

BROKEN & UNEQUAL: THE SOUTH AFRICAN EDUCATION SYSTEM AND THE ATTAINMENT OF THE RIGHT TO BASIC EDUCATION THROUGH LITIGATION

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Abstract

In 1994, South Africa transitioned into a new democratic and constitutional society. Since then, the South African Constitution necessitates the transformation of the public basic education system. A new public education system aimed at addressing the malaise of the past. To this end, South African jurisprudence recognises the right to basic education as a right that must be (i) equally accessible to all and (ii) immediately realisable without delay. However, the new education system has not completely succeeded in eliminating the legacy of apartheid, and there are residual differences and polarisation on various grounds, such as race and/or class. Accordingly, this article concedes that a critical survey of South African jurisprudence on the realisation of the right to basic education reveals that there are problems in the delivery of the right to basic education in South Africa. This is particularly the case in relation to black and/or poor South African pupils in the public education system. As such, the article intends to show that litigation (or the threat thereto), plays a fundamental role in the realisation and fulfilment of the right to basic education in South Africa.

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‘Things have changed, and things have not changed in South Africa.’¹

1 Introduction

In this article, the authors address concerns on the fulfilment of the right to basic education in South Africa. In particular, their article investigates the origins of the discrepancies existent in the South African education system. To do this, the article will consider the South African education system in three different periods: pre-apartheid, apartheid, and post-apartheid. In addition, the article will compare the international standard, setting out the right to education as an immediately realisable right against the standard in the South African Constitution. The authors concede that the South African Constitution and jurisprudence are aligned with international standards, however, because of the various stakeholders involved in the implementation of the right to basic education, its implementation may be derailed. Finally, the article identifies public litigation as a possible solution to the latter problem.

2 History of education law and the impact of pre-democratic education systems

Dating back to colonial ages, the education of different racial groups in South Africa was separated along the lines of race.² From as early as 1905, White South Africans were introduced to formal and well-funded universal schooling processes whereas Africans and other people of colour were mainly educated in missionary schools and churches.³ However, these missionary schools and churches increasingly became inadequate, especially due to a lack of funds.⁴ After the Unification Act was signed in 1910 in exchange for state funds, the missionary schools started to adopt the state curriculum which ultimately led to the transfer of control of the black education system from missionary schools to the state when the Afrikaner Nationalist Party came into power in 1948.⁵

1 A van Blerk ‘Critical Legal Studies in South Africa’ (1996) 113 *South African Law Journal* 87.

2 For a five-tier exposition of this difference see JD Jansen ‘Curriculum as a political phenomenon: Historical reflections on Black South African Education’ (1990) 59(2) *The Journal of Negro Education* at 195-206, who outlines five different phases in the education system from 1658 to the apartheid era.

3 L Chisholm ‘Apartheid Education Legacies and new Directions in Post-Apartheid South Africa’ (2012) 8 *Storia delle donne* at 84-85.

4 As above.

5 As above. See also C Churr ‘A child’s right to a basic education: A comparative study’ unpublished LLD thesis, University of South Africa, 2012 at 87 <http://uir.unisa.ac.za/handle/10500/8592> (accessed 18 March 2021); see also S Hlatshwayo *Education and Independence – Education in South Africa 1658-1988* (2001) at 35.

Under the rule of the Nationalist Party, the Bantu Education Act⁶ was introduced and used to facilitate the continued under-funding and the poor quality of education for the African child.⁷ When the Act came into effect in 1953, it was mandated with two main objectives.⁸ Firstly, it was aimed at introducing a system of mass education for Africans. The obligation for the administration of education for Africans was taken away from the four provincial governments and placed under the control of the Native Affairs Department.⁹ Secondly, the Bantu Education Act was designed to deregulate African education in churches and missionaries which were, for a large part, responsible for educating Africans.¹⁰

In 1994, with the dawn of democracy, the government committed to ensuring the full realisation of the right to basic education to all persons in South Africa. As a result of the pre-democratic systems that were in place, 'the post-apartheid government inherited a deeply divided and highly unequal education system'.¹¹ To counter this, the government implemented new legal frameworks which desegregated schools and introduced procedures that would equalise the distribution of funds and educational expenditures across the education system.¹²

Although there have been some changes to the education system since 1994, the post-apartheid education system is still highly unequal.¹³ Spauld describes the education system as 'a tale of two systems'.¹⁴ Spauld makes a comparison between the poorest public schools and the most well-off schools and his investigation reveals that there is a general correlation between wealth and performance.¹⁵

According to the Trends in International Mathematics and Science Study (TIMSS) 2011 scores for the Senior Phase, the poorest of schools

6 Bantu Education Act 47 of 1953.

7 Churr (n 5) 107.

8 Churr (n 5) 108.

9 As above.

10 As above.

11 N Spauld 'Education in SA: A tale of two systems' *PoliticsWeb* 31 August 2012 <http://www.politicsweb.co.za/news-and-analysis/education-in-sa-a-tale-of-two-systems> (accessed 8 February 2021). Nic Spauld demonstrates that even with the attempt to significantly reduce the inequalities in racial spending in the education system in 1994, the amount of money invested in each white pupil was at least two and a half times higher than that invested in a black pupil in an urban area and five times larger than that of a black pupil in the most impoverished homelands.

12 Spauld (n 11).

13 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) (*Hoërskool Ermelo*) para 46.

14 Spauld (n 11). See L Arendse 'Beyond Rivonia: Transformative constitutionalism and the public education system' (2014) 29(1) *Southern African Public Law* at 160-174.

15 Spauld (n 11).

(quintile 1) scored 280 points. That is about 55 points below the national average score.

On the contrary, well-off schools (quintile 5) scored slightly above 440 points and the wealthiest schools (independent schools) scored 480 points.¹⁶ This predicament has not changed much in recent years. In 2020, the Department of Basic Education revealed the 2019 TIMSS results, which indicated that the achievement gap between fee-paying and non-fee-paying schools is 75 points for Grade 9 Mathematics.¹⁷ The same indicators apply for Sciences, with a gap of 107 points between fee-paying and non fee-paying schools.¹⁸

This comparison indicates that the equalisation in the distribution of funds in the education system has not resulted in the equalisation of outcomes. The quality of education in the poorest schools still ranks worst in the education system.¹⁹ More concerning is the fact that former Model C schools only account for approximately 10% of all public schools and that independent schools account for less than 5% of all schools in South Africa,²⁰ meaning that the greater majority of schools are poor public schools.

Veriava and Coomans accentuate that the legacy of the apartheid education system is manifested through the ‘minimum level of resources, lack of qualified [educators], high teacher-pupil ratios, lack of adequate libraries and laboratories as well as a shortage of classrooms at [poor public] schools’.²¹ The same cannot be said about most of the former Model C schools which are highly equipped with modern technologies, well-resourced libraries and laboratories, and well-qualified educators.²² This disparity is a result of the education policies of the apartheid regime.²³ In *Hoërskool Ermelo*, the Constitutional Court succinctly noted that:²⁴

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It

16 See Spuull (n 11), this study shows that wealth and good educational outputs go hand in hand.

17 Human Sciences Research Council ‘Highlights of South African Grade 5 and 9 Results in Mathematics and Science’ (2020) *Department of Basic Education* at 16 https://www.education.gov.za/Portals/0/Documents/Reports/TIMSS2019/TIMSS2019_Release%20Presentation_DBE_8Dec2020_final.pdf?ver=2020-12-08-123418-627 (accessed 12 February 2021).

18 Human Sciences Research Council (n 17) 40.

19 L Arendse ‘The South African Constitution’s empty promise of “radical transformation”: unequal access to quality education for black and/or poor learners in the public basic education system’ (2019) 23 *Law, Democracy and Development* at 100-147.

20 Chisholm (n 3) 81-103.

21 Arendse (n 14) 160.

22 F Veriava & APM Coomans ‘The right to education’ in D Brand and C Heyns (eds) *Socio-economic rights in South Africa* (2005) at 60.

23 Arendse (n 14) 160.

24 *Hoërskool Ermelo* (n 13) para 45.

authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. *Access to private or public education was no exception.* While much remedial work has been done since the advent of constitutional democracy, sadly, deep social disparities and resultant social inequity are still with us.

From this, it is clear that the apartheid government aimed to reduce Africans to unskilled citizens who can only perform menial jobs to ensure the entrenchment of White domination through the introduction of Bantu education.²⁵ On this note, it is unsurprising that this racist and paternalistic undertaking by the apartheid government sought to inculcate subservientness and marginalisation of the African masses.²⁶ In this regard, the education of African people is seen as the responsibility of White people.²⁷ Presently, the African community is still reeling from institutional Bantu education misconceptions that a White teacher is more superior to a Black teacher who possesses the same credentials and qualifications.²⁸ This assertion confirms that the inequalities created by Bantu education have extended beyond the educational sector and have infiltrated the workspace amongst others.

Accordingly, it remains important that we consider the measures implemented to curb these [persistent] inequalities. Recently, as a result of the coronavirus (COVID-19) pandemic, the Human Rights Watch conducted a study to assess the impact of the pandemic on the right to education. The report on this study concluded that the closure of schools due to the pandemic 'exacerbated previously existing inequalities, and that children who were already most at risk of being excluded from a quality education have been most affected'.²⁹

25 Churr (n 5) 109.

26 MA Gallo 'Bantu Education, and its Living Educational Socioeconomic Legacy in Apartheid and in Post-Apartheid South Africa' unpublished thesis, Fordham University, 2020 at 18. https://research.library.fordham.edu/international_senior/43 (accessed 19 April 2021).

27 As above.

28 Gallo (n 26) 11.

29 Human Rights Watch 'Impact of Covid-19 on Children's Education in Africa: Submission to The African Committee of Experts on the Rights and Welfare of the Child' 31 August-10 September 2020 https://www.hrw.org/sites/default/files/media_2020/08/Discussion%20Paper%20-%20Covid%20for%20ACERWC.pdf (accessed 12 February 2021).

3 The international framework regulating the right to basic education and its relationship to South Africa's Constitution

The South African Constitution is considered to be supportive of international law standards.³⁰ Section 39(1)(b) provides that the interpretation of the Bill of Rights *must* take international law into consideration.³¹ Conversely, various instruments, internationally, regionally, and domestically promote the right to education as a fundamental right that shall be both free and compulsory at primary level and that shall be progressively realisable at secondary and tertiary levels.³² These frameworks also assist in positioning the right to education in the context of human rights and further assist in the interpretation of legislation. In South Africa, the Constitution provides context to the right to basic and further education.³³

While the South African Constitution does not provide a definition for 'basic education' with the term not having achieved a definite meaning in South African jurisprudence, it is imperative to consider the fact that the South African Schools Act³⁴ provides us with a starting point in our continued effort to define the term 'basic education'. The Schools Act provides that education is compulsory from grade 1 to grade 9 and between the age of 7 and 15 depending on whichever comes first.³⁵ In its recent judgment of *Moko v Acting Principal of Malusi Secondary School and Others*,³⁶ the Constitutional Court held that given the historical context of the right to basic education in South Africa and the need to foster transformation, the right to basic education must not be narrowly interpreted so as to be limited to the age of 15 or grade 9. In effect, the Court went on to extend that the right to basic education culminates in grade 12.³⁷

30 D Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* at 311.

31 Constitution of the Republic of South Africa, 1996 (Constitution) sec 39(1)(b).

32 Universal Declaration on Human Rights, 1948 Art 26; International Covenant on Economic, Social and Cultural Rights, 1966 Art 13; Convention on the Rights of the Child, 1990 Art 28; African Convention on the Rights and Welfare of the Child, 1990 Art 11.

33 Constitution (n 31) sec 29.

34 South African Schools Act 108 of 1996 (School's Act).

35 Schools Act (n 34) sec 3(1) states 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'. See also C Simbo 'Defining the term basic education in the South African Constitution: An international law approach' (2012) 16 *Law, Democracy and Development* at 173.

36 (CCT 297/20) [2020] ZACC 30.

37 *Moko v Acting Principal of Malusi Secondary School and Others* (n 35) paras 31-32.

Mtwesi suggests that to better understand the content of the right to basic education, we ought to be directed by the Preamble of the Constitution, which sets out the purpose of the Constitution. It provides that the mission ahead is to:³⁸

Heal the division of the past and establish a society based on democratic values, social justice and fundamental rights ... [and] improve the quality of life of all citizens and free the potential of each person.

In *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others*, Nkabinde J held that the right to basic education under section 29(1)(a) of the Constitution is immediately realisable as it is not subject to internal qualifiers such as ‘progressive realisation’ or ‘within available resources’ which are otherwise contained in qualified socio-economic rights in the Bill of Rights.³⁹ Accordingly, this right may only be limited in accordance with the provisions highlighted in section 36 of the Constitution. Nonetheless, the same cannot be said about the right to further education in section 29(1)(b) as the state is obligated to ensure that the right is ‘progressively available and accessible’.⁴⁰

Similarly, Chenwi postulates that the right to basic education, including adult basic education, may be distinguished from other socio-economic rights in the Constitution.⁴¹ Chenwi argues that whereas other socio-economic rights such as ‘the rights of access to housing and health care services, and the rights to food, water, and social security are qualified to the extent that they are made subject to the adoption of “reasonable legislative and other measures”; “progressive realisation” and “within the state’s available resources”, the right to basic education, including adult basic education, is not subject to the same constraints’.⁴² The right is therefore only subject to the constraints set out in section 36 of the Constitution.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides comprehensive detail on the content of the

38 A Mtwesi ‘The Right to Basic Education’ (2013) *Helen Suzman Foundation Briefs* <https://hsf.org.za/publications/hsf-briefs/the-right-to-basic-education> (accessed 12 February 2021).

39 *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* 2011 (8) BCLR 761 (CC) (*Juma Masjid*) paras 36-38; A Skelton ‘How far will the courts go in ensuring the right to a basic education?’ (2012) 27(2) *Southern African Public Law* at 396.

40 *Juma Masjid* (n 39<XREF>) para 37; See Skelton (n 39<XREF>) who notes that this decision must be distinguished from that of *Ermelo* where the court used the words ‘progressive realisation’ in the context of the right to basic education in a pupil’s language of choice. She notes that the progressive realisation indicated therein is not about the right to basic education in general, but about the accessibility of education in the language of the learner’s choice.

41 L Chenwi ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ (2013) *De Jure* at 39.

42 As above.

right to education. This Convention is arguably the most important international instrument which confers the right to education on everyone. In January of 2015, after a long delay, South Africa finally ratified the ICESCR but made a declaration to the effect that:⁴³

the Government of the Republic of South Africa will give *progressive effect* to the right to education, as provided for in Article 13 (2)(a) and Article 14, *within* the framework of its National Education Policy and *available resources* (own emphasis).

This declaration is very concerning as it subjects the right to ‘primary’ education to progressive realisation and the availability of resources.⁴⁴ The provision, therefore, denies the immediate realisation of the right. Accordingly, the declaration goes against the interpretation of the right to basic education as defined in the *Juma Masjid* case where the court left no doubt that it does not subscribe to such a restrictive interpretation of the right to basic education, but rather supports an interpretation which makes the right realisable without delay.⁴⁵

4 Strategic litigation and the right to basic education

The Committee on Economic, Social and Cultural Rights in its General Comment no. 13 states that the realisation of the right to education is four-fold, based on the ‘4 A-scheme’ developed by Katarina Tomasevski, the United Nations Special Rapporteur on the Right to Education from 1998 to 2004. This scheme is comprised of four elements, namely Availability, Accessibility, Acceptability, and Adaptability.

Availability denotes the idea that operative educational institutions and programmes ought to be available in adequate numbers within the jurisdiction of a State Party.⁴⁶ Accessibility necessitates that educational institutions and programmes be accessible to every person, without discrimination of any kind.⁴⁷

43 Right to Education ‘South Africa Ratifies the International Covenant on Economic, Social and Cultural Rights’ 19 January 2015 <https://www.right-to-education.org/news/south-africa-ratifies-international-covenant-economic-social-and-cultural-rights> (accessed 19 March 2021).

44 This is concerning, primarily because the right to primary education envisaged in Article 13(2)(a) of the ICESCR forms part of the right to basic education in section 29(1) of the Constitution of the Republic of South Africa.

45 *Juma Masjid* (n 39).

46 CESCR General Comment 13: The right to education (Article 13) para 6(a).

47 General Comment 13 (n 45) para 6(b). See also A Skelton ‘The role of the courts in ensuring the right to a basic education in a democratic South Africa: A critical examination of recent education case law’ (2013) 46 (1) *De Jure Law Journal* 5 who discusses that ‘Accessibility’ has three overlapping dimensions: Non-discrimination, physical accessibility and economic accessibility.

Acceptability brings into play the issues surrounding the form and substance of education (the quality thereof), including curricula and teaching methods,⁴⁸ while Adaptability dictates that education must be flexible enough to adapt to the demands of changing societies and communities and must respond to the needs of pupils 'within their diverse social and cultural settings'.⁴⁹

Skelton argues that there are sufficient grounds to believe that there are challenges in the delivery of basic education in South Africa⁵⁰. She posits that litigation or the threat of litigation may assist in the realisation of the right to basic education.⁵¹ To clearly demonstrate this point, it is important to consider a few cases which reveal the role of litigation in the delivery of the right to basic education.

In *Centre for Child Law v Government of the Eastern Cape Province* several schools in the Eastern Cape had struggled to get the provincial department to attend to the challenges regarding infrastructure backlogs.⁵² The schools were in poor condition with issues including dilapidated mud buildings, a lack of running water and sanitation, and inadequate seats and desks for the number of attending pupils.⁵³ The Legal Resource Centre and the Centre for Child Law took up the matter on grounds of public interest.⁵⁴ Both the Minister and the provincial MEC for Education were joined in the matter as respondents. The matter was resolved with a Memorandum of Understanding which pledged that the Department would attend to the matters raised. In addition, the parties had agreed that should there be a material breach of the agreement, the parties can, after giving two weeks' notice, go back to court for an enforcement order to force compliance.⁵⁵ Skelton suggests that whilst litigation is often perceived as adversarial, it may lead to an appropriate exchange with the executive which, as a consequence, leads to improved access to the right to basic education.⁵⁶

In *Section27 v Minister of Education*,⁵⁷ the applicant sought a declaratory order that pronounced the Departments' failure to deliver textbooks to schools in Limpopo as an infringement on the

48 General Comment 13 (n 46) para 6(c).

49 General Comment 13 (n 46) para 6(d).

50 Skelton (n 47) 1-23.

51 Skelton (n 47) 2.

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

53 *Centre for Child Law v Government of the Eastern Cape Province* (n 51); Skelton (n 47) 7.

54 Constitution (n 31) sec 38.

55 See discussion on Skelton (n 47<XREF>) 7-8.

56 Skelton (n 47) 8; D Isaacs 'Realising the Right to Education in South Africa: Lessons from the United States of America' (2010) 2 *South African Journal on Human Rights* at 356 &374-379.

57 2013 (2) SA 40 (GNP).

right to basic education, equality and dignity. The applicant equally sought an order directing the Department to urgently make the textbooks available and to deliver them to said schools by a certain date. The court recognised and held that the right to basic education is immediately realisable and that textbooks are an essential part of the right. It further went on to express that the failure to deliver the necessary textbooks constituted a violation of the right to basic education which is indispensable to the holistic quest for transformation.⁵⁸

Although the term ‘transformative constitutionalism’ is not expressly mentioned in the Constitution, the transformative character of the Constitution can be implied from the text of certain provisions in the Constitution.⁵⁹ In *Minister of Finance v Van Heerden*, the Constitutional Court held that we ought to follow a substantive approach to equality as this approach is rooted in a ‘transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved’.⁶⁰ Similarly, in view of the inequalities in the education system, Arendse posits that transformative constitutionalism advances a ‘substantive approach to equality which acknowledges that there are levels and forms of social differentiation and systematic underprivilege that persist as a result of the racist policies of the previous regime’.⁶¹ Arendse argues that more focus should be placed on transforming the public education system and integrating it into a single system of education, where all learners are able to thrive under the same conditions, with the same quality of education.⁶² In order to show the persistent disparities in the education system in contemporary times, it is noted that schools across South Africa were shut down due to the COVID-19 pandemic in 2020. During this period, many learners in public schools were deprived of the right to education as the implementation of online learning is not feasible in most public schools.⁶³ Most of these public schools are former Black schools, thus affecting more people of colour, than their White counterparts.⁶⁴

58 See discussion by Skelton (n 47) 10.

59 See secs 7(2), 8(1), 9, and all provisions concerning socio-economic rights. See also P Langa ‘Transformative Constitutionalism’ (2006) *Prestige lecture delivered at Stellenbosch University* (9 October); D Moseneke ‘The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication’ (2002) 18 *South African Journal of Human Rights* at 309-315.

60 *Minister of Finance v Van Heerden* 2004 (6) SA 121(CC).

61 Arendse (n 14); *Minister of Finance v Van Heerden* (n 60) para 142.

62 Arendse (n 14).

63 Human Rights Watch (n 29).

64 As above.

5 The role of stakeholders in the realisation of the right to basic education

The South African Schools Act provides that representatives of parents, learners and educators must all have a say in a learner's right to basic education.⁶⁵ This is done through the School Governing Body (SGB),⁶⁶ which is empowered to consider issues on language policies, admission policies, religious policies, the school code of conduct, and other policies such as learner pregnancy policies.⁶⁷ However, when exercising its powers in policy making, the SGB is subject to making policies that are in line with the Constitution and the Schools Act.⁶⁸

The involvement of the SGB in the fulfilment of the right to basic education is an illustration of participatory democracy.⁶⁹ In fact, the Constitutional Court has cited SGBs as an illustration of 'grassroots democracy', because they permit people who are directly affected by the right to basic education to be involved in the fulfilment of the right.⁷⁰ As a result, SGBs are somewhat permitted to function with a considerable amount of independence from the Provincial Department of Education as they have their own legal status and capacity, separate from that of state departments.⁷¹

In *Ermelo*, the Constitutional Court accentuated that the SGB has powers to enact its own policies.⁷² However, these policies must comply with the norms and standards set out by the Constitution,⁷³ the Schools Act and any other provincial legislation,⁷⁴ with due regard to what is 'fair, practicable, and what enhances historical redress'.⁷⁵ The Court found that the Head of Department had no powers, based on the merits of the facts, to dissolve the SGB of its functions regarding the determination of a language policy, and handed them over to an interim committee.⁷⁶ This solidifies the inherent and independent powers of the SGB as regards a school's legislative or policy measures. As such, we must always be wary that because of this

65 Schools Act (n 34 <XREF>).

66 S Mansfield-Barry & L Stwayi 'School Governance' in F Veriava et al (eds) *Basic Education Rights Handbook – Education Rights in South Africa* (2017) at 80-81.

67 EM Serfontein & E de Waal 'The effectiveness of legal remedies in education: A school governing body perspective' (2013) *De Jure* at 51.

68 Mansfield-Barry & Stwayi (n 66) 78.

69 See Schools Act (n 33) sec 8. See also S Fredman 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' *Constitutional Court Review* at 174.

70 Mansfield-Barry & Stwayi (n 66) 78.

71 E Bray 'Autonomy in school education in South Africa: a legal perspective' (2000) *Autonomy in education* at 256.

72 *Hoërskool Ermelo* (n 13) para 59.

73 Constitution (n 31) sec 29(2).

74 *Hoërskool Ermelo* (n 13) para 59.

75 *Hoërskool Ermelo* (n 13) para 61.

76 As above.

position, the SGB possesses excessive⁷⁷ powers in the governance of schools, and in some instances, this power may be used (even unwittingly) to hinder the right to access education. Hence *in casu*, the Court cautioned against the SGB's decisions on the language policy which was not equitable nor justified.⁷⁸

In fact, in an effort to 'limit' the powers of the SGB, the Constitutional Court in its 2013 *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others*⁷⁹ case stated that the SGBs admission powers are subject to the intervention of the provincial education department in terms of the Schools Act, where reasonably necessary.⁸⁰ In view of the court's decisions in *Ermelo and Rivonia*, the Court held:⁸¹

[although in circumstances] where the Schools Act empowers a governing body to determine policy in relation to a particular aspect of school functioning, a head of department or other government functionary cannot simply override the policy adopted or act contrary to it even where the functionary is of the view that the policies offend the Schools Act or the Constitution ... this does not mean that the school governing body's powers are unfettered, that the relevant policy is immune to intervention, or that the policy inflexibly binds other decision-makers in all circumstances.

Therefore, although the SGB is responsible for the creation and adoption of policies that govern its schools, South African jurisprudence is clear in outlining that any policies adopted by the SGB, including a school's code of conduct, must conform with the Constitution of the Republic of South Africa.⁸² For example, in *Pillay*,⁸³ the facts demonstrate that if a school's code of conduct is in contradiction with a pupil's 'religious beliefs or cultural practices', the school is obligated, as per the Constitution, to take positive steps

77 The word 'excessive' is used not to mean that the powers of the SGB are unrestricted – but that the SGB possesses powers that are more than necessary, hence they may hinder the access to the right to basic education.

78 Similarly, in an attempt to redress the hinderances perpetuated by the SGB, the Constitutional Court in *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC) para 53, an appeal case dealing with an admission policy, held that the Head of Department had the power to admit a learner who had been refused admission to the school to give effect to the principle of the best interest of the learner. In effect, the Court found that the Supreme Court of Appeal erred in concluding that the Head of Department could only exercise the Regulation 13(1) power 'in accordance with the [school's admission] policy'.

79 2013 (6) SA 582 (CC).

80 *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (n 78) para 43.

81 *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* (n 78) para 49.

82 Constitution (n 31) sec 2.

83 *MEC for Education, KZN v Pillay* 2008 (1) SA 474 (CC).

to make reasonable accommodation for the pupil concerned instead of unjustly limiting the pupil's right to access to education.⁸⁴

More so, the case study on Pretoria Girls High School (PGHS),⁸⁵ demonstrates that it is imperative for all SGBs, when enacting rules, policies, or codes of conduct, to give due regard to the religious, cultural, and racial diversity of the school populations they serve, and only then may they 'develop rules – after proper consultation with these different groupings – that are inclusive, and which accommodate and reflect this diversity'.⁸⁶

To this end, any failure on the part of the SGB or the Department of Basic Education in ensuring that positive measures are taken to curb hindrances on the right to access basic and quality education may lead to public litigation or the threat thereof. In such cases, litigation or the threat to litigation serves as a tool to obligate the SGB or the Department to take measures necessary in ensuring that the right to education is realised.

Some scholars are concerned with the use of litigation to achieve education rights.⁸⁷ On the one hand, concerns are raised regarding the incapacity of the courts to effectively assess the amount of funds that the State ought to allocate to the achievement of the right to basic education.⁸⁸ On the other hand, it is argued that courts may be reluctant to make orders that effectively bind the State in cases where a multiplicity of issues are at stake as 'the court may not be completely appraised of all the competing demands on the public purse'. In response to these concerns, some scholars have indicated that the court should make use of information provided by public interest litigators such as *amicus curiae*. This will, in turn, make litigation (or the threat thereof) a proper engine in the delivery of the right to basic education.⁸⁹

84 As above. This was further affirmed by the High Court in *Organisasie vir Godsdiensste-Onderrig en Demokrasie v Laerskool Randhart and Others* 2017 (6) SA 129 (GJ) (OGOD) paras 89-90 where the court stated that 'neither the Constitution nor the Schools Act confers on a public school or SGB the right to adopt the ethos of one single religion to the exclusion of others'. See also *Antonie v Governing Body, Settlers High School* 2002 (4) SA 738 (C) as well as *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

85 The SGB of PGHS had enacted a policy (Rule 6.4) on hair, which required students to straighten their hair and in effect, banning afros, which is the natural way that Black people's hair grows.

86 Mansfield-Barry & Stwayi (n 66).

87 G Rosenberg *The Hollow Hope: Can Courts Bring About Social Justice?* (2008); M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008); A Nolan *Children's Socio-Economic Rights, Democracy and the Courts* (2011).

88 A Skelton 'Leveraging funds for school infrastructure: The South African Mud Schools Case Study' (2014) *International Journal of Educational Development* at 61-62.

89 F Veriava 'Basic Education Provisioning' in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017) at 220.

6 An assessment of the case law pertaining to provisioning for education

According to Veriava, education provisioning denotes the provision of numerous ‘educational inputs’ that are required to provide learners with quality education.⁹⁰ Veriava defines ‘educational inputs’ as the resources used to educate learners, including but not limited to textbooks;⁹¹ teachers;⁹² buildings and furniture or the appropriate infrastructure;⁹³ transport,⁹⁴ and stationary.⁹⁵ These inputs make up a ‘basket of entitlements’ with which the State is obligated to provide in order to facilitate the right to basic education’.⁹⁶ To date, many historically disadvantaged public schools in South Africa still suffer from poor quality education. This is because there is still a lack of educational inputs that must be provided by the State in facilitating the full and proper realisation of the right to basic education.⁹⁷ Accordingly, to curb the challenges faced by historically disadvantaged public schools, civil society organisations with an interest in the provisioning of the right to basic education, have for almost a decade now led campaigns for better quality education in historically disadvantaged public schools across the country, including, but not limited to litigating on the subject matter at hand.⁹⁸

In *Juma Musjid* the court confirmed that the State must always ensure the immediate realisation of the right to basic education by making available the necessary educational inputs that make the right to basic education fully realisable without delay.⁹⁹ With this in mind, in the case of *Minister of Basic Education and Others v Basic Education for All and Others*,¹⁰⁰ the Supreme Court of Appeal delivered a judgment relating to the incomplete delivery of textbooks to learners at certain schools in Limpopo.¹⁰¹ The court declared that every learner has the right to a basic education which includes the entitlement that every learner at a public school must be provided

90 As above.

91 N Stein ‘Textbooks’ in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017).

92 S Sephton ‘Post Provisioning’ in F Veriava et al (eds) *Basic Education Rights Handbook – Education Rights in South Africa* (2017).

93 L Dragga Basic ‘Infrastructure and Equipment’ in F Veriava et al (eds) *Basic Education Rights Handbook – Education Rights in South Africa* (2017).

94 S Joseph & J Carpenter ‘Scholar Transport’ in F Veriava et al (eds) *Basic Education Rights Handbook - Education Rights in South Africa* (2017).

95 Veriava (n 89) 220-221.

96 Veriava (n 89) 221.

97 As above.

98 See Skelton (n 47) 1-23; See also generally throughout F Veriava *Realising the Right to Basic Education: The Role of the Courts and Civil Society* (2019).

99 *Juma Musjid* (n 39).

100 2016 (4) SA 63 (SCA).

101 *Minister of Basic Education and Others v Basic Education for All and Others* (n 100).

with every prescribed textbook for their grade, prior to the commencement of the academic year.¹⁰²

In the *Madzodzo* decision regarding the provisioning of school furniture, the court held that the State's failure to provide 'adequate age - and grade-appropriate' furniture to learners at schools amounted to a violation of the right to basic education.¹⁰³ The court enunciates that the provision of school infrastructure is important to the subject of education provisioning as it facilitates the proper and full realisation of the right to basic education.¹⁰⁴ In the court's own words:¹⁰⁵

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 educational 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 undermines the right to basic education.* (own emphasis).

Moreover, in the case of *Tripartite Steering Committee and Another v Minister of Basic Education and Others*, the court found that the right to basic education 'included a direct entitlement right to be provided with transport to and from school at government expense, for those learners who live a distance from school and who cannot afford the cost of transport'.¹⁰⁶ Plaskett J noted Kollapen J, stating that:¹⁰⁷

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 State expense in appropriate cases. 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 s 7(2) of the Constitution, to promote and fulfil the right to basic education.

The content of the right to basic education was said to be inclusive of the right to sufficient human resources (teachers) to effect teaching and learning as noted in the case of *Centre for Child Law & Others v Minister of Basic Education & Others*.¹⁰⁸ In that case, the Legal

102 *Minister of Basic Education and Others v Basic Education for All and Others* (n 100) paras 52-53.

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

104 As above.

105 *Madzodzo* (n 103) para 20.

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

107 *Tripartite Steering Committee v Minister of Basic Education* (n 106) paras 18-19.

108 2013(3) SA 183 (ECG).

Resource Centre argued that the Department of Education is under an obligation not only to fill teaching posts but also to provide schools with non-teaching personnel such as cleaners and administrators to effectively realise the right to basic education. This was included in the settlement agreement between the parties which was confirmed through an order by the court.¹⁰⁹ In other words, the court has, somewhat less explicitly, suggested that teaching and non-teaching posts in schools are further entitlements in respect of the right to basic education.¹¹⁰

From an assessment of the case law discussed above, Veriava notes that numerous principles have come to the fore, including that the right to basic education is a right that is immediately realisable as a first-generation right, and that it requires the State to take all measures necessary to ensure its full realisation.¹¹¹ Moreover, the courts have seemingly adopted a content-based approach to the interpretation of the right to basic education in order to elaborate on the components that make up the 'basket of entitlements' due to all beneficiaries of the right thereof.¹¹² However, no clear or objective test for determining the content of the right thereof is apparent from the jurisprudence of the courts.¹¹³

The courts have also held that the State cannot hide behind budgetary constraints when it has failed to fulfil the right to basic education as there is an implicit duty on it to budget appropriately to meet the demands necessitated by the right.¹¹⁴ Accordingly, these judgments indicate the courts' endorsement of a substantive approach to socio-economic rights adjudication.¹¹⁵ Skelton argues that the 'lack of planning, inability to carry out plans and the lack of resources are not, legally speaking, permissible defences to the violation of a child's right to a basic education'.¹¹⁶ Therefore, the State is not merely under a negative obligation to not interfere with the realisation and enjoyment of the right to basic education, but has

109 As above.

110 F Veriava 'The Limpopo textbook litigation: a case study into the possibilities of a transformative constitutionalism' (2016) 32 (2) *South African Journal on Human Rights* at 16.

111 As above.

112 As above.

113 See discussion by F Veriava & A Skelton 'The right to basic education: a comparative study of the United States, India and Brazil' (2019) *South African Journal on Human Rights*. For a discussion of the absence of a clear test, see Veriava (n 110) 321 & 336.

114 *Minister of Basic Education and Others v Basic Education for All and Others* (n 100) para 43. See discussion on Veriava (n 89) 232.

115 Veriava (n 110).

116 As above.

positive obligations to ensure that the right is indeed achieved by all.¹¹⁷ This view is supported by the interpretation of section 3 of the Schools Act which notes that the State must ensure that there are sufficient placements for all learners who fall within the compulsory phase of the education system to receive a quality education.¹¹⁸ Furthermore, in terms of section 5A of the Schools Act, the Minister of Basic Education is duty-bound to provide norms and standards for school infrastructure, school-learner admission capacity, and amongst others, the provision of learning and teaching support material, including textbooks and workbooks.¹¹⁹

7 Conclusion

‘[T]oday, while schools may not discriminate on racial grounds and must admit learners of all [racial groups], huge inequalities still exist between schools that [are] historically “White” and schools that are historically “Black”’.¹²⁰ Nonetheless, some progress has been made in the fight to give effect to the immediate realisation of the right to basic education by numerous civil society organisations through litigation and the threat of litigation. The Constitutional Court in *Juma Musjid* stated that the right to basic education as enunciated in section 29 of the Constitution is immediately realisable, without any internal limitations such as ‘progressive realisation’ and ‘within available resources.’ This interpretation strengthens the objective of transformation as ‘the right to education remains amongst the centrepieces of transformative constitutionalism’.¹²¹

117 *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC).

118 Veriava (n 89) 226.

119 As above.

120 See L Nevondwe & M Matotoka ‘Promoting and protecting the right of access to basic education in South Africa’ (2013) 57 *The Thinker: Education* at 9.

121 Nevondwe & Matotoka (n 120) 12.