

# SCHOOL OF COURT: THE DEVELOPMENT OF THE RIGHT TO BASIC EDUCATION THROUGH LITIGATION IN SOUTH AFRICAN COURTS

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## Abstract

*Education is a means to an end and a ‘good’ in-and-of-itself; but not everyone has equal access to it, if at all. South Africa’s history and extant legacy of colonial-apartheid has left in its wake structural barriers which continue to deny access to basic education for many, both young and old. Although there have been admirable reform efforts to engender system-wide improvements to access to and the quality of basic education through governance and the provisioning of resources, there are glaring shortfalls in making basic education ‘immediately realisable’ to ensure our constitutional vision of a transformed South Africa. Over time, non-governmental efforts aimed at realising basic education have turned to the courts to compel the state to make more equitable and qualitatively better provisions. In the historical and present circumstantial and structural status quo of basic education in South Africa, this paper explores the efficacy of such litigation efforts as well as litigation as a device to improve governance and access to basic education in our country.*

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## 1 Introduction

‘Education is the most powerful weapon which you can use to change the world ... The power of education extends beyond the development of skills we need for economic success. It can contribute to nation-building and reconciliation ... A good head and a good heart are always a formidable combination.’ These words by Nelson Mandela show the importance of education in uplifting our society and in the holistic development of people.

The obstacle South Africa confronts is the lack of access to quality education by all, and the issue we address is whether litigation is an effective means to achieve such access in the absence of political will and given structural barriers.

We first chart the South African disparate colonial-apartheid history and outline its enduring impact on education across the country. Second, we detail what the right to education means as enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution), international law, and as interpreted by the courts. Thereafter, we discuss the role-players in the education sector, their powers, functions, and responsibilities, and how (often litigious) disputes arise despite a framework designed to ensure mutual cooperation. Last, by analysing case law, we illustrate the largely inadequate provisioning of education resources by the state, resulting in continued, if not aggravated, deprivation of the right to education; and examine the arguably successful litigation efforts by civil society organisations to ensure that the right to basic education is realised.

## 2 Essential context: The history of education and the historical development of education law to present

Colonialism, and indeed colonial apartheid, exacted its exigencies through structures of domination. Economically, the otherisation was profit-driven, with the exploitation of indigenous peoples as ‘cheap labour’ proving a lucrative enterprise;<sup>1</sup> spatially, the ideological bent of racial superiority produced legislation which sustained mass relocations of people in segregation efforts;<sup>2</sup> and politically, people

1 J Brickhill & Y van Leeve ‘Transformative Constitutionalism – Guiding light or empty slogan?’ in A Price and M Bishop (eds) *A transformative Justice: Essays in Honour of Pius Langa* (2015) at 143, 144 & 149.

2 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 121-124.

of colour were methodically disenfranchised and denied equal agency in governmental affairs.<sup>3</sup>

Racialised education systems underlie all of the aforementioned policies of conquest and exploitation, preserving white supremacy throughout South Africa's colonial history by deliberately denying people of colour empowerment through learning.<sup>4</sup> This dates back to 1652 with the arrival of Dutch settlers at the Cape.<sup>5</sup> South Africa has, since then, rolled out five different systems of education, from religio-settler instruction to the apartheid Bantu education policy.<sup>6</sup>

The Bantu education policy and its precursors imposed a separate and unequal system of education, the aftermath of which remains extant today.<sup>7</sup> According to race, children were segregated, provided with separate facilities, and imparted with starkly different skills and knowledge.<sup>8</sup> It is no surprise, given the racial *animus* driving these policy choices, that the black child suffered: taught qualitatively poorer curricula; socialised and impressed upon (arguably indoctrinated) only to be menial or industrial labourers; relegated to learn in under-developed or dilapidated infrastructure; and impeded by inherent structural and physical barriers to accessing higher education.<sup>9</sup>

The legacies of such a pervasive and unequal history have resulted in an inequitable present.<sup>10</sup> In fact, the post-1994 South African

3 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC) paras 106-111; *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) para 64; *August v Electoral Commission* 1999 (3) SA 1 (CC) para 17. There are, of course, a multitude of other ways in which the white supremacy predominant in systems, cultures, and knowledge bases under colonial apartheid tentacularly embedded itself into the fabric of our society, allowing it to survive into the democratic era.

4 *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) (*Hoërskool Ermelo*) para 46. See also J Jansen 'Curriculum as a political phenomenon: Historical reflections on black South African education' (1990) 59(2) *The Journal of Negro Education* at 199.

5 L Chisholm 'Apartheid education legacies and new directions in post-apartheid South Africa' (2012) 8 *Storia del donne* at 84.

6 Jansen (n 4) 196-200.

7 Chisholm (n 5) 86. The regions affected by the disparate resource allocation still suffer the lowest quality education and worst performances outcomes.

8 Jansen (n 4) 196-200.

9 Jansen (n 4) 196-200; Nevondwe & Matotoka 'Promoting and protecting the right of access to basic education in South Africa' (2013) 57 *The Thinker* at 9; A Skelton ONR 420 (Education Law) (University of Pretoria) Lecture Notes (2020) (Skelton Lecture Notes).

10 Chisholm (n 5) 84. See also *Hoërskool Ermelo* (n 4) paras 45-46 (Moseneke J (as he then was) refers to these legacies as 'scars'). This is despite fundamental normative shifts in the corresponding legal and educational topography, namely the advent of the constitutional dispensation in 1994. For example, the democratic era has witnessed the introduction of the South African Schools Act 84 of 1996 (Schools Act), the National Education Policy Act 27 of 1996, and additional norms and standards. See also S Woolman & B Fleisch *The Constitution in the Class room: Law and education in South Africa 1994-2008* (2009) at 1; and

education system can be seen as a vector of inequality instead of a transformative cure.<sup>11</sup> schooling resources are generally sequestered in the same institutions which were well supported prior to 1994 and have the capital to self-sustain since schools that cater for the middle class and racially diverse students (e.g. former ‘Model C’ schools), are well-resourced compared to the under-resourced previously disadvantaged schools which serve primarily black students;<sup>12</sup> whilst poorer schools continue to be the site of learning for the vast majority of black learners who remain trapped by locality and circumstance borne of historical subjugation, largely unable to access anything but under-provisioned education.<sup>13</sup> Girls are also at higher risk in the education system owing to issues such as teen pregnancy and gender-based violence resulting in poor performance or in them dropping out from school.<sup>14</sup>

Measured domestically or internationally,<sup>15</sup> poor academic performance and the correlative sub-standard quality of education are prevalent.<sup>16</sup> There is empirical evidence of a correlation between poverty and under-resourcing of schools and depressed pass rates.<sup>17</sup> Thus, the South African education system remains plagued by apartheid and colonialism, with access to and quality of education still varying along racial and gendered lines.<sup>18</sup> For this, Spaul has

10 De Vos ‘Basic education: Democratic South Africa has failed the children’ 3 December 2015 <https://www.dailymaverick.co.za/opinionista/2015-12-03-basic-education-democratic-south-africa-has-failed-the-children/> (accessed 27 September 2020).

11 Education efforts in South Africa also suffer from provisioning inadequacy, namely; insufficient infrastructure maintenance and consequent collapse, general (and particularly human) resource deficits, as well as a lack of skills and understanding on the part of educators. See below.

12 N Spaul ‘Schooling in South Africa: how low-quality education becomes a poverty trap’ in De Lannoy et al (eds) *South African child gauge* (2015) at 37-38; 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 education system’ (2019) 3 *Law, Democracy and Development* at 3.

13 Arendse (n 12) 2-5; Spaul (n 12) at 37-39.

14 Chisholm (n 5) 98.

15 N Spaul ‘Education in SA: A tale of two systems’ 31 August 2012 <https://www.politicsweb.co.za/opinion/education-in-sa-a-tale-of-two-systems> (accessed 26 September 2020).

16 Chisholm (n 5) 98; 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 law’ (2013) 46 *De Jure* at 4.

17 Spaul (n 15).

18 Arendse (n 12) 2-5; *Hoërskool Ermelo* (n 4) para 46. Gendered educational barriers (to success) take the form of, *inter alia*: patriarchal familial bars on enrolment in schools that are cultural and normative (prohibitions), as well as merely practical (i.e. traditional gender roles dictate how children are socialised and raised, and so less than an enforced prohibition, girls are often expected to remain at home to attend to the household and family needs instead of being raised to expect to be educated); gender-based violence; and teenage pregnancy.

even coined the phrase ‘the tale of two systems’.<sup>19</sup>

### 3 The right to basic education: Legal framework

#### 3.1 South African domestic, international, and regional law frameworks

South Africa is a party to several binding and non-binding (‘soft’ law) international instruments that provide for the right to education.<sup>20</sup>

The United Nations Declaration of Human Rights (UNDHR) makes universally free the rights to ‘elementary’ and ‘fundamental’ education, and further stipulates that elementary education is ‘compulsory’.<sup>21</sup> Following in the UNDHR’s footsteps is the International Covenant on Economic, Social and Cultural Rights (ICESCR) which traces the right to education in Articles 13 and 14.<sup>22</sup> According to the United Nations Committee on Economic, Social and Cultural Rights (CESCR), Article 13 constitutes the ‘most wide-ranging and comprehensive article on the right to education in international human rights law’ and can therefore be considered a mainstay for universal rights to education.<sup>23</sup> Article 13(2) grades access and availability to the right to education similar to the UNDHR:<sup>24</sup> free (accessible) and immediately available education at the primary stage; progressively accessible and available education at the

See also D Bhana ‘Girls are not free – In and out of the South African school’ (2012) 32 *International Journal of Educational Development* at 352-358; and Chisholm (n 5) 98.

19 Spaul (n 15).

20 C Simbo ‘Defining the term basic education in the South African Constitution: An international law approach’ 2012 *Law Democracy and Development* at 173; Nevondwe & Matotoka (n 9) 9. ‘Soft’ law consists of ‘guidelines, declarations and recommendations by international bodies. These are not ‘binding’ laws, but they are persuasive guides to interpreting and applying rights’. See also C McConnachie et al ‘The Constitution and the right to a basic education’ in F Veriava et al *Basic Education Rights Handbook* (2017) at 18-22.

21 Universal Declaration of Human Rights, 1948, 217A(III) Art 26(1). Art 26(2) provides that ‘Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms’. See also L Arendse ‘The obligation to provide free basic education in South Africa: An international law perspective’ (2011) 14(6) *PER/PELJ* at 98-99.

22 International Covenant on Economic, Social and Cultural Rights (03 January 1976) UN Treaty Series (993) 3 (ICESCR). South Africa ratified the ICESCR in January 2015. See McConnachie et al (n 20) 18.

23 UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 13: The Right to Education (Article 13) (CESCR General Comment No. 13). It is contended that the ICESCR follows in the UNDHR’s footsteps because it is, for the most part at Article 13, a reiteration of the terms of the UNDHR. Both provide for the right to education and both grade the accessibility and availability of the right against the stage and importance of the education.

24 Arendse (n 12) 98-99.

secondary stage; and qualified progressively available tertiary education.<sup>25</sup>

The United Nations Convention on the Rights of the Child (UNCRC) requires the progressive realisation of education, on the basis of equal opportunity, as follows:<sup>26</sup> primary education as compulsory and free;<sup>27</sup> available and accessible secondary education that is free or coupled with financial assistance where needed;<sup>28</sup> and accessible higher education per capacity.<sup>29</sup> Thus, whilst the UNCRC is arguably more regressive than the ICESCR in subjecting the right to education at all stages to the valve of ‘progressive realisation’,<sup>30</sup> the UNCRC claws back access and availability through other terms such as the recognisance and provisioning for indigent learners.

Africa’s regional version of the UNCRC is the African Charter on the Rights and Welfare of the Child (ACRWC) which commits all state parties, through Article 11, to the provisioning of the right to education in similar detail to the UNCRC.<sup>31</sup> The ACRWC singles out women, disadvantaged children, and the need to improve school attendance and reduce drop-out rates.<sup>32</sup>

The above international law is relevant to South African domestic law because: (1) customary international law binds the Republic on the international plane and influences domestic agenda setting, including policy and legislative arrangements; (2) customary international law is law in the Republic (save to the degree inconsistent with the Constitution or an Act of Parliament),<sup>33</sup> and domestic legislation must be interpreted consistently with

25 ICESCR (n 22) Art 13(2); R Damina & E Durojaye ‘Four years following South Africa’s declaration upon the ratification of the ICESCR and jurisprudence on the right to basic education: A step in the right direction?’ (2019) 23 *Law Democracy and Development* at 270; Skelton Lecture Notes (n 9).

26 See Arendse (n 12) 98-99.

27 United Nations Convention on the Rights of the Child (20 November 1989) UN Treaty Series (1577) 3 (UNCRC) (Ratified by South Africa: 16 June 1995) Art 28(1)(a).

28 UNCRC (n 27) Art 28(1)(b).

29 UNCRC (n 27) Art 28(1)(c).

30 This as opposed to the standard of ‘immediate realisation’ applicable to primary education under the ICESCR.

31 African Charter on the Rights and Welfare of the Child (29 November 1999) OAU Doc. CAB/LEG/24.9/49 (ACRWC) (Ratified by South Africa: 2000) Art 11. See also Centre for Human Rights ‘South Africa’s reporting to AU body is an opportunity to advance children’s rights: Statement on South Africa’s second report submitted under the African Charter on the Rights and Welfare of the Child’ 19 November 2020 <https://www.chr.up.ac.za/latest-news/83-news-chr/1102-south-africa-s-reporting-to-au-body-is-an-opportunity-to-advance-children-s-rights-statement-on-south-africa-s-second-report-submitted-under-the-african-charter-on-the-rights-and-welfare-of-the-child> (accessed 27 September 2020).

32 ACRWC (n 31) Art 11(3)(d).

33 Constitution of the Republic of South Africa, 1996 (Constitution) sec 232; J Dugard *International law: A South African perspective* (2016) at 49-68.

international law where reasonably possible;<sup>34</sup> and (3) international law must be considered when courts interpret rights in the Bill of Rights.<sup>35</sup> International law relating to education, therefore, has a discernible role in the South African domestic dispensation.<sup>36</sup>

### 3.2 South African constitutional law framework

The South African Constitution entrenches the right to education at section 29<sup>37</sup> with this right encompassing the following: the right to education, including basic and further education;<sup>38</sup> the right of instruction at public establishments (in one's choice of an official South African language insofar as reasonably practicable);<sup>39</sup> the right to establish and operate independent education institutions subject to certain constitutional conditions;<sup>40</sup> and adult basic education.<sup>41</sup>

The right to education under section 29 has negative and positive dimensions.<sup>42</sup> The right requires fulfilment by the state (i.e. generates positive obligations for provisioning) and has been held to be 'immediately realisable' as opposed to being an obligation that the state can discharge progressively over time.<sup>43</sup> Therefore, the state must encourage and provide for education through the implementation of an education system that reacts to the needs of our country.<sup>44</sup> The upshot is that government is required to meet the

34 Constitution (n 33) sec 233; Dugard (n 33) 62; McConnachie et al (n 20) 18.

35 Constitution (n 33) sec 39(1)(b); Dugard (n 33) 62-63; McConnachie et al (n 20) 18; Arendse (n 21) 100. In *S v Makwanyane*, the Constitutional Court interpreted 'international law' (in the context of the interim Constitution) broadly to include both directly binding and non-binding sources. See *S v Makwanyane* 1995 (3) SA 391 (CC) paras 35 & 413-414.

36 The international educational frameworks examined above reflect the '4 As' of education namely, availability, accessibility, acceptability, and adaptability. See CESCR General Comment No 13 (n 23); and F Coomans 'Identifying the key elements of the right to education: A focus on its core content' (2007) *CRIN* at 3.

37 S Woolman & M Bishop 'Education' in S Woolman et al (eds) *Constitutional Law of South Africa* (2013) Ch 57.

38 Constitution (n 33) sec 29(1); Woolman & Bishop (n 37) Ch 57; Arendse (n 21) 97-98.

39 See *AfriForum and Another v University of the Free State* 2018 (2) SA 185 (CC); *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* 2020 (1) SA 368 (CC); and Woolman & Bishop (n 37) Ch 8, 42, 46, 56, 57 & 59-76.

40 Woolman & Bishop (n 37) Ch 57 & 76-95.

41 Constitution (n 33) sec 29(1).

42 In the negative sense, this means that the state and its agents must not interfere with or deprive the existing enjoyment of, access to, or exercises of the right; and in the positive sense, the state must construct, develop, and supply. See Woolman & Bishop (n 37) Ch 57.9-32; Arendse (n 21) 110-111; and Nevondwe & Matotoka (n 9) 13.

43 T Boezaart *Child law in South Africa* (2017) at 519; A Skelton 'How far will the courts go in ensuring the right to a basic education?' (2012) 27 *SAPL* at 403; T Mtsweni 'The fourth industrial revolution: a case for educational transformation' (2020) 2 *PSLR* at 321.

44 L Nevondwe & M Matotoka 'Promoting and protecting the right of access to basic education in South Africa' (2013) 57 *The Thinker* at 9.

operational and maintenance costs in provisioning for and facilitating (at least basic) education in South Africa.<sup>45</sup>

### 3.3 Transformative constitutionalism

‘Transformative constitutionalism’ is an elusive concept used to describe both ends and means.<sup>46</sup> Under the conceptualisation, the South African constitution is a project not yet complete – that will possibly never be complete – in an effort to continuously improve the normative and material conditions in the South African society to ensure substantive equality.<sup>47</sup> It has been conceived as a bridge to nowhere in particular, but with an eternal goal in sight.<sup>48</sup>

The imperative of ‘transformation’ involves revisioning, which includes restructuring the South African state in all its instantiations;<sup>49</sup> the re-distribution of resources in restitutive efforts to settle our pre-1994 moral and material ‘debts’;<sup>50</sup> and the re-vamping of paradigms, attitudes, and institutional cultures in politics and the law.<sup>51</sup> It enjoins the legislative, executive, and judicial branches to act in service of aspirations of a more just, equal, and free existence for each South African.<sup>52</sup>

Substantive equality is an essential ingredient in transformative constitutionalism, especially in consideration of socio-economic rights.<sup>53</sup> Substantive equality is the equality of outcomes and conditions, as it recognises that there are patterns of systemic advantage and disadvantage based on, amongst other things, class, gender, and race.<sup>54</sup> It is obvious that one of the primary means of achieving transformation is through generating material conditions

45 Woolman & Bishop (n 37) Ch 57.9-32; Arendse (n 21) 110-111; Nevondwe & Matotoka (n 9) 13.

46 P Langa ‘Transformative constitutionalism’ (2006) 3 *Stellenbosch Law Review* at 351; Brickhill & van Leeve (n 1) 142.

47 Langa (n 46) 352. See also C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* at 253.

48 Langa (n 46) 352-354; Brickhill & van Leeve (n 1) 152.

49 Langa (n 46) 352; Brickhill & van Leeve (n 1) 143.

50 And, arguably, any debts arising post-1994. See Albertyn (n 21) 253; C Albertyn & B Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ (1998) *SAJHR* at 249; and Brickhill & van Leeve (n 1) 152.

51 K Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* at 150, 151, 155 & 166. For example, in legal and institutional culture, there needs to be a shift from an approach of ‘authority’ (merely asserting power) to ‘justification’ (the exercise of public power must be justified; not eschewing accountability; exercising power in an open, transparent, responsive, and responsible manner; and evidencing this through substantiating with reasons and engaging in dialectical dialogue). See also Langa (n 46) 353; Brickhill & van Leeve (n 1) 152; and E Mureinik ‘A bridge to where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* at 32.

52 Langa (n 46) 358.

53 Langa (n 46) 352.

54 *Minister of Finance v van Heerden* 2004 6 SA 121 (CC) para 142; Langa (n 48) fn 9.



for the development of individuals and communities.<sup>55</sup> Implicit in this, is the erasure of the ring-fencing that has guarded, and continues to guard, colonial shareholding in the South African enterprise. These fences (or fault-lines) can be normative and doctrinal,<sup>56</sup> or physical and structural, or both.<sup>57</sup>

As a postulation of constitutional law, transformative constitutionalism operates as a normative device in policy-making and legislating, in the implementation and enforcement of prescripts and – whether in ‘lawfare’ and public interest litigation or ‘ordinary’ case – in adjudication by the courts of law.<sup>58</sup> The courts have become an epicentre of policy-change in South Africa under the 1996 Constitution, with Davis referring to the veiled political battles which play out in the courtrooms as ‘lawfare’.<sup>59</sup> There are, however, debates raging about whether the judiciary is going too far in its interventions and, equally, whether it goes far enough.

Under transformative constitutionalism, judges ought to adopt a substantive approach to deciding cases. Moseneke has coined this ‘transformative adjudication’.<sup>60</sup> In adopting this approach, judges must acknowledge their personal preferences and prejudices, disable them, and prevent them from entering the decisional equation of case adjudication.<sup>61</sup> The courts must acknowledge the conditions in which the law subsists and must be context-sensitive. The courts are obliged to take account of the policy and moral contents and implications of law and make human decisions to solve human problems,<sup>62</sup> therein eschewing formalist techniques.<sup>63</sup>

Transformative adjudication, as the name suggests, is a mode of interpretation in pursuance of transformative constitutionalism.<sup>64</sup> Its aim is to have judges appreciate the scope, nature, and implications of injustices of the past in present cases and to have those judges

55 Albertyn (n 47) 257.

56 Albertyn (n 47) 254.

57 Kriegler J in *Fedsure* captures the physical and spatial discrepancies pertaining to life in post-apartheid South Africa where a lack of development or maintenance of infrastructure, economic marginalisation, and overcrowding were and remain symptoms of underlying, more systemic oppression by a malicious, and now arguably indifferent, state. See *Fedsure* (n 2); and Albertyn (n 47) 254-255.

58 Langa (n 46) 352; D Moseneke ‘The fourth Bram Fischer memorial lecture: Transformative adjudication’ (2002) *SAHRJ* at 309.

59 D Davis & M le Roux *Lawfare - Judging Politics in South Africa* (2019).

60 See, generally, Moseneke (n 58).

61 Langa (n 46) 353.

62 Moseneke (n 58) 310, 316 & 317; Langa (n 46) 353; Brickhill & van Leeve (n 1) 152 & 164.

63 Brickhill & van Leeve (n 1) 161; Moseneke (n 58) 317.

64 Moseneke (n 58) 310, 316 & 317.

advance interpretations that are accommodative and remedial;<sup>65</sup> and which serve to redress historical injustices.<sup>66</sup>

Judges in South Africa have always been ‘social engineers’,<sup>67</sup> but now more so than ever under transformative constitutionalism and the injunction to promote the Bill of Rights.<sup>68</sup>

### 3.4 Realising education in South Africa ‘immediately’ under section 29(1)

Unlike other socio-economic rights entrenched in the South African Constitution,<sup>69</sup> the right to basic education, including basic adult education, contained in section 29(1), is not subject to ‘progressive realisation’.<sup>70</sup>

This position was confirmed by the Constitutional Court in *Juma Masjid*.<sup>71</sup> *Juma Masjid* was the first judgment in which the Constitutional Court gave a comprehensible interpretation of section 29(1)(a).<sup>72</sup> Despite the fact that, constitutionally, education in South

65 See, generally, Moseneke (n 58); and Langa (n 46).

66 Moseneke (n 58) 318. An example of an area where extensive and honest redress is sorely needed, is basic education. See also Brickhill & van Leeve (n 1) 151.

67 C Hoexter ‘Judicial policy revisited: Transformative adjudication in administrative law’ (2008) 24 *SAJHR* at 283.

68 Section 39(1) of the Constitution, (n 33), demands, *inter alia*, that courts ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’; section 39(2) of the Constitution demands that courts, tribunals and forums ‘must promote the spirit, purport and objects of the Bill of Rights’. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 35.

69 These rights generally have internal limitations for the finite nature and scarcity of resources and afford government a margin of appreciation – as recognised by the Court in *Bato Star* (n 68) para 35. A typical formula is: ‘which the state, through reasonable measures, must make progressively available and accessible’. See Constitution (n 33) sec 29(1)(b). See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 32; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 34; *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) paras 52–56; Brickhill & van Leeve (n 1) 150; and Mtsweni (n 43) 333.

70 Mtsweni (n 43) 333.

71 *Governing Body of Juma Masjid Primary School v Essay NO and Others (Centre for Child Law and another as amici curiae)* 2011 (8) BCLR 761 (CC) (*Juma Masjid*) para 37 (‘the right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”’. This right is therefore distinct from the right to ‘further education’ provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education progressively available and accessible’). The state must, therefore, take reasonable and justiciable measures to ensure ready access and availability of the right.

72 *Juma Masjid* (n 71) para 37.

Africa is not compulsory,<sup>73</sup> nor necessarily an entitlement to be availed universally for free,<sup>74</sup> the right must be made accessible.

In *Juma Masjid*, Nkabinde J made it clear that the right to basic education is immediately realisable. This is because the right has no internal qualifications subjecting it to being ‘progressively realised’ within ‘available resources’ or subject to ‘legislative measures’.<sup>75</sup> Thus, aside from a law of general application passing muster under section 36(1) limiting the right and buying government time and latitude in resource allocation and planning, the right is ‘not one to be made available gradually to people over time’.<sup>76</sup>

## 4 Policy-making and governance disputes

### 4.1 The structure of the South African education system: Governance outline

South Africa has adopted a democratic or subsidiary approach to education, whereby general, normative frameworks are developed at a national level with day-to-day (executive and administrative) school governance and management devolved to the provincial administrations and schools themselves.<sup>77</sup> The tiered, subsidiary structure is designed to decentralise authority to allow those affected

73 The Schools Act, (n 10), however makes it compulsory. See section 3(1) which renders school attendance compulsory from age seven to fifteen or up until Grade 9. Mtsweni criticises the quantitative approach under the Schools Act and *Juma Masjid*, arguing that it impedes ensuring quality education. See Mtsweni (n 43) 327; Chisholm (n 5) 92; and A Skelton ‘The role of courts in ensuring the right to a basic education in a democratic South Africa: A critical evaluation of recent education case law’ (2013) 46(1) *De Jure* at 1.

74 Levying fees is arguably not an unjustifiable limitation on the right to education provided that the fees charged are reasonable (i.e., proportionate) and, consequently and in general, that learners are not excluded owing to their financial status. See Woolman & Bishop (n <XREF>) Ch 57.24-29; and I Oosthuizen & J Beckman ‘A history of educational law in South Africa: An introductory treatment’ (1998) 3 *Australia & New Zealand Journal of Law & Education* at 67.

75 Woolman & Bishop (n 37) Ch 57.24-29.

76 Woolman & Bishop (n 37) Ch 57.10; Mtsweni (n 43) 333 (‘The right is not contingent on the availability of resources for its realization. Whether the state claims that it does not have enough resources to fulfill its constitutional obligation or not, it is not released from its duties as imposed by this right’). It is concerning that the government made a declaration that it would only realise education within the framework of national education policies and available resources in what appears to be an attempt by government to avoid its responsibilities under section 29 of the Constitution and Article 13 of the ICESCR. Having regard for the holding in *Juma Masjid*, it is unlikely that the government’s position, derogating from the right, would survive scrutiny if challenged. See also McConnachie (n 20) 18.

77 The structure and functioning of the relationships are crystallised in the Schools Act. Generally speaking, the Minister of Basic Education prescribes standards nationally; the MEC’s and HoD’s in the provincial spheres broadly implement those standards by developing policy and devising arrangements within their provinces; School Governing Bodies (SGB’s) make school policies and exercise oversight; and

by decisions to have more meaningful participation in decision-making themselves or through their proximate representatives,<sup>78</sup> providing for increased ‘grassroots’ and ‘democratic’ participation and,<sup>79</sup> hopefully, enhanced decision-making.<sup>80</sup>

Inherent to the structure is a tension between the tiers of decision-making and governance.<sup>81</sup> School Governing Bodies (SGBs) possess wide policy powers,<sup>82</sup> but provincial and national governments set standards and make arrangements (effectively, make policy) for education whereas SGBs are autonomous and responsible entities, governing the school and tending to its affairs.<sup>83</sup> Despite the autonomous status of SGBs, they remain organs of state and are not free of executive control.<sup>84</sup> The most immediate control mechanism placed on SGBs are HoDs, who are empowered to go as far as to intervene in policy matters and even withdraw the functions of SGBs.<sup>85</sup> Whilst there is often latitude for each authority to exercise their respective powers within this tiered framework without conflict, the inherent subject matter and functional co-extensiveness of their roles do result in disputes arising from time to time.<sup>86</sup>

#### 4.2 Structure of the South African education system: Disputes in the courts

The Constitutional Court’s decision in *Hoërskool Ermelo* concerned the constitutional right to be taught in an official language of one’s choice,<sup>87</sup> and the power of the Head of Department of Education (HoD) to withdraw the function of a school governing body to

77 School Principals are charged with day-to-day operational matters. See S Mansfield-Barry & L Stwayi ‘School Governance’ in F Veriava et al (eds) *Basic Education Rights Handbook* (2017) at 76.

10 Mansfield-Barry & Stwayi (n 77) 80; Woolman & Fleisch (n 10) 5; E Serfontein & E de Waal ‘The effectiveness of legal remedies in education: A school governing body perspective’ (2013) 46 *De Jure* at 45. See also M Murcott & W van der Westhuizen ‘The ebb and flow of the application of the principle of subsidiarity – critical reflections of *Motau* and *My Vote Counts*’ (2015) 7 *Constitutional Court Review* at 43.

79 *Hoërskool Ermelo* (n 4) 57.

80 SGB’s consist of: The School Principal (*ex officio*), educators, non-educators, parents, and learners.

81 *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) (*Welkom*) para 49; *Hoërskool Ermelo* (n 4) para 56.

82 School Governing Bodies (SGB’s) have extensive internal prescriptive powers – compared by the Constitutional Court to mini-legislatures – in that they are competent to make policies on, *inter alia*, admission, school discipline, language, culture, religion, schools fees, and pregnancy. See also *Welkom* (n 81) para 63; and Mansfield-Barry and Stwayi (n 77) 78.

83 *Welkom* (n 81) para 63; Mansfield-Barry & Stwayi (n 77) 78.

84 *Hoërskool Ermelo* (n 4) paras 77-78 & 81; *Welkom* (n 81) para 143.

85 Mansfield-Barry & Stwayi (n 77) 78.

86 Serfontein & de Waal (n 78) 54 & 57.

87 Constitution (n 33) sec 29(2). Disclaimer: A version of this summary (of *Hoërskool Ermelo*) was authored and submitted by Nicholas Herd to AfricanLII as work

determine the school's language policy.<sup>88</sup> English-medium schools in the region of Ermelo were full, whilst Hoërskool Ermelo had the physical capacity to accommodate more learners.<sup>89</sup> Following the Hoërskool Ermelo Governing Body's refusal to amend its language policy to provide for teaching in both Afrikaans and English in order to accommodate non-Afrikaans speaking learners in need, the HoD withdrew the Governing Body's function to determine the school's language policy.<sup>90</sup> Through the appointment of an interim committee, the HoD caused Hoërskool Ermelo's language policy to be amended to provide for teaching in both Afrikaans and English, thereby allowing the enrolment of the non-Afrikaans speaking learners.<sup>91</sup>

The Court ruled that whilst the state (under the Schools Act) grants the authority to SGBs to determine the language policies of public schools, the state continues to carry obligations under section 29(2) of the Constitution, namely the obligation to ensure effective access to teaching in the language of choice.<sup>92</sup> SGBs are entrusted with a public resource (the school and its assets) which must be managed not only in the interests of current learners, but also in the interests of the community and in light of the values of the Constitution.<sup>93</sup> Measures taken by SGBs and the state must be aligned to what is reasonably achievable and responsive to the need for historical redress.<sup>94</sup>

In order for the state to fulfil its obligations under section 29(2) of the Constitution, it must be able to intervene where SGBs exercise their power unreasonably and at odds with the constitutional promises to receive basic education and for learners to be taught in a language of their choice.<sup>95</sup> However, the Court found that the HoD's decisions to withdraw the Governing Body's function to determine the school language policy and appoint the interim committee were technically invalid because the decisions were taken contrary to the prerequisites and procedural fairness requirements under the Schools Act.<sup>96</sup> Thus, the Court struck a balance between competing considerations: SGB autonomy, oversight and intervention by government, and fundamentally, the accrued and outstanding rights of learners to basic education. On outcomes, the following can be

product. The summary is intended to be hosted on a mobile application for Members of Parliament (RSA).

88 Schools Act (n 10) sec 22.

89 *Hoërskool Ermelo* (n 4) paras 7-11.

90 *Hoërskool Ermelo* (n 4) para 21.

91 *Hoërskool Ermelo* (n 4) paras 21-26.

92 *Hoërskool Ermelo* (n 4) paras 43 and 101.

93 *Hoërskool Ermelo* (n 4) para 80.

94 *Hoërskool Ermelo* (n 4) para 81.

95 *Hoërskool Ermelo* (n 4) para 68.

96 *Hoërskool Ermelo* (n 4) paras 83-92. The sections in the Schools Act and approach of the Court are sensitive to the political devolution power and autonomy of SGBs as outlined above.

distilled from the case: SGBs are not free from state intervention, the state must intervene to safeguard rights, and the interests of learners placed in precarious positions are paramount.

In *Rivonia Primary School*, the Constitutional Court determined that whilst SGBs may not unfairly discriminate through admission policies, admission policies are flexible instruments to be devised by SGBs (which includes a determination of school capacity), subject to ultimate control over admissions being exercised by the HoD.<sup>97</sup> The Court also treated and applied the obligation to co-operate and resolve disputes extra-curially, and approach the courts as a last resort.<sup>98</sup> The difficulty in *Rivonia Primary School* was the broader inequality faced in schooling. The school, a former Model C school, declined to admit a Grade 1 learner, citing excess capacity despite, comparatively, 25% of schools nationwide admitting learners in excess of capacity.<sup>99</sup> From this broader view, Arendse criticises the judgment as overly textual and formalistic, failing to take account of the true situation of the school in the broader educational context.<sup>100</sup>

In *FEDSAS*,<sup>101</sup> the Constitutional Court was approached with challenges to regulations issued by the Gauteng MEC for Education.<sup>102</sup> The Court held that the regulations barring the free access to information by prospective schools served the legitimate purpose of preventing them from unfairly discriminating against prospective learners, and were thus valid.<sup>103</sup> In keeping with *Rivonia Primary School*, the Court reiterated that SGBs are not ultimate power-holders, and accordingly lack absolute control over the determination of admission policies. To this end, the Court reiterated the oversight and intervention powers reposing in the HoD which serve as a check and balance on self-serving decision-making by SGBs.<sup>104</sup> Lastly, and although the Court did not traverse in detail the challenge to the default feeder zones of 5km radius because it instead invalidated the zone-setting decision on procedural grounds,<sup>105</sup> the Court did

97 *MEC for Education in Gauteng Province and Others v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC) (*Rivonia Primary School*) para 53.

98 *Rivonia Primary School* (n 97) paras 69-78.

99 L Arendse 'Beyond Rivonia: transformative constitutionalism and the public education system' (2014) 29 *Southern African Public Law* at 159.

100 Arendse (n 99)168.

101 *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC) (*FEDSAS*).

102 The first challenge was with regards to Regulation 3(7) which barred prospective schools from seeking confidential records of learners from previous (current) schools. The second related to rules made by the MEC under Regulation 4(2) which established default feeder zones of 5km radius from the prospective school, requiring priority be accorded to learners within the 5km zone. Lastly, the third challenge regarded Regulations 5(8) and 8 which, respectively, empowered the district head to place learners unplaced by the end of admission periods and to declare the capacities of schools across the district.

103 *FEDSAS* (n 101) paras 30-33.

104 *FEDSAS* (n 101) paras 40-48.

105 *FEDSAS* (n 101) para 39.

acknowledge that the contention that the 5km zones had the effect of entrenching the apartheid geography and locking students out of schools on racial lines had merit.<sup>106</sup>

In *Welkom*,<sup>107</sup> Khampepe J (Moseneke DCJ and van der Westhuizen J concurring) dismissed the appeal, finding that the HoD's decision to direct the school principals to re-admit learners who had been excluded under school pregnancy policies (for falling pregnant) was unlawful;<sup>108</sup> but simultaneously ordered that the policies be revised for a *prima facie* want of constitutionality, in that the exclusion of learners for pregnancy for periods of one year facially violated their rights to 'human dignity, to freedom from unfair discrimination, and to receive a basic education'.<sup>109</sup> As a corollary, Khampepe J held that although SGBs have a role akin to a mini legislative authority, they cannot devise exclusionary pregnancy policies.<sup>110</sup> Khampepe J again reiterated the duty to co-operate incumbent upon role players in the education sector.<sup>111</sup> Froneman J and Skweyiya J wrote separately (also joined by Moseneke DCJ and van der Westhuizen J) to emphasise the need to place the best interests of learners at the forefront of educational decision-making, especially in the application of policies;<sup>112</sup> and that redress and interventions to achieve such decisional objectives, if interim or otherwise, must be taken through co-operation.<sup>113</sup> Zondo J held,<sup>114</sup> in dissent, that the exclusions under the policies were unlawful in that they amounted to suspensions or expulsions under the Schools Act, and accordingly, the HoD was obliged to intervene to ameliorate the injury caused by the policy application.<sup>115</sup>

The following principles or guidelines can be distilled from the above: (1) education authorities have an unequivocal obligation to meaningfully engage and resolve disputes in terms of a duty to co-

106 *FEDSAS* (n 101) para 38.

107 *Welkom* (n 81); M Bishop & J Brickhill 'Constitutional Law' (2013) 3 *Juta Quarterly Review Constitutional Law* at 1. The Court split three ways with no majority, although the appeal was dismissed in that the order secured a majority of five to four.

108 This was because, although the HoD had supervisory authority, the HoD had to exercise its powers in terms of the Schools Act.

109 Bishop & Brickhill (n 107). The revision was ordered to be in consultation with the HoD. The order was also arguably in line with ACRWC which requires, at Art 11(6), that States 'shall take appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue their education on the basis of their individual ability'. Translation: children who become pregnant should not be excluded on account of their pregnancy and their education should be able to resume as soon as possible after giving birth.

110 Bishop & Brickhill (n 107).

111 Bishop & Brickhill (n 107).

112 Bishop & Brickhill (n 107).

113 Bishop & Brickhill (n 107).

114 Bishop & Brickhill (n 107). Zondo J was joined by Mogoeng CJ, Jafta J, and Nkabinde J.

115 Bishop & Brickhill (n 107).

operate and consult before resorting to the courts for recourse; (2) the authorities within the education system – namely, the Minister, MECs, HoDs, SGBs, and school principals – occupy mutually adjunctive positions, and do not carry out their functions in isolation; (3) whilst SGBs serve as mini-legislatures within their respective governance settings, their powers are subject to procedurally fair and reasonable intervention by the relevant state officials under the Schools Act and in terms of the State’s duties at constitutional law; constitutional constraints, namely non-infringement of the Bill of Rights through direct or indirect exclusion and unfair discrimination racial or other grounds; and, lastly, (4) in taking decisions, the best interests of learners must be prioritised within the broader educational context encompassing history, geography, resource allocation, and access amongst other things.

Unfortunately, the authorities in education governance will likely continue to approach courts in instances where the power-sharing co-operative built into the Schools Act fails to resolve tensions produced by power struggles. It is hoped that the courts, unlike the arguably narrow and restricted decisionism displayed in *Rivonia Primary School*, will instead appreciate their legitimate role in the separation of powers under transformative constitutionalism and seek to remedy historical injustices in contemporary cases.<sup>116</sup>

## 5 Case law examination: Provisioning for education

There is an overt need for redress within the South African educational sector: former Model C school outputs are markedly better than poverty-stricken, disadvantaged schools,<sup>117</sup> and there is, as noted above, a strong, deleterious relationship between low performance and the disadvantage factor.<sup>118</sup> Disadvantage can be ascribed to:<sup>119</sup> the extant history of apartheid’s formalised inequality and subjugation in education,<sup>120</sup> as well as subsequent inadequate maintenance and construction of infrastructure, a lack of transport, non-delivery of learning material, human resource deficits, etc; and absent or abdicated management, oversight, and long-term planning from government at all levels.<sup>121</sup>

116 Arendse (n 99) 163; Moseneke (n 58) 314; Mtsweni (n 43) 327.

117 Spaul (n 15).

118 Spaul (n 15).

119 F Veriava ‘Basic education provisioning’ in F Veriava et al *Basic Education Rights Handbook* (2017) at 220; Spaul (n 15).

120 *Juma Masjid* (n 71) para 42.

121 F Veriava ‘The Limpopo textbook litigation – A case study into the possibilities of a transformative constitutionalism’ (2016) 32 *SAJHR* at 336.



Education is an empowering right with transformative potential – the potential to lift individuals and entire communities out of abject poverty and into the economy.<sup>122</sup> However, education is only empowering when accessible. Infrastructure, textbooks, and other baseline resources form the threshold for access to education.<sup>123</sup> In many ways, accessing education is similar to a water well – it is only good for as much water as one can draw out of it; if the well is too far to reach, runs dry, is not maintained, or is not dug at all, it is inadequate.<sup>124</sup>

Persistent inadequacy in the provisioning for basic education, despite the right to basic education being immediately realisable under the Constitution, has led to interventions by civil society becoming more common, if not the motive force for provisioning in many instances.<sup>125</sup> So too have the courts had to fashion remedies to address violations of the right to basic education at the coalface of the separation of powers.<sup>126</sup>

In *Minister of Basic Education v Basic Education for All (BEFA)*, the Supreme Court of Appeal (SCA) confirmed important aspects of the right to education relating to provisioning:<sup>127</sup> (1) textbooks prescribed for learners are a guarantee under section 29(1) of the Constitution, and as a corollary, the government is duty-bound to provide them before the commencement of the academic year concerned,<sup>128</sup> (2) and that delivery to some, but not others, fails the standard inherent in the duty to provide.<sup>129</sup> Whilst the SCA maintained comity with the Constitutional Court (in *Juma Masjid*) by rejecting budgetary constraint defences and maintaining that the right is immediately realisable,<sup>130</sup> and whereas the SCA effectively endorsed a substantive approach to adjudicating education provisioning cases,<sup>131</sup> according to Veriava,<sup>132</sup> it critically failed to devise an objective test for determining the content of the right.<sup>133</sup>

122 *Juma Masjid* (n 71) para 41; CESCR General Comment No 13 (n 23) para 1; Mtsweni (n 43) 323 & 325.

123 *Juma Masjid* (n 71) para 43; F Veriava ONR 420 (Education Law) (University of Pretoria) Lecture Notes on Educational Provisioning (2020) (Veriava Lecture Notes); Mtsweni (n 43) 331.

124 See A Skelton 'Leveraging funds for school infrastructure: The South African 'mud schools' (2014) *International Journal of Educational Development* at 39 on how the state of schools often reflects the socio-economic situation of learners and the community.

125 Veriava (n 119) 321-322.

126 Veriava (n 119) 321-322; Mtsweni (n 43) 334-338.

127 2016 (1) All SA 369 (SCA) (*BEFA*) para 8-11.

128 Veriava (n 119) 322.

129 *BEFA* (n 127) paras 50-52.

130 *BEFA* (n 127) paras 36-37.

131 This is because the Court assessed the impact and results of the incomplete delivery of textbooks rather than the government's policies on the matter.

132 Veriava (n 119) 322.

133 As above.

In *Madzozo* the government's systemic failure to provide desks and chairs for Eastern Cape schools was an issue.<sup>134</sup> The High Court applied the standard that government must take all reasonable measures to provide for the right.<sup>135</sup> The Court determined that the constitutional right to basic education is a right to 'a range of educational resources',<sup>136</sup> and that the lack of sufficient and appropriate desks and chairs violates this right.<sup>137</sup> The Court, therefore, rejected the reasonableness approach argued by the government, dismissed the budgetary constraints arguments raised in defence, and applied the immediately realisation principle, requiring the government to proactively budget and deliver the desks and chairs within a 90 day period.<sup>138</sup> Subsequent failures to comply with the Court's order directing delivery within 90 days eventually resulted in a settlement (made an order of court), the establishment of a task team, and regular ministerial reporting on the terms of a structural order.<sup>139</sup>

In *Tripartite*, the Eastern Cape High Court had to determine whether the right to basic education entitles learners who would not be able to attend school owing to prohibitive distance and cost factors to free transport.<sup>140</sup> The Court held that the right does include such entitlement as it would otherwise be meaningless if learners were unable to be present at and receive their education at school.<sup>141</sup> The Court ordered the government to provide such transport and required reporting on progress in adopting a policy to this effect.

Educators can also be considered 'provisions' encompassed by the right to basic education.<sup>142</sup> The issue of educator position or 'post provisioning' was central in *Centre for Child Law v Minister of Basic Education*, and subsequent enforcement litigation.<sup>143</sup> Post provisioning entails a process in which a provincial department of education declares the amount of government-paid teaching posts that will be allocated to a public school on an annual basis.<sup>144</sup> After the Provincial Department of Education failed to declare its post provisioning, the Centre for Child Law and seven SGBs sought an order

134 *Madzozo v Minister of Basic Education* 2014 (3) SA 183 (ECG).

135 Veriava (n 121) 21.

136 As above. Resources such as schools, classrooms, teachers, teaching materials, and appropriate facilities for learners.

137 Veriava (n 119) 322.

138 *Madzozo* (n 134) paras 17 & 40.

139 Veriava (n 121) 21.

140 *Tripartite Steering Committee v Minister of Basic Education* 2015 5 SA 107 (ECG) (*Tripartite*) para 2.

141 *Tripartite* (n 140) para 17.

142 S Sephton 'Post provisioning' in F Veriava et al *Basic Education Rights Handbook* (2017) at 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.

143 *Centre for Child Law v Minister of Basic Education* 2013(3) SA 183 (ECG) para 2.

144 Sephton (n 142) 249.

compelling the government to declare and implement non-teacher and teacher posts.<sup>145</sup> As a result of these cases, 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 education by keeping posts filled.<sup>146</sup> The High Court also established that ancillary support staff needed to be appointed to fulfil the right to basic education.<sup>147</sup> The government, however, did not comply with the settlement agreement nor did it reimburse the schools for the payment of the staff's salaries who were meant to be paid by the government.<sup>148</sup> Eventually, the government's assets were attached due to non-payment, and this punitive order compelled the government to reimburse the schools.<sup>149</sup>

In *Linkside I*, to pre-empt Departmental non-compliance which plagued the litigation in *Centre for Child Law v Minister of Basic Education*,<sup>150</sup> an order was sought (and granted) deeming appointments to have been made 'if the department failed to appoint recommended teachers to the posts after a specified period of time'.<sup>151</sup> The Court in *Linkside I* even permitted the attachment of Ministerial and MEC assets for the recovery debt arising from the department failing to 'reimburse the schools in compliance with the order'.<sup>152</sup> The unpaid salaries of teachers amounted to R28 million.<sup>153</sup> In *Linkside II*, the Court held that the government's 'ongoing failure' to appoint teachers was an infringement of the right to education,<sup>154</sup> thereby confirming the *Linkside I* position.<sup>155</sup> In this second case, additional schools opted-in to the class action and the Court ordered that a claim's administrator be appointed to ensure the reimbursement of R81 million in outstanding salaries to the 90 schools that joined in the class action with the same deeming clause.<sup>156</sup> Ultimately, almost all of the terms of the order were complied with, namely that all the named teachers were appointed to the vacancies.<sup>157</sup> Sephton observes that the *Linkside I* and *II* strategies,

145 As above.

146 *Centre for Child Law v Minister of Basic Education* (n 143) para 32; Sephton (n 142) 256.

147 *Centre for Child Law v Minister of Basic Education* (n 143) para 35; Sephton (n 142) 256.

148 Veriava Lecture Notes (n 123).

149 Veriava Lecture Notes (n 123).

150 Sephton (n 142) 257.

151 As above.

152 Sephton (n 142) 257. Sephton notes that 'this technique was successful in forcing the department to reimburse the schools'.

153 *Linkside v Minister of Basic and Others* (3844/2013) 2015 ZAECGHC unreported.

154 Veriava (n 119) 336.

155 Sephton (n 142) 257.

156 *Linkside* (n 153) para 1.

157 Sephton (n 142) 257.

with pre-emptive safeguards and deterrents built-in, were successful in achieving the filling of vacant posts.<sup>158</sup>

Equal Education initiated proceedings to compel the government to upgrade two schools in the Eastern Cape and to also oblige the Minister of Basic Education to finalise and publish regulations of norms and standards relating to infrastructure.<sup>159</sup> The case was settled, and norms duly promulgated. However, Equal Education again approached the High Court challenging those norms following the promulgation of norms: the High Court in *Equal Education v Minister of Basic Education* declared a sub-regulation incorporating a ‘loophole’ (making compliance with the norms and standards ‘subject to the resources and co-operation of other government agencies’) unconstitutional in light of government’s obligation to make education, including adequate school infrastructure as a crucial element thereof, immediately available.<sup>160</sup>

The Court in *Komape* found the government’s torpor in mustering resources for safe sanitation facilities at schools unconstitutional. In this case, the lack of such facilities resulted in the young Michael Komape’s death after he fell into a school pit toilet and suffocated.<sup>161</sup>

In 2020, the High Court in *Equal Education v Minister of Basic Department of Education* ordered the Department to resume the National School Nutrition Programme and feed millions of learners despite the COVID-19 pandemic, finding that the Minister and MEC were under constitutional and statutory obligations to do so.<sup>162</sup> The Court determined that: (1) school nutrition and education are unqualified rights; and (2) school nutrition was a self-standing right that interfaced with the right to education in that it was ancillary and supplementary in ensuring learning ability.

The line of cases summarised and commented on above make several things clear. First, the courts have begun to detail the content of the right to education both on the facts of the cases post *hoc* on review, and in the abstract. Concomitantly, the courts are growing more willing to tie the government to duties measured by objective standards determined with reference to access to the right to basic education and what is *sine qua non* of such ‘access’ in the subjective

158 As above. However, the shortfalls are the lack of inclusivity of poorer and under-resourced schools to the class action.

159 Veriava Lecture Notes (n 123).

160 *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) para 59; Section27 ‘Media Statement: Department of Basic Education argument dismissed in Norms and Standards case’ 19 July 2018 <https://section27.org.za/2018/07/media-statement-department-of-basic-education-argument-dismissed-in-norms-and-standards-case/> (accessed 28 September 2020).

161 *Komape v Minister of Basic Education* unreported case number [2018] ZALMPPHC 109 of 23 April 2018 paras 25, 55 & 63.

162 *Equal Education v Minister of Basic of Education* 2020 (4) All SA 102 (GP) para 103.

context and in general. Third, the courts (at least in the Eastern Cape) are prepared to hand down pre-emptive supervisory orders given that the government will not neglect its obligations to ensure continuity of provisioning and fairness to respective parties who would be injured by government torpor, ineptitude, or negligence. Fourth, the courts are willing to take a commanding role in enforcing the right to basic education in the face of departmental frustration of the right; this through the issuing of detailed structural orders and assuming supervisory roles despite the traditional conceptualisation of the doctrine of separation of powers dictating otherwise. This could be an overt trend in favour of a transformative adjudicative approach that places focus on the material conditions surrounding the case, on eliminating barriers to exercising the right, and on redress.<sup>163</sup> Last, the content of the right to basic education encompasses both classroom implements, equipment, and learning material, as well as necessary infrastructure and support to enable classroom learning for individual learners – extending the scope of the right beyond the four corners of the classroom.<sup>164</sup>

Reaching settlement agreements by incorporating structural interdicts requiring reporting by government, or winning them in court, and monitoring them thereafter for implementation and compliance has, and continues to be, an effective strategy in ensuring the provisioning for education post-litigation.<sup>165</sup>

Again, the Court, in this case, contributes to the delineation of the content of the right to basic education, both in and outside the classroom, and has thus continued the trajectory of a line of lower court cases adopting a substantive and objective approach to adjudicating the right to education by establishing the circumstances under and standards against which obligations (and their content) activate.<sup>166</sup>

## 6 Conclusion

The right to basic education imposes a duty on government to deliver the right to the doorstep of learners. This right was confirmed to be immediately realisable and is not subject to progressive realisation within available resources like other socio-economic rights.<sup>167</sup> Despite the immediate realisation principle, government has shown a lack of urgency in delivering education, often relying on the

163 See Mtsweni (n 43) 334-338.

164 See Skelton (n 124) 2.

165 G Marcus & S Budlender 'An evaluation of strategic public interest litigation in South Africa' (2008) *Atlantic Philanthropies Report* at 92; Skelton (n 124) 3.

166 See Veriava (n 121) 21; F Veriava & A Skelton 'The right to basic education: a comparative study of the United States, India and Brazil' (2019) 35 *SAJHR* at 1.

167 *Juma Masjid* (n 71) para 37.

progressive realisation principle.<sup>168</sup> The delivery is not a reality for many who go without the education they need to eke out a living.

Resort, therefore, is made to the courts to rectify what government will not – or cannot do. NGOs, public interest groups, and others now litigate on behalf of the indigent to secure their right to education – a right to other rights.

And the posture of the courts, too, appears to be shifting from a purely review-type approach typical of South Africa's socio-economic rights jurisprudence to a sensitive, context, and content-based approach to section 29(1)(a) adjudication. The courts are finding that the right encompasses support systems, mechanisms, materials, facilities, and personnel, whether within or beyond the classroom, necessary to ensure that learners are ultimately placed in a position of safety, are capacitated, and reach the classroom in order to access and benefit from the right. Additionally, the courts have issued innovative orders such as deeming clauses, supervisory orders, and structural interdicts to oversee the progress of government and to hold it accountable.<sup>169</sup>

It is patent that litigation has been and will, for the foreseeable future, continue to be a powerful, and unfortunately necessary, tool to achieve access to education in South Africa.

168 Arendse (n 99) 173.

169 Skelton (n 124) 62.