. The courts interpreted the right to basic education, legislation, and policies on basic education provisioning,⁵²⁵ and provided the right with a core content. The identified educational inputs are goods or resources that are guaranteed by the right to basic education. This illustrates a judicially determined minimum core obligation since courts developed and clarified a normative content upon a socio-economic right by pronouncing the specific targets (good and services) that are to be provided in realising the right.⁵²⁶ Although drafters of the Constitution did not define the content of the right to basic education, courts have clarified that

⁵²⁰ "Resuming the National School Nutrition Programme is a Vital Test for Children's Socio-Economic Rights" *Daily Maverick* 20 June 2020. See also: The Constitution of the Republic of South Africa, 1996 s29(1)(a) and s28(1)(c).

⁵²¹ *Ibid.*

⁵²² *Ibid.*

⁵²³ *Ibid.*

⁵²⁴ *Ibid.*

⁵²⁵ As required by section 39(1) of the Constitution.

⁵²⁶ Mavedzenge 2020 *JCLA* 70.

the realisation of the right is only possible where there is effective teaching and learning process that is underpinned by certain established minimum goods and services.

Courts illustrated that the provision of these education inputs enables the government to discharge its constitutional duty to respect, protect, promote, and fulfil the right to basic education.⁵²⁷ Furthermore, it enabled the government to make basic education available and accessible, as provided by the South African state's minimum obligation on the provision of basic education at an international level.⁵²⁸ However, the fulfilment of these international obligations undoubtedly allows for the fulfilment of the constitutional duties at the domestic level. The pronouncements of the High Courts in *Centre for Child Law* (on school infrastructure),⁵²⁹ *Madzodzo*,⁵³⁰ *Freedom Stationery*,⁵³¹ *Khula Community Project*,⁵³² *Equal Education*⁵³³ (on regulations for school infrastructure), *Section27*,⁵³⁴ *Basic Education for All* (High Court and SCA),⁵³⁵ *Centre for Child Law* (on the provision of teaching and non-teaching staff)⁵³⁶ and *Linkside II*⁵³⁷ supported the feature on availability of basic education. The education resources that the High Courts pronounced as components of the right to basic education, include school infrastructure, stationery, sanitation facilities, textbooks, teaching and non-teaching staff. These education resources secure functional education institutions and their provision to disadvantaged schools allow for functional education institutions of sufficient

⁵²⁷ As required by section 7(2) of the Constitution.

⁵²⁸ CESCR General Comment No.13: The Right to Education 1999 (Article 13 of the Covenant). See also: K Tomaševski "Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable", 2001, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf [accessed 16 June 2022].

⁵²⁹ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bhisho, case no 504/10.

⁵³⁰ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

⁵³¹ *Freedom Stationery v MEC for Education, Eastern Cape* (59/2011) [2011] ZAECELLC 1.

⁵³² *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported.

⁵³³ *Equal Education and Another v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016.

⁵³⁴ *Textbook I Judgment*.

⁵³⁵ *Textbook II Judgment*.

⁵³⁶ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG).

⁵³⁷ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36.

quantity. This is requirement at an international level in order for a state to discharge the minimum core obligation on the availability of the right to basic education.⁵³⁸

The pronouncement by the High Court in *Tripartite Steering Committee*⁵³⁹ supported the accessibility feature on the right to basic education. The court in this case pronounced that the provision of scholar transport was part of the minimum core obligations required by the right to basic education.⁵⁴⁰ The provision of scholar transport enables learners that have to walk long distances to and from school to be able access basic education, since walking long and dangerous routes hinders the realisation of the right to basic education as the court provided.⁵⁴¹

Therefore, the continuous failure by the South African state to discharge its duty to realise the right to basic education for the marginalized, encouraged courts to set specific targets that should be met in enabling the immediate provisioning of basic education. Courts have been willing to accept the minimum core obligations that the state has determined for itself in legislation and policy. The courts have interacted with these documents and often accepted that the state has already determined the minimum core obligation to the right to basic education for the courts to adopt. In essence, the mechanism attaches a minimum core obligation in itself and a judicially determined minimum core obligation onto the legal scope and content of the right to basic education.

While it is clear that the courts have been more than willing to accept that certain goods and services form part of the right to basic education, none of the cases thus far have substantially dealt with the adequacy or the quality of the education that is provided by schools. The cases have exclusively dealt with the basic inputs and resources that are required in order to fulfil the right, but has not questioned whether a certain quality of good or service is required as part of the minimum core. It is submitted that realising basic education compels the government to provide adequate education for the right to be enjoyed and fulfilled.⁵⁴² In the South African context, adequate education could refer to a standard of education that empowers people to rise

⁵³⁸ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 6(a) of the Covenant).

⁵³⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

⁵⁴⁰ *Ibid* para 18.

⁵⁴¹ *Ibid* para 14.

⁵⁴² Churr 2015 *PELJ* 2409.

above the poverty cycle and compete effectively in the labour market and enhance their dignity and self-worth as humans.⁵⁴³

As set out above, international law on the right to basic education does imply some level of adequacy or quality in relation to the right to education and in particular, the 4A framework under the CDESCR mentions the need for quality in education. The third requirement of acceptability means that the content of school education, the delivery methods, assessments, and the curriculum must be of good quality, relevant, and culturally aligning with the quality required by various international instruments.⁵⁴⁴

While our courts have not pronounced on this, it is submitted that the minimum core obligation in relation to the right to basic education must require some consideration of the adequacy or quality of the education or education resource. It is not simply enough to have a teacher in a class, if that teacher is not able to provide adequate or quality education. Similarly, a textbook that is not of sufficient quality and at an adequate age and grade level, is not sufficient to fulfil the minimum core obligation in relation to the right to basic education.

3.10 Conclusion

This chapter provided the legally determinable scope and content of the right to basic education as pronounced by the courts between 2010 and 2022. The normative content provided by the courts on the right to basic education clarifies the point of determination on whether the state is violating the right by not providing the essential education inputs that are guaranteed by the right. Courts have explicitly provided that the right to basic education requires the provision of adequate infrastructure; school infrastructure; textbooks; sufficient number of teachers; school nutrition and scholar transport. This means that the state may easily be held accountable where it has failed to make provision for any of these resources which are essential in realising the right to basic education.

Courts have illustrated that the provision of these education inputs refers to the minimum obligation placed upon the state which is guaranteed by the right. Courts referred to and interpreted education policies and legislation in conjunction with the nature of the right to basic education from its textual framing, to illustrate that there is a minimum core obligation that is attached to the right. This is precisely the role of the courts, which is to interpret the Bill of

⁵⁴³ *Ibid.*

⁵⁴⁴ CDESCR General Comment No.13: The Right to Education 1999 (Article 13, para 6 (b) of the Covenant).

Rights in manner that promotes values that underlie an open and democratic society based on human dignity, equality and freedom, and the requirement to consider international law.⁵⁴⁵

The role of the courts extends to interpreting legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.⁵⁴⁶ The effectiveness of the normative content provided by the courts seeks to achieve human dignity, equality and freedom for every school child by ensuring that the state is aware of the goods and services guaranteed by section 29(1)(a) and ensure their provision. Hence, allowing every learner to utilize basic education in achieving their greatest potential in society as an objective behind entrenching basic education as a constitutional right in the Bill of Rights.⁵⁴⁷

⁵⁴⁵ Section 39(1)(a) & (b) of the Constitution.

⁵⁴⁶ The Constitution of the Republic of South Africa, 1996 s39(2).

⁵⁴⁷ See Article 29(1) of the Child Rights Convention, which provides—

“States Parties agree that the education of the child shall be directed to:

1. The development of the child’s personality, talents and mental and physical abilities to their fullest potential;
2. The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
3. The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
4. The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

The development of respect for the natural environment.”

CHAPTER 4

FACTORS THAT INFLUENCE THE COURTS' INTERPRETATION OF THE RIGHT TO BASIC EDUCATION

4.1 Introduction

The following chapter seeks to identify and discuss the factors that courts consider when interpreting and developing the legal scope and content of the right to basic education as provided in section 29(1)(a) of the Constitution. The chapter will propose that there are five factors that have contributed to the courts' interpretation of the right to basic education, namely, the historical context of basic education in South Africa; the nature of the right to basic education as textually formulated in section 29(1)(a) of the Constitution; subsidiary basic education policies and legislation; the interrelationship between the right to basic education and other constitutionally protected rights; the budgetary arguments, and international law.

A brief theoretical framework on each factor will be provided in setting the context and relevance of the utilization of these factors by courts in the interpretation and clarification of the right to basic education. Thereafter, an analysis will be conducted on the way in which each factor has been considered in education rights cases and what role it has played in the courts' interpretation of the right to basic education.

4.2 Historical Context of the Right to Basic Education in South Africa

4.2.1 Theoretical Framework on the Historical Context

The Constitutional Court has stated that in addition to their textual setting, rights must be interpreted in their social and historical context.⁵⁴⁸ The discriminatory provision of basic education during the apartheid period in South Africa justifies the need for a specific content of the right to basic education that is framed in equality and non-discrimination and allows for all children to immediately access the right. Much of the rationale behind the slew of litigation on the right to basic education between 2010 and 2022 is a result of the legacy of apartheid on

⁵⁴⁸*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paras 22 and 25; *Minister of health v Treatment Action Campaign* 2002 (5) SA 721 (CC) at para 24.

education provision.⁵⁴⁹ As set out in Chapter 1, it is trite that South Africa, in reality, still harbours separate education system in its public-school domain: the one consisting of the former Model C schools, which are adequately resourced, and the other of the former black schools, which are under-resourced and entrenched in deep poverty.⁵⁵⁰ The legacy of apartheid is manifested through limited education resources, high teacher-pupil ratios, and dilapidated buildings.⁵⁵¹ On the other, most of the former Model C schools are well-resourced and consist of an adequate number of well-qualified teachers.⁵⁵²

The root of this disparity in the contemporary provision of basic education is found in the education policy of the apartheid regime.⁵⁵³ One of the key features of the apartheid education policy was the gross unequal funding in public schools which occurred along racial lines, where black learners were receiving the least amount of funding, while schools for white learners were better resourced.⁵⁵⁴ However, the post-apartheid financing system is heavily reliant on school fees and reinforces the existing inequality between former black and white schools.⁵⁵⁵ Former Model C schools are able to sustain their position of privilege by charging high school fees, which allows them to function on budgets far exceeding those of poor schools which are unable to charge similar amounts.⁵⁵⁶ Furthermore, during the apartheid era, discrimination in

⁵⁴⁹ L Arendse “Beyond Rivonia: Transformative Constitutionalism and the Public Education System” (2014) 29 *South African Public Law* 159 at 160.

⁵⁵⁰ South African Human Rights Commission Socio-Economic Rights Report Project 7: *Report on Economic and Social Rights* 88.

⁵⁵¹ Arendse 2014 *SAPL* 160.

⁵⁵² Veriava and Coomans “The right to education” in Brand and Heyns *Socio-Economic Rights* 60.

⁵⁵³ Arendse 2014 *SAPL* 160.

⁵⁵⁴ Veriava and Coomans “The right to education” in Brand and Heyns *Socio-Economic Rights* 60.

⁵⁵⁵ Roithmayr ‘Access, adequacy and equality: The constitutionality of school fee financing in public education’ 2003 (19) 3SAJHR 382. I use the terms ‘black schools’ and ‘white schools’ to distinguish between former Model C schools (which only admitted white children under the previous regime) and previously disadvantaged schools which served the interests of black learners under the apartheid government. Post 1994, however, the racial lines have become blurred. An increasing number of black learners are attending former Model C schools. However, the majority of black learners are situated at the former black schools.

⁵⁵⁶ *Ibid.* South African schools are divided into five national quintiles ranging from the poorest schools to the least poor school. The richest schools (quintiles 4 and 5) are entitled by the Schools Act 84 of 1996 to charge school fees. The poorest schools in quintiles 1–3 are declared no-fee schools. See South African Schools Act 84 of 1996: Amended National Norms and Standards for School Funding (GG 29179 of 2006) para 87.

the provisioning of basic education was legalised.⁵⁵⁷ “Separate education”⁵⁵⁸ was the rationale behind the system of apartheid and it ensured the unequal distribution of education opportunities in South Africa.⁵⁵⁹

Therefore, it may be deduced that the unequal provisioning of basic education necessitated the entrenchment of basic education as a justiciable constitutional right in section 29(1)(a) of the Constitution. Based on this context which considers the historical provision of basic education during the apartheid era in South Africa, Malherbe submits as follows:

*“Adequate basic education would refer to a standard of education that empowers people to rise above the poverty cycle and compete effectively in the labour market, enables people to understand and enjoy their newly acquired democratic values, rights and freedoms, encourages people to participate in and protect the fledging democratic system, and enhances their dignity and feeling of self-worth as human beings.”*⁵⁶⁰

The courts have routinely referred to South Africa’s history of inequality in the education system as a factor to consider when interpreting section 29(1)(a) of the Constitution. The historical context of the right to education and the need to ensure that the legacy of the colonial and apartheid education systems are eradicated, have often formed the background against which the courts have interpreted the right to basic education. Much of the litigation between 2010 and 2022, were also driven by no-fee paying schools that are entirely dependent on the state for all the resources necessary to provide education to its learners. These schools have suffered the most from the apartheid legacy, as they are unable to supplement their income through school fees, are often located in rural areas where poverty is rife and provide education to black learners that have historically been discriminated against by the apartheid government. It is therefore understandable that the history of education in South Africa, has informed how the courts have approached the interpretation of the right in the Constitution. With reference to select cases below, it will be illustrated that the historical context of the right to education has often been used by the courts to frame the current interpretation of the right, acting as the background against which the courts measure the actions of the state and determine whether it

⁵⁵⁷ Simbo 2013 LLD 479.

⁵⁵⁸ Robertson N & Robertson B *Education in South Africa* (1977) at 6.

⁵⁵⁹ P Christie *The Rights to Learn: the Struggle for Education in South Africa* 2 ed (1991) 10.

⁵⁶⁰ R Malherbe “The Constitutional Dimension of the Best Interests of the Child as Applied in Education” (2008) 2 *South African Law Journal* 267 at 274-275.

meets the constitutional imperative to provide basic education in terms of section 29 of the Constitution.

4.2.1.1 *Madzodzo v Minister of Basic Education*

As discussed in chapter 3, in this case the government had failed to provide age and grade appropriate school furniture in the form of desks and chairs.⁵⁶¹ The court framed the legal challenge around the provision of school furniture within its historical context. The court provided that, access to schools is a necessary condition for the achievement of the right to basic education.⁵⁶² It recognised the role of education as an “empowering right” that can be used to ensure that learners achieve their full potential. In this case, Goosen J affirmed the Constitutional Court’s finding in *Juma Masjid*,⁵⁶³ which stated that:

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

Furthermore, that the discriminatory way basic education was provided under the apartheid government has left a legacy in the unequal and inadequate distribution of resources.⁵⁶⁴ Goosen J specifically refers to the history of South Africa when he states that “[o]ur own history demonstrates the role that education plays in shaping social and economic development. Apartheid education has left a profound legacy, not only in the unequal and inadequate distribution of resources but in the appalling levels of literacy and numeracy still found in the general population as a consequence of decades of unequal and inadequate education.

Here the court not only recognises the historical context of the right to education in South Africa, but also argues that it continues to permeate the current education system and the

⁵⁶¹ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 1.

⁵⁶² *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 19.

⁵⁶³ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 43.

⁵⁶⁴ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 19.

unequal and inadequate provisioning of resources. Goosen J then refers to the dictum by the Constitutional Court in *Juma Masjid* which provides that:

*“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 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.”*⁵⁶⁵

The awareness of the historical context within which education functioned under apartheid underlies the finding in this case that desks, and chairs are part of the right to education. The court held that the state’s obligation is not limited to making places available at schools. It necessarily requires the provision of a range of education resources, which includes schools, classrooms, teachers, teaching materials and appropriate facilities for learners.⁵⁶⁶ It recognises that to address this historical reality and the continued impact of it on learning and teaching in South Africa, certain core resources are necessary in order to adequately give effect to section 29(1)(a) of the Constitution. This reliance on the history of South Africa was also visible in the litigation related to textbooks.

4.2.1.2 Section 27 v Minister of Basic Education (Textbook I Judgment)

In this case the government had failed to provide textbooks to affected schools in Limpopo.⁵⁶⁷ Consequently, the court provided that textbooks are an essential component of the right to basic education and that its provision is inextricably connected to the state’s fulfilment of the right.⁵⁶⁸ In coming to this conclusion, the court had regard to the purpose served by basic education and considered the historical provision of basic education in the South African context. The court again stated that basic education is an empowering right that enables the economically and socially marginalized groups to uplift themselves out of poverty and acquire the means to fully participate in society.⁵⁶⁹ The court stated that:

⁵⁶⁵ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 42.

⁵⁶⁶ *Ibid* para 20.

⁵⁶⁷ *Textbook I Judgment* para 1.

⁵⁶⁸ *Ibid* para 25.

⁵⁶⁹ *Ibid* para 4.

“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 to exist in so many areas and sectors of our society. Education takes on an even greater significance. It becomes at the makro 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.”

The *Textbook 1* judgment is important in that the manner which the core content of section 29(1)(a) as developed by the court, is premised on the recognition of the arbitrary provision of basic education by the apartheid government. It deprived many of the marginalized groups in society of economic and social upliftment. Textbooks are essential to the realisation of basic education as it enhances children’s literacy levels and enhances the acquisition of knowledge that may have been discussed in the classroom by their teachers. Therefore, it may be deduced that the impact of providing textbooks to children suffering from the most oppressive and unequal legacy of the apartheid education system is to enhance the acquisition of knowledge which grants them the opportunity to participate effectively in society.

The knowledge acquired from textbooks during the learning process allows for social upliftment, particularly for those from previously disadvantaged groups. Economic upliftment is also enhanced due to acquisition of knowledge and skills from textbooks on varying disciplines thus increasing the chances of employability. In this case, the court finds the right to education to be a necessary tool in a transformative society that gives effect to the transformative nature of the Constitution itself. Therefore, it may be deduced that the right to basic education seeks to promote the ethos of a transformative state in terms of transformative constitutionalism which is one of the fundamental principles underlying South Africa’s constitutional democracy.⁵⁷⁰ Again, the focus is on the role of education, and in this case, the need for textbooks, as part and parcel of addressing the history of inequality under the apartheid regime.

⁵⁷⁰ M Pieterse “What Do We Mean by Transformative Constitutionalism” (2005) 20 *South African Public Law* 155 at 157.

4.2.1.3 *Khula Community Project v Head of Department Eastern Cape Department of Basic Education*

In this case the government had failed to timeously provide stationery and textbooks to the affected schools in the Eastern Cape.⁵⁷¹ The court found that the failure to provide stationery was a violation of the learners right to basic education, and thus held that stationery was an essential component of the right to basic education.⁵⁷² In coming to this conclusion, the court considered the applicant's heads of arguments where it stated that the Department's failure to meet its obligations (that is, providing stationery and textbooks, timeously), resorts to unfair discrimination towards learners that suffer heavily from the grief striking legacy in the South African education system that emanated from the apartheid regime.⁵⁷³ It is this category of learners that suffer disproportionately as a result of the Department's failure to timeously provide textbooks and stationery.⁵⁷⁴ The court further referred to the dictum in *Minister of Basic Education v Basic Education for All*, where the court provided as follows:

*“The provision of textbooks and stationery to only some learners violate the right to equality in addition to our education system that was historically based on racial inequality and segregation, which is an injustice that must be remedied.”*⁵⁷⁵

In this case, the court stated that, as argued for the Applicant, this form of discrimination has predominantly affected poor and black children who suffer disproportionately in this regard.⁵⁷⁶ In defining the content of the right to basic education in this matter the court referred to submissions on the perpetual marginalization of children attending former black schools and that the government's failure to provide these learners with learning resources further places them at a disadvantage. In interpreting and developing the content of the right to basic education the court considered the effects of the unequal and arbitrary legacy of the apartheid education system. It went further than previous courts, by specifically linking the arbitrary

⁵⁷¹ “Eastern Cape Judgment Reaffirms that Textbooks and Stationery are Essential to Basic Education” *Daily Maverick* 8 May 2022.

⁵⁷² *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 42.

⁵⁷³ *Ibid* para 50.

⁵⁷⁴ *Ibid*.

⁵⁷⁵ *Textbook III Judgment* para 48.

⁵⁷⁶ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 43.

impact of the apartheid system on former black schools. These entrenched divisions between schools continue to exist and perpetuate entrenched patterns of discrimination. The court views the failure to provide stationery and textbooks to the learners in these schools as particularly deplorable, given the historical context of these schools.

4.2.1.4 *Equal Education v Minister of Basic Education*

This case dealt with the re-implementation of the NSNP only to learners that were part of the phased return to school after the closing of schools due to the Covid-19 pandemic.⁵⁷⁷ The court provided that the state had a positive constitutional duty to respect and protect the entitlement to basic nutrition and education as fulfilled by the NSNP.⁵⁷⁸ Thus, holding that basic nutrition is part of the legal scope and content of the right to basic education, and ordering the government to re-implement the NSNP program for all deserving learners.⁵⁷⁹ In reaching this conclusion, the court considered the purpose of the NSNP which was primarily to provide redress to the long lasting effects of the educational segregation of apartheid.⁵⁸⁰ Court referred to the Constitutional Court's *obiter dicta* in *Juma Musjid* where the court provided that based on the lived legacy of apartheid, the significance of basic education which is premised on individual and societal development cannot be ignored.⁵⁸¹

Therefore, in this matter, in developing the core content of the right to basic education, the court considered a measure (basic nutrition) of which its implementation allows for accessibility of basic education. In doing so, the court was conscious of the need to remedy the legacy of apartheid, which required the state to make education accessible to everyone. The NSNP provides an opportunity for learners suffering the disparities of this legacy to effectively participate in the learning process, since access to a nutritious meal is essential for teaching and learning.

4.2.2 Conclusion

When considering the cases discussed above, it seems that courts use the historical context of the right to education in two distinct ways. Firstly, it refers to the legacy of apartheid to provide

⁵⁷⁷ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 76 and 78.

⁵⁷⁸ *Ibid* para 44.

⁵⁷⁹ *Ibid* para 103.

⁵⁸⁰ *Ibid* para 55. See also White Paper on Reconstruction and Development Notice No.1954 of 1994.

⁵⁸¹ *Governing Body of the Juma Musjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 42.

context to the present legal battle in front of the court. It uses it to frame the dispute between the parties, placing emphasis on the arbitrary and unequal system that existed prior to the introduction of section 29(1)(a) of the Constitution. It highlights the role that race, class, and socio-economic circumstances played in the provisioning of education under apartheid. In this sense, it lays the foundation for a discussion on the role of basic education under the transformative Constitution. Secondly, I submit that it is also used as a measure to justify a finding that the right to education contains a specific core set of resources and services. Here it is important to note the reference to education as an “empowering right” that has the ability to ensure that everyone, irrespective of their race, socio-economic status, or background, can pull themselves from poverty and the legacy of the apartheid system. In this sense, education itself, and the adequate provisioning of resources to realise the right, is necessary to achieve the transformative objective of the Constitution and realise the individual’s potential in a democratic South Africa. The history is now not only relevant in understanding the present dispute, but in itself becomes a justification for settling the dispute in front of the court.

4.3 The Textual Formulation of the Right to Basic Education in Section 29(1)(a) of the Constitution

4.3.1 Theoretical Framework on the Nature of the Right to Basic Education

Apart from the historical context of the right to basic education in South Africa, the textual formulation of the right to education in section 29(1)(a) of the Constitution has also played an important role in the courts’ interpretation of the content of the right. As will be illustrated below, the formulation in the Constitution has often been the main reason why education resources have been provided to schools immediately, with courts rejecting the state’s arguments around capacity and budgetary shortfalls. Even though the Constitution does not specifically refer to the right to basic education as immediately realisable, the courts have followed this interpretation based on a simple reading of section 29(1)(a), which considers the unqualified nature of the right.⁵⁸²

⁵⁸² Skelton 2013 *De Jure Law Journal* 3; Veriava & Coomans “Right to Education” in *Socio-Economic Rights* 62; S Woolman & B Fleisch *The Constitution in the Classroom* 9; Kamga “The Right to a Basic Education” in *Child Law in South Africa* 2 ed (2020) 521.

As discussed in Chapter 2 on the nature and scope of the right to basic education,⁵⁸³ this interpretation was confirmed by the Constitutional Court in *Juma Masjid*⁵⁸⁴ where it provided the legal scope of the right and held that unlike other socio-economic rights, the right to basic education is immediately realisable and may only be limited in terms of a law of general application. The *Juma Masjid* judgment followed the pre-constitutional judgment in *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995*,⁵⁸⁵ (as also mentioned in the previous chapter)⁵⁸⁶ where the court clarified the nature of the right to basic education in that it creates a positive right, meaning that the right requires positive action of the South African government in providing for basic education.

Understanding the historical context within which the right to education in South Africa must be interpreted, assist us in understanding why the drafters of the Constitution saw it fit to include section 29(1)(a) in the Bill of Rights as an unqualified human right.⁵⁸⁷ It is also important to note, that the violation of the right to education is by its very nature, a breach that has to be remedied immediately in order to prevent its continued violation. For example, a learner who does not have a textbook to study from, will continue to have his educational rights violated until such time as a textbook is provided. Every day that the learner is without a textbook, the breach continues, and it can only be remedied once the state provides the resource. In addition to this, most learners only have a limited time in which to complete their schooling careers, and every infringement of their educational rights impacts on their ability to utilise education to reach their full potential. Had the right not been immediately realisable, it could result in generations of learners being deprived of the right while the state takes its time to remedy the breach. The nature of education itself, therefore, requires immediate action whenever a breach of the right occurs. The right to basic education is seen as a central facilitative and empowering right in South Africa's constitutional democracy.⁵⁸⁸ This stems from the fact that education sets people free from their lack of knowledge, false notions, and fear.⁵⁸⁹ Which thereafter, furnishes people with dignity, self-respect and self-assurance and it

⁵⁸³ See **Chapter 2** on page 25.

⁵⁸⁴ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 37.

⁵⁸⁵ *Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) para 9.

⁵⁸⁶ See **Chapter 2** pages 24-26.

⁵⁸⁷ *Simbo* 2013 LDD 478-479.

⁵⁸⁸ *Churr* 2015 PELJ 2416.

⁵⁸⁹ *Churr* 2015 PELJ 2406.

is a vital human right upon which the realisation of other rights depend.⁵⁹⁰ Therefore, the nature of the right to basic education as textually formulated in section 29(1)(a), serves the purpose for education to never again be used as a source to enforce the arbitrary policies of the apartheid government. To that end the state is obliged to utilize all possible avenues to guarantee the provision of basic education.

The unqualified character of the right to basic education as textually formulated in section 29(1)(a) is reflected in three linguistic tropes. The first is that everyone has the right to basic education itself, and not, as is the case with section 26 and 27, a right to “access”.⁵⁹¹ Considering that the Constitutional Court in *Grootboom*,⁵⁹² interpreted the inclusion of the word ‘access’ in section 26 right to housing to depict that the obligation placed upon the state in that regard was that of ‘enabling’ people to provide their own housing. The corollary must be that the absence of ‘access’ in section 29(1)(a) means that the state itself is required to provide basic education to everyone.⁵⁹³ This is compatible with the provision that the right to basic education secures the right to an actual good which is ‘basic education’, and not merely to an entitlement that the state performs reasonably in its adoption and implementation of goods related to the right.⁵⁹⁴

The second is that the right to education is not subjected to a standard socio-economic rights limitation such as reasonable legislative measures.⁵⁹⁵ This internal limitation lies at the core of the Constitutional Court's textual argument for adopting a 'reasonableness' standard for the socio-economic rights to housing and to health in *Grootboom* and *TAC*.⁵⁹⁶ Accordingly, section

⁵⁹⁰ *Ibid.*

⁵⁹¹ Woolman & Bishop *et al Constitutional Law of South Africa* ch.57 pg.10.

⁵⁹² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paras 35-36 (A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society).

⁵⁹³ Seleane 2003 *LDD* 140-142.

⁵⁹⁴ McConnachie & Mcconnachie “The Constitution and the Right to a Basic Education” in Veriava *et al Basic Education Rights Handbook* 25-26.

⁵⁹⁵ Bishop & Woolman *Constitutional Law* ch. 57 pg.11.

⁵⁹⁶ *Ibid.* See also: *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) and *Minister of health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

29(1)(a) cannot be satisfied unless everyone receives a basic education. The State's 'reasonable' measures to meet its obligation cannot justify a failure to provide this right. Section 29(1)(a)'s obligations can only be fulfilled by the provision of classrooms, teaching and non-teaching staff, textbooks, school furniture, scholar transport and basic nutrition for learners coming from impoverished backgrounds.⁵⁹⁷

The third is that section 29(1)(a) is not contingent on the availability of resources.⁵⁹⁸ As Seleane notes, whether the state does not have enough resources to fulfil its constitutional obligations does not release the state from the duty section 29(1)(a) imposes.⁵⁹⁹ The education rights litigation between 2010 and 2022, have been repeatedly characterised by the argument that it does not have the available resources to provide the good or service that is required. This is an argument that serves as a justification for the state's inability to provide education resources immediately, and likely to arise since socio-economic rights have budgetary implications.⁶⁰⁰ Courts have been unwilling to accept this argument without sufficient evidence of budgetary constraints. Courts have often dismissed this argument as the state failed to justify its assertion that it did not have the money to provide the education resource in question.

In *Rail Commuters Action Group v Transnet*,⁶⁰¹ the court held that in the budgetary constraints' assertion, the organ of state is required to provide evidence (whether human or financial in nature). Therefore, the state may not make bold assertions of budgetary constraints in justifying its inability to provide education resources. Furthermore, in *Madzodzo v Minister of Basic Education*,⁶⁰² the court held that the state is required to budget proactively to provide for the necessary components of the right to basic education. Therefore, the state's inability to pay for education resources is likely to be unjustified where the state is negligent or did not conduct due diligence in the allocation of sufficient funds and ensuring that they are used for their purpose. As shall be discussed below on litigating appropriate basic education cases, the budgetary constraints argument relied upon by the government has been rejected by the courts. This has been premised on the government's failure to prove to the courts that budgetary constraints cause the inability to provide education resources. Court have therefore rejected

⁵⁹⁷ As pronounced by the courts in litigating appropriate basic education cases in **Chapter 3**.

⁵⁹⁸ Seleane 2003 *LDD* 140-141.

⁵⁹⁹ *Ibid.*

⁶⁰⁰ Bishop & Woolman *Constitutional Law* ch.33 pg.5.

⁶⁰¹ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 259 (CC) para 88.

⁶⁰² *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 34-36.

bold claims of budgetary constraints which seek to hamper the immediate realisability of the right to basic education as textually formulated in section 29(1)(a) of the Constitution.

The last trope and which follows the immediate realisability of the right to basic education is that the right is not subject to progressive realization. In *Grootboom*, Yacoob J described progressive realization in the following terms:

*“It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.”*⁶⁰³

Basic education is not a good that can be made gradually available to more people 'over time'. In sum, the text of section 29(1)(a) indicates that, unlike the 'traditional' socioeconomic rights, the right to basic education is: (a) not subject to a reasonableness standard; (b) not dependent on the availability of resources; and (c) the source of a direct, immediate, and specific entitlement.⁶⁰⁴ In the discussion that follows, the role of the textual formulation of the right to education will be discussed with reference to the manner in which the courts have applied it when interpreting section 29(1)(a).

The textual formulation and nature of the right to education is referred to in nearly all litigation on the content of the right between 2010 and 2022. For purposes of this thesis, not all these cases will be discussed in detail, but reference will be made to a few of the cases where the textual formulation was discussed in more detail, specifically because of allegations of budgetary constraints being raised by the state.

4.3.1.1 *Madzodzo v Minister of Basic Education*

The court in this case considered the unqualified nature and immediate realisability of the right to basic education. Citing the decision of *Juma Masjid*, the court highlighted 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 realization.⁶⁰⁵ In order to comply with its obligation to respect the right to basic education, the state is required

⁶⁰³ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 45.

⁶⁰⁴ Bishop & Woolman *Constitutional Law* ch.57 pg.11.

⁶⁰⁵ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 16.

to “take all reasonable measures to realise” the right with “immediate effect”.⁶⁰⁶ The court reaffirmed the understanding that the right to basic education is immediately realisable, in particular with regard to schools’ infrastructure in the form of appropriate age and grade desks and chairs.⁶⁰⁷ On February 20, 2014, the High Court declared that it was not in dispute that schools were affected by a failure to provide furniture and that such fact was a serious impediment for children attempting to access the right to basic education in the province.

In the interpretation of the right to basic education and clarifying its content, the court was also influenced by the government’s budgetary constraints argument which was insufficient to substantiate justification for limiting the right to basic education.⁶⁰⁸ In this instance, the government had indicated to the court that due to budgetary constraints and the consequent resources constraint, it was not feasible for the government to meet the basic requirements of the right to basic education immediately.⁶⁰⁹ In argument, reliance was placed on the National Norms and Standards for School Funding developed in terms of the SASA,⁶¹⁰ which it was submitted, envisaged a progressive realisation of the provision of the requirements.⁶¹¹ The court dismissed the budgetary constraints argument.⁶¹² Rather than allowing the government to rely on this argument as a justification for not complying with the previous court orders, the court found that the government had failed to budget pro-actively for furniture shortages even though it ought to have based its budget on relevant information that was available at the time the budget was decided.⁶¹³ Failure by the government to budget pro-actively indicates the breach of a constitutional obligation to fulfil the right to basic education,⁶¹⁴ which requires the pro-active budgetary and administrative allocations in enhancing availability of basic

⁶⁰⁶ *Ibid* para 17.

⁶⁰⁷ *Ibid* para 36.

⁶⁰⁸ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 22.

⁶⁰⁹ *Ibid*.

⁶¹⁰ Act 84 of 1996.

⁶¹¹ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC) para 22.

⁶¹² *Ibid* para 35.

⁶¹³ *Ibid* para 30.

⁶¹⁴ As per section 7(2) of the Constitution.

education.⁶¹⁵ Furthermore, section 34(1) of the SASA,⁶¹⁶ requires 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.

The court found that the respondents have been 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.⁶¹⁷ 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. Nor is it good enough to state that the full extent of the needs is unknown. The information available to the respondents from 2011 was such that reasonable estimates of the funding required could be made and reasonable steps taken to plan for such expenditure.⁶¹⁸ The court held that the government is required to budget pro-actively to provide for the necessary components of the right to basic education, as learners are entitled to the right immediately.⁶¹⁹

Furthermore, 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.⁶²⁰ Hence the court’s declaration that the right to basic education extends to the provision of school infrastructure in the form of appropriate chairs and desks.⁶²¹ This case illustrates the failure by the government to satisfy the requirements of the budgetary constraints’ justificatory

⁶¹⁵ “The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” para 6; Russel 2003 *SALJ* 18; CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health 2000 (Article 12, para 33 of the Covenant); Brand “Introduction” in Brand & Heyns *Socio-economic Rights* 10.

⁶¹⁶ Act 84 of 1996.

⁶¹⁷ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 35. See also: section 7(2) and 29(1)(a) of the Constitution.

⁶¹⁸ *Ibid.*

⁶¹⁹ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 35.

⁶²⁰ *Ibid* para 36.

⁶²¹ *Ibid.*

mechanism.⁶²² The government did not provide any form of evidence (either human or financial) as required in the first stage of the inquiry. The government's conduct was also not justifiable, as it was not authorised by law of general application.⁶²³ Thus, the government failed to satisfy the court that it was indeed unable, due to limited resources, to provide the desks and chairs. The High Court ordered that the government ensures that on or before 31 May 2014 all schools identified in an audit as having furniture shortages shall receive adequate age and grade appropriate furniture which shall enable each child at the identified schools to have his or her own reading and writing space.⁶²⁴

This case aptly illustrates the role that the textual formulation of the right plays in the interpretation of the right to education. The starting point for the court is that the right must be realised immediately. If desks and chairs are necessary to realise the right, it must be provided. A lack of budget, or evidence of insufficient budgeting and planning is not an excuse for the state to absolve itself of responsibility to evade their constitutional obligations. The manner in which the Constitution formulates section 29(1)(a) results in this interpretation that ensures an immediate response to a breach of the right to basic education.

4.3.1.2 *Equal Education v Minister of Basic Education*

This matter dealt with the question whether the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure (2013) were consistent with the South African Schools Act and the Constitution.⁶²⁵ The effect of the Regulations was the lack of infrastructure provisioning to certain schools that were in partial need of such infrastructure.⁶²⁶ Relevant to the factor dealt with here (nature of the right to basic education as textually formulated in section 29(1)(a)) is the fact that within these norms and standards, the fulfilment of basic education amenities was subjected to the availability of state funds/resources.⁶²⁷

⁶²² As developed by the Courts in the litigation the rights in the Bill of Rights. See: *City of Johannesburg Metropolitan Municipality v Blue Moonlight* 2012 (2) SA 104 (CC), *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 259 (CC).

⁶²³ As a requirement in the first stage of the limitations analysis as provided in section 36 of the Constitution.

⁶²⁴ *Ibid* para 41.4.

⁶²⁵ *Equal Education and Another v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016 para 46.

⁶²⁶ *Ibid* para 118.

⁶²⁷ *Ibid* para 61.

In coming to its conclusion on the unconstitutionality and ordering the rectification of the Regulation, the court considered the unqualified nature and immediate realisability of section 29(1)(a) of the Constitution.⁶²⁸ The court provided that it is indisputable that basic school infrastructure plays a significant role in the provision of basic education and that the right to basic education was distinguishable from other socio-economic rights, that contained internal qualifiers.⁶²⁹ Considering the nature of the right to basic education, the court found that it cannot think of a reason why, given the nature of the right to basic education and the abundant crisis, the MOBE cannot develop a plan and allocate resources in accordance with her obligations.⁶³⁰ Should it become absolutely impossible to provide resources, only then, may she justify her failure in terms of section 36 of the Constitution.

The court declared infrastructure as an immediately enforceable entitlement that forms part of the right to education.⁶³¹ The fact that the court rejected the MOBE's contention that implementation of Norms and Standards may be subjected to budgetary constraints and to the co-operation of other state entities,⁶³² affirms the textual formulation of section 29(1)(a) of the Constitution. The formulation prevented the state from relying on the qualifier of "within available resources" in providing for a socio-economic right.⁶³³ It prevents a situation where learners continue to suffer in the interim while the state justifies its failure to provide education due to a lack of resources.⁶³⁴

4.3.1.3 Khula Community Project v Head of Department Eastern Cape Department of Basic Education

This case not only develop the legal scope and content of the right to basic education in considering the historical context of the provision of basic education in South Africa. It further considered the nature of the right to basic education as textually formulated in section 29(1)(a) of the Constitution. The court found that section 29(1)(a) of the Constitution provides everyone with the right to basic education and that section 7(2) of the Constitution requires the state to

⁶²⁸ *Ibid* para 170, 172, 174, 180 & 185.

⁶²⁹ *Ibid* para 170.

⁶³⁰ *Ibid* 185.

⁶³¹ JA Mavendzenge 2020 *JCLA* 63.

⁶³² *Equal Education and Another v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016 paras 180-185.

⁶³³ Mbariza *Litigating Socio-Economic Rights* 62.

⁶³⁴ *Ibid*.

respect, protect, promote and fulfil this right.⁶³⁵ The right to basic education is not a mere right of access to basic education, but rather a direct entitlement to basic education, including to all the tools necessary for the fulfilment of the right.⁶³⁶ Furthermore, the significance of the right to basic education in our constitutional order is borne out by the wording of section 29(1)(a).⁶³⁷ Following from the consideration of the applicant's heads of argument, the court emphasized that the constitutional obligation is a direct entitlement to basic education including the tools relevant to realise the right.⁶³⁸ The immediate realisability of the right to basic education is most important and correct, and that there is no doubt that the constitutional entitlement extends to all prescribed textbooks and stationery.⁶³⁹

This judgment reaffirms the vibrant, progressive, and evolving jurisprudence regarding the immediate realisability of the right to basic education. It reaffirms that the government is constitutionally required to deliver textbooks and now stationery to realise this right. The court's decision on stationery as an essential educational input in realising basic education, sets a target that the state should meet in fulfilling and making basic education available and accessible. The court rejected the state's budgetary constraints claims and ordered the immediate provisioning of stationery and textbooks.

4.3.2 Conclusion

As illustrated above, the textual formulation of the right to education has played a significant role in the interpretation of section 29(1)(a) and the clarification of its core content. The *Juma Masjid* judgment really solidified how the right should be read and understood and has been repeatedly referred to in subsequent education litigation. It often acts as the starting point for courts when dealing with education right cases that speak to the core content of the right. The textual formulation of the right has also been incredibly effective in rebuffing unqualified allegations around budgetary constraints and limitations of human or other resources by the state. This has aided the courts in effectively responding to the state's arguments – the courts

⁶³⁵ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 40. See also: section 29(1)(a) & section 7(2) of the Constitution.

⁶³⁶ *Ibid.*

⁶³⁷ *Ibid.*

⁶³⁸ *Ibid* para 41.

⁶³⁹ *Ibid* para 42.

will accept the budgetary argument, if it can be justified, but will not give the state any leeway where it cannot sufficiently justify its failure to provide the required resources.

4.4 The Role of Subsidiary Legislation, Policies and Regulations

4.4.1 Theoretical Framework on the Principle of Subsidiarity

Subsidiary legislation, regulations, and policies have played an important role in the courts' interpretation of the right to basic education. The principle of subsidiarity encapsulates the notion that a litigant who avers that a right protected by the Constitution has been infringed must rely on the legislation enacted to protect the right and may not rely on the Constitution directly.⁶⁴⁰ The proviso to the principle is that the litigant may rely on the Constitution directly when the enacted legislation is being challenged for being inconsistent with the Constitution.⁶⁴¹

The litigation on the right to education between 2010 and 2022, have relied heavily on subsidiary legislation, regulations, and policies to guide the courts' interpretation for the right and give specific content to section 29(1)(a) of the Constitution. Litigation on appropriate education cases emanates from subsidiary education policies, legislation and Minimum Norms and Standards on basic education. While this is litigation is related to the right to education, the specific goods and services that the state must provide is often derived from the state's own laws, regulations, and policies. It is submitted that these laws, regulations, and policies have clarified the content of the right to education and informed the courts' interpretation of the right. It has also allowed the courts to compel the state to provide specific goods and services without infringing on the principle of the separation of powers. In many of the cases, the courts have simply ordered the state to provide goods and services that it had already undertaken to provide in terms of its own laws, regulations, and policies. This is illustrated by the cases discussed below.

4.4.1.1 *Section 27 v Minister of Basic Education (Textbook I Judgment)*

After considering the historical context of basic education, the court also considered the policy framework formulated for the provision of teaching and learning resources in developing the legal scope and content of the right to basic education. The court referred to the LDOE's Annual Performance Plan for the years 2011 and 2012, which articulated the provision of

⁶⁴⁰ Van der Walt 2008 CCR 77.

⁶⁴¹ *Ibid.*

textbooks to every learner in accordance with the LTSM policy.⁶⁴² The Department in this regard set a 100% target in respect of the provision of textbooks and workbooks for the entire academic year, and this meant that any failure to meet this target during the year would *prima facie* constitute a violation of the right to basic education.⁶⁴³ This target is aimed at ensuring that every child's right to basic education within the Limpopo province is realised through the provision of textbooks as a provision encompassed by the right.⁶⁴⁴

The court referred to the strategy on the improvement of education in Limpopo that is set by the LDOE.⁶⁴⁵ The strategy provides:

*“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 where 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 rates than lack of learning materials in school, clearly points to our learners not performing well in their learning.”*⁶⁴⁶

After considering these policy frameworks the court concluded that these policy frameworks unambiguously illustrate the stance of the government that textbook are an essential and vital component in the delivering of quality learning and teaching.⁶⁴⁷

The *Textbook I* judgment is important as it clearly illustrates the way courts develop and clarify the legal scope and content of the right to basic education by referring to the executive obligation as provided in policy frameworks. In the present matter, the government recognised that the provision of textbooks to every learner was essential in realising the right to basic education. Hence, the government formulated and promulgated policy frameworks to give effect to this position. The preamble of the LTSM Policy states that the Department has developed the LTSM Policy to ensure that there is increased access to resources that are

⁶⁴² *Textbook I Judgment* para 23.2.

⁶⁴³ *Ibid.* See also para 25.

⁶⁴⁴ *Ibid* para 25.

⁶⁴⁵ *Ibid* para 23.3.

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

essential in securing quality basic education for all learners.⁶⁴⁸ In section 11 of the Policy in the definition of LTSM, textbooks are included as part of learning support materials.⁶⁴⁹ This illustrates the promise that the executive has made, which is to provide textbooks as a recognised vital educational resource that secures quality basic education. Therefore, in this matter, as the court was faced with a situation where textbooks were not provided, it relied on the obligation that the executive had identified for itself in concluding that the right to education entailed a textbook for every child. It also relied on the fact that the policy itself identified textbooks as part of the right to basic education. This enabled an interpretation of the right in section 29(1)(a) that recognised textbooks as a component of the right to education.

4.4.1.2 *Centre for Child Law v Minister of Basic Education*

In this case the court clarified and developed the legal scope and content of the right to basic education by pronouncing that teaching and non-teaching staff are a component of the right to basic education.⁶⁵⁰ In coming to this conclusion, the court considered Norms and Standards for School Funding that were regulated in terms of the SASA.⁶⁵¹ The court also considered the Employment of Educators Act,⁶⁵² as they provide the legislative framework for the appointment of educators in South Africa. The Norms and Standards requires the provision of an adequate number of teaching and non-teaching staff,⁶⁵³ as clearly contemplated in the South African Schools Act.⁶⁵⁴ The Employment of Educators Act,⁶⁵⁵ which provides in its preamble

⁶⁴⁸ See: The preamble of the LTSM Policy, which provides that the Department has developed the LTSM Policy to ensure that there is an increased access to resources and there are sound systems to manage the available resources and improve learner performance in all schools through the provision of quality education to all learners.

⁶⁴⁹ See section 11(a) of the LTSM Policy at “Department of Basic education”, 01 July 2018, available at <https://www.msmonline.co.za/wp-content/uploads/2018/07/Learning-and-Teaching-Support-Material-Policy-LTSM> [accessed 10 May 2022]. See also: Chapter 2 of the Bill of Rights in the Constitution of the Republic of South Africa, 1996.

⁶⁵⁰ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) para 33-34.

⁶⁵¹ *South African Schools Act: National Norms and Standards for School Funding: Amendment*, 31 August 2006, available at https://www.gov.za/sites/default/files/gcis_document/201409/29179 [accessed 30 June 2022].

⁶⁵² Act 76 of 1998.

⁶⁵³ See: section 20 of the *South African Schools Act: National Norms and Standards for School Funding: Amendment*, 31 August 2006, available at https://www.gov.za/sites/default/files/gcis_document/201409/29179 [accessed 30 June 2022].

⁶⁵⁴ See: sub-sections 20(1)(i) & (j) and 20(4) & (5) of Act 84 of 1996.

⁶⁵⁵ Act 76 of 1998.

for the employment of educators and that the Member of the Executive Council for education determines the educator establishment of public schools in a province.⁶⁵⁶ Although there is no provision made for non-teaching staff, their situation is governed by the Public Service Act.⁶⁵⁷

The court had declared that the Public Service Act empowers the MEC to determine the establishment for non-teaching staff at public schools in the province, and that the norms and standards that apply to the provincial department postulate an adequate number of both teaching and non-teaching staff to be employed at each school.⁶⁵⁸ This includes the correlation between the teaching and non-teaching establishments.⁶⁵⁹ The court further declared that the South African Schools Act allows, both teacher and non-teacher establishments to be known by governing bodies before their budgets can be approved which enables the determination of additional posts needed at their schools.⁶⁶⁰ The only interpretation of the legislation that is consistent with the obligation on the respondents to respect, protect, promote and fulfil the fundamental right to basic education is that the MEC is empowered to and obliged to determine the establishment for both teaching staff and non-teaching staff at public schools in the province.⁶⁶¹ As, in terms of section 1 of the Public Service Act, a post means a post on the establishment for which financial provision exists, any posts which have been determined can, and must, be filled.⁶⁶²

Plasket J found that the shortage of non-teaching staff in schools places a burden on the teaching staff since the teaching staff must perform the administrative duties that are meant for non-teaching staff. This compromises the teaching and learning process, particularly on the coverage of the curriculum since less time is spent on lessons as the teaching staff would be occupied with both teaching and administrative duties. Similarly, on the shortage of the teaching staff, the teaching and learning is inevitably affected due to the adverse teacher-to-learner ratio in classrooms. Meaning that there may be many learners in a classroom as there are less teachers and this is likely to make participation in lessons difficult due to overcrowding. It may also be difficult for teachers to maintain discipline in classrooms, and this affects the

⁶⁵⁶ See section 5(2) of Act 76 of 1998.

⁶⁵⁷ See: section 7 of Act 1994.

⁶⁵⁸ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) para 32.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.*

⁶⁶² *Ibid.*

teaching and learning. As a result, the acquisition of knowledge is compromised which ultimately violates learner's right to basic education.

While it was clear that the court drew a correlation between the need for educators and non-educators and the fulfilment of the right to education, the obligation on the state to publish a post establishment and appoint educators, was primarily derived from the legislative framework on educator appointments. The finding that teachers and non-teaching staff form part of the content of the right to education was therefore not primarily based on the right to education, but rather derived from the legislative framework aimed at giving effect to section 29 of the Constitution. This aided the court in concluding that the right to education included an entitlement to an educator as well as non-educator staff.

4.4.1.3 Tripartite Steering Committee v Minister of Basic Education

In this case the court relied heavily on the Eastern Cape Provincial Learner Transport Policy (the policy) which was formulated to give effect to the National Learner Transport Policy.⁶⁶³ The court states that the purpose of the scholar transport policy as provided in its preamble, is to allow access to basic education for learners that must walk long distances to their nearest schools and cannot afford to provide their own transport.⁶⁶⁴ When discussing the policy, Plasket J states as follows:

“It is common cause that scholar transport is provided in terms of a policy adopted in 2003 by the provincial government. This policy was published in the Provincial Gazette. Since then various draft policies have been formulated but they do not appear to have been adopted. The policy has never been converted into legislation. It is the framework within which scholar transport as an aspect of s 29 of the Constitution is applied.

The introduction to the policy records the department's concern that ‘there are learners who walk long distances to and from school’ and that in ‘many instances this has

⁶⁶³ “Department of Basic Education & Department of Transport National Learner Transport Policy 2015”,23 October 2015, available at https://www.gov.za/sites/default/files/gcis_document/201510/39314gon997.pdf [accessed 22 May 2022].

⁶⁶⁴ “Department of Basic Education & Department of Transport National Learner Transport Policy 2015”,23 October 2015, available at https://www.gov.za/sites/default/files/gcis_document/201510/39314gon997.pdf [accessed 22 May 2022].

*resulted in poor attendance by learners; increased dropout rates and, in some remote areas, a start to schooling at a late age by some learners or even failure to obtain any schooling at all'. The department hoped to address these problems by introducing 'a system of subsidised transport or boarding for certain learners'. It committed itself to providing a boarding allowance or transport subsidy 'to all learners who qualify' but, because of financial constraints, it decided that 'priority will be given to learners in the most disadvantaged communities and those very far from the nearest school'. It committed itself to the expansion of the program with the availability of more funds.'*⁶⁶⁵

The court itself recognises at the outset, that the policy provides the framework within which transport as part of section 29(1)(a) of the Constitution is applied. The court does not itself read into section 29(1)(a) an entitlement to scholar transport as part of the core content of the right to education but comes to this conclusion with reference to what the state has already identified in its own policy as constituting part of the right to education. This makes it easier for a court to interpret the right to education, as it simply gives effect to a standard and an entitlement that the state has identified for itself in its own policies.

4.4.2 Conclusion

As set out above, the interpretation that courts afford to the right to education is very often guided by the executive or the legislatures' own policies, regulations, or laws. This is important for a number of reasons. Firstly, it simply makes it easier for the courts to conclude that a specific good or service forms part of the right to education. If the legislature already accepts this as part of its obligation, then the courts can easier compel them to simply implement what they have already set out to do. Secondly, this ensures that the separation of powers is not violated, with the courts unduly infringing on the realm of the legislature or the executive. In these cases, the courts simply perform their constitutional duty to enforce the law, and where the law has already been clarified in legislation, regulations, or policies, the court can simply refer to those instruments to hold the state to account. It does not out of its own volition interpret section 29(1)(a) to include goods or services that the legislature or executive has not already envisioned providing.

Thirdly, it gives effect to the principle of subsidiarity. By relying on the subordinate legislation, regulations, and policies that give effect to the right to education, the courts avoid a direct

⁶⁶⁵ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) paras 21 & 22.

reliance on section 29(1)(a) where instruments already exist that give effect to the right. Fourthly, and perhaps most importantly, it tells the courts what the content of the right to education entails. It may be difficult for a court to interpret the right and give content to it in a vacuum. Courts are not lawmakers and do not always have the technical knowledge, insight, or understanding to know what is necessary for the right to education to be realised. In cases where reasoned legislation, regulations, and policies have already considered the content of the right, it provides courts with the required knowledge, and understanding to make a declaration on the content of the right itself.

4.5 The Interrelationship Between the Right to Basic Education and Other Rights

4.5.1 Theoretical Framework on the Interrelationship Between the Right to Basic Education and other Rights

The right to basic education cannot be seen as a separate right. This right is interrelated with a variety of rights in the Bill of Rights.⁶⁶⁶ Furthermore, education is an indispensable means of realising other rights.⁶⁶⁷ The mutual dependency between the right to basic education and other rights in the Bill of Rights, means that when the right to basic education is under consideration, it becomes important to interpret this right in the context of the Bill of Rights.⁶⁶⁸ The litigation on the right to education between 2010 and 2022 often use the interrelated nature of the rights in the Bill of Rights to guide its interpretation of section 29(1)(a).⁶⁶⁹ When considering litigation on the right to education between 2010 and 2022, a number of interrelated rights are repeatedly mentioned by the courts when interpreting section 29(1)(a). This includes the rights to equality, human dignity, freedom and security of the person, food, and the best interest of the child.

4.5.1.1 Section 9 – Right to Equality

Section 9 of the Constitution deals with the right to equality, and states as follows:

⁶⁶⁶ Churr 2015 *PELJ* 2417.

⁶⁶⁷ CESCR General Comment No.13: The Right to Education 1999 (Article 13, para 1 of the Covenant)

⁶⁶⁸ Churr 2015 *PELJ* 2418.

⁶⁶⁹ These include section 9, 10,11, 12, 27(1)(b) and 28(1)(c) of the Constitution.

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

As has been discussed above, education is often viewed by the courts as a mechanism to achieve equality and eradicate the inequitable and unequal legacy of the apartheid government. In this sense, the relationship between equality and education is clear, as the one is viewed as a prerequisite to achieve the other. By giving effect to the right to education, the courts also simultaneously cure the infringement of the right to equality. However, we also see in education litigation, that the two rights are often viewed separately, with courts finding that the failure by the state to provide a specific education good or resource violates both the right to education as well as the right to equality. In this sense, the courts often interrogate who is most affected by the failures of the state, and how this failure violate the right to equality of that specific group. The legacy of apartheid means that more often than not, the group most affected by the failures of government is black learners living in rural areas, whose socio-economic circumstances are dire.

Despite this relationship, the right to education as framed in section 29(1)(a) makes no reference to equal education or even equitable education. It is however submitted that given

the interrelationship between the right to education and the right to equality, the international law obligation to provide equal education, and the need to use education to eradicate the past injustices, a right to equal and equitable education is inferred. The major task of South Africa's new government was to design a more racially equitable education system using three concepts of equity, that is, equal treatment by race, equal educational opportunity, and educational adequacy.⁶⁷⁰ This means that the right to basic education is to be understood as a right to equal or equitable basic education.

This is illustrated by Moseneke J's judgment in the *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng*⁶⁷¹ matter which concerned the validity of amendments to the Regulations for Admission of Learners to Public Schools in Gauteng (Regulations) promulgated in 2012. Regulation 3(7) of the Regulations disallows a learner's prospective school from requesting confidential information from his or her current school.⁶⁷² Confidential information or confidential report in this regard refers to report containing information about the financial status of a parent, whether a parent can afford school fees and employment details of a parent or any other information that may be used to unfairly discriminate against a learner.⁶⁷³ The Court held that the regulation was rational as its legitimate purpose is properly aligned with preventing unfair exclusion of a learner at a point of admission at a school.⁶⁷⁴ The regulation is reasonable as it protects burdensome learners from unfair discrimination and ensures that the right to basic education extends equally to all learners.⁶⁷⁵ The interrelationship between the right to education and equality is also illustrated by the education judgment that deal with the content of the right.

⁶⁷⁰ CG Hartell, MG Steyn & M Chetty "Towards Equality and Equity in Education: Assessing an Initiative to Strengthen Teacher Professional Development in South Africa" (2015) 72 *Journal of International Cooperation in Education* 74.

⁶⁷¹ *Federation of Governing Bodies for South African Schools v Members of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC) para 10.

⁶⁷² *Ibid* para 30.

⁶⁷³ *Ibid* para 33.

⁶⁷⁴ *Ibid*.

⁶⁷⁵ *Ibid* para 18.

4.5.1.1.1 *Minister of Basic Education v Basic Education for All (Textbook III Judgment)*

The court in this matter did not limit itself to the scrutiny of the budgetary constraints argument as discussed above, in developing the legal scope and content of the right to basic education. The court went further and considered the rights to equality and human dignity as other affected rights, with a primary focus on the right to equality. In this appeal, the government had provided approximately 97 per cent of learners in Limpopo with textbooks, leaving the approximately 3 per cent without textbooks. The court discussed the failure of the delivery of textbooks and its connection with the right to equality in the Constitution by applying the *Harksen* test.

The *Harksen* Test is an inquiry developed in *Harksen v Lane*.⁶⁷⁶ The test involves a two-stage inquiry to determine whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution,⁶⁷⁷ and has been framed by the Constitutional Court as follows:

“Firstly, does the differentiation amount to ‘discrimination’? If it is on a specified ground [in terms of section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

If the differentiation amounts to ‘discrimination’, does it amount to ‘unfair discrimination’? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.”⁶⁷⁸

⁶⁷⁶ *Harksen v Lane* 1998 (1) SA 300.

⁶⁷⁷ Section 9(3) provides: ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’

⁶⁷⁸ *Harksen v Lane* 1998 (1) SA 300 para 54.

According to Albertyn and Fredman, dignity is generally recognised as the core value and standard of the unfair discrimination enquiry under section 9(3) of the Constitution.⁶⁷⁹ For example, in *President of the Republic of South Africa v Hugo*,⁶⁸⁰ the Constitutional Court held:

*“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.”*⁶⁸¹

Applying *Harksen* to the facts of the *Textbook 3* judgment, the Supreme Court of Appeal held first that differentiation occurred between those learners who had received textbooks (the approximately 97 per cent of learners in Limpopo as well as those in the rest of the country) and the roughly 3 per cent who did not receive textbooks.⁶⁸² The court found that this differentiation amounted to discrimination.⁶⁸³ A finding of unfair discrimination was justified as follows by Navsa JA:

*“Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.”*⁶⁸⁴

Navsa JA, therefore, clearly considered the dignity of the affected learners as the benchmark for his finding of unfair discrimination. Moreover, by employing an equality analysis, the Supreme Court of Appeal underscored the fact that equal access to education is vital in realising section 29(1)(a). Important to note, is that the Supreme Court of Appeal did not explicitly base

⁶⁷⁹ C Albertyn & S Fredman “Equality Beyond Dignity: Multi-Dimensional Equality and Justice Langa’s Judgments” in A Price & M Bishop *A Transformative Justice: Essays in Honour of Pius Langa* (2015) 435.

⁶⁸⁰ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

⁶⁸¹ *Ibid* para 41.

⁶⁸² *Textbook III Judgment* para 48.

⁶⁸³ *Ibid*.

⁶⁸⁴ *Ibid* para 49.

its finding of unfair discrimination on a listed ground in section 9(3), or on a comparable ground. However, as will be argued below, the court did so implicitly. First, Navsa JA argued that the approximately 3% of the learners who did not receive textbooks were treated differentially, meaning that they were being discriminated against and that there is no justification for such discrimination without ever mentioning the distinguishing ground(s) for differentiation.⁶⁸⁵

However, at the beginning of the judgment the court noted that it is common cause that the affected learners are from poor communities and are mostly, if not exclusively, located in rural areas. They are also overwhelmingly, if not exclusively, black learners.⁶⁸⁶ Furthermore, it is undisputed that the affected learners were all from no-fee schools which are predominantly historically black schools.⁶⁸⁷ White learners in the public education system were therefore hardly affected by the textbook crisis. An argument can therefore be made that the government's failure to deliver textbooks to those affected schools, amounted to unfair discrimination against black learners based on race, and social origin.

Navsa JA, also implicitly made a ruling of unfair discrimination on the comparable ground of socio-economic status. Subsequent to his finding of unfair discrimination, he stated that '[w]e must guard against failing those who are most vulnerable. In this case we are dealing with the rural poor and with children. They are deserving of constitutional protection.'⁶⁸⁸ He also acknowledged that all the affected learners were from poor communities.⁶⁸⁹ As established above, the children affected by the textbook crisis were all located in no-fee schools. Schools are allocated no-fee status based on the median household earnings, unemployment percentage and the standard of education of the community in which the school is located.⁶⁹⁰

According to Paterson,⁶⁹¹ it is therefore presumed that parents or guardians in these communities cannot afford to purchase textbooks. If the government does not provide

⁶⁸⁵ *Ibid* para 48.

⁶⁸⁶ *Ibid* para 3.

⁶⁸⁷ *Ibid*.

⁶⁸⁸ *Ibid* para 50.

⁶⁸⁹ *Ibid* para 3.

⁶⁹⁰ Paterson *SAJHR* 113-114.

⁶⁹¹ *Ibid*.

textbooks, the learners must study without them.⁶⁹² The socio-economic status of these learners therefore differentiates them from those learners in fee-charging schools whose parents or guardians are assumed to be able to afford textbooks. Thus, although the Supreme Court of Appeal did not explicitly refer to socio-economic status as a differentiating ground on which it based its finding of unfair discrimination, the court's emphasis on the poor and vulnerable as deserving of constitutional protection implies that unfair discrimination on the basis of socio-economic status was considered. In sum, *Textbook 3 Judgment* is a significant judgment in the courts' approach to the interpretation of the right to basic education and the broader constitutional imperative of transformation. As a point of departure, the Supreme Court of Appeal confirmed that section 29(1)(a) entitles every learner in the public school domain to be provided with all the textbooks for a specific grade.⁶⁹³

The Supreme Court of Appeal indeed found that equal access to textbooks (and impliedly to education as a whole) is a clear component of the right to basic education.⁶⁹⁴ Kamga argues that the court has clearly illustrated that the provision of textbooks is extrinsically connected to the achievement of the rights to equality and dignity.⁶⁹⁵ In Stein's view, the judgment clarifies that the government is in violation of the right to basic education if it fails to comply with its obligation to provide textbooks to learners in public schooling.⁶⁹⁶

In essence, the Supreme Court of Appeal recognised the pattern of disadvantage disproportionately skewed towards black, impoverished learners in the public school domain and delivered a judgment aimed at addressing this historical inequality.⁶⁹⁷ In this regard, the court implicitly found that the government's failure to provide textbooks to the affected learners amounted to unfair discrimination on the basis of race and socio-economic status.⁶⁹⁸ The position by the Supreme Court of Appeal was affirmed in the *Khula Community*

⁶⁹² *Ibid.*

⁶⁹³ *Textbook III Judgment* para 53.

⁶⁹⁴ *Ibid.*

⁶⁹⁵ Kamga *Child Law* 528.

⁶⁹⁶ N Stein "Textbooks" in Veriava *et al Basic Education Rights Handbook* 270.

⁶⁹⁷ *Textbook III Judgment* at para 48 Navsa JA writes: 'The State is prohibited from unfairly discriminating against any person whether on listed grounds or not. SASA and NEPA envisage equality of opportunity for learners. SASA's preamble recognises that historically, our education system was based on racial inequality and segregation and those past injustices have to be remedied' (my emphasis).

⁶⁹⁸ *Textbook III Judgment* para 49.

Development Project case, where the court made it clear that basic education is a necessary condition for the protection, promotion and fulfilment of the right to dignity and equality of every child.⁶⁹⁹ The court again recognised that the failure by the state to provide learners with textbooks and stationery, leads to unfair discrimination in respect of the poor communities’ children and those learners who suffer most from the oppressive and unequal legacy which colonialism and apartheid wrought on South Africa.⁷⁰⁰

4.5.1.2 Section 10 – Right to Human Dignity

Section 10 of the Constitution makes provision for the right to human dignity and states that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” The litigation on section 29(1)(a) often equate the right to education with a right to dignity, and similar to the right to equality, makes the one incumbent on the other. This is illustrated by some of the findings in the cases below.

4.5.1.2.1 *Madzodzo v Minister of Basic Education*

In developing and clarifying the legal scope and content of the right to basic education in this case, the court referred to the right to human dignity as another affected right as a result of the government’s failure to provide appropriate age and grade school furniture.⁷⁰¹ The court refers to the allegations made by the applicants in their founding papers which described the devastating effects on learners where there is scarcity of school furniture:

“Multiple learners are forced to share a desk, which means that the learners squashed together and struggle to concentrate on their work. Moreover, it is difficult for them to write on the desk space provided. In some instances, learners are even forced to stand throughout lessons, leaving them with no writing surface. The overcrowding around the desks also causes discipline problems, as children fight over the few available desks and chairs. These discipline problems can disrupt the lesson and inhibit learning.

“The lack of furniture results in an environment that is not at all conducive to teaching and learning. Learners are squashed together, and some students are forced to squat on their haunches, stand, or sit on the floor during the lessons. Sometimes the learners

⁶⁹⁹ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 49.

⁷⁰⁰ *Ibid* para 50.

⁷⁰¹ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 36.

are forced to sit on each other's laps. This makes it virtually impossible for the learners to take part in lessons.

“Many learners bring their own plastic chairs to the school, while others use empty beer crates and furniture cobbled together with broken frames and loose planks of wood. This helps children to have somewhere to sit, but almost none of the students have a desk to write on. This is completely unacceptable. Teachers are unable to give the students any writing exercises.

The learners' dignity is seriously impaired when they are forced to sit on the floor or squashed into desks like animals.”⁷⁰²

In this case, the provision of school infrastructure to learners attending former black schools promotes equality and secures their inherent human dignity. The court used the dehumanizing factual circumstances faced by learners attending schools without school furniture to find that it not only infringed on their right to education, but also on their right to human dignity. For the court it was not viable to realise the child's right to basic education where their self-worth is not fulfilled since the right to basic education also allows for the development of one's personality which enhances their self-worth in society. The provision of school infrastructure provides these learners with suitable learning environments that considers them as people worthy of attending functional schools that are equipped with education resources to enable them to acquire basic education.

This interrelationship between the right to education and the right to human dignity guided the court's interpretation of the content of section 29(1)(a) of the Constitution. In understanding that human dignity is also affected when children do not have desks and chairs in their school, the court was able to give content to section 29(1)(a) and place an obligation on the state to provide desks and chairs in order to realise these interrelated rights.

4.5.1.3 Section 12 – Right to Freedom and Security of the Person

4.5.1.3.1 *Centre for Child Law v Minister of Basic Education*

Section 12 of the Constitution makes provision for everyone to have a right to safety and security of the person. This includes the right to be free from all forms of violence.⁷⁰³ While

⁷⁰² *Ibid* para 20.

⁷⁰³ Section 12(1)(c) of the Constitution.

schools are meant to be places of safety, the reality is that the failure by the state to provide certain education resources can often result in learners' right to safety and security of the person being violated.

In this case, the court used this right as part of its analysis in finding that educators and non-educators form part of the content of the right to education. The court provided that the inability for the affected schools to perform properly due to the shortage of the non-teaching staff does not only have an effect on the right to basic education, but also has the potential to threaten other fundamental rights.⁷⁰⁴ The court provided that where hostels are understaffed, for instance, or security is lacking, the rights to dignity and to security of the person, as well as children's rights in terms of section 28 of the Constitution, may be implicated.⁷⁰⁵

When administrative capacity in a complex institution like a school is non-existent, administration either breaks down or must be performed by teachers who must deviate from their core functions to perform tasks that they are not trained or expected to perform. This affects the teaching and learning process because of the heavy burden placed on the teaching staff by having to balance between their teaching duties and attending to administrative issues. This often takes teachers out of the class unnecessarily, leaving the learners to their own devices. Consequently, learners' right to basic education is affected, as well as their right to a secure learning environment. Furthermore, the freedom and security of the learners is affected in a situation where there are less or no security guards at schools. Learners in these schools are vulnerable to violence or harm.

The court provided that similar issues arise in respect of the government's failure to appoint enough teaching-staff.⁷⁰⁶ In arriving at the conclusion that the right to education entitled a right to teaching and non-teaching staff, the court also took into account how the state's failure to appoint them, influenced the right to safety and security. The same was true in the *Tripartite Steering Committee* case.

⁷⁰⁴ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) para 21.

⁷⁰⁵ *Ibid.* See also sections 10, 12 & 28 of the Constitution.

⁷⁰⁶ *Ibid* para 16.

4.5.1.3.2 *Tripartite Steering Committee v Minister of Basic Education*

The main question dealt with in this matter was whether scholar transport formed part of the right to basic education.⁷⁰⁷ In dealing with this question, the court considered the right to freedom and security of the person as an implicated and affected right due to government failure to make basic education accessible to learners that lived far from their nearest schools. Firstly, the court stated that it is a notorious fact that in the Eastern Cape many learners of all ages live far from the schools they attend, and if they are not provided with transport to and from schools, they have to walk, and this includes walking during bad weather conditions.⁷⁰⁸

The court further stated that the problem is not limited to distance and time taken to walk each day, but extends to issues of safety which implicates the fundamental rights to freedom and security of the person, including the right to be free from all forms of violence from either public or private sources which loom large in our shockingly violent and often predatory society.⁷⁰⁹ The physical and psychological implications that the threat to safety and security may have on these children affects their learning, which further impacts their academic performance and may lead to dropping out of schools. These children may also lose their lives since their security is compromised and they are exposed to possible violence on their way to school. Hence, the court concluded that the right to basic education is meaningless without transport to and from school at state expense in appropriate cases.⁷¹⁰

The interrelationship between the right to education and the right to safety and security guided the court in finding that scholar transport formed part of the right to education. Without a safe mode of transport to and from school, the court found that both section 12 and section 29 of the Constitution had been violated.

4.5.1.4 Section 28 – Best Interests of the Child

The “best interest of the child” is a well-established standard in international human rights law.⁷¹¹ It initially developed from a mere international aspiration voiced in the Geneva Declaration of 1924 to an almost universal principle that finds special recognition in the

⁷⁰⁷ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 12-19.

⁷⁰⁸ *Ibid* para 12.

⁷⁰⁹ *Ibid* para 13.

⁷¹⁰ *Ibid* para 18.

⁷¹¹ S Coetzee & R Mienie “The Best Interest of the Child Standard in Education: An Overview of South African Case Law” (2014) 29 *South African Public Law* 90 at 92.

Convention on the Rights of the Child (CRC).⁷¹² Section 3(1) of the CRC states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.” It is also recognised in section 4 of the *African Charter on the Rights and Welfare of the Child* (ACRWC),⁷¹³ which was drafted as a regional human rights instrument to address specific problems experienced by children in Africa.⁷¹⁴ The ACRWC provides that the best interest of the child be of “primary importance” in all matters concerning the child. It seems like the ACRWC affords more weight to the principle than the CRC, substituting “consideration” with “importance.”

Section 28(2) of the Constitution, however, provides the most comprehensive protection to the rights of the child by stating that “[a] child’s best interests are of paramount importance in every matter concerning the child.” The use of the word “paramount” in the Constitution illustrates the weight attached to the “best interest of the child” and makes it a very important consideration when interpreting the right to education.

The litigation on the right to education between 2010 and 2022, have placed some emphasis on the interrelationship between the right to education and the best interest of the child. As a point of departure, courts have accepted that where the right to education is infringed or denied, the right in section 28(2) of the Constitution is infringed as well, as it cannot be in the best interest of the child. Interestingly, most of the cases did not provide much more than a finding that the best interest of the child has been infringed, with very little explanation by the court as to exactly how the right is infringed.

For example, in *Khula Community Development Project* the applicant’s heads of argument, which the court accepted, provided that the right to basic education was the foundation for the realisation of other rights.⁷¹⁵ Furthermore, that the right to basic education is inextricably linked to the constitutional duty to protect the best interests of children,⁷¹⁶ and to the child’s right to have their inherent dignity respected and promoted.⁷¹⁷ While the court accepted that the best

⁷¹² *Ibid.*

⁷¹³ (adopted 11 July 1990, entered into force 29 November 1999) CAB/LEG/24.9/49).

⁷¹⁴ Coetzee & Mienie 2014 *SAPL* 93.

⁷¹⁵ *Ibid* para 53.2

⁷¹⁶ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported. See also section 28 of the Constitution.

⁷¹⁷ *Ibid.* See also section 10 of the Constitution.

interest of the child was affected, it did not exactly explain how this was done. It almost seems to group it together with the other affected rights, namely dignity and equality and assume that if any of these rights are affected, it cannot be in the best interest of the child. In *Equal Education*⁷¹⁸ and *Tripartite Steering Committee*⁷¹⁹ the court arrives at similar conclusions, but again does not provide any further explanation for its finding. It is submitted that while courts seem to regard the realisation of the right to education as an important method of ensuring that the best interest of the child is realised, the courts could do more to develop this aspect of its jurisprudence and set out in more detail how these rights interact with each other. At present it seems to be used as a justification for the content given to the right to education, but its exact role and importance is not really explained by the courts.

4.5.1.5 Section 28 - Right to Basic Nutrition

4.5.1.5.1 Equal Education v Minister of Basic Education

In developing the legal scope and content of the children's right to basic education, this case also considered the violation of the child's right to basic nutrition in section 28(1) of the Constitution. Section 28(1)(c) of the Constitution provides all children with a right to basic nutrition, shelter, basic health care services and social services. It is closely related to the state's fulfilment of the right to basic education. This case is interesting in the sense that it deals with the right to nutrition in two capacities. Firstly, it had to consider whether the right to nutrition in section 28(1)(c) itself had been infringed by the failure to provide the NSNP programme, and secondly, whether the failure to provide nutrition constituted a violation of the right to education. This is an example of a case where the one right can be relied on independently of another, while simultaneously form an integral part of realising the right to education.

In assessing the relationship between section 28(1)(c) and section 29(1)(a), the court considered the question as to whether the MOBE and the MEC's have a constitutional duty in terms of section 29(1)(a) to provide basic nutrition.⁷²⁰ The state argued that the provision of nutrition is simply a by-product of their duty to educate and did not form part of the core content of the right. Here the court again relied on the state's own policies and instruments that give effect to the right to education. In particular, the White Paper on Reconstruction and Development (1994) which envision the NSNP programme stated that the programme had two goals, namely,

⁷¹⁸ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 166.

⁷¹⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 39.

⁷²⁰ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 36.

to contribute to the improvement of education quality by enhancing learning capacity, school attendance, and punctuality, and to contribute to general health development by alleviating hunger.⁷²¹ In its own reports on the NSNP programme, the DBE had explained the role of the NSNP as follows:

*“School Nutrition Programs, School Feeding Schemes, Food for Education (FFE) programs and take home rations are all responses to poverty and the poor nutritional status of children. There are two main groups of arguments in support of feeding children in schools: The first group is a nutritional one; and the second is an educational one. However, it is difficult to separate the two, since well-nourished children are assumed to perform better at school.”*⁷²²

The court found that with reference to the DBE’s own policies and statement, it accepted that nutrition is part of the right to basic education. It states that:

*“On the Departments own documents the stance that the nutritional aspects of the NSNP is just a by-product of their duty to educate is simply wrong. The Department’s own policy statements reflect basic nutrition as component to basic education. State policy is instructive on the content of the right to education and in the policies the provision of basic nutrition is inextricably linked to the fulfilment of basic education.”*⁷²³

The court therefore found that provision of education and the provision of nutrition to learners were interlinked, with education only being realised when nutrition is also provided.

The court also had to consider if the right to nutrition itself had been infringed. The court provided that section 28(1)(c) of the Constitution is qualified by the word “*basic*” and has no internal qualifier.⁷²⁴ This means that the failure to roll out the NSNP is justifiable only in terms of the limitation’s justification analysis as provided in section 36 of the Constitution.⁷²⁵ The court further provided that the state is a bearer of positive obligations in respect of the rights contained in the Bill of Rights and that the state accordingly has a duty to respect and protect

⁷²¹ White Paper on Reconstruction and Development Notice No.1954 of 1994.

⁷²² *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 38.2.

⁷²³ *Ibid* para 40.

⁷²⁴ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 43.

⁷²⁵ The Constitution of the Republic of South Africa, 1996.

the entitlement nutrition and education as fulfilled by the NSNP.⁷²⁶ In conclusion, the court provided that by discontinuing the NSNP program, learners' are deprived of the right to nutrition.⁷²⁷ The effect of the discontinuation of the NSNP serves as an impediment to the goals of the program and where the goals of the program are not fulfilled it means that the children's nutrition and basic education is likely to be violated. The court accepts the claims made in the applicant's affidavits, which provide that learners cognitive capacity is impaired due to hunger, and that some learners had given up on studying.⁷²⁸ Hence, the court did not declare hunger simply a problem, but accepted that it is an obscenity.⁷²⁹ Therefore, it is clear food and nutrition are linked to the right to basic education based on the fact that it is difficult to study on an empty stomach since it is difficult to concentrate when hungry. This means that the learning process is halted, and this violates the affected learners right to basic education since they are unable to partake in the learning process.

The judgment affirms that nutrition – alongside school infrastructure, textbooks, stationery, educators and non-educators, school furniture, and scholar transport – is a central part of the right to basic education. Furthermore, that the child's right to basic nutrition and the right to basic education are interconnected and unqualified rights that are immediately realisable – in other words, that the government cannot delay their duties to ensure that learners' rights to basic education and basic nutrition are met. This frames basic nutrition as an essential and immediately enforceable entitlement in realising the right to basic education which promotes the notion of a minimum core content of the right.

4.5.2 Conclusion

When considering the discussion of these cases, it is clear that the courts, when dealing with section 29(1)(a) do not confine itself only to a consideration of the right to education, Instead, it draws on a number of other affected constitutional rights, depending on the circumstances and the facts before the court. Between 2010 and 2022, the litigation on the right to education has benefitted from a reliance on the right to equality, human dignity, safety and security of the person, nutrition, and the best interest of the child. It is conceivable that as more litigation on

⁷²⁶ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP) para 44.

⁷²⁷ *Ibid* para 47.

⁷²⁸ *Ibid* para 29.

⁷²⁹ *Ibid*.

the core content of the right to education comes before the courts, that other rights may in time also be implicated and used by the courts to guide the interpretation of section 29(1)(a).

4.6 The Roles of International Law as a Guiding Principle in Interpreting the Right to Education

4.6.1 Theoretical Framework on the International Law Obligations

The Constitution requires that international law be used to interpret rights in the Bill of Rights.⁷³⁰ Carter⁷³¹ argues that international treaties, conventions, and other instruments may provide guidance on how to give content to the rights of children where domestic legislation has been lacking or unable to do so. There are several international law instruments that address the right to basic education, including the Universal Declaration of Human Rights,⁷³² the Convention on the Rights of the Child,⁷³³ the International Covenant on Economic, Social and Cultural Rights,⁷³⁴ the UNESCO Declaration Against Discrimination in Education,⁷³⁵ and other regional instruments such as the African Charter on the Rights and Welfare of the Child,⁷³⁶ and the African Charter on Human and People's Rights.⁷³⁷

While there has been some reference to international law in cases dealing with education in South Africa, courts have not relied heavily on international law when interpreting and

⁷³⁰ The Constitution of the Republic of South Africa, 1996 s39(1)(b).

⁷³¹ Carter *Access to Justice for Children with Disabilities in South Africa* 42.

⁷³² United Nations. (1998). The Universal Declaration of Human Rights, 1948-1998 [New York], [United Nations Department of Public Information].

⁷³³ Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, p3, available at https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf [accessed:15 March 2022].

⁷³⁴ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, 993, p3, available at <https://www.refworld.org/docid/3ae6b3c0.html> [accessed: 17 March 2022].

⁷³⁵ UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education, 14 December 1960, available at <https://www.refworld.org/docid/3ae6b3880.html> [accessed: 17 March 2022].

⁷³⁶ Organization of the African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 May 1990, available at <https://www.refworld.org/docid/3ae6b38c18.html> [accessed: 22 March 2022].

⁷³⁷ Organization of the African Unity (OAU), African Charter on Human and People's Rights, 27 June 1981, available at <https://www.refworld.org/docid/3ae6b3630.html> [accessed: 22 March 2022].

implementing the right. For example, in *Section 27*,⁷³⁸ *Centre for Child Law*,⁷³⁹ and *Equal Education*⁷⁴⁰ courts make passing reference to the duty under international law to provide education to all children in South Africa, however, do not use the available instruments to develop the right, rather relying on some of the other factors mentioned above. In many of the other education rights cases, reference to international law is entirely absent, which does impact on the richness of the courts' interpretation of the right.

4.6.1.1 *Section 27 v Minister of Basic Education*

In this case the court made a reference to the General Comment of the Committee on ESCR in discussing the nature and purpose of the right to basic education before reaching the conclusion that textbooks are an essential component of the right to basic education.⁷⁴¹ The court provided that the right to basic education is not a stand-alone right, however, it is a means through which other rights are realised, and that the General Comment number 13 of the Committee on ESCR, on the right to education, in respect of Article 13 of the ICESCR, captures the foundational character of the right as follows:

*“Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially, marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from hazardous labour and social exploitation, promoting human rights and democracy and protecting the environment and controlling the population growth.”*⁷⁴²

The reference to the international law position, assists the court in this instance to characterise the right within the South African context and provides valuable background to interpreting the right.

⁷³⁸ *Textbook I Judgment*.

⁷³⁹ *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG).

⁷⁴⁰ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP).

⁷⁴¹ *Textbook I Judgment* para 25.

⁷⁴² *Ibid* para 4.

4.6.1.2 *Equal Education v Minister of Basic Education*

In considering the right to basic nutrition as component of the right to basic education, the court made a passing reference to some of the international law instruments on the provision of basic nutrition and basic education. The court referred to the following:

Article 27(2) read with Article 27(3) of the Convention on the Rights of the Child which provides:

*“States parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”*⁷⁴³

It also referred to General Comment 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health which provides:

*“School feeding is desirable to ensure all pupils have access to a full meal every day which can also enhance children’s attention to learning and increase school enrolment. The Committee recommends that this be combined with nutrition and health education, including setting up school gardens and training teachers to improve children’s nutrition and healthy eating habits.”*⁷⁴⁴

The two international law instruments place an obligation upon member states (including South Africa) to provide basic nutrition to learners in need if the state is seeking to fulfil the right to basic education. Apart from referring to these international law instruments, the court does not elaborate on the duty to provide nutrition under international law or how these instruments will be used to inform the court’s interpretation of section 29(1)(a). While it is thus clear that a finding that nutrition is part of the right to education is in accordance with international law on the issue, the court does little more to illuminate this finding. It is submitted that the international law on the right to education case be an incredibly valuable tool for courts to use when interpreting the core content of the right to education and that it has thus far been under-utilised in education litigation.

⁷⁴³ *Convention on the Rights of the Child* was signed in 1993 and ratified in 1995.

⁷⁴⁴ UN Committee on the Rights of the Child (CRC), General Comment No.15 (2013) *on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health* (Article 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> [accessed 23 June 2022].

4.6.2 Conclusion

This chapter illustrated that the development and clarification of the legal scope and content of the right to basic education, have often been informed by five distinct factors. While not all the factors are present in each and every education case, and reliance on these factors differ depending on the nature of the matter, it is submitted that these five factors have played an important role in how the courts have approached the right to education and how it has interpreted the core content of the right. In particular, it is submitted that the historical context of the right, its textual formulation, and the legal- and policy framework on the right to education have been important guiding principles when courts have grappled with the content of the right. While much of the content is often clarified in policies, laws, and regulations, the other factors are important in assisting the courts to find that an infringement of the right has occurred and clarifying the duty that the state must fulfil the right.

The interaction between the right to education and other rights in the Bill of Rights have also been an important factor that courts have considered when interpreting the right. However, it is submitted that the courts can sometimes do more to clarify the relationship between the different rights and how the interpretation of the right to education is influenced by interrelated rights. In this instance, the litigation on the right to nutrition is instructive as it really grappled with the interrelationship between section 29(1)(a) and section 28(1)(c) of the Constitution. In particular, it is submitted that more can be done to clarify the role that the best interest of the child plays in litigation on education.

The same is true for the role of international law. As set out in Chapter 2, there are a number of important international law instruments that speak to the right to education. However, in practice, the courts do not refer to these instruments as often as is perhaps necessary. International law binds South Africa and courts have a constitutional duty to consider international law when making decisions. It can also act as an important guideline when courts are tasked with interpreting the right and giving content to it. It is therefore submitted that reliance and reference to international law cannot only act to fulfil South Africa's international law obligations but can also play an important role in clarifying the rights and duties of the state as well as the core content of the right to education.

CHAPTER 5

THE IMPACT OF THE LITIGATION ON THE RIGHT TO BASIC EDUCATION

5.1 Introduction

The role of the courts in interpreting the right to basic education has resulted in tangible outcomes for learners in South Africa. It gives rise to an enforceable obligation on the state, and particularly education authorities, to take positive steps to realise the right to basic education for all learners and make goods and services available to schools and learners. It also provides a mechanism for learners, teachers, school governing bodies, and parents, to hold the state accountable for its failure to realise the right to basic education for learners in the schools in cases where the goods and resources have not been provided and have formed the basis for further litigation on the right to basic education.

Most of the cases have resulted in improvements in the education resources provided to schools and changes in relation to education policies and legislation that give effect to section 29(1) of the Constitution. Not only has this improved access to resources for the parties involved in the case, but it has set precedents that have been used in subsequent cases to achieve similar outcomes for schools, learners, parents, and teachers in other parts of South Africa. Furthermore, precedent set by the cases can inspire further litigation and the enforcement of rights. Therefore, this chapter analyses the impact of litigating the right to education between 2010 and 2022. It will consider the need for a “just and equitable” remedy that actually has the potential to ensure that goods and services are provided, before discussing how some of the remedies in the cases between 2010 and 2022 have been implemented. It evaluates the effectiveness of the remedies and the outcomes that were achieved following the litigation. The chapter also considers the role that some of the litigation has played in setting precedents for subsequent education rights cases. Finally, it considers some of the insights that can be gleaned from the litigation between 2010 and 2022 on the right to education and how this can inform litigation on other socio-economic rights.

5.2 The Duty on the Courts to Provide “Just and Equitable” Remedies

In South Africa socio-economic rights are justiciable, meaning that they can be judicially enforced.⁷⁴⁵ The Constitution allows a competent court to exercise its discretion by granting appropriate relief when a complainant’s right in the Bill of Rights has been infringed. Section 38 and section 172(1)(b) of the Constitution accords courts with powers to grant remedies for infringements of constitutional rights.⁷⁴⁶ The former provision accords a court with powers to grant “appropriate relief, including a declaration of rights”.⁷⁴⁷ The latter provision allows a court to “declare that any law of conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency”,⁷⁴⁸ and permits the court to grant “any order that it finds to be just and equitable”.⁷⁴⁹ The central consideration for courts in crafting remedies for constitutional violations is to ensure the effective vindication and protection of the right violated.⁷⁵⁰ Furthermore, as noted by Ackermann J in *Fose v Minister of Safety and Security*:

*“Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.”*⁷⁵¹

The Constitutional Court also emphasised that crafting of remedies where there are constitutional rights violations in enabling their vindication is important not only to the immediate victims of the relevant rights but extends to others similarly affected.⁷⁵² This point

⁷⁴⁵ Skelton 2014 *UPIR* 3.

⁷⁴⁶ The constitution of the Republic of South Africa, 1996.

⁷⁴⁷ The Constitution of the Republic of South Africa, 1996 s38.

⁷⁴⁸ The Constitution of the Republic of South Africa, 1996 s172(1)(a).

⁷⁴⁹ Section 172(1)(b). This provision specifies that just and equitable remedies include an order limiting the retrospective effect of an invalidity order, and a suspended declaration of invalidity. For the broad range of just and equitable remedies available to the courts, see Bishop "Remedies" in Woolman & Bishop *Constitutional Law of South Africa* ch.9 p.151 – 196; Liebenberg *Socio-Economic Rights* 397 – 450.

⁷⁵⁰ S Liebenberg “Remedial principles and Meaningful Engagement in Education Rights Disputes” (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 4.

⁷⁵¹ *Fose v Minister of Safety and Security* 1997 (3) 786 (CC) para 69.

⁷⁵² Thus, a court should in principle be prepared to grant any remedy for a constitutional rights violation that it awards to the individual party before it to all similarly affected parties: “[T]he litigants before the Court should

made by the Constitutional Court shall be illustrated later in this chapter on the discussion of the value of former litigation on appropriate education cases as precedents for future litigation and enforcement of the right to basic education. The just and equitable remedies granted in order to vindicate the violated right to basic education meant that when the government acts according to the court orders, it was obligated to ensure that provision of basic education extended to learners in schools that were affected by governments conduct, however, could not form part of the litigation. A classic example of this would be the *Linkside v Minister of Basic Education*⁷⁵³ litigation that took in a form of a class action. Although there were affected schools that could not opt into the litigation, it remained a government's obligation to fulfil post provisioning to all affected schools in the Eastern Cape.

In respect of developing and clarifying the legal scope and content of the right to basic education, litigators and the courts developed innovative new and creative remedies that have resulted in tangible outcomes for litigants. This mechanism put into practice the *obiter dictum* of the court in *Section 27 v Minister of Basic Education*,⁷⁵⁴ where it stated that where a violation has taken place, the remedy that is offered must be effective and meaningful. If not, it renders the vindication of rights hollow.

Therefore, a court should act in both the spirit of the Constitution as well as to ensure that when rights are vindicated, the remedies that are provided should be appropriate to meet the mischief which is being addressed.⁷⁵⁵ However, Woolman and Bishop, provide one way to limit the unqualified nature of section 29(1)(a) is through a remedy.⁷⁵⁶ While a person who establishes that the government has failed to provide them with basic education is entitled to relief, that relief need not necessarily be an order that the government immediately provide basic education.⁷⁵⁷ A court must give an order that is just and equitable as required by section 172(1)(b) of the Constitution.⁷⁵⁸ The purpose of this kind of relief or remedy (which may include a declaratory order, suspended order or a structural interdict) would be to give the

not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants." *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC), para 32.

⁷⁵³ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36.

⁷⁵⁴ *Textbook I Judgment* para 35.

⁷⁵⁵ *Ibid.*

⁷⁵⁶ S Woolman & M Bishop Constitutional law of SA chapter 57 page 15

⁷⁵⁷ *Ibid.*

⁷⁵⁸ The Constitution of the Republic of South Africa, 1996.

government an opportunity to offer a *bona fide* plan to implement the right to a basic education.⁷⁵⁹

Therefore, in contrast to private law remedies, the broader public interest is also a highly relevant factor in devising remedies to redress constitutional rights violations.⁷⁶⁰ The South African public has an interest in the effective protection of constitutional rights, which are fundamental to the fabric of our post-1994 constitutional democracy.⁷⁶¹ However, during the remedial stage of constitutional litigation, it is important for courts to be cautious by not violating the separation of powers doctrine, resulting in the usurpation of legislative, executive and administrative branch of government powers.⁷⁶² The legislature and executive enjoy greater democratic legitimacy as well as institutional capability in exercising these functions.⁷⁶³ Respect for the roles and functions of the legislature and executive as well as those of administrative bodies and organs of state constitutes the second significant separation of powers principle in a remedial context.⁷⁶⁴ In the remedial context, the doctrine requires that courts fulfil their responsibility under the South African Constitution for crafting effective remedies for infringements of constitutional rights.⁷⁶⁵ This responsibility arises from the principle of constitutional supremacy in section 2 of the Constitution,⁷⁶⁶ combined with the remedial obligations of the courts as per section 38 and section 172(1) of the Constitution.⁷⁶⁷

5.3 Implementation of the Orders on the Right to Basic Education

In litigating the right to basic education, courts have granted orders and provided remedies which compelled the government to implement basic education policies and legislation where it had promised to provide basic education resources in discharging its constitutional obligations. The provision of the education resources in this regard enforced the

⁷⁵⁹ Woolman & Bishop "Education" in Woolman & Bishop *Constitutional Law of South Africa* ch.57 pg.15.

⁷⁶⁰ Liebenberg 2016 *PELJ* 4.

⁷⁶¹ *Ibid.*

⁷⁶² Liebenberg 2016 *PELJ* 9.

⁷⁶³ *Ibid.*

⁷⁶⁴ For an account of the links between the doctrine of separation of powers and notions of judicial deference in South African public law, see: C Hoexter & G Penfold *Administrative Law in South Africa* 3 ed (202) 137-155.

⁷⁶⁵ *Ibid.*

⁷⁶⁶ Section 2 of the Constitution reads: "The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

⁷⁶⁷ The constitution of the republic of south Africa, 1996.

implementation of the right to basic education by the government. Some of the orders were implemented effectively, while, as had already been alluded to in previous chapters, others were more difficult to implement. What follows is a discussion on the effectiveness of the implementation of some of the orders.

5.3.1 Implementation of Infrastructure Litigation

The *Centre for Child Law and Seven Others v Government of the Eastern Cape Province*,⁷⁶⁸ related to the mud schools is perhaps an example of some of the more successful education rights litigation between 2010 and 2022. After a legal battle with the provincial education department, significant media publicity, and intervention from the national government, a legally binding Memorandum of Agreement (MOA) was signed, which locked the government into concrete obligations to allocate adequate funds to build seven schools, ensure their construction within a reasonable time frame, and report back to the court on a regular basis.⁷⁶⁹ Apart from its immediate implications for those seven schools, the case was important because it significantly contributed to the rollout of a nationwide school infrastructure delivery initiative.⁷⁷⁰ This is known as the Accelerated Schools Infrastructure Development Initiative (ASIDI). Budget analysis by civil society organisations was a core component of the legal case and the MOA between the parties contained specific budget commitments that resulted in R8.2 billion in dedicated resources over a three-year period for the school improvement program.⁷⁷¹

In respect of the intended objectives, the case has not yet resulted in the full and timely implementation of the actions delineated in the final legally binding agreements.⁷⁷² In some

⁷⁶⁸ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bhisho, case no 504/10.

⁷⁶⁹ A Tshangana, “The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa”, 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁷⁰ A Tshangana, “The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa”, 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁷¹ A Tshangana, “The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa”, 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁷² A Tshangana, “The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa”, 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

areas only temporary structures have been provided, which have likely improved learner experience, and indirectly learner outcomes, but is still not completely in accordance with the Norms and Standards.⁷⁷³ Despite this, the ASIDI program has made enormous strides in eradicating mud schools across the country.⁷⁷⁴ 483 schools were replaced with new buildings in the Eastern Cape and another 1145 schools have since been provided with water.⁷⁷⁵ In addition 939 schools received sanitation services and 932 schools were provided with electricity.⁷⁷⁶ There are still infrastructure needs at many schools in South Africa. However, the litigation in the mud schools' matter was critical in establishing infrastructure as an essential component for basic education and recognising the link between teaching and learning with a safe and sturdy school building.

The Norms and Standards litigation in *Equal Education v Minister of Basic Education*⁷⁷⁷ was instrumental in the publishing of binding regulations and is seen as a milestone in addressing the inadequate infrastructure needs in South Africa. Not only did it recognise that infrastructure was part of the right to education, but for the first time, it would provide for a binding standard of infrastructure that clarified what schools were entitled to receive from the state, as well as provided a mechanism for them to hold the state accountable for failing to provide these entitlements. This in itself, was an important step towards realising the right to education in South Africa. In implementing the regulations, much provision for infrastructure has been made for schools that are in need.⁷⁷⁸ While this was a breakthrough in advancing the right to

⁷⁷³ A Tshangana, "The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa", 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁷⁴ "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022]. See also: "Department of Basic Education", 10 May 2021, available at <https://www.education.gov.za/Programmes/ASIDI.aspx> [accessed 12 November 2022].

⁷⁷⁵ "Department of Basic Education", 10 May 2021, available at <https://www.education.gov.za/Programmes/ASIDI.aspx> [accessed 12 November 2022].

⁷⁷⁶ "Department of Basic Education", 10 May 2021, available at <https://www.education.gov.za/Programmes/ASIDI.aspx> [accessed 12 November 2022].

⁷⁷⁷ *Equal Education v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016.

⁷⁷⁸ A Tshangana, "The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa", 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

basic education and ensuring that children are safe at schools, much work still has to be done to ensure that the regulations are fully implemented. The current regulations set specific deadlines (which are three-year, seven-year, ten-year and 31 December 2030 deadlines) for the achievement of infrastructure goals.⁷⁷⁹ By November 2021, it became clear that the MOBE had missed a number of important deadlines in the Regulations, and while some work has been done to improve conditions at schools, the reality is that the fight for improved school infrastructure remains.

Equal Education Law Centre is currently occupied with a campaign around these deadlines as the MOBE has published revised regulations and plans that will see the deadlines removed from the Norms and Standards.⁷⁸⁰ It is unquestionable that the removal of deadlines has a retrogressive effect on the implementation of the government's minimum obligation as provided through the Norms and Standards since the government accountability is eradicated in this regard. It is also a direct response to its failure to meet the deadlines in the first place and an active step to try and avoid accountability for this failure. The government may delay the provision of school infrastructure which leaves affected schools and learners vulnerable to the failure to acquire adequate basic education.

Thirdly, in *Madzodzo v Minister of Basic Education*⁷⁸¹ the LRC played a role in securing the delivery of school furniture to schools that faced shortages in the Eastern Cape province.⁷⁸² The litigation resulted in successful delivery of furniture to the schools that the LRC represented, however, the ECDOE failed on several occasions to comply with all the parts of the November 2012 order.⁷⁸³ The ECDOE was ordered to compile an audit of the furniture needs in the province, however, the audit omitted several schools and failed to verify the data of the schools they did include.⁷⁸⁴ In August 2013, the LRC again approached the court to have

⁷⁷⁹ "Equal Education Law Centre", 29 July 2022, Available at <https://equaleducation.org.za/wp-content/uploads/2022/08/Submission-Draft-Amended-Norms-EE-and-EELC> [accessed 12 November 2022].

⁷⁸⁰ "Equal Education Law Centre", 29 July 2022, Available at <https://equaleducation.org.za/wp-content/uploads/2022/08/Submission-Draft-Amended-Norms-EE-and-EELC> [accessed 12 November 2022].

⁷⁸¹ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

⁷⁸² A Tshangana, "The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa", 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁸³ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 12.

⁷⁸⁴ *Ibid* para 5.

the ECDOE declared in contempt of the 2012 order.⁷⁸⁵ The court in this case found that the state's obligation to providing basic education is not limited to making places available at schools, but also extends to the provisioning of education resources such as schools, teachers, teaching materials and appropriate facilities for learners.⁷⁸⁶

The LRC continuously monitored the implementation of this order and returned to court twice to ensure that children are off the floor and have proper desks and chairs.⁷⁸⁷ By 2020, the ECDOE had provided most of the learners in the province with desks and chairs and had established a programme that refurbishes broken school furniture and returns it to schools.⁷⁸⁸ More than 600 000 units of furniture have been provided to schools.⁷⁸⁹ The success of this case lies in the persistent monitoring of the ECDOE's implementation of the order in the years following the judgment. This case illustrates the real impact of education rights litigation, but also the need for persistence and follow-up in the implementation of the judgments. In effect, the implementation of the judgment lasted around 8 years, and efforts will have be made to continue to monitor the provisioning of desks and chairs and to ensure that shortages do not arise again.

5.3.2 Implementation of the Provision of Textbooks

Section27 v Minister of Basic Education,⁷⁹⁰ is another example of successful litigation that resulted in learners gaining access to textbooks as well as the implementation of catch-up plans to make up for the teaching and learning that was lost due to a shortage of textbooks. As evidence, the Executive Summary Report on the Delivery of Textbooks in Limpopo which was drafted by the DBE on 16 July 2012 and referred to Section27, illustrates the implementation

⁷⁸⁵ *Ibid* para 25.

⁷⁸⁶ *Ibid* para 36

⁷⁸⁷ A Tshangana, "The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa", 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁸⁸ A Tshangana, "The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa", 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁸⁹ A Tshangana, "The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa", 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

⁷⁹⁰ *Textbook I Judgment*.

on the right to basic education through the provision of textbooks in terms of the court order,⁷⁹¹ and the consequent provision of textbooks was indicative of the enforcement of the court's order.⁷⁹²

Initially textbooks were provided to the various schools that faced textbooks shortages, however, this was accompanied with varying issues⁷⁹³ which continuously left many learners without the prescribed textbooks.⁷⁹⁴ As of 14 September 2012, there were textbooks that were still outstanding on back orders due to unavailability of stock from publishers.⁷⁹⁵ These were reported to the North Gauteng High Court and the court's decision was that these books be delivered to the relevant schools by 12 October 2012.⁷⁹⁶ The LDOE made some progress in the delivery of back-order shortages that was reported in the government's executive summary on the delivery of textbooks.⁷⁹⁷ Textbooks were delivered to 160 schools on 8 October 2012, 415 textbooks delivered by 10 October 2012, and a total quantity of 81,705 textbooks moved out of the central warehouse by 9 October to be delivered to schools.⁷⁹⁸ As of 11 October 2012, all outstanding learning and teaching support materials were delivered to schools in the Limpopo

⁷⁹¹ "Department of Basic Education", 16 July 2012, available at https://serve.mg.co.za/content/documents/2012/07/16/FINAL_LIMPOPO_VERIFICATION_REPORT_150712 [accessed 12 November 2022]. See also: Department of Basic Education, 12 October 2012, available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed at 19 October 2022].

⁷⁹² Which compelled the government to provide every learner with a textbook as it is an essential component of the right to basic education.

⁷⁹³ These included: schools that received books, however, felt they are not what they ordered/incorrect titles, schools that received some books, however, have shortages in other learning areas.

⁷⁹⁴ "South African Government", available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022].

⁷⁹⁵ "South African Government", available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022]

⁷⁹⁶ *Textbook I Judgment*.

⁷⁹⁷ "South African Government", available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022].

⁷⁹⁸ "South African Government", available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022].

province.⁷⁹⁹ Despite these efforts, Section 27 returned to court in 2014 when shortages of textbooks were again reported to them.

In respect of the implementation of the catch-up programme, the Department indicated that Subject Guides would be developed and provided to schools that had not covered Term 1 and/or Term 2 subject content. The content for these terms would form part of the guides and be incorporated into day-to-day teaching.⁸⁰⁰ Subject Guides were developed by curriculum advisors who were subject specialists located in the curriculum branch. The Guides focus in the main on new content identified in each subject. In addition, content that has been identified by teachers as difficult in Term 1 and 2 has been factored in.⁸⁰¹

Some success was also achieved following the judgment in *Khula Community Development Project*⁸⁰² where the ECDOE was ordered to deliver stationery and textbooks to schools in the Eastern Cape by 31 March 2022. The ECDOE managed to deliver 99.9 per cent of stationery packs to schools in the province by 18 March 2022.⁸⁰³ The delay in deliveries were a matter of concern since schools had already opened on 25 January 2022. The delays are said to have been caused by a lack of funding for purchasing of the LTSM for 2022 academic year and the Department had to request the intervention of the DBE, Treasury and Office of the Premier and funds were allocated to the amount of R270 million to procure LTSM for the 2022 academic year.⁸⁰⁴ However, this amount was made available in December 2021, which meant that the Department could start with the procurement process in January 2022, hence the delay in the

⁷⁹⁹ “South African Government”, available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022].

⁸⁰⁰ “South African Government”, available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022].

⁸⁰¹ “South African Government”, available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022].

⁸⁰² *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported.

⁸⁰³ “Eastern Cape Department of Basic Education Delivers 99.9% of Stationery to Schools”, 18 March 2022, available at <https://eceducation.gov.za/news-details/ecdoe-delivers-999-of-stationery-to-schools> [accessed 25 March 2022].

⁸⁰⁴ “Eastern Cape Department of Basic Education Delivers 99.9% of Stationery to Schools”, 18 March 2022, available at <https://eceducation.gov.za/news-details/ecdoe-delivers-999-of-stationery-to-schools> [accessed 25 March 2022].

delivery of the material.⁸⁰⁵ An amount of R53, 539, 800.00 was set aside for the purchasing of the required top up as requisitioned by schools.⁸⁰⁶

Importantly, and in an effort to ensure that the same situation does not occur in 2023, the court ordered the ECDOE to report to them by September 2022 on its readiness to provide textbooks and stationery to schools for 2023. The report was ultimately filed by the ECDOE and indicated that according to the department, all processes were in place to ensure that the learners receive their textbooks on time. At the time of the submission of this thesis, efforts were ongoing to monitor whether all schools had received their textbooks and stationery.

5.3.3 Implementation of the Provision of Teaching and Non-Teaching Staff

The *Linkside v Minister of Basic Education*⁸⁰⁷ (*Linkside II case*), was litigated in multiple stages and required the multiple trips to court to force compliance with the order.⁸⁰⁸ *Linkside II* was the last stage where the LRC developed the opt-in class action that was instituted on behalf of 90 public schools in the Eastern Cape that opted into the class. Schools that had opted in were required to illustrate that they had educator posts allocated to them which had not been permanently filled. They also had to illustrate that the SGB had appointed educators to occupy the vacant post and had remunerated them in the place of the ECDOE. They further had to show that they had not been reimbursed by the department.⁸⁰⁹ Since the class action was finalised, the department has paid over R82 million to the school governing bodies of the 90 schools to reimburse them for the expenses they incurred in paying the teachers in the place

⁸⁰⁵ “Eastern Cape Department of Basic Education Delivers 99.9% of Stationery to Schools”, 18 March 2022, available at <https://eceducation.gov.za/news-details/ecdoe-delivers-999-of-stationery-to-schools> [accessed 25 March 2022].

⁸⁰⁶ “Eastern Cape Department of Basic Education Delivers 99.9% of Stationery to Schools”, 18 March 2022, available at <https://eceducation.gov.za/news-details/ecdoe-delivers-999-of-stationery-to-schools> [accessed 25 March 2022].

⁸⁰⁷ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36.

⁸⁰⁸ The matter on vacant educator posts departed from *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG) to *Linkside v Minister of Basic Education* [2015] ZAECGHC 36 (*Linkside I & II Judgments*). See also: *Linkside II Judgment* at para 2.

⁸⁰⁹ “Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years”, 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

the department.⁸¹⁰ This has had long-term effect of greatly reducing the number of vacant posts that are not filled.⁸¹¹

Despite this litigation, teacher vacancies in the Eastern Cape continues to be a problem. While the litigation was able to establish important legal principles and address the needs of some schools, by 2022, some schools still struggled with teacher vacancies.⁸¹²

5.3.4 Implementation on the Provision of Scholar Transport

The LRC has made great strides over the years in ensuring that learners have safe transportation and access to their schools. In 2015, in the case of *Tripartite Steering Committee v Minister of Basic Education*,⁸¹³ the LRC successfully challenged the ECDOE's decisions to deny scholar transport to several learners in the Eastern Cape province. This case was the first of the kind in the country and argued that part of the right to basic education included the right to transport.⁸¹⁴ This case was an important first step in establishing the constitutional and legal framework for scholar transport in the country, however, implementation remained weak and there were thousands of learners that walked long distances to school.⁸¹⁵

In 2019 the LRC brought another case on the provision of scholar transport. Acting for the Khula Community Development Project and four schools in Peddie area of the Eastern Cape, the LRC challenged ECDOE's failure to take steps to resolve the systematic administrative

⁸¹⁰ "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

⁸¹¹ "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

⁸¹² S Pongco "Frustrated parents and learners protest ongoing Mary Waters teacher shortages" *Grocott's Mail* (25 April 2022).

⁸¹³ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

⁸¹⁴ *Ibid.*

⁸¹⁵ "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

crisis that continuously left thousands of learners in the province without scholar transport.⁸¹⁶ This was based on the ECDOE's repeated failure to take decisions on the schools' applicants for transport for learners, or to respond to letters inquiring about transport provisioning.⁸¹⁷ The LRC sought a two-part order, providing urgent relief to learners at the four schools, however, also seeking systematic relief in the form of a policy that clearly sets out the application process and makes it easier for schools to apply on behalf of the learners.⁸¹⁸

The ECDOE acknowledged its constitutional obligations to provide scholar transport to qualifying learners and agreed to urgently provide transport to 91 learners at the four schools.⁸¹⁹ The ECDOE also indicated that it is improving the systematic administration of scholar transport by using the digital database, the South African Schools Administration Management System (SASAMS), to log and process applications.⁸²⁰ Nevertheless, many schools have encountered difficulties in using the new system, and there is a lack of training in this regard.⁸²¹ The LRC continues to pursue its claim for systematic relief.

At the start of the 2023 academic year, scholar transport providers in the Eastern Cape also made preparations for a complete shutdown, which would have left all the learners dependent

⁸¹⁶ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG). See also: "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

⁸¹⁷ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) para 9.

⁸¹⁸ *Ibid* para 60.

⁸¹⁹ "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

⁸²⁰ "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

⁸²¹ "Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years", 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

on this service without scholar transport.⁸²² The operators alleged that they had not yet been paid by the ECDOE for October to December 2022 and refused to provide its services until such time as it received payment as well as an undertaking that payment will be made for January to March 2023. While the strike was later called off, it illustrated the systemic issues that continue to plague the realisation of the right to basic education in South Africa. Despite a clear pronouncement by the court that the right to education included a entitlement to scholar transport, it remains the duty of the other organs of state to take the necessary steps to ensure compliance with the court orders and their constitutional duties.

5.3.5 Implementation on the Provision of Basic Nutrition

On 17 July 2020, in *Equal Education v Minister of Basic Education*,⁸²³ the High Court handed down a watershed ruling that got school meals back into the stomachs of needy pupils. The judgment handed down by the High Court in this matter expanded the right to education to include basic nutrition, even during the Covid-19 pandemic when learners were unable to attend school in person.⁸²⁴ Given that education departments had made no substantive plans to deliver meals to qualifying learners at the time of the court hearing, the judgment included a structural interdict as the most pragmatic remedy to ensure that qualifying learners received the food they needed.⁸²⁵ Continued monitoring by Section 27, Equal Education and the Equal Education Law Centre as well as engagements with education departments, improved access to school meals.⁸²⁶ In September 2020, the DOE reported that 4 million learners were receiving meals while at home; by October 2021, the number had doubled, with 83 per cent of eligible learners (more than 8 million) queuing up at school for meals, even on days where they were not required to be physically in classrooms.⁸²⁷ However, more than 1.5 million qualifying

⁸²² V Sangotsha “Unpaid Scholar Transport Operators Prepare for Total Shutdown” *Daily Dispatch* (10 January 2023).

⁸²³ *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP).

⁸²⁴ *Ibid* para 47.

⁸²⁵ *Ibid* para 87.

⁸²⁶ J Chaskalson, P Mkuzo & S Jacobs, “School Meals Victory: A Moment to be Celebrated”, 21 July 2020, available at <https://www.news24.com/citypress/voices/school-meals-victory-a-moment-to-be-celebrated-20220721> [accessed 25 August 2022].

⁸²⁷ J Chaskalson, P Mkuzo & S Jacobs, “School Meals Victory: A Moment to be Celebrated”, 21 July 2020, available at <https://www.news24.com/citypress/voices/school-meals-victory-a-moment-to-be-celebrated-20220721> [accessed 25 August 2022].

learners were still not receiving meals.⁸²⁸ The NSNP did not reach its full capacity until the Cabinet approved the scrapping of rotational timetabling for all schools.⁸²⁹ Although imperfect, the implementation of the court order got meals into many learners' stomachs at the time when they would otherwise have gone hungry. By April 2021, more than 9.9 million learners were benefiting from the NSNP.⁸³⁰

5.4 The Value of Litigating the Right to Basic Education and the Provision of Just and Equitable Remedies as Precedent

It is also important to discuss the value of the litigation on the right to basic education as precedent for other similar fact cases that have followed or that are yet to follow. The incremental development of the legal scope and content of the right to basic education through litigation has made it easier for subsequent cases to make similar pronouncements based on the previous court decisions with similar facts or issues. Furthermore, the overall litigation on the core content of the right to basic education is likely to inspire future litigation and allow for further enforcement of basic education rights.

Before discussing some of the cases that have pronounced that the provision of a specific education resource is encompassed by the right to basic education, it is worth mentioning the overarching precedent set by the Constitutional Court on the nature and content of the right to basic education.⁸³¹ This precedent has encouraged the slew of litigation that had developed and clarified the legal scope and core content of the right to basic education based on the nature of the right as provided by the Constitutional Court. In *Juma Masjid*⁸³² the Constitutional Court held that the right to basic education is an unqualified right that is immediately realisable and may only be limited in terms of the law of general application. The Constitutional Court's

⁸²⁸ J Chaskalson, P Mkuzo & S Jacobs, "School Meals Victory: A Moment to be Celebrated", 21 July 2020, available at <https://www.news24.com/citypress/voices/school-meals-victory-a-moment-to-be-celebrated-20220721> [accessed 25 August 2022].

⁸²⁹ J Chaskalson, P Mkuzo & S Jacobs, "School Meals Victory: A Moment to be Celebrated", 21 July 2020, available at <https://www.news24.com/citypress/voices/school-meals-victory-a-moment-to-be-celebrated-20220721> [accessed 25 August 2022].

⁸³⁰ J Chaskalson, P Mkuzo & S Jacobs, "School Meals Victory: A Moment to be Celebrated", 21 July 2020, available at <https://www.news24.com/citypress/voices/school-meals-victory-a-moment-to-be-celebrated-20220721> [accessed 25 August 2022].

⁸³¹ *Governing Body of the Juma Masjid Primary School v Essay* 2011 (8) BCLR 761 (CC).

⁸³² *Ibid* para 37.

judgement has set precedent that has allowed lower courts during subsequent litigation to rely on the Constitutional Court's judgment in the interpretation of the right to basic education.

The precedent set by the Constitutional Court had been clearly applied in the following litigation on the right to basic education: *Madzodzo v Minister of Basic Education*,⁸³³ *Equal Education v Minister of Basic Education*,⁸³⁴ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education*,⁸³⁵ as illustrated in Chapter 3.⁸³⁶ In all these cases, the courts pronounced that the provision of school infrastructure, sanitation facilities, textbooks and stationery are encompassed by the right to basic education and ordered for their immediate provision since the right was immediately realisable as per the Constitutional Court's judgment in *Juma Musjid*. It would have not been this effortless for the courts to order the immediate provision of the mentioned education resources had the textual formulation and the nature of the right not been clarified in *Juma Musjid*.

Subsequent education rights cases have also built on each other. For example, litigation on certain education resources, formed the basis for later decisions that finally gave clarity on the core content of the right. *Trackstar Trading Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape*,⁸³⁷ was an unreported judgment from 2014, where the court addressed the impact of not having scholar transport. In what was essentially a provide contractual dispute between the parties on the provisioning of transport to learners in the Eastern Cape, the court held that the reality of the situation is that if the provincial government does not provide scholar transport many thousands of scholars would simply not be able to attend school. The court's decision in *Trackstar Trading Mtha-Wethemba*⁸³⁸ was later utilised by the court in *Tripartite Steering Committee v Minister of Basic Education*⁸³⁹ which dealt with the government's failure to provide transport to affected learners within the Eastern Cape

⁸³³ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 36.

⁸³⁴ *Equal Education and Another v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016 para 170.

⁸³⁵ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported, para 40.

⁸³⁶ See **Chapter 3** on page 73.

⁸³⁷ *Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape and Others* (ECG case No 3611/13, 4 December 2014), unreported, para 10.

⁸³⁸ *Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape and Others* (ECG case No 3611/13, 4 December 2014), unreported.

⁸³⁹ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG).

province. The court in *Tripartite* referred to the aforementioned decision of *Trackstar Trading Mtha-Wethemba* in coming its conclusion that the right to basic education is meaningless without transport to and from school at the state's expense in appropriate cases.⁸⁴⁰ In 2019, when the LRC again returned to court to compel the delivery of scholar transport, it simply relied on the *Tripartite Steering Committee* case and its findings on the content of section 29(1)(a) to argue that the affected learners were entitled to receive scholar transport.

A second example of the role of precedents in education litigation is the textbook litigation which commenced with *Section 27 v Minister of Basic Education*⁸⁴¹ in the High Court and ended with *Minister of Basic Education v Basic Education for All*⁸⁴² in the SCA. The precedent set by this judgement was relied upon in the 2022 textbook and stationery litigation in *Khula Community Project v Head of Department Eastern Cape Department of Basic Education*⁸⁴³ The court in this litigation simply relied on the previous litigation on textbooks in finding that the learners' right to education in the Eastern Cape had been violated by the failure to deliver textbooks on time.⁸⁴⁴ It also relied on the rationale of the textbook litigation to find that stationery was a component of the right to basic education.

These precedents are not only useful in subsequent litigation on the same subject matter, but the factors that the court considered when arriving at its conclusion can also be useful in subsequent litigation. This includes litigation on other socio-economic rights where clarity may be sought on the content of a particular right, or the state's obligation to fulfil the right. In this respect, it is important to consider some insights that can be gleaned from the litigation on the content of the right to education in an effort to determine how similar developments may be possible in relation to other socio-economic rights.

5.5 Insights from Litigating the Right to Basic Education and the Provision of Just and Equitable Remedies

The basic education cases between 2010 and 2022 have been ground-breaking in developing the core content of the right to education in South Africa. However, there are also some

⁸⁴⁰ *Ibid* para 18-19.

⁸⁴¹ *Textbook I Judgment*.

⁸⁴² *Textbook III Judgment*.

⁸⁴³ *Khula Community Project v Head of Department Eastern Cape Department of Basic Education* (ECD case No 611/2022, 22 March 2022), unreported.

⁸⁴⁴ *Ibid* paras 51 - 53.

interesting features of these cases that have to be noted, specifically with a view to the role it can play in developing the content of other socio-economic rights. Firstly, the cases saw an unusually high degree of orders by consent or settlement agreements, on the substantive rights and obligations in issue.⁸⁴⁵ Two of the most important cases, namely *Centre for Child Law and Seven Others v Minister of Basic Education*,⁸⁴⁶ and *Equal Education v Minister of Basic Education*⁸⁴⁷ were at least initially, entirely resolved by agreement among the parties. The government respondents effectively accepted their constitutional responsibilities and committed to taking the necessary steps to eradicate unsafe schools in the Eastern Cape and to adopt legally binding regulations governing school infrastructure.⁸⁴⁸

In particular, the government conceded, either expressly or by conduct, that the right to basic education entitled learners to what was claimed and undertook in principle to remedy the rights violations. This illustrates that more often than not, government is aware of its duties in relation to constitutional rights, but either wilfully or through neglect, fail to execute their obligations. When finally challenged in court, the state is often willing to accept its responsibility without much opposition.

Secondly, many of the cases were conducted in a multi-stage or ‘serialised’ manner, combining several elements that resulted in multi-layer complex structural orders from the courts.⁸⁴⁹ The litigation took place in multiple stages, in some instances because it was planned by the litigators and in other cases it was due to non-compliance with earlier orders.⁸⁵⁰ The effect of conducting litigation in stages was to enable the litigants to establish the content of the right and the obligations of the state in principle; to secure a basic order requiring the provision of the necessary resource; to create a supervisory framework for the implementation of the order and to refine that framework to secure compliance; and thereby to “scale up” the relief, shifting

⁸⁴⁵ See: *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM); *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG).

⁸⁴⁶ *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bhisho, case no 504/10.

⁸⁴⁷ *Equal Education v Minister of Basic Education*, Eastern Cape Division, Bhisho, case no. 276/2016.

⁸⁴⁸ C. McConnachie & C. McConnachie “Concretising the Right to a Basic Education” (2012) 129 *South African Law Journal* 554 at 556.

⁸⁴⁹ Such as from *Textbook I Judgment* to *Textbook III Judgment*.

⁸⁵⁰ Jason Brickhill was one of the counsels for the applicants in stages of *Madzodzo*; *Centre for Child Law*; *Tripartite Steering Committee*; *Linkside* and in the initial stage of *Equal Education*’s ‘norms and standards’ litigation.

from individual schools in the first stage to an entire province by the end.⁸⁵¹ The litigation by the LRC to secure school furniture and the appointment and payment of teachers on behalf of schools and students in the Eastern Cape are good examples of how this process played out in serial litigation.

The first example of the multi-stage nature of this litigation is seen in the furniture case, *Madzodzo*.⁸⁵² The final reported judgment in *Madzodzo* records that there had been two previous orders made (by consent) before the matter was argued before Goosen J.⁸⁵³ The first order identified that the lack of furniture in schools was a breach of the right to education.⁸⁵⁴ The court directed the provincial department to conduct an audit of school furniture needs in the province, appoint a Furniture Task Team, and publish a circular to inform schools of the process and to endeavour to meet the furniture needs identified by this process before a specified deadline.⁸⁵⁵ The provincial department failed to meet its commitment to deliver furniture by the deadline and concerns also emerged that the audit of needs was incomplete.⁸⁵⁶ This prompted a return to court. In the second phase of litigation, a second order was made in terms of which additional schools (previously omitted from the process) were added, an independent body was appointed to verify the findings of the department's audit and a fresh deadline was set for delivery of furniture.⁸⁵⁷

A second example of how this litigation ran in stages is seen in the cases dealing with teachers in the Eastern Cape. This litigation also considers the third distinguishing feature of the remedial aspect, which refers to courts' employing several novel orders such as deeming orders and class actions.⁸⁵⁸ The litigation to secure the appointment of teachers to vacant posts and to secure payment of their salaries had a series of sequels, each building on the first case.⁸⁵⁹ The

⁸⁵¹ J Brickhill & Y van Leeve "From Classroom to the Courtroom: Litigating Education Rights in South Africa" in S Fredman, M Campbell & H Taylor *Human Rights and Equality in Education* (2018) 163.

⁸⁵² *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM).

⁸⁵³ *Ibid* para 12.

⁸⁵⁴ *Ibid* para 21 and 36.

⁸⁵⁵ *Ibid* para 3-6.

⁸⁵⁶ *Ibid* para 28.

⁸⁵⁷ *Ibid* para 7-8.

⁸⁵⁸ J Brickhill & Y van Leeve "From Classroom to the Courtroom: Litigating Education Rights in South Africa" in S Fredman, M Campbell & H Taylor *Human Rights and Equality in Education* (2018) 161.

⁸⁵⁹ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG); *Linkside v Minister of Basic Education* [2015] ZAECGHC 36.

first stage produced the judgment in *Centre for Child Law*,⁸⁶⁰ which confirmed that the government was required to fill vacancies and to pay teachers and set out a series of steps it was required to do to achieve this. When the government failed to comply, the LRC instituted the proceedings which, after several orders by consent, resulted in the judgment in *Linkside*.⁸⁶¹

The court in *Linkside* certified an opt-in class action, enabling affected schools to opt into the class to secure the appointment and payment of teachers.⁸⁶² In the end, over 90 schools benefited, although it is likely that other schools remained unaware of the litigation and were unable to participate, especially the poorest schools in remote rural areas.⁸⁶³ However, part of the problem on the inability to participate was that schools in rural areas often did not have the record-keeping to support their claims.⁸⁶⁴ It required the schools to provide moneys they had paid to teachers and to provide proper records of the payments. Many school simply did not have these records as money was paid in cash, and therefore unable to participate as their claims could not be verified.⁸⁶⁵ Unfortunately, this litigation benefited mostly former model-C schools whose record-keeping was much better in general.⁸⁶⁶ This is perhaps an important consideration when litigating any socio-economic rights case as it is important to be aware of some of the unintended consequences of the litigation.

Some of the specific orders granted in these cases were also remarkable in other respects, quite apart from the serialised nature of the litigation discussed above.⁸⁶⁷ Perhaps the most radical remedies granted was in *Linkside*, regarding teacher appointments and payment.⁸⁶⁸ This case was the first opt in class action in any area of law to be ‘certified’ by the High Court in South Africa following the development by the courts of new procedural rules to govern class actions.⁸⁶⁹

⁸⁶⁰ *Centre for Child Law v Minister of Basic Education* 2013 (3) SA 183 (ECG).

⁸⁶¹ *Linkside v Minister of Basic Education* [2015] ZAECGHC 36.

⁸⁶² *Linkside v Minister of Basic Education* [2015] ZAECGHC 36, part B, para 1.

⁸⁶³ S Sephton “Post Provisioning” in F Veriava *et al Basic Education Rights Handbook* 257.

⁸⁶⁴ *Ibid.*

⁸⁶⁵ *Ibid.*

⁸⁶⁶ *Ibid.*

⁸⁶⁷ J Brickhill & Y van Leeve “From Classroom to the Courtroom: Litigating Education Rights in South Africa” in S Fredman, M Campbell & H Taylor *Human Rights and Equality in Education* (2018) 164.

⁸⁶⁸ *Ibid.*

⁸⁶⁹ *Ibid.*

Thirdly, the cases also illustrated that it is simply not enough for courts to pronounce on the content of the right to education, without also providing some tangible remedies that tells the state what to do to remedy the violation of the right to education. The education right litigation nearly always contained a declarator on the content of the right to education, together with specific directives and sometimes structural interdicts to compel action on the side of the state. In crafting remedies on socio-economic rights litigation, it is important to understand that a mere declaratory order that defines the content of the right, will not necessarily prompt the state into fulfilling the right. More is required, often in the form of creative and practical remedies to ensure that the state complies with its duties.

Lastly, the litigation also illustrates the needs for the continued monitoring and implementation of court orders by the applicants and civil society organisations. While a successful judgment may establish the legal principle and set precedent, it does not necessarily translate into actual change on ground level. The *Madzodzo* case for example has mostly been successful through continued efforts by the LRC to monitor its implementation. The same is true for some of the textbook litigation, where Section 27 continued to monitor the LDOE's compliance with the orders. This process may require multiple trips back to court in contempt proceedings, or large-scale efforts to determine whether the relief has actually reached those learners most affected at ground level. Without these monitoring efforts, many of these cases would not have resulted in tangible change for the applicants or other affected learners.

5.6 Conclusion

This chapter sought to illustrate how the education litigation has been implemented following the judgements and the role that the courts have played in ensuring that learners' education is improved on ground-level. In this respect it is submitted that some of the litigation has been more successful than others in resulting in improvements in the education system. Many of the cases have been hamstrung by poor implementation of the orders by the state which continues to undermine the right to education of the affected learners. The chapter also sought to explain the benefits of these judgements as precedents for subsequent education litigation, as well as litigation on other socio-economic rights. It argued that much of the benefit of declaring that the right to education has a core content consisting of specific goods and services, is the role that these judgements can play in subsequent litigation. Lastly, the chapter sought to provide some insights into the cases and the lessons that can be learnt with a view to future litigation on the right to education or other socio-economic rights. It highlighted the need for an

incremental approach to the litigation, as well as the continued monitoring of the implementation of court orders.

CHAPTER 6

CONCLUSION

6.1 Introduction

The study set out to explore the role of the courts in the interpretation and implementation of the right to basic education in South Africa. The focus of the study was on education rights litigation between 2010 and 2022, where courts started to incrementally interpret and clarify the core content of the right to education in section 29(1)(a) of the Constitution. While the Constitutional Court has rejected the assigning of a judicial minimum core obligation to socio-economic rights, much of litigation during this period was specifically aimed at ensuring that the right to education be assigned a core content of goods and services that the state need to provide for the right to be realized. In this sense, the litigation contributed to the development of a normative standard assigned to the right to basic education that has clarified both the obligations of the state, as well as made it easier for learners, parents, and school governing bodies to hold the state to account when it fails to act in accordance with its obligations.

As has been illustrated in Chapter 5, much of this litigation has resulted in tangible changes in the lives of the affected litigants, as well as some systemic changes in the manner which the core education goods and services are delivered. This approach by the court and its willingness to interpret section 29(1)(a) as consisting of a core content, has thus been instrumental in addressing some of the systemic inequality that persists following the apartheid years. This study analysed South Africa's legislative-, regulatory-, and policy framework on the right to education. It also considered the international legal framework on the right to education that has a bearing on South Africa's education system. The study then provided an overview of the litigation between 2010 and 2022, and the way this litigation has contributed to the development of a core content for the right to basic education.

The study then proposes that there are five factors that courts seem to employ when interpreting the right to education. It is submitted that the historical context of the right, its textual formulation in the Constitution, the role of legislation, regulations and policies, the interrelation between the right to education and other rights in the Constitution, and international law, seems to guide the courts' interpretation in these cases. While not all of these factors were considered in each of the cases, and the weight attached to them differed depending on the facts of the case, the study proposes that these were the most common factors that guided the interpretation of the right and the assigning of a core content.

The study also considered how these judgments have been implemented and the role that the courts have played in ensuring that the right to education is realized. As was demonstrated above, the success of the litigation and its implementation on ground-level has been difficult in some instances and have often required multiple trips to the courts to ensure compliance with the orders. Some of the judgments have however resulted in real changes for the litigants involved in the litigation, and has also set important precedents that have been used in subsequent litigation on the right to education. The study also considered what insights can be gleaned from the approach of the courts in the education litigation, and what role this court potentially play in litigating the content of other socio-economic rights.

This chapter will provide a few concluding remarks on the study. It will commence with an overview of the chapters and the main findings from each of the chapters. It will also provide a discussion on the study's contribution towards the education law and the notion of transformative constitutionalism.

6.2 Overview of the Main Findings in the Study

Chapter 1 of the study framed the study against the historical background on the provision of basic education during the apartheid government, which was along racial and class divides. It sought to explain how section 29(1)(a) of the Constitution must be read and understood, as a move away from an unequal and racially divided education system to one that provides every learner with the opportunity to fulfill their full potential. This discussion formed an important backdrop for understanding the factors that have given rise to the litigation between 2010 and 2022. It also provided an explanation as to why the period between 2010 and 2022 was chosen as the focus of the study and the developments that led to the important education rights litigation that arose in this period.

Chapter 2 of the study sought to provide an overview of the legal framework that govern education in South Africa. This included a discussion on the nature of section 29(1)(a) of the Constitution, as well as the laws, regulations, and policies that the state has adopted to give effect to the right to education in South Africa. Chapter 2 also considered the international law obligation that South Africa must provide basic education. This legal framework is important for understanding the subsequent education rights litigation that engaged much of this legal framework in the reasoning and interpretation of section 29(1)(a).

Chapter 2 also considered the notion of a minimum core obligation in South African law. It provided an overview of the legislative and executive minimum core in relation to the right to

education and considered the manner in which the courts have approached the judicial minimum core obligation in the cases before it. It finds that the Constitutional Court in the *Grootboom* and *TAC* cases have rejected the judicial minimum core obligation in favor of a reasonableness approach that simply seeks to consider the reasonableness of the state's conduct in realizing socio-economic rights. The courts have however stopped short of assigning a specific content to socio-economic rights. It is however proposed that when considering similar litigation on the right to education, the courts have not been deterred in interpreting the right to education to include a specific core content. This is somewhat contrary to how the courts have approached the interpretation of other socio-economic rights and as is discussed more fully in Chapter 4, it is suggested that there are five distinct factors that the courts have used to justify this interpretation.

Chapter 3 provided an overview of the most important education rights cases between 2010 and 2022. It considered litigation on infrastructure, textbooks and stationery, school furniture, scholar transport, teaching and non-teaching staff, and nutrition. The litigation on these issues have been instrumental in clarifying the content of the right to education and have set a standard that the state is obliged to uphold in the provisioning of education. The discussion on the litigation illustrated that litigation of this nature can often take several paths, perhaps commencing with settlement agreements between the state and the litigants, only to culminate in a judgment when the state fails to oblige by the orders. It also illustrated that much of this litigation was borne out of desperate and untenable conditions that learners had to endure that had a grave impact on their education rights and their ability to fully participate in the education process.

Chapter 3 also provided some insight into the courts' reasoning and findings in education rights cases. It became clear from the discussion of the cases that once these cases started coming before the courts, they were very much willing to accept that there was a clear link between the right to education and the provision of certain resources. The interpretation of the content of the right to education in these cases, is therefore mainly premised on a clear understanding and recognition by the courts that without these resources, the right to education itself cannot be realized.

In **Chapter 4** the factors utilised by the courts in developing and clarifying the legal scope and content of the right to basic education are discussed. The factors were the historical context on the provision of basic education; the nature of the right to basic education as textually

formulated in section 29(1)(a) of the Constitution; subsidiary basic education policies and legislation that seek to secure the right to basic education as provided in the Constitution; the interrelationship between the right to basic education and other constitutionally protected rights; and lastly, international law.

This chapter proposes that these factors have been the most common features that have guided the court's interpretation of the right to education. It makes this argument with reference to the reasoning employed by the courts in the cases between 2010 and 2022. It is proposed that in many of these cases, the courts illustrate an acute awareness of the historical context within which the right to education must be understood, particularly given the history of the country and its apartheid legacy. It is proposed that when evaluating the litigation and its engagement with the historical context, it appears that this factor plays two distinct roles. Firstly, it provides context to the legal dispute in front of the courts. It uses it to frame the dispute between the parties, placing emphasis on the arbitrary and unequal system that existed prior to the introduction of section 29(1)(a) of the Constitution.

Secondly, it is also used as a measure to justify a finding that the right to education contains a specific core set of resources and services. In this sense it emphasises the role of education as an "empowering right" that has the ability to ensure that everyone, irrespective of their race, socio-economic status, or background, can fulfil their potential through education. In this sense, education itself, and the adequate provisioning of resources to realise the right, is necessary to achieve the transformative objective of the Constitution and realise the individual's potential in a democratic South Africa.

The second factor relates to the textual formulation of the right in the Constitution. The finding in *Juma Masjid* that the right is immediately realisable, not subject to available resources, and does not have to be progressively realised like the other socio-economic rights, laid the foundation for developing the content of the right to education. As illustrated above, it is often the courts' starting point when interpreting the right to education. The textual formulation of the right has also been effective in addressing unqualified allegations around budgetary constraints and limitations of human or other resources by the state.

The subsidiary laws, regulations, and policies have also played an important role in the courts' interpretation of the right to education. As illustrated above, the executive and the legislature often define the minimum core content of the right in its legislation, regulations, and policies and set themselves specific goals and obligations. When they fail to perform these obligations

and the matter comes before the court, the courts often refer to these legislative and policy obligations in arriving at its finding that a specific good or service forms part of the right to education. This makes it easier for the court to give content of the right, as the state has already accepted and clarified its obligation in this regard and themselves view the particular resource or service as forming part of the right to education.

The fourth factor that courts consider is the role of interrelated rights in the Constitution. This includes the right to equality, human dignity, safety and security of the person, as well as nutrition and the best interest of the child. The chapter provided an overview of how these rights have been utilised in education rights cases to justify an interpretation of the right as containing a core content. As is suggested in Chapter 4, it is conceivable that as more litigation on the core content of the right to education comes before the courts, that other rights may in time also be implicated and used by the courts to guide the interpretation of section 29(1)(a). It is however also recommended that the courts can sometimes do a bit more to explain the relation between these rights and the right to education, particularly as far as the best interest of the child is concerned.

Lastly, the chapter considered the role of international law. It found that while courts do sometimes refer to the international law instrument on a specific aspect of education, it often does so in passing, without really explaining how the international law influences the decision that it makes. Many international law instruments actually clarify the content of the right to education and can aid courts in interpreting the right at domestic level, it is submitted that more must be done by courts to engage these instruments.

Chapter 5 discussed the impact and implementation of the courts' interpretation of the right to basic education. The chapter considered how some of the judgements have been implemented in practice as well as some of the difficulties that continue to exist in ensuring compliance with the court orders. It also demonstrated the role that these cases can play in setting precedents for subsequent education rights cases. The chapter demonstrated that there are certain insights that can be used by courts in subsequent education rights cases, as well as other socio-economic rights cases, to give content to the rights. This included an understanding of the systemic and incremental nature of the litigation, which often requires multiple trips to the courts to adequately clarify the content of the right and ensure implementation. It also highlighted the need to be mindful of unintended consequences that court result due to the litigation. It is also necessary for the courts to craft effective remedies that can result in tangible

change at ground-level. Lastly, the chapter suggests that much of the success of the litigation can be attributed to work that was undertaken after the judgment was delivered. This included a need to monitor and evaluate the implantation of the judgments, and where implementation is problematic, potentially returning to court.

6.3 The Study's Contribution Towards South African Education Law

Although it has now been 28 years since the advent of the constitutional democracy, with the existent disparities in the provision of basic education based on race and class, this study illustrated that the courts have largely immersed themselves in advancing the transformative agenda of the South African Constitution. Brickhill and van Leeve correctly point out that transformative constitutionalism is not explicitly referred to in the text of the South African Constitution.⁸⁷⁰ However, the transformative nature of the Constitution can be construed from certain constitutional provisions. The preamble is a point of departure as it encapsulates a specific vision for the South African society, and the right to basic education is also one of the fundamental human rights that was entrenched in the Constitution as a means of improving the quality of life for all citizens. It was meant to address the inequalities of the past, and eradicate racial, class, and social divides.

Notably, the role of basic education, which is an empowerment right, serves to uplift economically and socially marginalised children and adults to participate fully in society.⁸⁷¹ The courts' jurisprudence in respect of basic education must be commended. Given the fact that the Constitutional Court rejected the judicial determination of a minimum core obligation in relation to socio-economic rights, the normative based approach of the courts in respect of section 29(1)(a) of the Constitution has to be valued. Had these courts not pronounced on the content of the right to basic education where the government was in breach of its constitutional obligation under section 7(2) of the Constitution,⁸⁷² a large segment of learners would not have received adequate basic education. Many of the learners attending disadvantaged schools would not have experienced the realisation of their constitutionally protected right.

⁸⁷⁰ J Brickhill and Y van Leeve "Transformative Constitutionalism-Guiding Light or Empty Slogan?" (2015) 2015 *Acta Juridica* 141 at 146.

⁸⁷¹ See: *Governing Body of the Juma Masjid Primary School v Essay* 2011(8) BCLR 761 (CC) para 43; *Textbook I Judgment* paras 4-5.

⁸⁷² The Constitution of the Republic of South Africa, 1996.

This study sought to understand how the courts went about interpreting the right to education as containing specific core components. It suggests that five overarching factors guide the interpretation of the right and illustrate how these factors have contributed to the clarification of the core content of the right to education. In this sense, the study is an important contribution to South African law, as it evaluates the existing litigation, and provides a reasoned analysis of how the courts go about their interpretative role, and what they use when dealing with education rights litigation.

6.4 Conclusion

This study offers a contribution in clarifying how the judiciary may exercise powers granted by the Constitution and discharge its constitutional obligations in a manner that eradicates the apartheid legacy. It argued that the right to education has been interpreted to contain a minimum core content which has aided in the provisioning of education to marginalised learners. In this sense, the right to education has been used by the courts to eradicate some of the remnants of the apartheid system and address the inequalities that continue to persist under a democratic South Africa. While this study has focused on the litigation between 2010 and 2022, it is conceivable that given the rich jurisprudence that has developed in relation to the right, litigation over the coming years could see further development of the right and the expansion of the content of the right.

Bibliography

Books

P Christie *The Rights to Learn: the Struggle for Education in South Africa* 2 ed (1991) Sached Trust: South Africa.

A Das *Right to Education* 2 ed (2010) SAGE Publishing: India.

GE Devenish *A Commentary on the South African Bill of Rights* (1999) Butterworths.

P. De Vos, W. Freedman, D. Brand, C. Gevers, K. Govender, P. Lenaghan, D. Mailula, N. Ntlama & S.Sibanda *South African Constitutional Law in Context* (2014) Oxford University Press: Cape Town, South Africa.

C Hoexter & G Penfold *Administrative Law in South Africa* 3 ed (2021) Juta: Claremont.

S Khoza *Socio-Economic Rights in South Africa* 2 ed (2007) Socio-Economic Rights Project, Community Law Centre, University of the Western Cape: Bellville.

S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) Claremont: South Africa.

S Pendlebury, L Lake & C Smith *South African Child Gauge* (2008/2009) 2009 Children's Institute, University of Cape Town: Cape Town.

A Prince & M Bishop *Transformative Justice: Essays in honour of Pius Langa* (2015) Juta: Cape Town.

N Robertson & B Robertson *Education in South Africa* (1977) Delta Kappa Publishers: Cape Town.

A Skelton *Strategic Litigation Impacts: Equal Access to Quality Education* (2017) Open Society Foundations: New York.

N. Spaul & J. Jansen *South Africa Schooling: The Enigma of Inequality, A study of the Present and Future Possibilities* (2019) Springer Nature Switzerland AG: Switzerland.

F Veriava *The 2012 Limpopo Textbook Crisis* (2013) Section27: Johannesburg (South Africa).

S Woolman & B Fleish *The Constitution in the Classroom: Law and Education in South Africa 1994–2008* (2009) Pretoria University Law Press: Centre for Human Rights, University of Pretoria.

Chapters in Books

M Bishop “Remedies” in S Woolman & M Bishop *Constitutional Law of South Africa* 2 ed (2013) Juta: South Africa.

D Brand “Introduction” in D Brand & C Heyns *Socio-Economic Rights in South Africa* (2005) Pretoria University Law Press: Centre for Human Rights, University of Pretoria.

J Brickhill & Y van Leeve “From Classroom to the Courtroom: Litigating Education Rights in South Africa” in S Fredman, M Campbell & H Taylor *Human Rights and Equality in Education* (2018) Bristol University Press:

C Fenwick “Minimum obligations with respect to article 8 of the International Covenant on Economic, Social and Cultural Rights” in AR Chapman & S Russell (eds) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) Intersentia publishers: Churchillian.

SD Kamga “The Right to a Basic Education” in T Boezaart (eds) *Child Law in South Africa* 2 ed (2020) Juta: Cape Town.

S Liebenberg “The Interpretation of Socio-Economic Rights” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) Juta: South Africa.

C McConnachie & S Brener “Litigating the Right to Basic Education” in J Brickhill *Public Interest Litigation in South Africa* (2018) Juta: South Africa.

C McConnachie, A Skelton & C McConnachie “The Constitution and the Right to a Basic Education” in F Veriava, A Thom & F Hodgson (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (2017) Section 27: South Africa.

D McLaren “Funding Basic Education” in F Veriava, A Thom & F Hodgson (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (2017) Section 27: South Africa.

S Sephton “Post Provisioning” in F Veriava, A Thom & F Hodgson *Basic Education Rights Handbook: Education Rights in South Africa* (2017) Section 27: South Africa.

N. Spaul “Schooling in South Africa: How Low-Quality Education Becomes a Poverty Trap” in A. De Lannoy, S. Swartz, L. Lake & C. Smiths (eds) *South African Child Gauge* (2015) Children’s Institute, University of Cape Town: Cape Town.

N Stein “Textbooks” in F Veriava, A Thom & F Hodgson (eds) *Basic Education Rights Handbook: Education Rights in South Africa* (2017) Section 27: South Africa.

F Veriava & F Coomans “The right to education” in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) Pretoria University Law Press: Centre for Human Rights, University of Pretoria.

S Woolman & M Bishop “Education” in S Woolman & M Bishop *Constitutional Law of South Africa* 2 ed (2013) Juta: South Africa.

Case Law

AD v DW 2008 3 SA 183 (CC).

Adam Legoale v The MEC of the Department of Education Northwest, Case No 499/11.

Basic Education for All v Minister of Basic Education 2014 (4) SA 274 (GP).

Centre for Child Law v The Government of the Eastern Cape (ECHC, Bisho) unreported case no 504 /10.

Centre for Child Law v Minister of Basic Education 2013 (3) SA 183 (ECG).

Centre for Child Law v Minister of Basic Education 2020 (3) SA 141 (ECG).

CEO of the South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd [2011] ZASCA 13 (2011-03-20).

City of Johannesburg Metropolitan Municipality v Blue Moonlight 2012 (2) SA 104 (CC).

Equal Education v Minister of Basic Education, Eastern Cape Division, Bisho, case no. 276/2016.

Equal Education v Minister of Basic Education 2019 (1) SA 421 (ECB).

Equal Education v Minister of Basic Education 2021 (1) SA 198 (GP).

Fose v Minister of Safety and Security 1997 (3) 786 (CC).

Freedom Stationery v MEC for Education, Eastern Cape (59/2011) [2011] ZAECCELLC 1.

Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995 1996 (3) SA 165 (CC).

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

Governing Body of the Juma Masjid Primary School v Essay 2011 (8) BCLR 761 (CC).

Harksen v Lane 1998 (1) SA 300 (CC).

Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo 2010 (2) SA 415 (CC).

Head of Department, Department of Education Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School 2014 (2) SA 228 (CC).

Khula Community Development Project v Head of Department: Eastern Cape and Others (case number 611/2022) (22 March 2022), unreported judgment.

Linkside v Minister of Basic Education (3844/2013) [2015] ZAECGHC 36.

Madzodzo v Minister of Basic Education 2014 (3) SA 441 (ECM).

Mazibuko v City of Johannesburg 2010 (4) SA 1 (CC).

Member of the Executive Council for Education in Gauteng Province v Governing Body of Rivonia Primary School 2013 (6) SA 582 (CC).

Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC).

Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA).

Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd 2010 4 SA 359 (SCA).

Moko v Acting Principal of Malusi Secondary School 2021 (3) SA 323 (CC).

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC).

Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 259 (CC).

S v Bhulwana; S v Gwadiso 1996 1 SA 388 (CC).

Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC).

Section 27 v Minister of Basic Education 2013 (2) SA 40 (GNP).

Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC).

Trackstar Trading 256 (Pty) Ltd t/a Mtha-Wethemba v Head of the Department of Transport, Province of the Eastern Cape (ECG case No 3611/13, 4 December 2014), unreported.

Tripartite Steering v Minister of Basic Education 2015 (3) SA 718 (ECG).

Trustees for the time being of Children's Resource Centre Trust v Pioneer Foods 2013 (2) SA 213 (SCA).

International Instruments

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.

Convention on the Rights of the Child (CRC) 1989.

CESCR General Comment No.3: The Nature of States Parties Obligations 1990.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1998.

CESCR General Comment No.12: The Right to Adequate Food 1999.

CESCR General Comment No.13: The Right to Education 1999.

CESCR General Comment No.14: The Right to the Highest Attainable Standard of Health 2000.

Internet Sources, Websites

Auditor-General of South Africa "A Performance Audit of the Learner Transport Scheme in the Eastern Cape Department of Transport" AGSA February 2016, available at https://www.agsa.co.za/Portals/0/PA_Audit/A%20performance%20audit%20of%20the%20learner%20transport%20scheme%20at%20the%20Eastern%20Cape%20Department%20of%20Transport.pdf [accessed on 22 September 2022].

“A guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights in South Africa”, 30 August 2019, available at <https://www.icj.org/wp-content/uploads/2019/08/South-Africa-Guide-ESCR-Publications-Thematic-Report-2019-ENG.pdf> [accessed 10 May 2022].

Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series, 1577, p3, available at https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf [accessed:15 March 2022].

J Chaskalson, P Mkuzo & S Jacobs, “School Meals Victory: A Moment to be Celebrated”, 21 July 2020, available at <https://www.news24.com/citypress/voices/school-meals-victory-a-moment-to-be-celebrated-20220721> [accessed 25 August 2022].

J Chowdhury “Judicial Adherence to a Minimum Core Approach to Socio-Economic Rights- A Comparative Perspective”, 23 March 2009, available at http://scholarship.law.cornell.edu/lps_clacp/27 (accessed 27 March 2022).

“Department of Basic Education”, 13 January 1994, available at <https://education.gov.za/Programmes/NationalSchoolNutritionProgramme.aspx> [accessed 16 August 2022].

“DBE Action Plan 2014”, 5 May 2010, available at https://www.gov.za/sites/default/files/gcis_document/201409/dobeshortened-action-plan-2025031120100 [accessed 7 September 2022].

“Department of Basic Education”, 16 July 2012, available at https://serve.mg.co.za/content/documents/2012/07/16/FINAL_LIMPOPO_VERIFICATION_REPORT_150712 [accessed 12 November 2022].

“Department of Basic Education”, 12 October 2012, available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed at 19 October 2022].

“Department of Basic Education & Department of Transport National Learner Transport Policy 2015”,²³ October 2015, available at https://www.gov.za/sites/default/files/gcis_document/201510/39314gon997.pdf [accessed 22 May 2022].

“Department of Basic Education”, 01 July 2018, available at <https://www.msmonline.co.za/wp-content/uploads/2018/07/Learning-and-Teaching-Support-Material-Policy-LTSM> [accessed 10 May 2022].

“Eastern Cape Department of Basic Education Delivers 99.9% of Stationery to Schools”, 18 March 2022, available at <https://eceducation.gov.za/news-details/ecdoe-delivers-999-of-stationery-to-schools> [accessed 25 March 2022].

ESCR-Net “The Obligation to Promote” available at <https://www.escr-net.org/resources/obligations-promote> [accessed 14 June 2022].

Equal Education, 19 July 2016, available at <https://equaleducation.org.za/campaigns/school-infrastructure/> [accessed 19 July 2022].

“Equal Education Law Centre”, 29 July 2022, Available at <https://equaleducation.org.za/wp-content/uploads/2022/08/Submission-Draft-Amended-Norms-EE-and-EELC> [accessed 12 November 2022].

“Litigating the Right to Education in South Africa – An Overview of Some of the Most Important Cases of the last 10 Years”, 12 August 2020, available at <https://insideeducation.co.za/2020/08/12/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/> [accessed 12 September 2022].

T Mbeki “State of the Nation Address” *SA History* 21 May 2004, available at <https://www.sahistory.org.za/archive/2004-president-mbeki-state-nation-address-21-may-2004-after-national-elections> [accessed on 15 January 2023].

Organization of the African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 May

1990, available at <https://www.refworld.org/docid/3ae6b38c18.html> [accessed: 22 March 2022].

D Petherbridge “South Africa’s Pending Ratification of the International Covenant on Economic, Social and Cultural Rights: What are the implications?” available at <http://blogs.sun.ac.za/.../South-Africas-pending-ratification-of-theICESCR.pdf>. [accessed on 14 March 2022].

School Infrastructure - Equal Education, 19 June 2016, available at <https://equaleducation.org.za/campaigns/school-infrastructure> [accessed 27 March 2022].

A Skelton “Strategic Litigation Impacts: Equal Access to Quality Education”, (2017), available at <https://files.eric.ed.gov/fulltext/ED606082.pdf> [accessed 5 July 2022].

South African Government, *A Plan of Action: Improving Access to Free and Quality Basic Education for All*, 14 June 2003, available at www.gov.za/documents/plan-action-improving-access-free-and-quality-basic-education-all [accessed 11 May 2022].

“South African Government”, available at <https://www.gov.za/executive-summary-report-delivery-textbooks-limpopo-update-after-high-court-ruling> [accessed 1 October 2022].

“South African Schools Act: National Norms and Standards for School Funding: Amendment”, 31 August 2006, available at https://www.gov.za/sites/default/files/gcis_document/201409/29179 [accessed 30 June 2022].

“South African Schools Act, 1996 (Act No.83 of 1996): Minimum Uniform Norms and Standards for Public School Infrastructure”, 29 November 2013, available at <https://www.gov.za> [accessed 16 July 2022].

N Spaul “Priorities for Education Reform (Background Note for Minister of Finance 19/01/2019)”, available at https://nicspaul.com/2019/01/19/priorities-for-education-reform-background-note-for-minister-of-finance-19-01-2019/#_ftnref1 [accessed on 15 December 2022].

K Tomaševski “Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable”, 2001, available at https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/Tomasevski_Primer%203.pdf [accessed 16 June 2022].

A Tshangana, “The Impact of Litigation by the Legal Resources Centre for Adequate Classroom Infrastructure in South Africa”, 1 November 2012, available at <https://ssrn.com/abstract=2333657> [accessed 11 September 2022].

United Nations Human Rights Office of the High Commissioner “International Human Rights Law” available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [accessed 14 June 2022].

UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, 993, p3, available at <https://www.refworld.org/docid/3ae6b3c0.html> [accessed: 17 March 2022].

UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 11 January 2023].

“World GDP Ranking 2021” available at <https://statisticstimes.com/economy/projected-world-gdp-ranking.php> [accessed 12 April 2022].

Journal Articles

L Arendse “The Obligation to Provide Free Basic Education in South Africa: An International Law perspective” (2011) 14 *Potchefstroom Electronic Law Journal* 112.

L Arendse “Beyond Rivonia: Transformative Constitutionalism and the Public Education System” (2014) 29 *South African Public Law* 159.

D Bilchitz “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance” (2002) 119 *South African Law Journal* 484.

D Bilchitz “Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence” (2003) 19 *South African Journal on Human Rights* 1.

J Brickhill and Y van Leeve “Transformative Constitutionalism-Guiding Light or Empty Slogan?” (2015) 2015 *Acta Juridica* 141.

T Broodryk “The South African Class Action vs Group action as an Appropriate Procedural Device” (2019) 30 *Stellenbosch Law Review* 1.

L Chisholm “The Textbook Saga and Corruption in Education” (2013) 19 *South African Review of Education* 1.

C Churr “Realisation of a Child’s Right to a Basic Education in the South African School System: Some Lessons from Germany” (2015) 18 *Potchefstroom Electronic Law Journal* 2405.

S Coetzee & R Mienie “The Best Interest of the Child Standard in Education: An Overview of South African Case Law” (2014) 29 *South African Public Law* 90.

O Fuo & A Du Plessis “In the Face of Judicial Deference: Taking the Minimum Core of Socio-Economic Rights to the Local Government Sphere” (2015) 19 *Law, Democracy and Development* 1.

R Joubert “Incorporating International Standards into National Education law in South Africa: The Accountability of the State (2014) 29 *South African Public Law* 1.

R Malherbe “The Constitutional Dimension of the Best Interests of the Child as Applied in Education” (2008) 2 *South African Law Journal* 267.

L Maqutu “When the Judiciary Flouts Separation of Powers: Attenuating the Credibility of the National Prosecuting Authority” (2015) 18 *Potchefstroom Electronic Law Journal* 2672.

JA Mavedzenge “Revisiting the Role of the Judiciary in Enforcing the State’s Duty to Provide Access to the Minimum Core Content of Socio-Economic Rights in South Africa and Kenya” (2020) 7 *Journal of Comparative Law in Africa* 60.

C McConnachie & C McConnachie “Concretising the Right to a Basic Education” (2012) 129 *South African Law Journal* 554.

E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 *South African Journal on Human Rights* 31.

U Naidoo, K Reddy & N Dorasamy “Reading Literacy in Primary Schools in South Africa: Educator Perspective on Factors Affecting Reading Literacy and Strategies for Improvement” (2014) 7 *International Journal of Education Science* 155.

S Liebenberg “South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty” (2002) 6 *Law, Democracy and Development* 159.

S Liebenberg “Socio-Economic Rights. Adjudication Under a Transformative Constitution” (2013) 24 *European Journal of International Law* 739.

S Liebenberg “Remedial Principles and Meaningful Engagement in Education Rights Disputes” (2016) 19 *Potchefstroom Electronic Law Journal* 1.

K Paterson “Constitutional Adjudication on the Right to Basic Education: Are We Asking the State to do the Impossible?” (2018) 34 *South African Journal on Human Rights* 112.

M Pieterse “What Do We Mean by Transformative Constitutionalism” (2005) 20 *South African Public Law* 155.

G Quinot “Juta’s Quarterly Review of South African Law Public Procurement” 2011 *Juta Quarterly Review* 1.

T Roux “Understanding Grootboom – A Response to Cass R Sunstein” (2002) 12 *Constitutional Forum* 41.

D Roithmayr “Access, Adequacy and Equality: The Constitutionality of School Fee Financing in Public Education” (2003) 19 *South African Journal on Human Rights* 382.

J Rooney “Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives” (2017) 33 *South African Journal on Human Rights* 406.

S Russell “Minimum State Obligations” in T Field “Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives” (2003) 137 *South African Law Journal* 1.

M Seleane “The right to education: Lessons from Grootboom” (2003) 7 *Law, Democracy and Development* 137.

C Simbo “The Right to Basic Education, the South African Constitution and the Juma Musjid case: An Unqualified Human Right and a Minimum Core Standard” (2013) 17 *Law Democracy and Development* 477.

C Simbo “A Hexagon Right: The Six Dimensions of the South African Right to Basic Education” (2018) *Obiter* 126.

A Skelton “How Far Will Courts go in Ensuring the Right to Basic Education?” (2012) 27 *South African Public Law* 392.

A Skelton “The Role of the Courts in Ensuring the Right to a Basic Education in a Democratic South Africa: A Critical Evaluation of the Recent Case Law” (2013) 46 *De Jure Law Journal* 1.

A Skelton “Leveraging Funds for School Infrastructure: The South African ‘Mud Schools’ Case Study” (2014) *University of Pretoria Institutional Repository* 1.

A Skelton & F Veriavaa “The Right to Basic Education: A Comparative Study of the United States, India and Brazil” (2019) 35 *South African Journal on Human Rights* 1.

N Spaul “Poverty and Privilege: Primary School Inequality in South Africa” (2013) 33 *International Journal of Educational Development* 436.

AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *Constitutional Court Review* 77.

F Veriava “Legal Mobilization for Education in the Time of Covid-19” (2021) 37 *South African Journal on Human Rights* 230.

F Veriava “The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism” (2016) 32 *South African Journal on Human Rights* 321.

VS Walker & KN Archung “The Segregated Schooling of Blacks in the Southern United States and South Africa” (2003) 47 *Comparative Education Review* 21.

S Yeshanew “Combining the Minimum Core and Reasonableness Models of Reviewing Socio-Economic Rights” (2008) 9 *Economic and Social Rights in South Africa* 8.

KG Young “The Minimum Core of Economic and Social Rights: A Concept in Search of Content” (2008) 33 *Yale Journal of International Law* 113.

Legislation and Policy

Constitution of the Republic of South Africa, 1996.

Employment of Educators Act 76 of 1998.

National Education Policy Act 27 of 1996.

National Health Act 61 of 2003.

South African Schools Act 84 of 1996.

Eastern Cape Provincial Learner Transport (ECPLT) Policy (2016).

Education White Paper 1: Education and Training (1995).

Education White Paper 2: Education and Training (1996).

Learning and Teaching Support Material (LTSM) Policy (2000).

The National Education Policy on Equitable Provision for Enabling Physical Teaching and Learning Environment (2010).

National Learner Transport (NLT) Policy (2015).

South African Schools Act, 1996 (84 of 1996): Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure.

South African Schools Act 84 of 1996: Amended National Norms and Standards for School Funding (GG 29179 of 2006).

World Declaration for All, 1990.

Newspaper Articles

“Resuming the National School Nutrition Programme is a Vital Test for Children’s Socio-Economic Rights” *Daily Maverick* 20 June 2020.

“Eastern Cape Judgment Reaffirms that Textbooks and Stationery are Essential to Basic Education” *Daily Maverick* 8 May 2022.

S Pongco “Frustrated parents and learners protest ongoing Mary Waters teacher shortages” *Grocott’s Mail* (25 April 2022).

V Sangotsha “Unpaid Scholar Transport Operators Prepare for Total Shutdown” *Daily Dispatch* (10 January 2023).

Reports

South African Human Rights Commission *Report on Poverty Traps and social Exclusion among Children in South Africa*. (Summary Report, 2014).

South African Human Rights Commission: *Report of the Public Hearing on the Right to Basic Education*.

South African Human Rights Commission Socio-Economic Rights Report Project 7: *Report on Economic and Social Rights*.

Theses

E I Carter *Access to Justice for Children with Disabilities in South Africa* (Doctoral thesis: UP, 2015).

MJ Merabe *The Core Content of Public School Learners’ Right to a Basic Education in terms of Section 29(1)(a) of the Constitution* (LLM thesis, UFS, 2015).

E L Phakathi *The Management of Learning and Teaching Support Materials in Public Schools: A Comparative Study* (M.ed thesis, UKZN, 2015).

A Strohwald *The Child’s Right to, in and Through Basic Education: An Analysis of South Africa’s International Obligations* (LLD Thesis, Stell, 2021).

F Veriava *The contribution of the courts and of civil society to the development of a transformative constitutionalist narrative for the right to basic education* (LLD thesis, UP, 2018).

Other

Foreword of the Department of Basic Education & Department of Transport 'National Learner Transport Policy' 2015 (GN 997/2015).

Report by the Special Rapporteur on the right to education E/CN.4/1999/49.