

**BASIC EDUCATION JURISPRUDENCE: COURTS' DEVELOPMENT
OF THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA**

by

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Abstract

Over the last decade, courts have experienced a string of litigation on the right to basic education. Central to this litigation is to effect access to basic education for all learners, particularly those in remote villages, forgotten townships, and formerly whites-only schools. A significant number of judgements from the High Courts, the Supreme Court of Appeal and the Constitutional Court have addressed this right by highlighting what ought to be the obligations of the government in respect of basic education access and provisioning. Two streams of basic education litigation regarding public schools in South Africa have emerged. In this paper, I focus on several judgements from these streams and analyse the courts' interpretation of the right to basic education and approach to inserting substantive entitlements into this right. Thereafter, I draw on scholarly work to briefly make proposals in respect of effective remedies and a substantive approach to basic education right. The paper concludes that the courts' jurisprudence on the right to basic education has played significant role in interpreting this right and attempting to ensure it is realisable. However, their substantive approach to the right and the employment of meaningful engagement as a remedy in certain circumstances can both be further developed to improve the realisation of basic education for all and its effective governance.

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BASIC EDUCATION JURISPRUDENCE: COURTS' DEVELOPMENT OF THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA.

I. INTRODUCTION

Over the last decade, courts have experienced a string of litigation on the right to basic education. Central to this litigation is to effect access to basic education for all learners, particularly those in remote villages, forgotten townships, and formerly whites-only schools. A significant number of judgements from the High Courts, the Supreme Court of Appeal and the Constitutional Court have addressed this right by highlighting what ought to be the obligations of the government in respect of basic education access and provisioning. Two streams of basic education litigation regarding public schools in South Africa have emerged. The first relates to the contestation over who bears the right to formulate schools' policy, and the second is concerned with what physical entitlements or inputs are required to make up the right. The judgements in both streams have aligned with the concept of transformative constitutionalism, where judges endorse a substantive approach in deciding basic education matters.¹ There is common acceptance that the right to basic education requires a higher protection than other socio-economic rights, and can only be limited through rigorous qualification as per the *s* 36 provision. It calls for immediate realisation and direct enforcement, and is not subject to internal qualifications of 'reasonable measures', 'within available resources' or 'progressive legislation'. One reason for this is that the drafters of the Constitution of the Republic of South Africa, 1996 ("the *Constitution*") had South Africa's history of education in minds, and afforded at least basic education with higher protection because it fosters equality. Overall, this signifies the transformative nature of constitution.²

This is not to say that the right to basic education, alone, can bring about an equal society. It cannot. However, at least, basic quality education advances individual freedom, dignity and independence, and may assist in realising socio-economic rights.³ The realisation and fulfilment of many rights thus depend on it.⁴ This, in turn, requires more than access to

¹ This has been described by Moseneke J (as he was then) as 'transformative adjudication' in Dikgang Moseneke 'The Fourth Bram Fischer Memorial Lecture : transformative adjudication' (2002) 18 *SAJHR* 309 - 319.

² KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146. This is the first study to argue for the Constitution of the Republic of South Africa, 1996 as a transformative tool, which its full potential may be threatened by conservative legal culture in analysing it.

³ Faranaaz Veriava *Realising the Right to Basic Education: The role of the courts and civil society* (2019) 105.

⁴ C Chürr 'Realisation of a child's right to a basic education in the South African school system: Some lessons from Germany' (2015) 18 *PER / PELJ* 2405 at 2406.

education.⁵ Education, in itself, is a process which differs across societies, time and space. Thus its content and outcomes may differ in light of such changing needs. In light of the above, I draw attention to the courts' development of the right to basic education, enshrined in s 29(1)(a) of the Constitution. I evaluate two streams of basic education litigation: policy contestation between basic education officials and School Governing Bodies and the development of physical entitlements. I commence by tracing the development of the right to education and basic education. I do so, first, by looking at the meaning of education and then how international legal instruments have framed basic education. In section 3, I focus on the two streams to analyse the approach adopted by our courts in developing the right to basic education. I analyse whether remedies provided by the courts in the policy contestation stream have been effective and relevant to the realisation of the right to basic education. In respect of the development of physical entitlements, I show that, although the Constitutional Court in the past has rejected the concept of a minimum core of other socio-economic rights,⁶ the lower courts have successfully engaged in its development concerning basic education. In section 4, I draw on scholarly work to briefly make proposals in respect of effective remedies and a substantive approach to basic education right. Section 5 provides the conclusion.

II. THE BEGINNING OF THE RIGHT TO BASIC EDUCATION

(a) *Education*

There are many definitions of education put forward by scholars and activists. Common in these definitions is that it is a lifelong process, which is omnipresent throughout an individual's life.⁷ Some scholars suggest that at the heart of education is an 'intention to transmit', in a 'morally acceptable' way, something deemed valuable.⁸ This is the reason all nation states, modern economies, and international organisations have distinguished and drawn a line between formal and informal education, basic and higher education, as well as quality education and access to education. Accordingly, there is a universal declaration of and worldwide emphasis on formal basic and quality education as a human right.

⁵ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) para 20. Goosen J emphasised that '[t]he state's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools.'

⁶ *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC) para 30-33.

⁷ Will Curtis, Stephen Ward, John Sharp et al (eds) *Education Studies: An issue-based Approach* 3 ed (2014) 4.

⁸ *Ibid.*

This was first articulated in Article 26 of the 1948 Universal Declaration of Human Rights (UDHR) provides:

‘[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.’

After this declaration, many nations began to codify the scope of formal education for its citizens, including for those deemed inferior. For example, apartheid South Africa passed the *Bantu Education Act*⁹ in 1953, five years after the proclamation of the UDHR with the intention not only of deepening racial separation educational amenities, but also of developing an unequal and hierarchical system. Although the Act pushed the apartheid government to increase funding for black learners’ education, the schooling system reserved for white learners received far much more funding, and its curriculum was notably superior to that of black learners. This cemented racial oppression and segregation. To this day, the effects of apartheid are evident in the current labour market and within democratic South Africa’s schooling system.

Children in formerly white public schools continue to enjoy apartheid’s inheritance and privilege of excellent resources, while most children in township and rural areas experience resource shortages. Thus, the gap between the rich and poor continues to widen. The Constitutional Court in *Juma Musjid* evocatively noted the legacy of apartheid in education as follows:

‘Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.’¹⁰

Considering more than two decades of democratic governance, the existing disparities within the public schooling system should not only be attributed to the apartheid regime, but also to the current government’s recalcitrant attitude towards education. Several proponents of equal and quality education have spoken about this attitude. In a 2020 report¹¹ on the state of education in South Africa, Amnesty International, a transnational NGO, recommended review and reform of how funding is distributed in order to achieve quality and equality in education.

⁹ Bantu Education Act 47 of 1953.

¹⁰ *Governing body of the Juma Musjid Primary School v Essay* 2011(8) BCLR 761 (CC) para 42.

¹¹ Amnesty International ‘Broken and Unequal’ available at https://amnesty.org.za/wp-content/uploads/2020/02/FINALBrokenAndUnequal_FULLREPORTredu_compressed.pdf, accessed on 28 August 2021.

It notes that, although democratic South Africa has made significant progress in providing education, it is still failing many of its children because the government is not effectively tackling the apartheid legacy. The report concludes, ‘South Africa needs to better monitor and inspect the quality and nature of education being delivered’.¹² This has indeed been an ongoing concern for various civil society organisations in South Africa as they continue to expose deficiencies and inequalities in the schooling system through research, public campaigns and legal mobilisation.

(b) *International Law*

As highlighted earlier, the right to education first found protection under international law in *art 26* of the UDHR. Interestingly, this article also articulates the objectives of education, beyond acquiring literacy and numeracy skills, as follows:

“[e]ducation shall be directed to the full development of the human personality and to the strengthening of *respect for human rights and fundamental freedoms*.”

Thus education as a human right is not only concerned with its realisation, but also with the outcome thereof. The provision extends the scope of education beyond access alone, and suggests it contributes to realising other human rights and leads to human development. Just over 70 year later, the general provision regarding the nature and scope of the right to education in the 2019 Abidjan Principles¹³ echoes the same sentiment: ‘Education must aim to enable individuals to effectively participate in society, to be tolerant, to live together, and to have the capacity and critical thinking to elaborate and realise their own or collective life plan in an autonomous way.’¹⁴ In relation to access, *art 26* provides that elementary education must be ‘free’ and ‘compulsory’. Since the UDHR, these two elements have found binding codification in subsequent international instruments providing the right to basic education. Amongst these instruments is the 1960 *UNESCO Convention against Discrimination in Education (CDE)*¹⁵, the 1966 *International Covenant on Social, Economic and Cultural Rights (ICESCR)*¹⁶, and

¹² Ibid at 107.

¹³ ‘The Abidjan Principles: Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education’ available at <https://www.abidjanprinciples.org/explore-the-principles>, accessed on 28 August 2021.

¹⁴ Ibid para 8.

¹⁵ Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962).

¹⁶ International Covenant on Social, Economic and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1966).

the 1989 *Convention on the Rights of the Child (CRC)*¹⁷, which have all been ratified by South Africa respectively in 2000, 1995, and 2015.

The *CDE* is the first legal binding international instrument which entirely focuses on the right to Education. It seeks to eliminate and prevent discrimination in education and, most importantly, it affords a broad scope of protection against discrimination. Hence, it has been described as the core of an international educational code.¹⁸ Similar to the *art 26* of the UDHR, the *CDE*'s objective is twofold: to eliminate and prevent discrimination, and to realise equality. Three years prior adoption of the *CDE*, Ammoun had suggested that the objective to eliminate and prevent discrimination and realise equality should be borne out of understanding what he calls active and static discrimination.¹⁹ Indeed, the *CDE* has taken this into consideration, albeit not using the same language.

According to Ammoun, active discrimination involves any element of intent or deliberate inaction on the part of governments that perpetuates discrimination in education.²⁰ This includes where a government pursues a policy intended to start, maintain or aggravate inequality. This is, of course, what the apartheid government has done in South Africa, where the legacy of past active discrimination still haunts democratic education arrangements. Active discrimination includes government inaction. This is when a government fails to implement its progressive and transformative legislative and policy measures. For example, Veriava notes that the inequality in basic education 'provisioning is further exacerbated by the post-apartheid funding model, which, while having some redress mechanisms, nevertheless perpetuates inequality.'²¹ This can be seen in government's failure to implement the content of its policies. In terms of static discrimination, Ammoun states it is as the result of 'discriminatory practices which are economic, social, political or historic in character'.²² Somewhat similar, static discrimination in provisioning basic education is present in South Africa due to social and economic inequalities as well the history of education. Although it is evident that the ailing provisioning of basic education in post-apartheid South Africa arises from both active and static discrimination, active discrimination is more capable of being condemned by the courts.

¹⁷ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990).

¹⁸ Klaus Dieter Bouter *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (2005) 243.

¹⁹ Charles D. Ammoun *Study of Discrimination in Education* (1957) 14-15.

²⁰ *Ibid* at 4.

²¹ Veriava *op cit* note 3 at 15.

²² Ammoun *op cit* note 19 at 4.

The *ICESCR* devotes *arts 13* and *14* to the right to education. Most relevant to this paper is *art 13(2)(a)* which provides that, in achieving the right to education in general, primary education shall be compulsory and available to all. Determining the precise meaning of the term ‘primary education’ is not easy, especially in the absence of international clarification. According to the UN’s General Comment No 13 on the right to education, ‘[p]rimary education must be universal, ensure that the basic learning needs of all children are satisfied, and take into account the culture, needs and opportunities of the community’.²³ Thus, satisfying primary education is dependent on individual states and the circumstances thereof. However, the universal benchmark is satisfying the basic learning needs which are extensively defined in *art 1* of the *World Declaration on Education For All* (‘WDEFA’).²⁴ The Comment also asserts that primary education, just like any other level and form of education, is inclusive of elements of availability, accessibility, acceptability and adaptability.²⁵ These elements have come to be known as the ‘four A’ scheme, which Veriava extols as ‘the most useful foundations from which to begin to interpret and to give substantive content to the right to basic education’.²⁶

The right to education also finds protection in *arts 28* and *29* of the *CRC*. While *art 28(1)(a)* obliges the states to ensure that primary education is compulsory and available to all children, *art 29* sets out the aims of education in general. Given that the phrase ‘primary education’ is again not defined in the *CRC*, it is safe to postulate that its meaning can be deduced from the five aims of education in *art 29*, although the article provides aims of education in general. Amongst those aims is that the education concerned with the development of a child should realise the full potential of a child’s personality, talents, mental and physical abilities.²⁷ Indirectly, this and the other four aims²⁸ are concerned with the form and substance of education, which can be linked to one component of the ‘four A’ scheme: acceptability.

The acceptability element also finds affirmation at a regional level through the aims of the right to education entrenched in *art 11* of the *African Charter on Rights and Welfare of the Child* (‘ACRWC’)²⁹. The aims in the *ACRWC* are more extensive than the *CRC*, but they are not necessarily obtained through compulsory primary education. Article 11 of the *ACRWC*

²³ CESCR General Comment No. 13: The Right to Education (Art. 13) contained in Document E/C.12/1999/10 para 9.

²⁴ World Declaration on Education for All (adopted 5-9 March 1990)

²⁵ General Comment No. 13 op cit note 23 para 8.

²⁶ Veriava op cit note 3 at 7 and 8. .

²⁷ CRC op cite note 17 art 29(1)(a).

²⁸ Ibid art 29(1)(b) -(e).

²⁹ African Charter on Rights and Welfare of the Child (adopted July 1990, entered into force 29 November 1999).

provides that every child shall have the right to education, but is quiet on whether such education shall be compulsory and free, as is the *African Charter on Human and Peoples' Rights* ('ACHPR').³⁰ Both instruments make no mention of phrases such as primary education or basic education. These two phrases are normally used interchangeably in South Africa, mainly to distinguish lower from further or higher education. However, our South African Bill of Rights employs the phrase basic education instead of primary education phrase. This choice suggests a difference between the two phrases, and perhaps takes guidance on the proper understanding of the phrase 'primary education' from the *WDEFA*. Article 5 of the *WDEFA* provides that 'the main delivery system for the basic education of children outside the family is primary schooling.' Thus, primary education connotes the level of schooling, while basic education the level of education.

(c) *The Right to Basic Education: South Africa*

Section 29(1)(a) of the Constitution provides that '[e]veryone has the right – to a basic education, including adult basic education...'. At first glance, its language appears direct and clear. However, after reading s 29(1)(b), which provides for the right to further education and requires the state to make this right progressively available and accessible through reasonable measures, one notes the absence of an internal limitation in s 29(1)(a). This suggests that basic education should be immediately available and accessible. This has been rightly confirmed by the Constitutional Court in *Juma Musjid*³¹ by noting that s 29(1)(a) is nevertheless subject to s 36 and 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'. Section 29 does not define, nor give content to, the meaning of, the words 'basic' and 'further'. The South African School Act 84 of 96 (the SASA) is also mute in clarifying the line between basic and further education. However, after a careful reading of the SASA, the Constitutional Court accepted that the distinction is on grades — education offered from Grades one to nine constitutes basic education.³² However, more recently in *AB v Pridwin Preparatory School*³³ (*Pridwin*), Theron J writing for majority added that the scope of basic education pertains to the legal entitlement to having one's basic learning needs met.³⁴ This ruling rightly expands basic

³⁰ African Charter on Human and Peoples' Rights (adopted 01 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 17.

³¹ *Juma Musjid* supra note 10 para 37.

³² Ibid para 38.

³³ 2020 (5) SA 327 (CC).

³⁴ Ibid para 166.

education beyond school grades because it is inclusive of adult basic education as per the full wording of *s* 29(1)(a). This is also in line with how the World Declaration on Education for All has broadened the meaning and scope of basic education.

Most recently, the Constitutional Court, in *Moko v Acting Principal of Malusi Secondary School*³⁵ (*Moko*), had an opportunity to further give meaning to the term basic education by defining it to be inclusive of grade twelve. It relied on the fact that the majority in *Pridwin* did not define basic education with reference to a person's age or school-grade³⁶ and in its unanimous judgement, penned by Khampepe J, the Court held as follows:

‘[t]o limit basic education under section 29(1)(a) either to only primary school education or education up until Grade 9 or the age of 15 is, in my view, an unduly narrow interpretation of the term that would fail to give effect to the transformative purpose and historical context of the right.’³⁷

On the contrary, if one reads *s* 29(1)(a) in its entirety, there is an indication that the word basic is limited to a specific substantial content of the right to education — a certain level of education regardless of age. Section 29(1)(a) provides that everyone has the right to basic education, including *adult* education. The extension of this right to an adult distinguishes no difference to a certain level of education envisaged by the Constitution regardless of age. The 1995 White Paper on Education and Training rightly noted that ‘[b]asic education is a flexible concept which must be defined so as to meet the learning needs appropriate to the age and experience of the learner, whether child, youth or adult ...’.³⁸ The flexibility, alluded to above, limits its scope to certain knowledge, skills and experiences that are often measured through the completion of a specific level of schooling. On this point, I respectfully part ways with legal scholars and the judiciary who have employed age in describing the term basic education. Section 29(1)(a) provides the phrases *basic education* and *adult basic education* for inclusivity of all ages.

III. COURTS’ APPROACH TO BASIC EDUCATION

This section focuses on the two streams mentioned in the introduction to trace and analyse the courts’ approach to developing the right to basic education. I further analyse whether remedies

³⁵ 2021 (3) SA 323 (CC).

³⁶ *Ibid* para 30.

³⁷ *Ibid* para 32.

³⁸ The *White Paper on Education and Training* (Gen N 196 in GG 16312 of 15 March 1995)

provided by the courts have been effective and relevant to the realisation of the right to basic education. For each stream, I limit the analysis to at least three significant cases respectively. I begin with cases dealing with policy making tension between education officials and later move on to the cases dealing with basic education entitlements.

(a) *Policy Making*

Policies have the power to destroy. However, they also have the power to build a society inclusive or exclusive of other members. Bantu education, introduced in 1953, was born from the official policy of apartheid.³⁹ The policy extolled ethnic pride and racial identity, and its aftermath remains present today.⁴⁰ Owing to this, post-apartheid South Africa adopted a single national education department to replace the racially fragmented system.⁴¹ The approach of this system is democratic, in that ‘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’.⁴² The system allocates responsibilities for basic education right provisioning to different levels of government.⁴³ Furthermore, at the school level, the School Governing Body (SGB) for each school is responsible with day-to-day management of that school,⁴⁴ albeit not professional management. This approach creates a space whereby, viewed negatively, the national department plays only ‘a supportive – subsidiary – role’ and, viewed positively, the national department ‘creates the context and circumstances within which the lower levels operate’.⁴⁵ To a certain extent, it enables the community and its proximate representatives to engage in meaningful and democratic participation.⁴⁶

³⁹ Jonathan D Jansen ‘Curriculum as a Political Phenomenon: Historical Reflections on Black South African Education’ (1990) 59 *JNE* 2 at 3.

⁴⁰ Ibid. *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 45.

⁴¹ J Brickhill & Y van Leeve ‘From the classroom to the courtroom: litigating education rights in South Africa’ in S Fredman, M Campbell & H Taylor (eds) *Human Rights and Equality in Education: Comparative Perspectives on the right to education for minorities and disadvantaged groups* (2018) 143 at 150.

⁴² A Osei-Fofie & N Herd ‘School of Court: The Development of the Right to Basic Education through Litigation in South Africa’ (2021) 15 *PSLR* 387 at 397.

⁴³ At a national level is the Minister of Basic Education and Department of Basic Education, provincial level is the Member of the Executive Committee and provincial department of basic education, district level has directors and offices, and circuit level has circuit managers and offices.

⁴⁴ Section 16(1) of the South African Schools Act 84 of 1996 states that ‘subject to Act, the governance of every public school is vested in its governing body’.

⁴⁵ M Murcott & W van der Westhuizen ‘The Ebb and Flow of the Application of the Principle of subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*’ (2015) 7 *CCR* 43 at 46.

⁴⁶ However, this structure has also generated tensions between the echelons tasked with different forms of decision-making and governance.

The national and provincial governments set basic standards and norms and make holistic policy that all schools should meet in order to realise adequate basic education.⁴⁷ At the grassroots, the SGBs carry wide policy powers, in that they decide on and implement school policies suitable for their respective schools. The SGBs enjoy autonomous responsibility for creating and adopting school code of conduct,⁴⁸ determining school's language policy,⁴⁹ making rules regarding religious observance⁵⁰ and devising pregnancy policies.⁵¹ Although the SGB possesses autonomous policy-making powers, they are not impervious to executive intervention when they exercise power 'unreasonably and at odds with constitutional warranties to receive basic education'.⁵² For example, the MEC and the Head of Department (HOD) are tasked with the duty to ensure that each SGB's admission policy is in line with national norms and standards.⁵³ Some of the SGB's powers at wealthy, formerly white schools have been used to gatekeep doors of learning and exclude learners purported to be different to that school community.⁵⁴ It is such proclivity that has resulted in various disputes and litigation all the way to the apex court of the land.

(i) *Hoërskool Ermelo*

The first seminal judgement that featured tensions between the tiers of governance and decision-making in public schools is *Hoërskool Ermelo*.⁵⁵ It concerned the right to receive education in the official language of one's choice.⁵⁶ The Constitutional Court considered whether the HOD, acting on behalf of the provincial government, may lawfully revoke the function of the SGB's determination of language policy, which stipulated Afrikaans as the only medium of instruction. Upon the HOD's request to have the school admit English-speaking learners, the SGB consistently refused, citing the school's policy to provide education in Afrikaans.⁵⁷ In response to this, the HOD revoked the SGB's powers and appointed an interim committee to amend the policy to the extent that non-Afrikaans speaking learners are enrolled at Hoërskool Ermelo to be taught in English.⁵⁸ Brickhill and Van Leeve rightly observe that

⁴⁷ Z Sujee 'School Governance' in F Veriava & T Kathrada (eds) *The Basic Education Rights Handbook* 2 ed (2022) 81 at 84.

⁴⁸ Ibid 90.

⁴⁹ Ibid 91.

⁵⁰ Ibid 92.

⁵¹ Ibid 91.

⁵² *Ermelo* supra note 40 para 78.

⁵³ Sujee op cit note 47 at 88 – 89.

⁵⁴ Brickhill & Van Leeve op cit note 41 at 152.

⁵⁵ *Ermelo* supra note 40.

⁵⁶ Section 29(2) of the Constitution.

⁵⁷ *Ermelo* supra note 40 paras 15-18.

⁵⁸ Ibid 21-26.

although ‘this dispute was framed as a question of authority to set policies, it was underpinned by issues of race and class, as the effect of the policy was to exclude black children from accessing education’.⁵⁹ They are correct in contending that this policy also violates the constitutional right to equality.⁶⁰

The Court held that the HOD acted unlawfully and in breach of the constitutional principle of legality in revoking the functions of the SGB and appointing the interim committee.⁶¹ However, the Court also ruled that the SGB’s power must be exercised in line with the Constitution and the Schools Act or any provincial law, and ‘more importantly it must be understood within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress’.⁶² The Court observed that s 29(2) of the Constitution ‘is made up of two distinct but mutually reinforcing parts’.⁶³ The first entitles one to receive education in public institutions in the language of their choice. However, this entitlement is subject to an internal limitation because it can only be enjoyed when it is ‘reasonably practicable’.⁶⁴ This, in turn, will depend on all the relevant circumstances of each case.⁶⁵ The reasonableness standard is inherent to s 29(2) and requires a context-sensitive approach to each claim concerning being taught in one’s language of choice.⁶⁶ This means there must be no resource constraints to implementing a language policy and such policy must not offend constitutional norms. In observing the second part of s 29(2), the Court said the state must consider all educational alternatives, including single medium institution in order to realise education in one’s language of choice. In doing so, the state must further consider what is fair, practicable, and the need to remedy the past racially discriminatory laws and practices.⁶⁷ This two-part analysis is a much-needed emphasis of the right to receive education in the language or languages of one’s choice. It is an injunction on

⁵⁹ Brickhill & van Leeve op cit note 41 at 153.

⁶⁰ Section 9(5) and (5) of the Constitution.

⁶¹ *Ermelo* supra note 40 paras 15-18.

⁶² *Ibid* para 61. The aforesaid statement by the Court indicates confusion between basic education entitlements to that of higher education, which does not require immediate realisation of education. This, however, has since been corrected by the same court in judgements that followed *Hoerskool Ermelo*, the recent being *Moko* para 27.

⁶³ *Ermelo* supra note 40 para 52.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*. Amongst other things the court listed the availability of and accessibility to public schools, their enrolment levels, the medium of instruction of the school its SGB has adopted, the language choices learners and their make and the curriculum options offered.

⁶⁶ *Ibid*.

⁶⁷ *Ermelo* supra note 40 para 53.

any party to education provisioning to give effect to s 29(2) of the Constitution when making decisions regarding a school's language of learning.⁶⁸

The *Hoerskool Ermelo* judgement is seminal in education jurisprudence on at least two fronts: the balance between competing interests and the remedial approach. Although the Court found that the HOD's decisions to withdraw the SGB's functions and appoint the interim committee were technically invalid and unlawful, it did not end there, but went on to strike a balance between competing interests: the SGB's autonomy and government's intervention and, fundamentally, the outstanding rights of learners to basic education.⁶⁹ In light of this, it amassed its constitutional powers from s 172(1)(b) to state:

‘This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements.’⁷⁰

The Court directed the SGB to reconsider the school language policy in light of learners receiving education in English, dwindling enrolment numbers at their school, the underlying challenge in Ermelo relating to the scarcity of classroom places for learners receiving education in English, and the interests of the broader community in which the school is located.⁷¹ Based on these considerations, it made the first ancillary order – the SGB to review and determine its language policy in terms of s 6(2) of the SASA, and to report back to the court within three months on the process followed in reviewing the policy.⁷² In relation to the HOD, the Court raised dissatisfaction with the fact that his department had not taken adequate steps to ensure enough school places for every child to attend school as required by s 3(1) and (2) of SASA.⁷³ It issued the second ancillary order in this regard and required the HOD to file, within three months' time, a report to the Court 'setting out the likely demand for grade eight English places at the beginning of 2010 and setting out the steps that the department has taken to satisfy this likely demand'.⁷⁴

⁶⁸ Recently the same court in *Afriforum v University of the free State* further endorsed reasonable practicable as involving both a factual and normative (constitutional) element

⁶⁹ Osei-Fofie & Herd op cit note 42 at 399.

⁷⁰ *Ermelo* supra note 40 para 97.

⁷¹ Ibid paras 80 & 98-100.

⁷² Ibid para 102.

⁷³ Ibid para 103.

⁷⁴ Ibid para 104.

These ancillary orders find their home in the concept of meaningful engagement as a remedy, albeit not expressly mentioned by the Court. It is implicit in both orders that a participatory process is envisaged that requires all relevant stakeholders to be involved through fair deliberative processes.⁷⁵ However, Liebenberg argues that ‘a more explicit incorporation of meaningful engagement in the orders would have clarified that the policy and planning processes should occur through a participatory process involving all individuals, organisations, and institutions whose input was necessary’ for realising objectives of the orders.⁷⁶ She adds that effective implementation of remedies would require the court to ‘include the recruitment of parties at the remedial stage who were not involved at the liability stage’, and parties may be invited also to ‘consider how the participatory process could be structured so as to ensure fair participation by all relevant stakeholders’.⁷⁷ This approach is valuable in realising inclusive basic education and advances the constitutional principle of cooperative governance. When partnered with supervisory orders, effective meaningful engagement requires the court, after receiving a report, to deliver a further judgement detailing whether the constitutional principles outlined in the initial judgement were followed. In *Hoërskool Ermelo*, the Court has not done so. Liebenberg rightly observes that ‘such judgement could have provided guidance to all organs of state and stakeholders involved in the implementation of constitutional educational rights in South Africa, thereby vindicating the broader public interest in the remedy issued in the *Hoërskool Ermelo* case.’⁷⁸

(ii) *Welkom High School*

The case of *Head of Department, Department of Education, Free State Province v Welkom High School*⁷⁹ (*Welkom High School*) followed the *Ermelo* judgement in the Constitutional Court and also featured meaningful engagement. The dispute concerned who had a final say between the SGB and HOD over learner pregnancy policies. The majority in this case found that the HOD’s decision to instruct the school to re-admit learners who had been excluded based on pregnancy policies was unlawful.⁸⁰ It asserted that, although the rights of pregnant learners must be protected, ‘this must be done lawfully.’⁸¹ The constitutionality of the pregnancy

⁷⁵ S Liebenberg ‘Remedial Principles and Meaningful Engagement in Education rights Disputes’ (2016) 19 *PER/PELJ* 1 at 16.

⁷⁶ *Ibid* 17.

⁷⁷ *Ibid*.

⁷⁸ Liebenberg op cit note 75 at 20.

⁷⁹ *Head of Department: Department of Education, Free State Province v Welkom High School, Head of Department: Department of Education, Free State Province v Harmony High School* 2014 (2) SA 228 (CC).

⁸⁰ Osei-Fofie & Herd op cit note 42 at 401.

⁸¹ *Welkom* supra note 79 para 105.

policies was not in issue before the Court, nevertheless it found ‘a prima facie violation of the learners’ rights to equality and education’.⁸² It however refrained from making a declaration of invalidity on the pregnancy policies since the school did not present argument in justification of such policies.⁸³ This meant, as put by Zondo J (as he then was) in his dissenting judgement, that the pregnancy policies remained valid until the SGBs reconsidered them as per the court order or the court, in a new proceeding, set it aside.⁸⁴ This suggests that the exclusionary effect of these policies prevails over the rights to equality and access to basic education. In reality, ‘this has wide ramifications, especially for the many pregnant learners who had been excluded over the years, who deserve recompense for the breach of their fundamental rights’.⁸⁵

Furthermore, the majority missed an opportunity to develop further the transformative adjudication invoked in *Hoërskool Ermelo*. In that case, the same court contended it would be unrealistic and unjust to address only issues of legality and administrative justice brought before it and turn a blind eye to the lawfulness of the exclusive language policy.⁸⁶ If constitutional supremacy prevails, the majority in *Welkom High School* ought to have equally considered the substantive breach by the SGB as a violation of the rule of law. Alternative to finding the SGBs’ actions unlawful, the majority in its ancillary order held that SGBs must review their pregnancy policies in light of the judgment, and report back to the court on ‘reasonable steps they have taken to review the pregnancy policies’.⁸⁷

Finally, what stands out as a further development from *Hoërskool Ermelo* is that both majority and minorities ordered extensive meaningful engagement. In doing so, they referenced the principles of co-operative government provided for in chapter three of the Constitution and the overall setup of the SASA.⁸⁸ The majority further ordered the SGBs and HOD to engage meaningfully with each other to give effect to the ancillary order. However, the order makes provision for only the SGBs and HOD and leaves out broader range of stakeholders relevant in this area. ‘This broader stakeholder involvement would have contributed to more expert, broadly acceptable school pregnancy policies and would have facilitated integrative and educative functions of engagement processes.’⁸⁹ As in *Hoërskool Ermelo*, the court in *Welkom*

⁸² Sandra Fredman ‘Procedure or Principle: The Role of Adjudication in Achieving the Right to Education’ (2014) 6 *Const. Court Rev* 165 at 170.

⁸³ *Welkom* supra note 79 paras 115 – 116.

⁸⁴ *Ibid* 170.

⁸⁵ Fredman op cit note 72 at 172.

⁸⁶ *Ermelo* supra note 40 paras 39 – 40.

⁸⁷ *Ibid* 125.

⁸⁸ *Welkom* supra note 79 paras 120 – 126 & 154 – 166.

⁸⁹ Liebenberg op cit note 75 at 25 – 26.

High School has not accordingly given a public judgement on whether parties have meaningfully and successfully engaged one another in revising pregnancy policies nor whether revised policies have complied with substantive guidelines observed in the majority judgement.

(iii) *Rivonia Primary School*

The *MEC for Education v Governing Body of the Rivonia Primary School*⁹⁰ (*Rivonia Primary School*) case also addressed the lawfulness of interventions by the HOD. In this case the learner was refused admission to the school and was waitlisted due to the school policy which determined the Grade One enrolment capacity to be 120 learners. The school however, for that year enrolled 124 grade one learners and still denied one learner access. The HOD was accordingly of the view that the school had capacity to admit one learner and overturned the refusal of the learner's application by ordering the school to admit the learner with immediate effect. In the High Court, it was held that the HOD has powers to intervene where necessary to protect children's right to access schooling. The SGB successfully appealed to the Supreme Court of Appeal which was of the view that the SGB is empowered to determine admission policy and school capacity.

The HOD appealed to Constitutional Court, which stated that the SGB determines admission policy, and this may include determining the admission capacity of the school, but 'the determination of admissions may be subject to provincial government's intervention in terms of the Schools Act, or applicable provincial law if the intervention is provided for in those instruments'⁹¹ The Court found these instruments to exist and empower the HOD to overturn the rejection of a learner's admission to a school.⁹² However, it found the HOD's decision lacked procedural fairness in so far as affording the school an opportunity to make representations on certain issues at some stage.⁹³ The Court again reiterated that, where a dispute arises between the national or provincial government, 'cooperation is the required general norm'.⁹⁴ It further emphasised 'the critical role of engagement in realising the right to education in the context of systemic capacity issues in public schools'.⁹⁵ It said the co-operative governance practice expected from both parties is not only instrumental in facilitating smooth

⁹⁰ 2013 (6) SA 582 (CC).

⁹¹ Ibid paras 39 - 41.

⁹² Ibid 41 – 45.

⁹³ Ibid 68.

⁹⁴ Ibid 69.

⁹⁵ Liebenberg op cit note 75 at 31.

inter-governmental relations, but also ‘has a direct effect on the people whom the government serves’.⁹⁶

After ordering that the HOD is empowered to issue an instruction to the principal of Rivonia to admit the learner in excess of their policy limit, the court ordered the HOD to do so in a procedurally fair manner. It held that the HOD did not act in a procedurally fair manner when he issued instructions to the principal of Rivonia to admit the learner.⁹⁷ Despite the majority devoting ten paragraphs of its judgement to the important role co-operative governance and good faith engagement have in education rights disputes, it made no declaratory, mandatory or supervisory order relating to meaningful engagement.⁹⁸ In response to this, Fredman contends that this approach therefore ‘fails to give any substantive guidance on the principles by which to ensure the interests of outsiders are also considered’.⁹⁹ According to Liebenberg, the Court’s failure to make any specific order relating to meaningful engagement could be because ‘the court considered engagement duties to be subsumed in the orders pertaining to procedural fairness’.¹⁰⁰ Although this may be the case, the Court in this case had ample room to at least develop the potential of collaborative engagement as an effective remedy. Furthermore, this judgement has been criticised for reaching its decision based on a technical reading of the SASA and not in terms of the rights and values of the Constitution.¹⁰¹ Arendse correctly asserts that such conservative approach disregards the principles of transformative constitutionalism.¹⁰²

(b) *Substantive Inputs*

The slow progress in social transformation has been, to a certain extent, attributed to the way the Constitutional Court has interpreted and enforced socio-economic rights.¹⁰³ The Court has previously refused, in *Grootboom*¹⁰⁴ and *Mazibuko v City of Johannesburg*,¹⁰⁵ to adopt the minimum core concept in socio-economic rights. In interpreting these rights, the Court limited its scope to the examination of the obligations imposed by these rights on the government. This

⁹⁶ *Rivonia* supra note 90 para 77.

⁹⁷ Ibid 81.

⁹⁸ Liebenberg op cit note 75 at 34.

⁹⁹ Fredman op cit note 82 at 187.

¹⁰⁰ Liebenberg op cit note 75 at 34.

¹⁰¹ Lorette Arendse ‘Beyond Rivonia: Transformative Constitutionalism and the public education system’ (2014) 29 *SAPL* 160 at 168.

¹⁰² Ibid.

¹⁰³ Oliver Fuo and Anél du Plessis ‘In the face of judicial deference: minimum core of socio-economic rights to the local government sphere’ (2015) 19 *LDD* 1 at 3.

¹⁰⁴ *Grootboom* supra note 6.

¹⁰⁵ 2013 (6) SA 249 (CC).

is despite the court's knowledge of the fact that the text of the Constitution does not preclude some reliance on the minimum core concept. In *Grootboom*, the Court cited lack of sufficient comparable information before it,¹⁰⁶ but noted that '[t]here may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable'.¹⁰⁷ However, the Court also stated that varying conditions and factors come to play when determining opportunities for the enjoyment of a right, and thus 'courts are ill-placed and to make these assessments for both institutional and democratic reason.'¹⁰⁸ It is perhaps due to the above reasons that the same court found it easy to incorporate elements of the minimum core concept, albeit not explicitly mentioned, into the right to basic education jurisprudence. Veriava refers to this implicit use of the minimum core concept as a substantive interpretation approach.¹⁰⁹ This was first witnessed in the Constitutional Court case of *Juma Musjid*,¹¹⁰ just a few years after *Grootboom* and *Mazibuko*.

(iv) *Juma Musjid*

In *Juma Musjid*, a public school established in a private property faced eviction by a private landlord. The Court began, as per the norm, began by examining the nature of the right and the obligations the right imposes towards the government and private parties.¹¹¹ In as far as the nature of the right and obligations thereof are concerned, the Court held that the s 29(1)(a) right is immediately realisable and the state bears primary obligations towards its realisation.¹¹² Thus, it is not subject to the availability of government resources and can only be limited in terms of s 36 of the Constitution.¹¹³ Having identified the nature of the right, its importance in promoting and developing a child to their fullest potential, and government's positive obligation, the Court went on to identify access as one of the important components of the right. It stated access 'is a necessary condition for the achievement of this right'.¹¹⁴ The Court further qualified its findings on the fact that ss 3(6)(a) and (b) of the SASA make it an offence for any parent and person, without just cause, to prevent a learner who is subject to compulsory attendance from attending from a school. In terms of remedy, the Court made an interim order

¹⁰⁶ *Grootboom* supra note 6 para 31.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Mazibuko* supra note 105 paras 59 – 61.

¹⁰⁹ Veriava op cit note 3 at 87.

¹¹⁰ *Juma Musjid* supra note 10.

¹¹¹ *Ibid* paras 36 – 60.

¹¹² *Ibid* para 37.

¹¹³ *Ibid*.

¹¹⁴ *Ibid* para 43.

for the parties to attempt meaningful engagement to ascertain whether eviction is avoidable. Although the attempt yielded no positive results, and eviction was granted with a requirement that learners would be placed in an appropriate public school, the Court's proclamation that access is essential for the delivery of basic education has emboldened the lower courts to fill in the provisioning bucket of s 29(1)(a). As noted by Veriava, *Juma Musjid* therefore became a watershed case for the right to basic education.¹¹⁵

(v) *Furniture Case*

*Madzodzo v Minister of Basic Education (Madzodzo)*¹¹⁶ is another significant case, post *Juma Musjid*, that also decided on the content of the right to basic education. In *Madzodzo*, the systemic failure of government to provide desks and chairs to public schools was at issue, and the Eastern Cape High Court had to decide whether this failure is in breach of the learners' rights to education, equality, and dignity. Specifically, the Court was tasked to decide, first, whether government's failure to provide adequate age and grade appropriate furniture to all public schools in the Eastern Cape constitutes a serious violation of the learners' right to basic education as guaranteed in the Constitution,¹¹⁷ and, second, whether such persistent 'failure to meet the furniture requirements of public schools constitutes a breach of the learners' right to equality and human dignity'.¹¹⁸ The Court referenced that access to schools is a necessary condition for the achievement of the right to education,¹¹⁹ and so too is the provisioning of teaching and non-teaching staff¹²⁰ and adequate teaching resources.¹²¹ The Court went on to say: '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 of access to basic education.'¹²² It painted, in detail, the harmful effects on learners caused by the scarcity of furniture in a classroom. The learner's right to dignity is seriously impaired by such effects. This was not contested by government who argued that budget constraints and the availability of resources constrained their ability to meet the requirements of the right to basic education immediately. The government further relied on their National Norms and Standards for School Funding, which

¹¹⁵ Veriava op cit note 3 at 87.

¹¹⁶ *Madzodzo* supra note 5.

¹¹⁷ Ibid para 14.

¹¹⁸ Ibid.

¹¹⁹ As was ruled in *Juma Musjid* para 43.

¹²⁰ *Centre for Child Law v Minister of Basic Education* 2012 (3) SA 183 (ECG) para 34.

¹²¹ *Madzodzo* supra note 5 para 19.

¹²² Ibid 20.

allegedly ‘envisaged the progressive realisation of the provision of the basic education’.¹²³ The Court rejected this approach, stating that government ought to be proactive and that an open-ended approach to providing furniture for teaching and learning is unreasonable because learners are entitled to have immediate access to basic education.¹²⁴

Accordingly, the Court declared the government to be in breach of learners’ s 29(1)(a) right. Amongst others, it ordered the government to ensure that 90 days after the filing of the furniture audit with the court and applicant, all schools identified in the said audit as having furniture shortages shall receive adequate age and grade-appropriate furniture for each learner. The Court also proactively ordered that, if the government envisaged failure to comply with the latter order, it must make application, on notice to the applicants and supported by an affidavit, seeking an extension of time within which to comply. The Court elaborated in greater detail on what the said affidavit should address. This shows some significant advancement in pursuing an effective remedy for a violation of immediately realisable rights. *Madzodzo* is significant in that ‘the court expanded the content of the right by interpreting s 29(1)(a) as a right to school infrastructure and the various educational resources referred to above’.¹²⁵

(vi) *Textbook Case*

*Minister of Basic Education v Basic Education for All*¹²⁶ (*BEFA*), also known as *Textbook 3*, is the latest groundbreaking judgement in which textbooks as an essential component of s 29(1)(a) were the central issue.¹²⁷ In 2012 the Gauteng High Court had to decide, in *Section 27 v Minister of Education (Textbook 1)*,¹²⁸ whether the failure of the government to provide textbooks to schools in Limpopo constituted an infringement of the rights to basic education, equality, and dignity.¹²⁹ In its answer, it referenced various pronouncements made by the government on the issue. Amongst them was that ‘the administration must ensure that every child has a textbook on time’.¹³⁰ It also referred to the Limpopo Department of Education’s Annual Performance Plan 2011 to 2012 in which one of the objectives is ‘[t]o ensure that every learner has access to a minimum set of textbooks and work books required according to

¹²³ Ibid 22.

¹²⁴ Ibid 35 – 36.

¹²⁵ Lorette Arendse ‘Slowly but surely: The substantive approach to the right to basic education of the South African courts post-*Juma Musjid*’ (2020) 20 *AHRLJ* 285 at 295.

¹²⁶ 2016 (4) SA 63 (SCA).

¹²⁷ Arendse op cit note 125 at 295.

¹²⁸ 2013 (2) SA 40 (GNP).

¹²⁹ Ibid 21.

¹³⁰ Ibid para 23.1. Quoting the then President, in his 2011 State of Nation Address.

National Policy'.¹³¹ It further referred to the Province's curriculum strategy to improve education in Limpopo, and noted '[t]he availability and retention of learning support materials is a vital ingredient in the delivery of quality learning and teaching.'¹³² The court then concluded: '[c]learly the above provides correctly in my view the unambiguous stance by Government that text books are an essential and vital component in delivering quality learning and teaching'.¹³³ This judgment, therefore, provides clear guidance as to when the judiciary is equipped to give content to socio-economic rights. It 'consulted a range of policies to reach the conclusion that the right to basic includes the right to textbooks'.¹³⁴

When the government failed to effect complete delivery of textbooks as per the order in *Textbook 1*, two more settlement agreements followed in which government promised to deliver textbooks within agreed timeframes. However, the government did not comply with these timeframes, and a second case was brought urgently before the same court under the name *Basic Education for All v Minister of Basic Education (Textbook 2)*.¹³⁵ In *Textbook 2*, the applicant asked for a supervisory order, for example,

'directing the DBE by a specified date to lodge an affidavit confirming full delivery, directing the DBE to lodge a plan indicating how they intend to address textbook shortages in schools throughout Limpopo and directing the SAHRC to monitor the full delivery of textbooks and compliance by the plan to address textbook shortages.'¹³⁶

According to the government at the time of this application, it had already delivered at least 97 per cent of textbooks in the province.¹³⁷ It therefore argued that 'the teacher can fulfil the functions of a textbook' and that their failure to supply textbooks to the remaining schools did not amount to a violation of s 29(1)(a) because most of the textbooks had been delivered.¹³⁸ In addition to confirming its finding in *Textbook 1* that textbooks are essential component to the right to basic education,¹³⁹ the Court rejected the government's argument and unequivocally said:

¹³¹ Ibid.

¹³² Ibid para 23.3.

¹³³ Ibid.

¹³⁴ Arendse op cit note 125 at 297.

¹³⁵ 2014 (4) SA 274 (GP).

¹³⁶ Ibid 39.

¹³⁷ Arendse op cit note 125 at 298.

¹³⁸ *Textbook 2* supra note 135 paras 44 & 50.

¹³⁹ Ibid para 51.

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

It ordered the government to ensure delivery of textbooks to all learners within the timeframe set by the government in their answering papers.¹⁴⁰ The court also ordered the government to furnish the applicant, BEFA, with an affidavit setting out the Limpopo textbook budget allocation.¹⁴¹ However, it did not order supervisory relief sought. Amongst other things the court noted, ‘[i]n respect of the SAHRC’s role in such supervision, this was justified largely on the basis that the SAHRC had claimed that they did not have the capacity to undertake the monitoring requested’.¹⁴²

The *Textbook 2* judgment was appealed by the government to the SCA and cross-appealed by BEFA. Amongst others, the government argued that an order requiring all learners to have a textbook is tantamount to a standard of perfection, and ‘such a standard was equivalent to imposing a minimum core obligation on government, a standard which had been rejected by the Constitutional Court in *Mazibuko*’.¹⁴³ It contended a reasonable standard is a requisite standard in checking whether it had taken all reasonable steps in or measures to fulfil the right. The SCA began its judgement by contextualising the issue before it and the impact thereof. It noted that ‘the learners affected by the non-delivery of textbooks are from poor communities, attending no-fee schools, which are the poorest schools, “and are mostly, if not exclusively,” black learners living in rural areas’.¹⁴⁴ The SCA referred to the Constitutional Court’s *Juma Musjid* and *Ermelo* judgements and affirmed that s 29(1)(a) right is different to other rights due to its potential ability to redress the entrenched inequalities caused by apartheid and its significance in transforming our society.¹⁴⁵ The SCA went on to unanimously and unequivocally condemn the education department’s conduct by stating that the department ‘did not only set itself a “lofty” ideal but that its policy and actions, as set out in the affidavits filed on its behalf, all indicate that it had committed to providing a textbook for each learner across

¹⁴⁰ Ibid para 82(3).

¹⁴¹ Ibid para 82(4).

¹⁴² Faranaaz Veriava ‘The Limpopo Textbooks litigation: a case study into the possibilities of a transformative constitutionalism’ (2016) 32 *SAJHR* 1 at 10.

¹⁴³ Ibid at 10.

¹⁴⁴ Veriava op cit note 3 at 117.

¹⁴⁵ *BEFA* supra note 126 para 37.

all grades'.¹⁴⁶ It went further to say '[t]he truth is that the DBE's management plan was inadequate and its logistical ability woeful'.¹⁴⁷ This court too rejected the government's reliance on budgetary constraints as fallacious. The *Textbook 3* judgement affirms that government's justification of the violation of basic education provisioning will require more than reasonable plans for realisation of the right. The government will have to provide 'details of precise character of the resource constraints, whether human or financial'.¹⁴⁸

IV. PROPOSALS CONCERNING BASIC EDUCATION JURISPRUDENCE

Although 'the South African jurisprudence on the right to basic education has captured international attention due to their contribution in mapping out'¹⁴⁹ the right, some basic education right scholars have criticised the courts for failing to develop an objective test for determining the necessary content to the right. Veriava points out that it was left to the government's discretion to determine the necessary entitlements that make up the content of the right.¹⁵⁰ As observed in the entitlements cases above, the High Court and Supreme Court of Appeal have, in determining an entitlement, consulted the government's policies and promises, the social and historical context of the right, as well as the impact that the absence of the entitlement has on teaching and learning. This is, of course, in line with the spirit of the separation of powers principle, which for the courts requires the judiciary not to venture into policy formulation – the role accorded to the executive or legislative arm. The courts' jurisprudence is also replete with references to the right as an empowerment right.¹⁵¹ The question remains, however, how will the court proceed in instances where the government has not yet pronounced an entitlement? In a simple case, can WIFI provision in schools, not yet provided for in policy, be a necessary entitlement to the content of the right to basic education? The judiciary is yet to come across this quandary, especially in this era whereby technology accessibility and use impacts both learners and teachers.

McConnachie and McConnachie note that, while s 29(1)(a) affords a number of advantages to litigants, there are two challenges with its enforcement. They said:

¹⁴⁶ Ibid 42.

¹⁴⁷ Ibid 43.

¹⁴⁸ *Rail Commuters action Group v Transnet Ltd* 2005 (2) SA 359 (CC) para 88.

¹⁴⁹ Serges Kamga 'Monitoring the Realisation of the Right to Basic Education: The South African Jurisprudence and Structural-Process-Outcome Indicators' (2020) 53 *CILSA* 1 at 27.

¹⁵⁰ Veriava op cit note 3 at 91.

¹⁵¹ Ibid 105.

‘First, the need to give content to the right will raise familiar concerns about the courts’ competence and legitimacy in specifying the content of socio-economic rights. Secondly, there is the challenge of reconciling the unqualified right with state’s limited capacity and resources.’¹⁵²

They proffer a three stage test for determining the content of the right.¹⁵³ First, the broad purpose of education must be determined; second, learners’ needs must be identified ‘based on these purposes’; and third, ‘different inputs required to meet these needs must be identified’.¹⁵⁴ They argue that this test does not equate ‘to fix precise, quantified standards for the provision of socio-economic goods’¹⁵⁵ – which the courts have rejected as the minimum core. It is a case by case test that seeks to determine whether the claim is essential for the fulfilment of the right.¹⁵⁶ The authors submit that ‘where an entitlement is found to be a component of the right, government is open to justify a limitation in terms s 36 or, if that limitation is not justifiable, to argue that immediate relief is not “just and equitable” in terms of s 172(1)(b) of the Constitution’.¹⁵⁷ However, Veriava notes that this approach is expansive as it may include policies and programmes emanating from legislation – to an extent that everything will be law of general application and give government a way to escape its obligation to provide particular entitlements.¹⁵⁸

The case law has shown a range of remedies to be preferable in realising basic education. The courts have been employing structural interdicts and the doctrine of meaningful engagement. However, scholars have noted an emptiness in respect of the latter in some of the judgements.¹⁵⁹ The cases highlight an inconsistent and undeveloped role of meaningful engagement in basic education jurisprudence. Liebenberg notes that, in *Welkom* case for example, meaningful engagement was employed at both the court’s reasoning and remedial stage, but it noted only a limited range of stakeholders, and there was no follow-up judgement on the engagement ordered.¹⁶⁰ She proposes that courts must order ‘meaningful engagement as a fully-fledged

¹⁵² Cameron McConnachie & Chris McConnachie ‘Concretising the right to a basic education’ (2012) 129 *SALJ* 554 at 580.

¹⁵³ Veriava op cit note 3.

¹⁵⁴ Ibid at 109.

¹⁵⁵ Ibid at 110.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid at 120.

¹⁶⁰ Liebenberg op cit note 69 at 37.

participatory remedy’ because it constitutes a powerful vehicle ‘for developing systemic policy reforms capable of advancing access to quality education for all South Africa’s children’.¹⁶¹ Liebenberg however notes that courts often lack the capacity to see through engagement processes, especially over an extended period of time.¹⁶² In terms of the imposition of structural orders, it has been suggested that courts should not limit them to instances where they foresee or believe wilful non-compliance is likely to happen, but also ‘where the consequences of even a good-faith failure to comply with the court order are so serious that court should be at pains to ensure effective compliance’.¹⁶³

V. CONCLUSION

The courts’ jurisprudence on the right to basic education has played an important role in interpreting this right and attempting to ensure it is realisable. Despite this progress, jurisprudence and scholars have not yet settled on the meaning of the term basic education in s 29(1)(a) and, thus, courts are likely to come across this question soon. On this point, I have argued that s 29(1)(a) does not envisage age as a factor in interpreting the term because it extends basic education to adult education. Therefore, basic education is concerned with certain knowledge, skills, and experiences that are often measured through a specific school level. I have analysed, through two streams of litigation the courts’ approach to basic education and remedies therefor. On the stream of policy making, although the courts have rightly exercised deference and often ordered structural interdicts and meaningful engagement, it was found that courts have not been consistent in providing details and clarity on what meaningful engagement as an important remedy entails. On the other stream, the substantive approach to the right has been welcomed by many, albeit with criticism levelled against the courts’ failure to develop an objective test for determining the necessary content to the right. This remains an important challenge for litigators and judges alike.

¹⁶¹ Ibid at 38.

¹⁶² Sandra Liebenberg ‘The Art of the (Im)possible? Justice Froneman’s Contribution to Designing Remedies for Structural Human Rights Violations’ (2022) 12 *Const. Court Rev.* 137 at 157.

¹⁶³ Veriava op cit note 3 at 120 -121.

BIBLIOGRAPHY

Constitution

Constitution of the Republic of South Africa, 1996.

Statutes

Bantu Education Act 47 of 1953.

South African Schools Act 84 of 1996.

The *White Paper on Education and Training* (Gen N 196 in GG 16312 of 15 March 1995)

Cases

AB and Another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC).

Afriforum and Another v University of the free State 2018 (2) SA 185 (CC).

Basic Education for All and Others v Minister of Basic Education Others 2014 (4) SA 274 (GP).

Centre for Child Law and Others v Minister of Basic Education and Others 2012 (3) SA 183 (ECG).

Governing body of the Juma Musjid Primary School and Others v Essay N.O and Others 2011(8) BCLR 761 (CC).

Government of the Republic of South Africa AND Others v Grootboom and Others 2000 (1) SA 46 (CC).

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

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

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

Mazibuko and Others v City of Johannesburg and Others 2013 (6) SA 249 (CC).

MEC for Education in Gauteng Province and Other v Governing Body of the Rivonia Primary School and Others 2013 (6) SA 582 (CC).

Minister of Basic Education v Basic Education for All 2016 (4) SA 63 (SCA).

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

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

Regional and International Treaties

African Charter on Human and Peoples' Rights (adopted 01 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

African Charter on Rights and Welfare of the Child (adopted July 1990, entered into force 29 November 1999).

Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990).

CESCR General Comment No. 13: The Right to Education.

International Covenant on Social, Economic and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1966).

1960 UNESCO Convention against Discrimination in Education (adopted 14 December 1960, entered into force 22 May 1962).

World Declaration on Education for All (adopted 5-9 March 1990).

Secondary Sources

A Osei-Fofie & N Herd 'School of Court: The Development of the Right to Basic Education through Litigation in South Africa' (2021) 15 *PSLR* 387.

Amnesty International 'Broken and Unequal' available at https://amnesty.org.za/wp-content/uploads/2020/02/FINALBrokenAndUnequal_FULLREPORTredu_compressed.pdf, accessed on 28 August 2021.

Cameron McConnachie & Chris McConnachie 'Concretising the right to a basic education' (2012) 129 *SALJ* 554.

Charles D. Ammoun *Study of Discrimination in Education* (1957).

C Chürr 'Realisation of a child's right to a basic education in the South African school system: Some lessons from Germany' (2015) 18 *PER / PELJ* 2405.

Dikgang Moseneke 'The Fourth Bram Fischer Memorial Lecture : transformative adjudication' (2002) 18 *SAJHR* 309 - 319.

Faranaaz Veriava *Realising the Right to Basic Education: The role of the courts and civil society* (2019).

Faranaaz Veriava 'The Limpopo Textbooks litigation: a case study into the possibilities of a transformative constitutionalism' (2016) 32 *SAJHR* 1.

Jonathan D Jansen 'Curriculum as a Political Phenomenon: Historical Reflections on Black South African Education' (1990) 59 *JNE* 2.

J Brickhill & Y van Leeve 'From the classroom to the courtroom: litigating education rights in South Africa' in S Fredman, M Campbell & H Taylor (eds) *Human Rights and Equality in Education: Comparative Perspectives on the right to education for minorities and disadvantaged groups* (2018).

KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146.

Klaus Dieter Bauter *The Protection of the Right to Education by International Law: Including a Systematic Analysis of Article 13 of the International Covenant on Economic, Social and Cultural Rights* (2005).

Lorette Arendse 'Beyond Rivonia: Transformative Constitutionalism and the public education system' (2014) 29 *SAPL* 160.

Lorette Arendse 'Slowly but surely: The substantive approach to the right to basic education of the South African courts post-*Juma Musjid*' (2020) 20 *AHRLJ* 285

M Murcott & W van der Westhuizen 'The Ebb and Flow of the Application of the Principle of subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*' (2015) 7 *CCR* 43.

Oliver Fuo and Anél du Plessis 'In the face of judicial deference: minimum core of socio-economic rights to the local government sphere' (2015) 19 *LDD* 1.

S Liebenberg 'Remedial Principles and Meaningful Engagement in Education rights Disputes' (2016) 19 *PER/PELJ* 1.

Sandra Fredman 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2014) 6 *Const.Court Rev* 165.

Sandra Liebenberg 'The Art of the (Im)possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations' (2022) 12 *Const.Court Rev* 137.

Serges Kamga 'Monitoring the Realisation of the Right to Basic Education: The South African Jurisprudence and Structural-Process-Outcome Indicators' (2020) 53 *CILSA*.

The Abidjan Principles: Guiding Principles on the human rights obligations of States to provide public education and to regulate private involvement in education' available at <https://www.abidjanprinciples.org/explore-the-principles>, accessed on 28 August 2021.

Will Curtis, Stephen Ward, John Sharp et al (eds) *Education Studies: An issue-based Approach* 3 ed (2014).

Z Sujee 'School Governance' in F Veriava & T Kathrada (eds) *The Basic Education Rights Handbook* 2 ed (2022).