FIGHTING TO LEARN...

A LEGAL RESOURCE FOR REALISING THE RIGHT TO EDUCATION

LRC
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A LEGAL RESOURCE FOR REALISING
THE RIGHT TO EDUCATION

A book focusing on the efforts of South African civil society to ensure quality basic education in schools

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Fighting to Learn…
A Legal Resource for Realising the Right to Education
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The annexes referred to in the court proceedings in this publication are too lengthy to include here, but readers may obtain them via the Legal Resources Centre (shona@lrc.org.za).

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Preface

The right to education that enables effective learning for life and livelihood is vital for democracy and development. Education is a fundamental human right recognised globally in international and regional legal instruments. The incorporation of the right into national legal frameworks means that in many jurisdictions, it is a justiciable right. Courts are given the means to hold governments to account when they fail to ensure the realisation of the right to education.

The South African Constitution explicitly incorporates socio-economic rights which means, if the rights are not met, the state can be challenged through the courts. The Legal Resources Centre has embarked on extensive constitutional litigation to give content to these rights, advance their implementation and hold the government to account for failing to realise them.

In particular, the Constitution incorporates the right to education which is an immediately realisable right. The huge discrepancies in the South African education system have their roots in the apartheid era, when education was separate and deeply unequal. The systemic disadvantages were ingrained under this system, and although some significant steps have been taken, the fundamental and structural factors perpetuating disadvantage have not been adequately addressed. The cases set out in this book represent steps forward in closing these gaps. These cases also draw attention to the need for – and seek to enable – more effective interventions in order to ensure that all South African children are able to realise their right to an education, regardless of their background. It is necessary that these interventions also enable schools, teachers, parents, communities and pupils to become more actively engaged in planning, improving and monitoring the education system.

Fighting to Learn... reflects on the work the LRC has undertaken to build on matters pursued and covered in the first edition of *Ready to Learn?* published in November 2013. The first publication – intended primarily as a legal resource – sets out in detail the background to litigation undertaken in respect of education. This second publication updates the reader on many of those cases, as well as providing a more general reflection on the role of education in the global development agenda.

Litigation is one of many tools that can be used to advance human rights. Court action must be used in conjunction with other advocacy methods and should be a last resort, where less adversarial methods have been tried and failed. It is hoped that practitioners in different jurisdictions can benefit from this book and use it as a resource in successfully litigating the right to education.

Over the last decade, through the experiences of its client communities, the LRC has come to understand the crucial role access to education plays in building a democratic state and improving the living conditions for all its residents.

Introduction

The Legal Resources Centre was established in 1979 as a public interest law centre that seeks to use the law as an instrument of social justice. Following the transition to democracy in 1994, a central focus of the work of the LRC became the use of the law to realise socio-economic rights – that is, to realise the promise of the new Constitution. In the first decade of democracy, the LRC litigated for poor clients, in particular, to secure basic human needs: housing, land and water. Over the last decade, through the experiences of its client communities, the LRC has come to understand the crucial role access to education plays in building a democratic state and improving the living conditions for all its residents.

The LRC's work in education began with a series of cases asserting the rights of poor learners and school communities, particularly in the Eastern Cape, to the most basic building blocks of an education – a safe classroom and school, a teacher, a space to read and write and the learning materials needed to teach and learn. These cases are concerned primarily with securing the "inputs" necessary to make education at all possible.

In the "mud schools" litigation in 2010, the LRC instituted proceedings to replace unsafe school structures with classrooms that are safe and functional. The litigation resulted in concrete relief for the individual client schools, which had new classrooms built. However, more importantly, it secured a binding commitment by the state to eradicate all "mud schools" across the Eastern Cape and the rest of the country, including a financial commitment of over R8 billion and a plan of action.

Following the successful settlement of "mud schools", the LRC monitored the roll-out of the special plan, Accelerated Schools Infrastructure Development Initiative (ASIDI). By January 2014, the government was far behind schedule, with as many as 200 schools still needing assistance and with no plan in place for improvements. Moreover, many schools with inappropriate structures had not been included in the master list at all and other schools that were on the ASIDI list were not aware of this fact; schools were not aware whether they were to receive new school buildings or, if they were, when they could expect to. As a result, the LRC was instructed by affected schools to launch "mud schools 2" in order to compel government to develop and publish plans and to put in place a system to ensure that all mud schools are included in the plans. This case, too, resulted in a significant settlement agreement in August 2014, requiring these steps to be taken. The material relating to "mud schools 2" falls in Article 1 of this book.

Having successfully litigated a series of cases concerned with specific unsafe schools, over several years, the LRC increasingly came to appreciate the scale of the infrastructural deficiencies at public schools across the country. The infrastructural problems, far from being isolated or sporadic, represent systemic problems affecting thousands of schools across the country. This shift from an individualised perspective to a focus on the systemic needs of schools across the country coincided with the birth of a new national social movement, Equal Education (EE). EE is a learner-based social movement that campaigns for access to an adequate education for all learners across the country.

The experiences of the LRC and of its clients in the "mud schools" litigation, together with the experiences that EE's members were able to share, led the LRC and EE to identify a key challenge: the absence of a binding law setting minimum standards for school infrastructure. A law was needed to tell the state and communities "what makes a school a school" and to establish standards for adequate classrooms, sanitation, electricity, security and other aspects of school infrastructure. And, crucially, a law was needed to set real deadlines for provincial education departments to provide this infrastructure.

Acting for EE and for individual schools with disastrously unsafe school buildings, the LRC launched the "norms and standards" case. We sought to compel the Minister of Basic Education to make regulations in terms of the South African Schools Act to set minimum uniform norms and standards for public school infrastructure. The Minister had previously promised to make the regulations, but apparently reconsidered and informed EE and the LRC that she would not do so. In response, EE launched a campaign that included letters, petitions and marches to Parliament.

When this still did not succeed, the High Court application was launched. LRC lawyers and EE members visited schools across the country, gathering information and the experiences of poor school communities. The founding papers included graphic detail of the conditions of poor schools across the country; and the impact on their learners and teachers of the grossly inadequate infrastructure at those schools. This included schools where classrooms became unusable in rainy weather and schools without any toilets at all. On the eve of the court hearing, the Minister finally relented and agreed to publish the norms and standards.

EE and the LRC played a further role during the drafting process, engaging with the Minister and providing substantial comments on the initial draft norms and standards. This finally culminated in the Minister publishing binding norms and standards in November 2013. These norms and standards now lay a basis for the LRC to assist schools to secure the basic infrastructure now promised by law, to enable learners to receive an education in a safe and functional school environment. The norms and standards litigation is covered in Article 2 of this book.

Article 3 of this book covers the LRC's furniture litigation. From the school visits towards the "mud schools" litigation and other cases, the LRC learnt that many schools across the Eastern Cape lacked basic classroom furniture that could enable each child to have a place to sit and write. In addition, the provincial department appeared not to have adequate knowledge of the furniture needs of schools. The LRC accordingly launched the *Madzodzo* case, in which we sought both systemic relief and specific relief for individual schools. At a systemic level, we sought and obtained court orders requiring the province to conduct an audit of school furniture needs and to develop a plan to procure and provide the furniture. We also sought specific orders

to provide furniture to individual schools. The resultant High Court judgment in *Madzodzo* reaffirms the nature of the education right as immediately enforceable and establishes that school furniture is one aspect of the content of the right. Many schools across the province have received new furniture as a result of the judgment, giving thousands of learners a space to read and write in their classrooms.

In relation to the equally serious challenge of the lack of sufficient teachers at public schools, the LRC followed a similar trajectory. Initial litigation sought to compel the Eastern Cape government to appoint and pay the teachers that it had itself determined were needed in the educator post establishment for specific schools. At the same time, the LRC secured an order that the department was obliged to appoint and pay teachers to fill vacancies at all affected schools across the province. However, when the provincial government failed to do this – with thousands of teacher vacancies remaining – the LRC sought a novel legal solution to the systemic problem. In the *Linkside* case, the LRC succeeded in obtaining the certification of a class action on behalf of all schools with teacher vacancies or unpaid teachers. This was the first opt-in class action ever to be certified by a South African court. The teacher provisioning litigation is covered in Article 4 of this book.

The textbooks litigation conducted by Section27 in Limpopo province has drawn attention to the problems, particularly in certain provinces, of providing textbooks that learners require to complete their curriculum. The LRC's client schools in the Eastern Cape have experienced similar difficulties relating to textbooks and other learner-teacher support materials (LTSM), including such basic items as blackboard dusters. These problems have been exacerbated by the centralisation of procurement of these materials, depriving schools of the ability to use their budgets to secure the items that they need. Because they lost control of their own budgets for LTSM, schools were forced to divert other funds to buy these materials or risk having learners go without. The LRC was instructed by affected schools to launch an application firstly, that the department reimburse schools for the difference in the budget between the amount allocated and the value of the textbooks actually received for 2013 and 2014; and secondly, to enable the schools themselves to procure LTSM so that they can obtain materials they require, and not be limited to textbooks obtained centrally by the department. We discuss this litigation in Article 5 of the book.

Finally, the LRC recognises that its education litigation takes place in a broader context. At a national level, the realisation of the right to education is integrally related to the realisation of all socio-economic rights and of the development goals of the state. South Africa's development needs also to be considered in the context of the international commitments reflected in the Millennium Development Goals and the post-2015 development agenda. We situate our education work in this context in Article 6 of the Book.

The LRC assisted schools in establishing crisis committees, and put pressure on the government to provide the infrastructure the schools required.

Mud schools 2

In 2010 the LRC embarked on litigation to address the problem of unsafe, crumbling mud structure schools in the Eastern Cape after repeated unsuccessful requests to the Education Department to remedy the situation at client schools. The LRC represented the Centre for Child Law (CCL), as well as the "infrastructure crisis committees" of seven schools, whose structures had been built by community members using branches and mud. The schools had no ceilings, and dilapidated corrugated iron and thatch for roofs. Representing the CCL and infrastructure crisis committees of these schools ensured that the LRC could obtain relief on behalf of the named schools as well as on behalf of all schools in the Eastern Cape.

The LRC assisted the schools in establishing crisis committees, and put pressure on the government to provide the infrastructure the schools required. However, there was no response from the Eastern Cape Department of Education (ECDOE), and so court proceedings were issued.

The litigation was successful in that the government, having initially opposed the application, offered to settle the matter and provide temporary and then permanent infrastructure relief to the seven schools involved. Construction of permanent structures was to be completed within one year. Most significantly however, the government agreed to commit R8.2 billion to replacing inadequate school structures nationwide, with R6.36 billion committed to schools in the Eastern Cape. This settlement offer was to be spent over three years to eradicate approximately 500 "inappropriate school structures". The programme created to oversee the replacement of the schools is known as the Accelerated Schools Infrastructure Development Initiative (ASIDI). Having the CCL as the LRC's institutional client was instrumental in ensuring an outcome that did not just benefit the seven applicant schools.

Now, three years after the settlement was reached, the seven applicant schools have been replaced, together with 63 other schools with very poor infrastructure. Another 230 schools are under construction or at an advanced stage of planning. Unfortunately however, the ASIDI programme has not been as successful as had been hoped. By January 2014, it was extremely behind schedule, with as many as 200 schools still needing assistance and with no plan in place for improvements. Moreover, many schools with inappropriate structures had not been included in the master list at all and other schools that in fact were on the ASIDI list were not aware of this fact. Most schools had no knowledge of the ECDOE's plans. Tragically, the ASIDI programme has spent only a quarter of the money allocated to it by National Treasury for this three year period. One of the ongoing reasons for under-expenditure has been a failure to plan adequately.

The conditions in many of the schools not included in the ASIDI programme are appalling. Children are exposed to the weather, walls crumble, and strong winds easily blow the roofs off. School attendance suffers, teaching and learning is disrupted and children are prevented from receiving a quality education. Repeated requests by these schools to be included on the ASIDI programme have been ignored, and requests by schools on the ASIDI list for information about their replacement have been similarly disregarded. The LRC, acting on behalf of the Centre for Child Law (CCL) and five mud schools in dire need of emergency relief in the Eastern Cape, applied to the court in January 2014 for an order that the ECDOE immediately

provide relief to the five co-applicant schools, publish a list of all schools in the province scheduled to be replaced, and produce and publish a comprehensive plan setting out what each school is to receive and a timetable for this. The application also sought an order directing the Department to publish the criteria to be used when deciding whether to include a school on the list, and to give schools an opportunity to put forward reasons why they should be placed on the list and provided with relief.

On 21 August 2014, a settlement was reached and the Department agreed to publish a list within 45 days of those schools in the Eastern Cape that still comprised of inappropriate structures and to produce the required plan. The settlement was made an order of the court. This is an important step forward and, by ensuring that the ECDOE puts plans into place, it is hoped that it will be able to spend a much larger portion of its budget.

The LRC has embarked on a monitoring programme to track the progress being made. This involves visiting the 200 schools to establish whether the ECDOE's lists are accurate and whether the plans produced in terms of the court order are reasonable. Thus far, the monitoring has shown that the Department's lists are inaccurate (one of the schools on the list was, in fact, closed seven years ago), and a huge amount of work still needs to be carried out. The LRC will continue monitoring and ensuring full compliance with the court order. The production and publication of plans is critical to ensuring there is transparency in the programme, improved expenditure of the budget and accountability to the schools.

Worryingly the Department failed to produce the plan by the end of November 2014 in terms of the court order, and has given no reasons for their failure to comply. Further litigation is being considered to sanction the non- compliance, and appoint an independent administrator to produce the plan if the department remains in breach of the court order.

(i) Extracts from founding affidavit Centre for Child Law

The annexes referred to in the court proceedings are too lengthy to include here. Please contact the LRC for the full court document.

IN THE HIGH COURT OF SOUTH AFRICA EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO.

In the matter between:

MAKAZIWE MAQHELANA obo PARENTS OF LEARNERS
AT SAMSON SENIOR PRIMARY SCHOOL | *First Applicant*

NOMVUSELELO VUKAPHI obo PARENTS OF LEARNERS
AT SIRHUDLWINI JUNIOR SECONDARY SCHOOL | *Second Applicant*

MENEZI HARRIOT DANISO obo PARENTS OF LEARNERS
AT NCINCINIKWE JUNIOR SECONDARY SCHOOL | *Third Applicant*

NGQEBELELE NOMTATI obo PARENTS OF LEARNERS
AT MELIBUWA SENIOR PRIMARYSCHOOL | *Fourth Applicant*

NOBUNTU YENGWA obo PARENTS OF LEARNERS
AT GQEYANE SENIOR PRIMARY SCHOOL | *Fifth Applicant*

CENTRE FOR CHILD LAW | *Sixth Applicant*

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA | *First Respondent*

MEC FOR EDUCATION: EASTERN CAPE | *Second Respondent*

GOVERNMENT OF THE EASTERN CAPE PROVINCE | *Third Respondent*

SUPERINTENDENT GENERAL OF THE
EASTERN CAPE DEPARTMENT OF EDUCATION | *Fourth Respondent*

MINISTER OF BASIC EDUCATION | *Fifth Respondent*

Founding Affidavit

I, the undersigned,

ANN MARIE SKELTON

state under oath the following:

B. THE PURPOSE AND BACKGROUND OF THIS APPLICATION

1. This application is concerned with what are referred to as mud schools, being public schools including the applicants schools, which have unsafe and woefully inadequate school infrastructure. While many public schools face infrastructure challenges, this application is concerned with the worst off schools in the Eastern Cape Province with infrastructure that endangers learners or, at the very least, makes effective learning and teaching virtually impossible.

2. In this regard, the respondents have conceded and recognised the seriousness of the problem. They have consequently developed and, to some extent, implemented an Accelerated Schools Infrastructure Development Initiative (ASIDI) to fast track the eradication of inappropriate classrooms at approximately 500 schools in the Eastern Cape.

3. The applicants welcome the intent of the respondents to develop and implement the ASIDI plan. However, as will be discussed below, the development and implementation of the plan is seriously flawed in various respects. Repeated attempts by the applicants to resolve these flaws via correspondence and discussion have proved fruitless. It has therefore, regrettably, been necessary for the present litigation to be initiated.

4. This application therefore has three central purposes and seeks three main forms of relief:

4.1 First, to allow individual schools in the Eastern Cape to understand the state's plans to eradicate mud schools so that they will know if and when the state will assist them and, if so, what infrastructural assistance they have been identified to receive.

4.2 Second, to ensure that the first and second applicant schools are included on the ASIDI list and to allow other similarly placed schools that have been omitted from the ASIDI list to be given an opportunity to motivate for their inclusion on the list.

4.3 Third, to secure emergency relief for the applicant schools by obtaining temporary infrastructure for those schools in order that they can alleviate the desperate situation in which their learners find themselves.

5. This case concerns the fundamental right to education as provided for in section 29 of the Constitution. A central component of that right is the duty on the state to provide sufficient, safe classrooms so that children can learn in a properly constructed, safe environment that does not pose a threat to their health, with sufficient space in which to read, write, and learn. In respect of the applicant schools as well as many others, the state (at national and provincial level) has not provided safe classrooms for all learners in fulfilment of its constitutional duties, and has not disclosed any plan to do so. If it does have a plan to do so, this has not been communicated to the CCL, our attorneys, the schools, or the public despite repeated requests to do so. This is an ongoing breach of the right to a basic education, particularly when considered in conjunction with other provisions of the Constitution.

6. It is indisputable that thousands of learners in the Eastern Cape are forced to use classrooms that are made out of mud or other "inappropriate materials" such as corrugated iron, asbestos, or wooden planks. These classrooms are unsafe and do not provide an enabling learning environment. I will refer to these as "inappropriate classrooms". The children affected are mainly black and poor, and come almost exclusively from the rural areas of the Eastern Cape.

7. The problem of inappropriate classrooms is not a recent phenomenon. Thousands of schools were built by communities, predominately in the former homeland of the Transkei, during the apartheid era when spending on black education

was criminally low. Even after 1994 and still continuing to the present day, where there has been a need for classrooms and the state has failed to provide them, communities continue to build classrooms using readily available material such as forest wood and mud, corrugated iron, and timber.

8. Over the past 12 years the state has made repeated promises to eradicate all inappropriate classrooms that have not been kept, and set many targets that have not been met.

9. Despite all of these undertakings, all school building projects had virtually come to a standstill in the province by 2010. Letters written by mud schools pleading for help from the state were met with a simple, "there are no funds to assist". This led to the CCL and seven mud schools launching a High Court application against the state in August 2010 in the Bhisho High Court under case number 504/10. The application sought to break the impasse and compel the respondents to provide much needed urgent relief to the seven schools and develop a plan for the eradication of mud schools.

10. In settlement of that matter reached in February 2011, the respondents agreed to address the urgent needs of the seven schools and to spend R8.2 billion on eradicating "inadequate structures" nationally, with the lion's share (over R6.36 billion) to be spent on schools in the Eastern Cape. A copy of the agreement is attached marked **Annexure "AS12"**. This was recorded in the agreement as follows:

> *"The Second Respondent has committed R8.2 billion from 1 April 2011 to 1 March 2014 to replace inadequate structures, including mud structures, at schools throughout South Africa and provide basic services to those schools. This amount will be allocated across the next three financial years as follows:*
>
> *R700 million for the 2011/12 financial year;*
> *R2.3 billion for the 2012/13 financial year; and*
> *R5.1 billion for the 2013/14 financial year."*

11. The ASIDI was launched in order to spend this money and to fast-track the eradication of inappropriate classrooms at approximately 500 schools in the Eastern Cape. As will be discussed below, exact numbers on schools needing to be replaced are not available.

12. The ASIDI is funded in the form of a "Schedule 7 conditional grant" known as the "school infrastructure backlog grant". A screen shot of the ASIDI web page on the Department of Basic Education's website is attached as **Annexure "AS13"**.

13. The DBE's stated plan for the ASIDI to spend these monies included replacing 50 inappropriate structures by 31 March 2012 (which included the seven schools that were part of the February 2011 settlement agreement), another 100 schools by 31 March 2013, and another 346 schools by 31 March 2014. The National Department reported these targets to Parliament's Select Committee on Education and Recreation on 12 September 2012. Relevant pages of the power point presentation are attached as **Annexure "AS14"**.

14. There has been some progress made in eradicating inappropriate classrooms subsequent to the settlement agreement. The seven schools party to the agreement have either been completed, or are close to being completed, and the 42 other schools which make up the initial 49 are in a similar position. (The initial 50 schools scheduled to be replaced were reduced to 49 after it transpired that one school had been counted twice.) But there have been massive delays and serious underspending of the budget.

15. The initial phase of the ASIDI is at least 18–24 months behind schedule. The second batch of 100 schools has been reduced to 50. Construction on this second batch of 50 schools has begun. Another 50 schools have been identified and are at the "site development" and tendering stage. As reported in an article by Bhekisisa Mncube published on SAnews.gov.za and attached as **Annexure "AS15"**, the latest projection by the Deputy Minister is that only 150 schools will be completed by 2015. This is a substantial delay and of great concern for hundreds of other schools in the Eastern Cape that are comprised of inappropriate structures.

16. This application does not seek to ignore or undermine what progress has been made

in terms of the ASIDI, even if that progress has been slow. The critical issue, however, is the absence of concrete, publicised plans for the future of the programme.

16.1 Not having fixed criteria to determine whether schools should be replaced and in what order, the lack of planning by the Department in terms of identifying schools to be replaced, and the failure to communicate plans to schools and communities is a serious breach of the applicants' rights.

16.2 It raises the very real prospect of perpetual underspending on the grant, the reduction and then termination of the grant for the eradication of inappropriate structures at schools, and many inappropriate structures not being replaced.

16.3 The serious shortcomings in the ASIDI's planning and communication have resulted in many schools such as those represented by the first and second applicants not forming part of the ASIDI programme at all.

17. The underspending of monies set aside for the eradication of inappropriate structures and the delay in providing safe and appropriate infrastructure is an egregious breach of children's right to education. The underspending is caused by a failure to plan ahead.

18. Many schools identified as mud schools recorded on the ASIDI list have no idea if or when their buildings are going to be replaced. Enquiries by the CCL and the LRC's offices have revealed that at least 36 schools are on the ASIDI list but have no idea of this fact. Another 49 schools have been visited by someone who has "surveyed" their school but given them no information about what will happen next. Another 21 schools have been told that their school buildings are going to be replaced, and sometimes even been given a date that has since passed for when construction will begin, but have not been told what is scheduled to be built.

19. There have been repeated requests for:

19.1 information about when the schools represented by the first and second co-applicants would receive emergency infrastructure and be placed on the ASIDI list; and

19.2 the publication of the plans, building programmes, the criteria used to identify schools for the ASIDI programme, and an opportunity for the public to make input.

20. Despite these repeated requests, the respondents have failed to respond in any meaningful way.

21. There is no justification for the ASIDI programme being shrouded in mystery and schools being left to guess their fate in terms of possible infrastructural improvements. The CCL and our attorneys have repeatedly been informed by many schools that they have no idea if or when they are scheduled to receive infrastructural improvements from the department of education.

22. Due to the dire conditions that many schools are in, the schools' governing bodies are often forced to fund desperately needed infrastructural improvements using a mixture of money raised by the community and portions of the school's budget earmarked for other line items, such as learner and teacher support material, school nutrition, or non-education consumables.

23. This places extreme pressure on indigent rural communities that can ill-afford to make donations to school building projects. It also results in schools having to forego essential materials. While schools know that funding infrastructure projects in this manner is against departmental policy and not contemplated by the legal framework governing public schools, the desperate situation imposed by the infrastructural conditions forces them to take desperate measures to ensure that their students can be taught.

24. Equally concerning is that the sacrifices of schools and communities are often unnecessary, as infrastructural improvements arrive or are made unannounced, soon after the school's own infrastructural efforts are completed, or when they are still underway. Nyangilizwe High School on the outskirts of Mthatha is a good example. Parents made donations and

the school rearranged its budget to build four desperately needed classrooms. Weeks before completion, contractors arrived and constructed six temporary classrooms on concrete slabs with shaded walkways. The school abandoned the classrooms they were building to avoid any further financial loss. The school estimates that it wasted over R200,000 because they were not informed of the Department's building plans.

25. At schools, such as the applicant schools with inappropriate structures, the conditions of learning are deplorable. Classrooms often have corrugated iron roofs that leak badly and are held down by heavy stones and makeshift wire bindings. They are easily blown off during storms or high winds. Walls made of mud or corrugated iron often crumble or collapse and allow the wind and rain to enter. The floors are usually made of mud and the classrooms are extremely dusty in dry weather and muddy in wet weather. At other schools, such as Samson SPS, there are no classrooms at all and the 200 children are forced to use privately-built rondavels and community-built churches which are even less well-suited for use as classrooms.

26. The respondents simply cannot continue to neglect their legal duties to plan, communicate, and execute their mandate to eradicate inappropriate classrooms and ensure that children can access their right to basic education. Their ongoing failure in this regard creates a real risk that monies allocated to the ASIDI will be reduced and ultimately stopped prior to the eradication of the inappropriate structures.

27. While public schools receive money from the National Department of Education to procure items necessary to provide basic education, the construction of necessary classrooms is not budgeted for in the allocations made to schools. While there is a small budget for the "maintenance" of buildings, there is no line item in any school's provincially determined budget for infrastructure. The classroom crisis in the Eastern Cape affects both "section 20 schools" that have limited control over the spending of their state allocated school budget, as well as "section 21" schools that have greater autonomy regarding the allocation of their school budget.

28. It is very difficult for poor and under-resourced schools (which educate children from poor families) to build appropriate classrooms by using money raised through school fees or by readjusting funds from other areas of the school's budget to build classrooms (temporary or permanent) due to the high cost of building classrooms. They depend on the government to build classrooms.

29. Building programmes, public pronouncements, and the settlement agreement recorded between the CCL and the respondents confirm that the respondents acknowledge their constitutional and legislated responsibilities to provide learners with classrooms and safe school infrastructure. Despite acknowledging their responsibilities, the schools represented by the first and second applicants and numerous other schools whose interests are represented by the CCL are not scheduled to receive appropriate classrooms and have not been informed of any plan to provide classrooms.

30. A vague glimmer of a possible plan for dealing with the hundreds of other inappropriate structures in the Eastern Cape can be found in the minutes of a 20 August 2013 DBE meeting with Parliament's Education Portfolio Committee. Acting Director-General, Mr Paddy Padayachee, stated that "Although the DBE was making good progress in providing school infrastructure in the Eastern Cape through the ASIDI programme, a number of inappropriate structures still needed to be dealt with, so there was a plan to provide mobile classrooms – and mobile ablution facilities – to address school readiness in 2014 in all the provinces, with the exception of Gauteng and the Western Cape. When the inappropriate structures had been replaced, the mobiles would be moved for use at other locations…" The summary and minutes of the meeting are attached as **Annexure "AS16"**.

31. Despite this report by the Acting Director-General, the National Department and ECDOE have not provided any plan to the applicants and the other affected schools.

32. It has, therefore, proved necessary for the applicants to seek the three forms of relief summarised in paragraph 4 above and set out

in the Notice of Motion to which this affidavit is attached.

D. CONDITIONS AT THE APPLICANT SCHOOLS

33. The first and second applicant schools are both section 21 schools that do not charge fees and are in the poorest quintile of schools. They do not appear on any ASIDI list that our attorneys have had sight of. Despite two written requests from our attorneys for the schools to be assessed and included on the list, the respondents have failed to respond meaningfully and have failed to assess the schools in terms of the undertaking made.

34. Photographs A to E, which are referred to below, were taken by employees of the Legal Resources Centre on the dates set out in the caption appearing under each photograph.

MUD SCHOOLS NOT ON THE ASIDI LIST

SAMSON SPS

Photo A (taken 25 February 2013) – the inside of the mud structure church which functions as a grade 6 classroom at Samson SPS. The trusses are collapsing and the roof leaks badly.

35. As is set out in more detail in the supporting affidavit of the first applicant, Samson SPS has 230 learners enrolled in grades R (reception) to six and has five teachers. The school consists of five privately-built rondawels and two small, community built mud structure church buildings. Some of the rondawels were unused while others were generously provided by local owners willing to vacate their homes during school time. The five rondawels and two church buildings accommodate seven grades as well as the staff and administration of Samson SPS. Each grade has between 25 and 50 students.

36. The rondawels and church buildings are small and are in an advanced state of disrepair. The wooden roof support beams are collapsing. When it rains the school is closed, due to severe leaks in the roofs. Photographs depicting the collapsing roof support beams and the insides of the mud structure classrooms are attached to the affidavit of Mr Maqhelana. These appalling conditions are not conducive to effective learning and teaching and pose a serious health and safety risk to both the children and teachers. The parents worry about the safety of their children attending a school that could collapse at any time.

37. The school has no toilet facilities and children relieve themselves in the surrounding veldt. Faeces are scattered around the rondawels and church buildings used as classrooms. It is unhygienic and a health risk. It is also an affront to the learners' dignity and privacy.

38. Despite repeated requests for assistance, there has been no confirmation from any of the respondents that improvements will be made. The last promise of assistance was made by an inspector in September 2011 who said that the school would be replaced in the 2014-2015 financial year. There has been no confirmation of this and no further information regarding this promise of assistance, and the school does not appear on the ASIDI programme list of schools to be replaced.

39. The school deposed to an affidavit detailing the dire conditions at the school in 2011. That affidavit was filed in the Bhisho High Court under case number 81/2012 in the matter of Equal Education and two others versus the Minister of Basic Education and twelve others where the applicants sought to compel the Minister to promulgate binding minimum norms and standards for school infrastructure in terms of section 5A of the Schools Act. The respondents

have therefore had knowledge of the conditions at the school for, at the bare minimum, over two years. As discussed below, in April 2013 the respondents undertook to assess the school and provide assistance if necessary. None of the applicants or our attorneys have any knowledge of an assessment taking place or whether a decision has been taken to provide assistance.

SIRHULDWINI SPS

Photo B (23 August 2012) – the mud structure classrooms at Sirhuldwini are small and ill-suited for teaching and learning.

40. Sirhudlwini SPS is in the district of Mount Frere, has 124 learners enrolled in grades R (Reception) to 6, and consists of six community-built classrooms. Four classrooms are mud structures and two are made of concrete blocks and cement. There are between 16 and 38 learners in each of the classrooms. Photographs depicting the classrooms are attached to the affidavit of Ms Vukaphi.

41. One of the classrooms is simultaneously used as a staffroom, a kitchen and a storeroom. Grades 1 and 2 share the same classroom and grades 5 and 6 are also combined. Not surprisingly, the fact that four grades must share only two classrooms makes it extremely difficult for teachers to effectively instruct the children and generally creates a more chaotic atmosphere.

42. The classrooms are not insulated and are extremely cold in winter and hot in summer. The roofs leak and wet weather disrupts learning.

Despite repeated requests to the ECDOE for assistance and numerous promises by the ECDOE that they will investigate the conditions at the school, Sirhuldwini SPS still does not appear on any building lists, including the 2012 ASIDI list.

43. As has been made clear in the preceding paragraphs and the affidavits of the first and second applicants, the infrastructure at Samson SPS and Sirhuldwini SPS is hopelessly inadequate. The schools are constructed entirely (or almost entirely) of mud. The infrastructure is so inadequate that it threatens the safety of the learners concerned and, at the very least, severely undermines the ability of learners to be properly educated. Despite this, Samson SPS and Sirhuldwini SPS do not appear anywhere on the ASIDI list.

44. By contrast, the third to fifth applicant schools are (correctly) included on the ASIDI list but the condition of Samson SPS and Sirhuldwini SPS are as bad, if not worse than, the conditions at the third, fourth, and fifth applicant schools.

45. There is no rational, reasonable or lawful basis for Samson SPS and Sirhuldwini SPS to be excluded from the ASIDI list.

SCHOOLS ON THE ASIDI LIST WITH NO KNOWLEDGE WHETHER THEY WILL EVER BE ASSISTED

46. The schools represented by the third to fifth applicants do appear on the ASIDI list but have no knowledge of whether they are scheduled to receive improved infrastructure. The conditions at all three schools are dire and as bad, if not worse, than the conditions at Samson and Sirhuldwini. All three of the schools are section 21, no-fee schools that have been placed in quintile one. None of them have toilet facilities. Gqeyane Senior Primary School (Gqeyane SPS) and Melibuwa Senior Primary School (Melibuwa SPS) have been visited by officials who surveyed the schools but gave them no information about possible improvements. Ncincinikwe Junior Secondary School (Ncincinikwe JSS) has never been visited by departmental officials to assess its infrastructure.

NCINCINIKWE JSS

Photo C (taken 28 October 2013) – the toilets at Ncincinikwe JSS are no longer used as they are unstable and full of waste. Children relieve themselves in the surrounding bushes.

47. Ncincinikwe JSS is located in the district of Butterworth. It has 117 learners in grades R to 8, and five teachers. As is set out in more detail in the third applicant's affidavit that is attached hereto, all of the classrooms are made of mud, the zinc roof sheeting leaks badly, the buildings are unstable, and there are not enough water tanks to harvest sufficient rainwater for the schools' needs. One of the biggest problems at the school is the complete absence of toilets for learners. The learners are forced to relieve themselves in a nearby field which is strewn with faeces and toilet paper. The affidavit of Siyabonga Benile, a female learner in grade 7 at the school, is also attached to this application and describes the hardships faced by female students, particularly when they are menstruating.

48. The schools' enrolment has been in slow decline over the past few years and the parents attribute this to the failing infrastructure. Many children have been removed from the school and sent to live in bigger towns with relatives where there are schools with better infrastructure. The parents are certain that enrolment at the school would increase dramatically if the state provided improved infrastructure.

49. Since 2003, when the school was informed that it was number one on the priority list of schools to be replaced, it has not heard anything about the government's plans to improve the infrastructure at the school.

G. THE IMPACT OF INADEQUATE INFRASTRUCTURE ON THE EDUCATION OF LEARNERS

50. There is a direct relationship between adequate school infrastructure and learner performance. Adequate infrastructure is a necessary element for providing an adequate education.

51. The Minister and her Department have acknowledged this causal relationship. This is made clear both in official government documents, and in government's correspondence with the first applicant.

52. For example, in the Minister's foreword to the National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment (National Policy for an Equitable Provision) she highlighted the significance of school infrastructure as follows:

> *"School infrastructure remains a critical issue on the social agenda for South Africa for a number of reasons. In the first place, infrastructure differentials are so large in South Africa and some of the infrastructure available so inadequate that it is inconceivable that it DBEs [does] not impact on learner performance. Secondly, the highly unequal access to quality facilities remains critical in the light of our Constitution and the Bill of Rights which demand equity and equality." (page 4) (emphasis added)*

53. The National Policy for an Equitable Provision states:

> *"Significance of the Physical Teaching and Learning Environment:*
>
> *Yet as recent studies show, there is a link between the physical environment learners are taught [in], and teaching and learning effectiveness, as well as learning outcomes. Poor learning environments have been found to contribute to learner irregular attendance and dropping out of school, teacher absenteeism and the teacher and learners' ability to engage in*

the teaching and learning process. The physical appearance of school buildings are shown to influence learner achievement and teacher attitude toward school. Extreme thermal conditions of the environment are found to increase annoyance and reduce attention span and learner mental efficiency, increase the rate of learner errors, increase teacher fatigue and the deterioration of work patterns, and affect learning achievement. Good lighting improves learners' ability to perceive a visual stimuli and their ability to concentrate on instructions. A colourful environment is found to improve learners' attitudes and behaviour, attention span, learner and teacher mood, feelings about school and reduces absenteeism. Good acoustics improves learner hearing and concentration, especially when considering the reality that at any one time, 15 percent of learners in an average classroom suffer from some hearing impairment that is either genetically based, noise-induced or caused by infections. Outdoor facilities and activities have been found to improve learner formal and informal learning systems, social development, team work and school-community relationships." (Page 7. See also pages 23-25.)

H. LEGAL BASIS FOR RELIEF SOUGHT

54. The applicants submit that there is unquestionably a legal and constitutional obligation on the respondents to provide adequate and safe school infrastructure and, in doing so, to plan appropriately and provide information to the affected schools. There is, similarly, an obligation to provide emergency assistance to schools where required. These are matters for legal argument and will therefore not be addressed in detail in this affidavit.

55. I emphasise, however, that these legal and constitutional obligations flow from a range of sources, including:

55.1 The right to a basic education contained in section 29(1)(a) of the Constitution;

55.2 Further constitutional provisions, including:

55.2.1 The duty of the state to ensure accountability, responsiveness, and openness (section 1);

55.2.2 The duty of the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights (section 7(2));

55.2.3 The right to equality (section 9);

55.2.4 The right to human dignity (section 10);

55.2.5 The right to freedom and security of the person (section 12);

55.2.6 The rights of children (section 28);

55.2.7 The basic values and principles governing the public administration (section 195); and

55.2.8 The duty on the state to perform its obligations diligently and without delay (section 237).

55.3 The Schools Act, including sections 3 and 34 thereof; and

55.4 The Eastern Cape Schools Education Act 1 of 1999, including section 4(1) thereof.

56. Again, without seeking to anticipate or limit the detailed legal argument that will be advanced at the hearing of this matter, I emphasise the following points.

57. First, the right to a basic education necessarily implies the right to a basic education that is adequate and in an environment that is safe.

57.1 I would be most surprised if the respondents disagreed with this contention.

57.2 As is illustrated by the situation at the applicant schools, safe and functional infrastructure is essential for adequate education to be provided. Educating a child requires more than a teacher, or a teacher and a textbook. The achievement of an adequate basic education requires, amongst other things, that a child study in classrooms and

an environment that are safe and conducive to learning.

57.3 Yet the present case demonstrates that learners required to attend school are being subjected to serious health and safety risks from unsafe buildings. In several of the applicant schools, the buildings are in an advanced state of disrepair, and many wooden roof support beams are collapsing. Other buildings are structurally unsound and continue to deteriorate in bad weather.

57.4 There is a real concern about the safety of children attending a school that could collapse at any time. As well as the risk from unsafe structures, learners are subject to health risks from classrooms that are not insulated and are extremely cold in winter and hot in summer; from floors which are very dusty in dry weather and muddy in wet weather; from leaking roofs and other structural defects. The state, by subjecting learners who are required to attend school to such risks, has actively interfered with their rights.

57.5 Learners at the applicant schools and other similar schools are also consequently subject to unfair indirect discrimination on grounds of race and ethnic and social origin. In this case, the state's provision of inadequate infrastructure at schools overwhelmingly affects black learners.

58 Second, the relevant provisions require that plans by the state to fulfil its constitutional and statutory obligations regarding education be made available at least to those affected by them.

58.1 In the present case, government has already embarked on a plan to fulfil its obligations under the Constitution. This is the ASIDI plan. However, as appears from this affidavit and those filed together with it, the design, implementation and communication of the ASIDI plan has varied from haphazard (at best) to deeply flawed. This application is a first step in seeking to remedy some of those defects.

58.2 In this regard, it bears emphasis that the Constitutional Court has already emphasised the critical importance of making such plans publicly available and accessible. In the context of government's response to HIV and AIDS, the Court unanimously held that for a programme to pass constitutional muster, it is essential that it be communicated and made known to those involved:

> *"The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately."* [1]

58.3 There can, in my submission, be no question that this applies equally to government's duties in relation to the right to a basic education. The rights-bearers themselves are entitled to know when and in what way their rights will be fulfilled and the relevant plans and budgetary allocations should be made public.

1. Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) at para 123

59 Third, the relevant provisions require that plans by the state to fulfil its constitutional and statutory obligations regarding education must make immediate provision for those who are in immediate need.

59.1 It is now well-established that, even where the state is only required to act "reasonably", it will not be doing so if those in immediate need are simply told to wait for their position on the waiting list to come up.

59.2 In the present context, the failure of the respondents to provide some form of emergency relief to the applicant schools is itself a breach of the various constitutional and statutory provisions set out in this affidavit, which must be remedied.

60 Finally, I point out that on 29 November 2013, acting in terms of the Schools Act, the Minister prescribed *"Regulations Relating to Minimum Uniform Norms and Standards for Public School infrastructure"* (the regulations).

60.1 The regulations provide standards for, inter alia, the size of schools, access for disabled people, where schools should be located geographically, classroom sizes, standards for the availability of electricity, water, sanitation, libraries, laboratories, sport facilities, electronic connectivity, perimeter security and school safety amongst other things.

60.2 The ASIDI and the Memorandum of Agreement concluded by the state pre-date the regulations. Prior to the regulations being promulgated, the state had already conceded its legal obligation to provide adequate infrastructure to schools in the position of the applicant schools.

60.3 However, to the extent that the regulations apply, they reaffirm the respondents' obligations to provide safe and proper infrastructure.

CONCLUSION

61 The precise relief sought by the applicants is set out in the Notice of Motion and is not repeated here. Suffice it to reiterate that the relief sought takes three forms.

61.1 **First,** in prayer 1 of the Notice of Motion, the applicants seek relief which would allow individual schools in the Eastern Cape to understand the state's plans to eradicate mud schools via the ASIDI so that they will know if and when the state will assist them and, if so, what infrastructural assistance they have been identified to receive.

61.2 **Second,** in prayers 1.4 and 2 of the Notice of Motion, the applicants seek relief to ensure that the first and second applicant schools are included on the ASIDI list and to allow other similarly placed schools that have been omitted from the ASIDI list to be given an opportunity to motivate for their inclusion on the list.

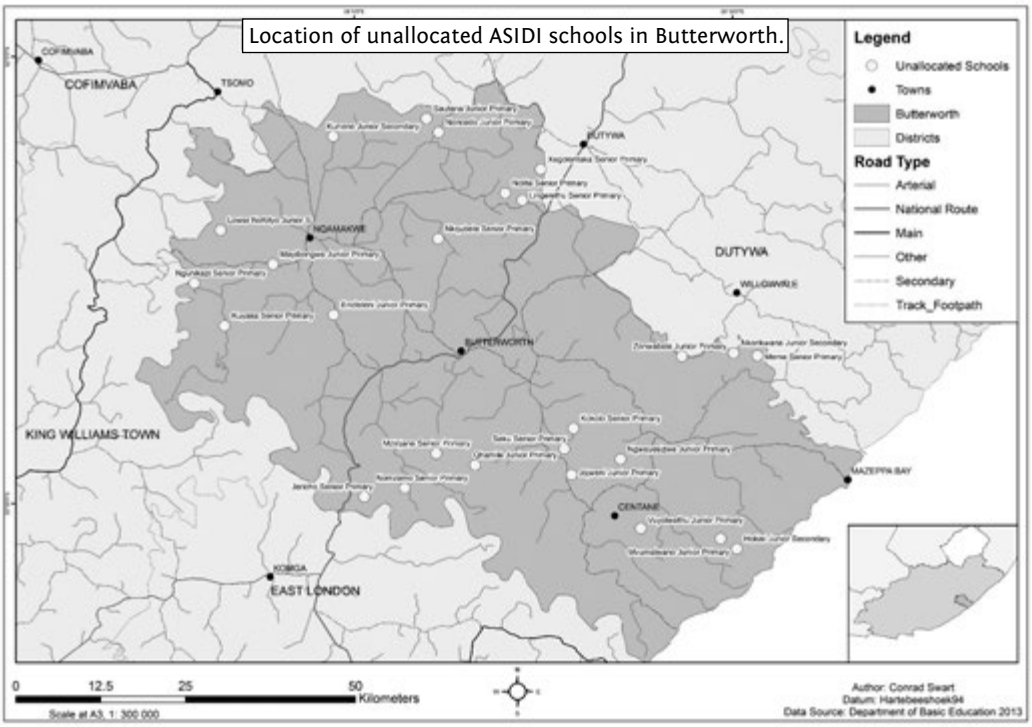
61.3 **Third,** in prayers 3 and 4 of the Notice of Motion, the applicants seek emergency relief for the applicant schools, in order that they can obtain at least temporary infrastructures and alleviate the desperate situation in which the learners at the applicant schools find themselves.

62 I submit that this relief is undoubtedly appropriate, just and equitable.

WHEREFORE the applicants pray for the relief set out in the Notice of Motion.

(ii) Examples from LRC monitoring programme

MUD SCHOOLS MONITORING



BUTTERWORTH DISTRICT

OVERVIEW

NAME OF SCHOOL	INFRASTRUCTURE RECOMMENDATION	PROBLEMS OR CONCERNS WITH THE FOLLOWING:*					
		FURNITURE	ENROLMENT AND TEACHERS	SANITATION	FUNDING (INCL. LTSM)	SCHOOL NUTRITION	TRANSPORT
Endleleni Junior Primary	Remove from list	N/A	N/A	N/A	N/A	N/A	N/A
Hokisi Junior Secondary	Rebuild	Yes	No	Yes	No	No	No
Jericho Senior Primary	Other						
Jojweni Junior Primary	Rebuild	Yes	No	Yes	No	No	No
Kokolo Senior Primary	Remove from list						
Kunene Junior Secondary	Remove from list	Yes	No	No	No	No	No
Kuyasa Senior Primary	Other	Yes	No	No	No	No	
Lingelethu Senior Primary	Rebuild	Yes	No	No	No	No	No
Lower Nofotyo Junior Secondary	Rebuild	No	?	?	?	No	?
Mayibongwe Junior Primary	Rebuild	Yes	Yes	Yes	No	Yes	No
Meme Senior Primary	Rebuild	No	Yes	Yes	No	No	No
Mvumelwano Junior Primary	Rebuild	Yes	No	Yes	No	No	No
Mzinjane Senior Primary	Other	No	No	Yes	No	Yes	Yes

NOLITA SENIOR PRIMARY

Principal Name and No.:
Ms Dambisa
SGB Chairperson Name and No.:
Mrs Piliswa

Address: PO Box 1897
Grades: Gr R – Gr 6
No. of Learners: 63
Visited on: 26 August 2014
Visited by: Cameron, Elizabeth, Pasika

Recommendation:
- [x] Rebuild
- [ ] Close and merge
- [ ] Remove from list
- [ ] Other

Reasons:
Classrooms built of cement and blocks. No ceilings. Nearest schools, which require crossing rivers to reach, are about 3km away.

Mud school with cement plaster. Classrooms in poor condition and have no ceilings.






NOMZAMO SENIOR PRIMARY

Principal Name and No.:
Ms Noluthendo Bovela

Recommendation:
- [x] Rebuild
- [ ] Close and merge
- [ ] Remove from list
- [ ] Other

Address: PO Box 61, Butterworth, 4990
Grades: Gr R – Gr 5
No. of Learners: 41
Visited on: 29 August 2014
Visited by: Cameron, Elizabeth

Reasons:
Buildings are block and cement. Well maintained but inappropriate. Closest school is too far to walk.






...over 1 100 schools in South Africa still do not have access to electricity, over 500 do not have sanitation facilities and over 600 are without water.*

* National Education Infrastructure Management System (NEIMS) Reports 2014

Norms and standards for school infrastructure

A report conducted by the Department of Basic Education (DBE) in May 2011 shockingly revealed that over 3 500 schools in South Africa still did not have access to electricity, 900 did not have sanitation facilities and 2 400 were without water. A principal problem in resolving these infrastructural issues was a complete lack of regulations which clearly set out what a school in South Africa should consist of, and what the minimum requirements in terms of sanitation, electricity and running water needed to be.

Acting on behalf of Equal Education (EE) and two public schools in the Eastern Cape, the LRC launched a court application in March 2012, seeking an order which directed the Minister of Basic Education to set minimum norms and standards to regulate school conditions throughout the country. Parties entered a settlement agreement on 19 November 2012, whereby the Minister agreed to provide the two applicant schools with sufficient infrastructure, and, perhaps more importantly, to publish regulations setting out minimum norms and standards required in schools. By May 2013, however, the Minister had still failed to publish final regulations, leading to a further round of litigation to force the Minister to set them down.

On 29 November 2013, a set of regulations was finally made law, to ensure that each learner is guaranteed to be educated in a safe environment, with access to electricity, sanitation and clean water. This step was a breakthrough in advancing the right to a basic education, and ensuring that children are safe at school.

Summary of regulations

The regulations brought into force on the 29 November 2013 are extensive, covering many aspects of school infrastructure. The principal points can be summarised below as:

GENERAL PROVISIONS

- The regulations set out how new schools should be built, as well as how existing schools should be upgraded and maintained.[i]
- Annual reports must be submitted to ensure implementation of the norms and standards.[ii]
- Minimum universal design standards are set out, which apply to all structures within the school. Schools for learners with special education needs must comply with standards relating to the nature of the specialised support programme at the school.[iii]
- For the purposes of identifying the site of a school, schools must be located to ensure easy access to roads, sewage lines and other basic services. They must not be located too close to bottle stores and shebeens, railway stations, and other inappropriate structures and buildings.[iv]
- The regulations set out categories for key school areas, such as classrooms, and stipulate the minimum sizes they must be.[v]
- Design considerations must be taken into account for all school areas, to make provision for the specific needs of the educators and

teachers, in particular those with special educational needs. This includes issues such as reducing noise as much as possible, ensuring that male and female toilets are as far apart as possible, and ensuring that innovative design is used which is cost efficient and creates an enabling and inclusive learning environment.[vi]

- The Department of Education must review the regulations at regular intervals to ensure that the norms and standards remain current, and are appropriate to serve the needs of the teaching and learning processes. An education department may adapt the norms and standards to best suit the schools within the province concerned.[vii]

WORK TO BE COMPLETED WITHIN THREE YEARS

- "Mud schools" and those made of other materials such as metal, wood and asbestos, as well as those without access to any form of electricity, water and sanitation, must be prioritised and eradicated by 30 November 2016.[viii]

WORK TO BE COMPLETED WITHIN SEVEN YEARS

- Each school must have an electricity supply that complies with all relevant laws relating to its safety.[ix]
- All schools must have a sufficient water supply, which complies with all relevant laws and is clean and available for drinking, personal hygiene and food preparation.[x]
- All schools must have a sufficient number of proper sanitation facilities. Pit toilets and bucket latrines are not allowed at schools.[xi]
- All schools must have electronic connectivity, including an internet connection.
- All schools must conform with security and safety regulations, in that they must have either a security guard or alarm system, and burglar proofing to all windows and doors, etc. All schools must comply with fire regulations.

WORK TO BE COMPLETED WITHIN TEN YEARS

- All schools must have a library or media centre and a minimum and adequate school library collection.[xii]
- Laboratories for science, technology and life sciences must be installed in all schools.[xiii]

WORK TO BE COMPLETED BY 2030

- Sport and recreation facilities must be installed in all schools, or these facilities must be available to the school at a local community centre/other facility.[xiv]

TRAGEDY TURNED TO HOPE

On 20 January 2014, a six-year-old boy tragically died after falling into a pit toilet at a school in the Limpopo province, an accident which could have been avoided had the school been provided with proper facilities. This was heart-wrenching evidence of the urgent need to ensure that school infrastructure had to meet a minimum standard.

It also highlighted the difficulty of having binding regulations that don't immediately address many of the emergency conditions that plague hundreds of schools. While the regulations will hopefully bring medium- to long-term systemic relief, the immediate challenge for the LRC is determining how to litigate for those in immediate need of assistance. Schools overcrowded with more than 90 children in a classroom designed for 30, approximately 600 schools with absolutely no toilet facilities, and schools that are constantly being broken into and stripped of their resources because of a lack of security cannot wait for the timeframes set out in the norms and standards for relief.

A report carried out by the Department of Education in October 2014 showed that over 1 100 schools still do not have access to electricity, over 500 do not have sanitation facilities, and over 600 remain without water.

i. Reg 4 (6)(b)(iii)
ii. Reg 4 (7)
iii. Reg 6
iv. Reg 7
v. Reg 9
vi. Reg 18
vii. Reg 19
viii. Reg 4 (3)(a) & (b)
ix. Reg 10
x. Reg 11
xi. Reg 12 (4)
xii. Reg 13
xiii. Reg 14
xiv. Reg15

(i) Full set of norms and standards

GOVERNMENT NOTICE
DEPARTMENT OF BASIC EDUCATION
No. R. 920
29 November 2013

SOUTH AFRICAN SCHOOLS ACT, 1996
(ACT NO. 84 OF 1996)

REGULATIONS RELATING TO MINIMUM UNIFORM NORMS AND STANDARDS FOR PUBLIC SCHOOL INFRASTRUCTURE

I, Angelina Matsie Motshekga, Minister of Basic Education, acting under section 5A(1)(a) of the South African Schools Act, 1996, and after consultation with the Minister of Finance and the Council of Education Ministers, hereby prescribe the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure set out in the Schedule.

SCHEDULE

PREAMBLE

WHEREAS, as a result of the painful legacy of apartheid, South Africa has suffered an uneven development with regard to the provisioning of basic school infrastructure to all public schools, and bearing in mind that social investment in education is a responsibility of the Government, and requires education to be central to Government policies as one of its key priorities;

AND WHEREAS the State continues to provide basic school infrastructure to all public schools, particularly those that were previously disadvantaged;

AND WHEREAS strides have been taken to provide relevant, effective, responsive, inclusive and sustainable teaching and learning school infrastructure to address the systematic inequalities experienced by all learners and, in particular, those learners with disabilities within and outside the special and mainstreamed school environment;

BE IT THEREFORE REGULATED by the Minister of Basic Education as follows –

DEFINITIONS

1. In these regulations any word or expression to which a meaning has been assigned in the South African Schools Act, 1996 (Act No. 84 of 1996), has the meaning so assigned and, unless the context otherwise indicates –

"administration areas" means areas in a school, listed in the first column of Annexure C, that are used by the school management and staff for administration and management purposes and for the day to day running of a school;

"Agrément South Africa" means the body that operates under the delegation of authority of the Minister of Public Works (1969);

"education support areas" means areas in a school, listed in Annexure B, that are required to create a healthy, safe and conducive school environment and to support the teaching and learning functions at a school;

"minimum education areas" means the minimum teaching and learning areas in a school, listed in Annexure A, that are essential to carry out the teaching and learning functions at a school;

"MTEF" means the medium term expenditure framework containing the three-year spending plans of national and provincial governments, published at the time of the Budget;

"National Building Regulations" means the regulations issued in terms of section 17 of the National Building Regulations and Building Standards Act, 1977 (Act No. 103 of 1977);

"new schools" means schools built after the date of publication of these regulations;

"SANS 10-400" means the South African National Standard with that number, issued by the South African Bureau of Standards in terms of the National Building Regulations;

"school" means a public school;

"the Act" means the South African Schools Act, 1996 (Act No. 84 of 1996); and

"Universal Design" means the design of products, environments, programmes and services to be usable by all people, to address the diversity of learners and teachers with functional limitations.

OBJECTIVES OF REGULATIONS

2. The objectives of the regulations are –

(a) to provide minimum uniform norms and standards for public school infrastructure;

(b) to ensure that there is compliance with the minimum uniform norms and standards in the design and construction of new schools end additions, alterations and improvements to schools which exist when these regulations are published; and

(c) to provide for timeframes within which school infrastructure backlogs must be eradicated.

SCOPE AND APPLICATION

3. These regulations apply to all schools.

IMPLEMENTATION OF REGULATIONS

4. (1) Notwithstanding the provisions of these regulations, the norms and standards contained in the regulations –

(a) must, subject to subregulation (5) and as far as reasonably practicable, be applied to all new schools and additions, alterations and improvements to schools, with the exception of schools contemplated in subregulation (2); and

(b) as far as schools are concerned which exist when these regulations are published, must, subject to subregulation (5), and as far as reasonably practicable –

(i) with reference to the norms and standards mentioned in subregulation (3)(a) and (b), be complied with within a period of three years from the date of publication of these regulations;

(ii) with reference to the norms and standards mentioned in subregulation (3)(c), be phased in over a period of seven years from the date of publication of these regulations;

(iii) with reference to the norms and standards mentioned in subregulation (3)(d), be phased in over a period of ten years from the date of publication of these regulations; and

(iv) with reference to all the other norms and standards contained in these regulations, be planned, prioritised and phased in before 31 December 2030.

(2) (a) New schools and additions, alterations and improvements to schools excluded from subregulation (1)(a) are those of which the planning and prioritisation within the current 2013–2014, 2014–2015 and 2015–2016 MTEF cycle have already been completed.

(b) The plans and prioritisation of the schools contemplated in paragraph (a) must, where possible and reasonably practicable, be revised and brought in line with these regulations.

(3) As far as schools contemplated in subregulation (1)(b) are concerned –

(a) and for the purposes of subregulation 1(b)(i), all schools built entirely from mud as well as those schools built entirely from materials such as asbestos, metal and wood must be prioritised;

(b) and for the purposes of subregulation 1(b)(i), all those schools that do not have access to any form of power supply, water supply or sanitation must be prioritised;

(c) a Member of the Executive Council must, for the purposes of subregulation (1)(b)(ii), prioritise the norms and standards relating to the availability of classrooms, electricity, water, sanitation, electronic connectivity and perimeter

security, and their plans contemplated in subregulation (6) must reflect such prioritisation; and

(d) a Member of the Executive Council must, for the purposes of subregulation (1)(b)(iii), specifically focus on the norms and standards relating to libraries and laboratories for science, technology and life sciences.

(4) In implementing these regulations every reasonable possible avenue must be explored and alternatives considered to give effect to the norms and standards contained in these regulations.

(5) (a) The implementation of the norms and standards contained in these regulations is, where applicable, subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general mid the making available of such infrastructure.

(b) The Department of Basic Education must, as far as practicable, facilitate and co-ordinate the responsibilities of the government agencies and entities contemplated in paragraph (a).

(6) (a) A Member of the Executive Council must, within a period of 12 months after the publication of the regulations and thereafter annually on a date and in the manner determined by the Minister, provide the Minister with detailed plans on the manner in which the norms and standards are to be implemented as far as schools referred to in subregulation (1) are concerned.

(b) The plans referred to in paragraph (a) are to make provision for, but not be limited to, the following:

(i) The backlogs at district level that each province experiences in terms of the norms and standards;

(ii) costed short-, medium- and long-term plans with targets;

(iii) how new schools should be planned and maintained and how existing schools are to be upgraded and maintained; and

(iv) proposals in respect to procurement, implementation and monitoring,

(7) in addition to the requirements contained in section 58C of the Act, a Member of the Executive Council must, in the manner determined by the Minister, report annually to the Minister on the implementation of the plans required in terms of subregulation (6).

(8) Measures which are taken to comply with the norms and standards contained in these regulations must be funded through the relevant budgetary sources and processes for new facilities and the upgrading of existing facilities at schools.

TYPES OF SCHOOLS

5. (1) Schools are classified as primary or secondary schools.

(2) Primary schools offer grades R to 7 or offer learning within that range.

(3) Primary schools are further classified into –

(i) micro-primary schools, with a capacity of less than 135 learners;

(ii) small primary schools, with a minimum capacity of 135 learners;

(iii) medium primary schools, with a minimum capacity of 311 learners;

(iv) large primary schools, with a minimum capacity of 621 learners; and

(v) mega-primary schools with a capacity in excess of 931 learners.

(4) Secondary schools offer grades 8 to 12 or offer learning within that range.

(5) Secondary schools are further classified into –

(i) small secondary schools, with a minimum capacity of 200 learners;

(ii) medium secondary schools, with a minimum capacity of 401 learners;

(iii) large secondary schools, with a minimum capacity of 601 learners; and

(iv) mega-secondary schools, with a capacity in excess of 1 001 learners.

(6) A Member of the Executive Council may, based on valid reasons, approve the establishment or retention of a school below the minimum capacity as contemplated in subregulations (3) and (5), subject to the availability of infrastructure and the norms and standards contained in these regulations.

(7) Notwithstanding subregulations (3) and (5), a Member of the Executive Council may, based on valid reasons, approve the establishment or retention of a combined school where it is not practicable to have a separate primary and secondary school, on such conditions as the Member of the Executive Council may determine and for a fixed period which may from time to time be extended.

UNIVERSAL ACCESS

6. (1) All schools must adhere to the requirements and principles of Universal Design. This will apply to all buildings, access ways, indoor and outdoor facilities as well as signage, communication and other services in new schools and to additions, alterations and improvements to existing schools.

(2) In addition to the requirements contained in subregulation (1), schools for learners with special education needs must comply with the requirements related to the nature of the specialised support programme offered at the school, and the level of support required at that particular school,

(3) (a) Schools for learners with special education needs must be fully accessible, and such access includes ramps, handrails and space for manoeuvrability for all learners and educators.

(b) For the purposes of paragraph (a) minimum Universal Design requirements must include, but not be limited to, the following:

(i) Clear floor area in passages, walkways and points of ingress for people using wheelchairs and other mobility devices and aids;

(ii) parking for persons with disabilities to be located as close as possible to entrance areas;

(iii) ramps and handrails with regulated gradients, heights and spacing;

(iv) toilets for the disabled must meet the requirements of the National Building Regulations;

(v) all schools must be provided with adequate notice boards which are accessible for all users in the school building and which contain signage that is visible and legible;

(vi) tactile signage should be provided for learners and educators with impaired vision;

(vii) visual aids should be provided for communication with learners and educators who are deaf or hearing impaired; and

(viii) all other aspects of Universal Design must be compliant with the relevant requirements of the National Building Regulations and SANS 10-400.

SITE AND IDENTIFICATION OF SCHOOL

7. (1) The following principles apply in respect of the geographic location of a new school:

(a) The location of the school should ensure easy accessibility to roads, sewage lines and other basic services; and

(b) where practicable, a school may not be located close to, or adjacent to –

(i) cemeteries;

(ii) business centres;

(iii) railway stations;

(iv) taxi ranks;

(v) sewage treatment plants;

(vi) public hostels;

(vii) busy roads, unless adequate preventative measures have been taken to ensure the safety of the learners; and

(viii) bottle stores and shebeens.

(2) The siting of new schools should, as far as possible, recognise the need for appropriate topography and location related to access and demographic realities.

(3) A school site must contain a name board which is clearly visible to the public, indicating –

(a) the name of the school;

(b) the contact details of the school; and

(c) the GPS coordinates and the National Education Management and Information System (EMIS) number of the school.

CATEGORIES OF KEY SCHOOL AREAS AND THEIR SIZES

8. (1) An enabling teaching and learning environment in a school consists of –

(a) minimum education areas;

(b) education support areas; and

(c) administration areas.

(2) Subject to regulation 4 and to subregulation (3), and having regard to the curriculum of a school, the size norms for areas referred to in subregulation (1) required by a school, must be determined in accordance with Annexures A, B and C.

(3) As far as schools referred to in regulation 4(1)(b) are concerned, the size norms contained in Annexures A, B and C will serve as a guideline.

(4) As part of planning for schools contemplated in regulation 4(1)(a), Annexures D, E and F provide for a minimum package of education areas for each classification of a school contemplated in regulation 5.

CLASSROOMS

9. (1) The minimum space in a school allocated for each learner and educator must be as follows:

(a) Grade R –

(i) learner: 1.6m^2; and

(ii) educator: 7m^2;

(b) Grades 1-12 –

(i) learner: 1m^2; and

(ii) educator: 7m^2; and

(c) learners with disabilities: 2m^2.

(2) The following are acceptable norms for class size:

(a) Grade R: a maximum of 30 learners; and

(b) for all other classes: a maximum of 40 learners.

ELECTRICITY

10. (1) All schools must have some form of power supply which complies with all relevant laws.

(2) The choice of an appropriate power supply must be sufficient to serve the power requirements of each particular school and must be based on the most appropriate source of power supply available for that particular school.

(3) Forms of power supply could include one or more of the following:

(a) Grid electrical reticulation;

(b) generators;

(c) solar powered energy; or

(d) wind powered energy sources.

WATER

11. (1) All schools must have a sufficient water supply which complies with all relevant laws and which is available at all times for drinking, personal hygiene and, where appropriate, for food preparation.

(2) Sufficient water-collection points and water-use facilities must be available at all schools to allow convenient access to, and use of, water for drinking, personal hygiene and, where appropriate, for food preparation.

(3) The choice of an appropriate water technology must be based on an assessment conducted on the most suitable water supply technology for each particular school and must be maintained in good working order.

(4) Sources of water supply could include one or more of the following:

(a) A municipal reticulation network;

(b) rain water harvesting and, when so required, tanker supply from municipalities;

(c) mobile tankers;

(d) boreholes and, when so required, tanker supply from municipalities; or

(e) local reservoirs and dams.

SANITATION

12. (1) All schools must have a sufficient number of sanitation facilities, as contained in Annexure G, that are easily accessible to all learners and educators, provide privacy and security, promote health and hygiene standards, comply with all relevant laws and are maintained in good working order.

(2) The choice of an appropriate sanitation technology must be based on an assessment conducted on the most suitable sanitation technology for each particular school.

(3) Sanitation facilities could include one or more of the following:

(a) Water borne sanitation;

(b) small bore sewer reticulation;

(c) septic or conservancy tank systems;

(d) ventilated improved pit latrines; or

(e) composting toilets.

(4) Plain pit and bucket latrines are not allowed at schools.

LIBRARY

13. (1) All schools must have a school library or a media centre and a minimum, adequate and suitable school library collection.

(2) The core school library collection must be regularly replenished according to the requirements of a particular school and administered using one or more of the following:

(a) A mobile library;

(b) a cluster library;

(c) a classroom library;

(d) a centralised school library; or

(e) a school community library.

LABORATORIES FOR SCIENCE, TECHNOLOGY AND LIFE SCIENCES

14. (1) All schools that offer science subjects must have a laboratory and the necessary apparatus and consumables in accordance with the specific curriculum needs of a particular school to make it possible to conduct experiments and scientific investigations.

(2) The apparatus and consumables contemplated in subregulation (1) may be housed in a laboratory, a mobile laboratory, a classroom or a safe container, as determined by the school.

(3) The apparatus and consumables contemplated in subregulation (1) must be stored in a lockable facility in accordance with safety standards provided for in all relevant laws.

(4) A laboratory for science, technology and life sciences may, where practicable, be combined in one room.

(5) A laboratory must be maintained in good working order.

SPORT AND RECREATION FACILITIES

15. (1) All schools must have areas where physical education, sporting and recreational activities can be practised.

(2) The areas that are provided by a particular school for sporting and recreational activities will depend on the type of sporting and recreational activities undertaken by that school.

(3) Despite the provisions of this regulation, a school may make use of the sporting and recreational facilities of another school or of a local community, in consultation with that other school or with the responsible officials of the community concerned, if it is not possible for the first mentioned school to provide such facilities.

ELECTRONIC CONNECTIVITY AT A SCHOOL

16. (1) All schools must have some form of wired or wireless connectivity for purposes of communication, which must be maintained in good working order.

(2) The following communication facilities must be provided:

(a) telephone facilities;

(b) fax facilities;

(c) Internet facilities; and

(d) an intercom or public address system.

PERIMETER SECURITY AND SCHOOL SAFETY

17. (1) Every school site, which includes all school outbuildings and sporting and recreational facilities, must be surrounded by appropriate fencing to a minimum height of at least 1,8 meters.

(2) School buildings must have at least one form of safety and security measure, such as the following:

(a) Burglar proofing to all opening window sections on all ground floor buildings that are accessed by learners and educators;

(b) a security guard arrangement; or

(c) an alarm system linked to a rapid armed response, where available.

(3) School buildings and other school facilities must comply with fire regulations in terms of the National Building Regulations and SANS 10-400.

DESIGN CONSIDERATIONS FOR ALL EDUCATION AREAS

18. (1) School design must make as much provision for the specific needs of learners, educators and administrative staff with disabilities as for the needs of their able colleagues.

(2) Obscure glazing must be used in both male and female toilet windows.

(3) Boys and girls toilets must, as far as reasonably practicable, be separated from each other.

(4) The relationship of buildings and open areas within the school should, as far as reasonably practicable, allow for natural surveillance for the safety of learners.

(5) Passive solar design principles should be employed in the design of all education areas to address energy saving and natural cooling, subject to all relevant laws.

(6) (a) Natural day lighting should be utilised when designing classrooms, to minimise the dependence on artificial lighting.

(b) Lighting and shading should, as far as reasonably practicable, be designed to minimise glare.

(7) Ventilation should be natural ventilation and should include permanent wall vents and windows with opening sections in compliance with all relevant laws.

(8) In the provisioning of windows, ease of operation, natural ventilation requirements and maintaining an adequate level of safety must be taken into account.

(9) Acoustic conditions should, as far as reasonably practicable, facilitate clear communication of speech between teacher and learner, and between learners themselves, and should not impede teaching and learning activities.

(10) Background noise and reverberation should, as far as reasonably practicable, be reduced to a minimum.

(11) Flexibility of usage and the assigning of multiple functions should be a consideration in the design of education areas and education support areas.

(12) Innovative design that is efficient, cost effective and appropriate to create an enabling and inclusive teaching and learning environment should be promoted.

(13) Schools must not be constructed with mud or asbestos material or any other inappropriate material.

(14) In the planning and design of all schools contemplated in regulation 4(1)(a), school design must comply with all relevant laws, including the National Building Regulations, SANS 10-400 and the Occupational Health and Safety Act, 1993 (Act No 85 of 1993).

(15) Where the use of alternative or innovative building technologies are to be considered for the implementation of the norms and standards contained in these regulations, certification is required from Agrément South Africa.

REVIEW OF REGULATIONS

19. (1) The Department of Basic Education must periodically review the norms and standards contained in these regulations in order to ensure that those norms and standards remain current and serve the needs of the teaching and learning process.

(2) (a) An education department may within the parameters set by these regulations, adapt the norms and standards to best suit schools within the province concerned.

(b) Any adaptation contemplated in paragraph (a) may not lead to a diminution of the minimum norms and standards contained in these regulations.

DISPUTE RESOLUTION

20. (1) Any dispute between government agencies and entities with regard to the implementation of these regulations must be dealt with in terms of the Intergovernmental Relations Framework Act, 2005 (Act No, 13 of 2005)

(2) Any dispute between government agencies and entities, on the one hand, and any other party, on the other hand, with regard to the implementation of these regulations, may by agreement be referred for mediation or for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

SHORT TITLE

21. These regulations are called the Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure.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Getting children into school is just one step in the battle to ensure children receive a quality education. Thousands of no-fee South African schools do not have furniture.

Furniture – a chair to sit on and a desk to work at

Getting children into school is just one step in the battle to ensure children receive a quality education. Thousands of no-fee South African schools do not have furniture. Children are forced to share desks and chairs, or sit on beer crates, sacks and any other items which can serve as makeshift furniture. This creates disciplinary difficulties, as disputes break out over the furniture they do have, as well as health problems, as a result of sitting for hours on end on cold, hard floors.

In November 2012, the LRC represented schools in an application against the Eastern Cape Department of Education (ECDOE) for furniture to be provided. As a result of this, the LRC made an application to court, the aim of which was twofold: 1. To have the ECDOE provide a desk and chair to every schoolchild in every public school in the province, and 2. To develop the jurisprudence and substantive content to the constitutional right to a basic education. On 29 November 2012, the court granted the application and a court order set out the terms applied for. This resulted in some furniture being delivered, but unfortunately there was substantial non-compliance with the order by the Department.

The Department was also ordered to conduct an audit of the furniture needs of the province, and provide the furniture as needed to schools by 30 June 2013. However, the audit initially carried out by the Department contained a number of similarities across multiple school districts, suggesting falsification of data. In addition, by June 2013, schools had not been informed of the numbers of desks and chairs they would receive, nor when they would receive them. Although the Department itself had estimated a need of R360 million to satisfy the province's school furniture, it allocated less than 10 percent of the amount needed from its 2013/2014 budget.

The LRC filed a further application in the High Court in August 2013 to have the Department declared in breach of the order of November 2012. A further order was granted, which set out additional promises of a furniture audit and plan for the provision of furniture to those schools which required it.

By February 2014, these children were still sharing desks and sitting on empty paint cans. Conditions had barely improved since the initial litigation of 2012. A third round of litigation ensued, resulting in a hearing before Judge Goosen on 25 February 2014. Goosen's judgement was scathing of the lack of action taken by the Department, and underlined the fact that education was an immediately realisable right, and therefore necessitated a clear timetable for the provision of relief.

Goosen J ordered the Department to provide full furniture for schools that required it by 31 May 2014. If they were unable to comply with this deadline, the Department would have to make an application to court, setting out fully the steps they had taken to carry out the audit and provide the furniture, and full reasons they could not comply with the court order.

At the end of May 2014, the ECDOE applied for an extension of a further four months to provide

furniture to the schools. The Department had failed to provide nearly all of the furniture ordered by the court, and cited as reasons for the delay: 1. constraints in the budget; 2. legal challenges faced as a result of the implementation of tenders (see below); and 3. the assumption of procurement function by the National Treasury meant that the Department was no longer able to purchase furniture.

A major factor in the failure to deliver furniture has been repeated irregular procurement processes, which resulted in the suspension of the Minister of Education, and the National Treasury assuming responsibility for procurement. The LRC, on behalf of the CCL, has been involved in some of the litigation surrounding the procurement as it is concerned about unlawful tender processes, resulting in delays in the delivery of furniture and a large waste of money.

The result is that desks and chairs, which have been ordered and paid for, have been unused, stored in warehouses, while children continue to sit on cold hard floors at school.

The ECDOE have recently filed an answering affidavit, which sets out their timeframe for delivery of the furniture. They project that delivery of the furniture will be completed by the end of the second term in 2015. Large quantities of furniture have begun being delivered to schools. Despite the progress, however, the LRC will continue to put legal pressure on the ECDOE by seeking to have the department's undertakings made an order of court in the first quarter of 2015.

(i) Madzozo obo Parents of Learners at MPIMBO Junior Secondary School and others v Minister of Education and Others: judgment

IN THE HIGH COURT OF SOUTH AFRICA EASTERN CAPE LOCAL DIVISION, MTHATHA

Case No: 2144/2012
Date Heard: 13 February 2014
Date Delivered: 20 February 2014
REPORTABLE

In the matter between:

M MADZODZO obo PARENTS OF LEARNERS
AT MPIMBO JUNIOR SECONDARY SCHOOL | *First Applicant*

S MGCANYANA obo PARENTS OF LEARNERS
AT MBANANGA JUNIOR SECONDARY SCHOOL | *Second Applicant*

P VUKHAPI obo PARENTS OF LEARNERS
AT SIRHUDLWINI JUNIOR SECONDARY SCHOOL | *Third Applicant*

CENTRE FOR CHILD LAW | *Fourth Applicant*

S NOKUBELA obo PARENTS OF LEARNERS
AT PUTUMA JUNIOR SECONDARY SCHOOL | *Fifth Applicant*

R NOLUGXA obo PARENTS OF LEARNERS
AT GWEBITYALA SENIOR SECONDARY SCHOOL | *Sixth Applicant*

A ZITENA obo PARENTS OF LEARNERS
AT UPPER MPAKO SENIOR SECONDARY SCHOOL | *Seventh Applicant*

S SULWANA obo PARENTS OF LEARNERS
AT MILTON DALASILE SENIOR SECONDARY SCHOOL | *Eighth Applicant*

AND

THE MINISTER OF BASIC EDUCATION | *First Respondent*

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA | *Second Applicant*

MEC FOR EDUCATION: EASTERN CAPE | *Third Respondent*

GOVERNMENT OF THE EASTERN CAPE PROVINCE | *Fourth Respondent*

ACTING SUPERINTENDANT GENERAL OF THE
EASTERN CAPE DEPARTMENT OF EDUCATION | *Fifth Respondent*

Judgment

GOOSEN, J.

[13] It is not in dispute that the state of public school education in the Eastern Cape Province is seriously and adversely affected by a failure to provide adequate furniture to a significant portion of schools in the Province. It is also not in dispute that the shortage of furniture in schools is a serious impediment for children attempting to access the right to basic education in the province. … A more recent report issued by the Department on 28 May 2013 estimates the cost of addressing learners' furniture needs in the Eastern Cape schools as being approximately R360 million. It is this ongoing state of affairs that prompted the first to fourth applicants to bring this application.

[14] The applicants allege that the respondents' 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 by the Constitution. It is also alleged that the persistent failure to meet the furniture requirements of public schools constitutes a breach of the learners' right to equality and human dignity.

[15] The right to basic education provided for in section 29 (1) (a) of the Constitution is an unqualified right which is immediately realisable and is not subject to the limitation of progressive realisation, as is the case with other socio-economic rights guaranteed by the Constitution.

[17] This has important implications for determining whether the state is in compliance with its constitutional obligations in respect of the right to basic education. In the first instance the nature of the right requires that the state take all reasonable measures to realise the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to education be provided.

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

[21] The impact that a lack of adequate and age appropriate furniture has upon the learners' right of access to basic education is not denied by the respondents. It is not denied that this persistent lack of access to appropriate resources at public schools constitutes a violation of the right to basic education.

[22] The respondents nevertheless contend that budget constraints and the availability of resources constrain the respondents in their ability to meet the basic requirements of the right to basic education immediately. In argument, reliance was placed on the National Norms and Standards for School Funding developed in terms of the South African Schools Act, Act 84 of 1996 which, so it was submitted, envisaged the progressive realisation of the provision of the basic requirements. The policy document was not furnished. In any event, it was not submitted that the norms and standards determined for public schools override the constitutional imperative provided by section 29. It was, however, argued that the respondents are doing everything that can reasonably be done to achieve the right to basic education and that the respondents are committed to meeting the furniture requirements of schools in the province as speedily as possible. On this basis it was submitted that the respondents are only able to provide a comprehensive plan for the delivery of school furniture to schools identified as requiring such furniture, when the results of the independent audit are known on 28 February 2014. Once the audit results are

available appropriate steps may then be taken to determine the budget requirements to meet such needs. In the light of the fact that an amount of R30 million has been allocated in the budget for the forthcoming financial year, the respondents are not able to meet all of the furniture requirements of schools in the Province within the forthcoming financial year. Accordingly, the respondents argue that it would be unreasonable to impose upon them a fixed time period within which the identified furniture needs of public schools must be met.

[23] The stance adopted by the respondents must be viewed against the backdrop of what has transpired since this application was first brought by the applicants in October 2012.

[26] The allegations of non-compliance with the order of Griffiths J are not seriously disputed. In fact it is conceded that the respondents did not ''fully comply". Significantly the respondents admit in the answering affidavits filed in respect of the August proceedings that the May audit was deficient in many respects. In seeking to explain why this occurred, the respondents have sought to suggest that responsibility for the deficiencies was the responsibility of schools as well as the very limited timeframes within which the respondents were operating.

[27] The audit report of May 2013 was also not verified as required by the terms of the order made by Griffiths J, nor were the affected schools visited and therefore furniture needs properly recorded. As already indicated no comprehensive plan for the delivery of the required furniture has been produced. The respondents allege in the answering affidavits that this was impossible within the time constraints since the school furniture needs had to be assessed against the budget and the furniture required had to be sourced and costed. The respondents' reliance upon the alleged limited time constraints is extraordinary in light of the fact that the terms of the order made by Griffiths J were negotiated between the parties and were accepted by the department's officials as reasonable at the time that Griffiths J granted the order.

[28] The order granted by Griffiths J also included an undertaking made by the respondents that they would endeavour to ensure that the furniture needs of all public schools in the Eastern Cape Province would be met by June 2013. The applicants allege that the respondents have failed to comply with this undertaking. It is apparent from the May 2013 audit that an amount of R360 million was estimated as needed to satisfy the school furniture requirements of the learners at public schools in the province. By August 2013 when the applicants returned to court no budgetary measures had been taken to give effect to this identified need. In the Department of Education's 2013/2014 budget only R30 million was allocated to addressing furniture needs in schools in the Eastern Cape. In seeking to explain this, the respondents submitted that the Department had requested the National Treasury to allocate an amount of R120 million but received only R30 million. In doing so it sought to suggest that responsibility for the limited budget available to the provincial Department falls to be placed at the door of the National Treasury.

[29] The order granted by Makaula J on 26 September 2013 made provision for the engagement of independent auditors to verify the results of the May audit undertaken by the Department and to verify the needs of schools for furniture. That report was to be produced by 17 December 2013. The respondents were then again ordered to produce a comprehensive plan, together with the audit, detailing when each of the schools could expect delivery of the furniture identified as needed by such school in the audit report. In the case of the 265 schools in the Libode district the order required that their furniture needs be identified and that the required school furniture be delivered to those schools by 16 January 2014.

[30] It is not in dispute that the respondents have again failed to comply with the terms of the court order of 26 September 2013. In this regard the answering affidavit states that the furniture needs at 27 schools in the Libode district out of a total of 265 have been identified

and met with deliveries. It is common cause that the comprehensive plan and independent audit due by 17 December 2013 has not been completed. In the supplementary answering affidavit the Superintendent General states that by 16 January 2014 the IDT had completed a mere 8 percent of the audit by that date. The revised plan for completion of the auditing process indicates that the audit and verification process will only be completed by 28 February 2014. Furthermore, no comprehensive delivery plan has yet been produced. According to the Superintendent General, the Department obtained only R30 million for school furniture from National Treasury in April 2013, which was the start of the 2013/2014 financial year. These funds were directed at securing furniture for 25 schools and that tenders for the delivery of furniture were received on an expedited procurement process in May and June 2013. The Superintendent General further avers that in September 2013 the Chief Financial Officer of the Department applied to National Treasury for a special allocation of R60 million for school furniture. This allocation was obtained on 30 October 2013 and a three-year tender for the provision of school furniture has been advertised. In his supplementary answering affidavit, deposed to on 16 January 2014, the Superintendent General explains that the tender process has been delayed as a result of queries addressed to the Department. No indication has been given as to when this tender process would be finalised.

[31] In argument before me, counsel for the respondents conceded that the respondents had not complied with the terms of either of the two court orders. This non-compliance, it was submitted, was not willful. It reflected the fact that the Department was not able to meet the impossibly short timeframes and that the Department remains hamstrung by serious budgetary constraints in dealing with the furniture shortage in public schools in the Eastern Cape Province.

[32] Counsel for the respondents was unable to give any indication as to when the respondents would be able to address the admitted furniture shortage in public schools in the Eastern Cape Province. The respondents appeared to adopt the stance that since the IDT audit has not yet been completed they are unable to determine the extent of the furniture shortage in public schools in the Province and therefore are unable to make appropriate plans to address that furniture shortage. This stance is surprising in the light of the fact that a May 2011 audit conducted by the Department had already identified a furniture need estimated in the amount of R274 million. The subsequent audits, conducted by the Department pursuant to the present application, reflect that at May 2013 the furniture shortage is estimated in the amount of R360 million. It is also simply quite incorrect to conceive the IDT audit as being an original audit to determine the extent of the furniture needs of public schools in the Eastern Cape Province. The order granted on 26 September 2013 making provision for the IDT audit sought to ensure verification of the results of the May 2013 audit. In other words, the IDT audit was envisaged as a further and additional verification exercise to ensure accuracy of the results already having been obtained in the May 2013 audit. The stance adopted by the respondents, therefore, that the extent of the problem is unknown is simply untenable. It is apparent that the respondents have been well aware of the nature and extent of the furniture crisis for a period well in excess of two years. What flowed from this stance adopted by respondents' counsel in argument was that no practical steps could be taken to address the furniture crisis until after the IDT audit is available. Furthermore, no time periods for addressing the furniture crisis could, therefore, be determined by the respondents at this stage. It was, therefore, submitted that the best that could be hoped for was the formulation of a comprehensive plan to address the shortage, once the extent of the shortage is determined by the IDT audit.

[33] In my view this is wholly inadequate. The approach suggested offers learners at public schools in the Eastern Cape Province no prospect of achieving access to basic resources required,

in order to access the right to basic education. In the light of the fact that the respondents have determined the budget allocation for the forthcoming year, in an amount of R30 million, there is, on the respondents' stance, no prospect that the dire furniture shortage across public schools in the province will be adequately and appropriately addressed until at least the next budget year, namely 2014/2015. Furthermore, in the light of the amount of money actually budgeted to address the furniture shortage in the province and the admitted problems associated with the so-called three- year tender, which is yet to be awarded, the approach favoured by the respondents offers little or no prospect that the furniture crisis will be addressed in the foreseeable future. This is the effect of the open-ended approach that the respondents sought to urge upon this court.

[34] In City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) at para 74, the court addressed an argument advanced by the City of Johannesburg that it was not obliged to go beyond its available budgeted resources to deal with emergency housing needs, in the following terms:

> *This court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.*

[35] These remarks, made in the context of evaluating the reasonableness of steps taken to realise a progressively realisable right of access to housing are apposite to this matter. As already indicated the respondents have been aware since at least May 2011 that there is a very serious shortage of furniture in public schools and that this lack of furniture constitutes a serious impediment to the enjoyment of the right to basic education that the Constitution guarantees. Accordingly, the respondents have been well aware for a considerable time that proactive steps need to be taken to address this shortage and to fulfil the right to basic education as required by sections 7 and 29 of the Constitution, in these circumstances it is not good enough to state that inadequate funds have been budgeted to meet the needs and that the respondents therefore cannot be placed on terms to deliver the identified needs of schools within a fixed period of time. Nor is it good enough to state that the full extent of the needs is unknown. The information available to the respondents from 2011 was such that reasonable estimates of the funding required could be made and reasonable steps taken to plan for such expenditure.

[36] In my view the open-ended approach urged by the respondents is unreasonable. Learners in this province are entitled as of right to have immediate access to basic education. They are also entitled as of right to be treated equally and with dignity. The lack of adequate age and grade appropriate furniture in public schools, particularly public schools located in deep rural and impoverished areas, undermines the right to basic education and the persistent failure to deliver such age and grade appropriate furniture to public schools constitutes an ongoing violation of the right to basic education. This court, in the exercise of its jurisdiction, is obliged to give effect to the fundamental rights enshrined in the Constitution and to make appropriate orders to vindicate those rights where such orders are required. In the circumstances of this matter this court is called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with responsibility for ensuring the right of access to basic education act reasonably to fulfil their constitutional obligations.

[37] The applicants argued for a time period of 90 days after the date on which the IDT audit becomes available as a reasonable period within which to expect delivery of furniture needed to all public schools. In support of this it was pointed out that the respondents have available to them Treasury Regulation 16A.6.4, which regulates procurement in circumstances of an emergency.

[38] The applicants also point to the fact that in response to both the 29 November 2012 and 26 September 2013 court orders, the respondents were able to procure furniture within a very short space of time and to provide for the furniture needs of the first to third and fifth to eighth applicant schools without any apparent difficulty. This, the applicants suggest, reflects a welcome response to an emergency situation and that there is no reason why a similar approach could not be adopted more broadly to address the furniture needs of public schools across the province, particularly those in remote rural and impoverished areas.

[39] To ameliorate the effect of imposing a fixed time period for the delivery of furniture it was argued that provision should be made for the respondents to apply for an extension of time.

[40] I am mindful of the fact that the extent of the furniture needs in public schools in the province appears, on anyone's version, is very substantial. The most recent estimate of the projected costs associated with those needs is in the order of R360 million. Securing an appropriate level of budget allocation for the Department from the National Treasury will no doubt take some time and require significant commitment by both the Provincial and National Treasuries. When the budget funds are available the process of procurement of the furniture required will also take time. This much is self-evident. It was suggested by the respondents that this cannot be achieved within a period of 90 days. The respondents however, could not and did not suggest how long it might in fact take. This court is therefore left without guidance from the respondents as to what they consider would be a reasonable period. In the light of this, I am compelled to conclude that a period of 90 days is indeed a reasonable period within which it may be expected that the identified furniture needs of public schools in the Eastern Cape Province can be met. To the extent however, that the exigencies of executing so significant a project may give rise to legitimate delays and therefore a legitimate inability to meet that projected time period, it will be appropriate to order that the time period may be extended at the instance of the respondents, subject to full disclosure as to the steps already taken to meet the deadline and the projected time period within which the needs will indeed be met.

[41] In the circumstances I make the following order:

1. Declaring that the respondents are in breach of the constitutional right of learners in public schools in the Eastern Cape Province to basic education as provided by section 29 of the Constitution, by failing to provide adequate, age and grade appropriate furniture which will enable each child to have his or her own reading and writing space;

2. Declaring that the respondents are in breach of paragraphs 3.1, 3.2.2, 3.2.3, 3.2.4, 4, 5 and 7 of the order granted by Griffiths J on 29 November 2012 under case number 2144/2012;

3. The respondents are ordered to file at court and to provide the applicants' attorneys with a copy of the completed Independent Development Trust (IDT) audit of all learner furniture needs at Eastern Cape public schools on or before 28 February 2014;

4. The respondents are ordered to ensure that on or before 31 May 2014 (i.e. 90 days after the filing of the audit referred to in paragraph 3 above) all schools identified in the said audit as having furniture shortages shall receive adequate age and grade appropriate furniture which shall enable each child at the identified schools to have his or her own reading and writing space;

5. In the event that the respondents envisage that they will not be able to comply with paragraph 4 above, the respondents must make an application on notice to the applicants and supported by an affidavit of the first respondent and / or such of the respondents as may be authorised to depose thereto, seeking an extension of time within which to comply. The affidavit shall deal with:

a. All steps taken up until the time of signing the affidavit to comply with the terms of this order;

b. The nature and extent of the non-compliance;

c. The reasons for the non-compliance;

d. The steps taken or proposed to be taken to remedy the envisaged non-compliance; and

e. The date on which full compliance will be achieved.

6. The respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved, and such costs are to include the costs of two counsel where employed.

G. GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPLICANTS

Mr. T. Ngcukaitobi
Instructed by Legal Resources Centre

FOR THE RESPONDENTS

Ms. S. Collet
Instructed by the State Attorney

(ii) Extracts from ECDOE's responding affidavit

The annexes referred to in the court proceedings are too lengthy to include here. Please contact the LRC for the full court document.

IN THE HIGH COURT OF SOUTH AFRICA (EASTERN CAPE DIVISION, MTHATHA)

Case No.: 2144/12

In the matter between:

CENTRE FOR CHILD LAW | *Applicant*

and

MINISTER OF BASIC EDUCATION | *First Respondent*

GOVERNMENT OF THE REBUBLIC OF SOUTH AFRICA | *Second Respondent*

MEC FOR EDUCATION: EASTERN CAPE | *Third Respondent*

GOVERNMENT OF THE EASTERN CAPE PROVINCE | *Fourth Respondent*

SUPERINTENDENT GENERAL OF THE EASTERN CAPE
DEPARTMENT OF EDUCATION | *Fifth Respondent*

Respondents' Answering Affidavit

I, the undersigned,

RAYMOND MONWABISI TYWAKADI

do hereby make oath and state:

A. THE PRESENT STATE OF FURNITURE PROCUREMENT AND DELIVERY IN THE EASTERN CAPE

1. The data provided by the IDT audit was found to be not wholly reliable. A copy of the report is annexed as **"CA1".** This became evident upon making enquiries from districts and on information subsequently provided by certain districts. The application to intervene brought by the Rockwell Schools similarly illustrates this issue. Furthermore, whilst the audit was in process, delivery was ongoing so the needs of certain schools may have been satisfied. A subsequent list of needs has been compiled by MR MPONGWANA of the Department and is annexed hereto as **Annexure "CA2"**. The Department is, thus, using this list as a baseline for furniture supplies as it is believed to be more accurate.

2. In terms of **Annexure "CA2"** the total budget required to address the needs of the schools in terms of the court order dated 20 February 2014 is R193 185 952.50. A School Furniture Update Report prepared by DR A.S NUKU, deputy director – General IOM dated 9 September 2014, **Annexure "CA3"** indicates as follows:

8.1 In 2013/2014, R48 165 898.11 was utilised to provide furniture to 491 schools.

8.2 In 2013/2014, Department of Basic Education (DBE) supplied 252 schools in the Libode district with furniture, such schools are listed in **Annexure "CA4"**

8.3 In 2014/2015, DBE has committed to supply 544 schools in eight districts with furniture, such schools are listed in **Annexure "CA5"**

8.4 The Provincial Department has committed an amount of R100 million for furniture provision as per engagement with provincial treasury. This is evidenced by an internal memorandum written by me to DR NUKU dated 9 September 2014 which is self-explanatory and annexed as **"CA6".**

8.5 In March 2014, the Department procured R17 764 704.17 furniture which is presently being delivered to 115 schools. The delivery started on 29 August 2014 and is expected to be completed by 30 September 2014. The schools that are to receive this furniture are listed in **"CA7"** and include the four (4) intervening schools Mmnceba SSS, Mtonjeni SPS, Redhill JSS and Mzimhlope SPS in the Lusikisiki district.

9. In 2013, a tender for R60 million for the provision of furniture was advertised. Without unnecessarily burdening these papers, the tender became the subject of litigation and in fact is still the subject of litigation. Whilst the monies for the tender were not rolled over to the current financial year, I have, as accounting officer, taken a decision to utilise R60 million of the allocated R100 million furniture budget for the 2014/2015 year to settle the disputes surrounding this tender and facilitate the procurement of furniture through this tender. I refer to **Annexure "CA6"** in this regard. This will have the effect of expediting deliveries to schools. I attach a list of schools that were intended to benefit from the R60 million tender but hasten to add that in the interim some of the schools listed therein have been supplied in terms of **"CA7"** and accordingly this list is presently being cleansed. Those schools who have already received furniture are being replaced with other schools. The total units of furniture to be delivered will remain unchanged.

10. National Treasury in terms of **Annexure "MLN3"** attached to the application brought by the respondents, indicated that they were 'formally assuming the procurement process for the Eastern Cape Provincial Department of Education'. There was a misinterpretation between the Provincial Department of Education and National Treasury regarding the exact

nature of this assumption of responsibility for the procurement of furniture for the province as contained in **Annexure "MLN3"** In effect, National Treasury facilitated a transversal supply contract for furniture provisioning in the Eastern Cape. Such process has since been completed. Contracts have been awarded in terms of **RT1-2014** for the supply and delivery of fully assembled school furniture for the Eastern Cape for a period ending July 2016. In this regard I annex correspondence of MR PETER MTHOMBENI, Director: Contract Management of National Treasury dated 12 August 2014 as **Annexure "CA9"**. Accordingly I am advised that the applicant's intention to join National Treasury is without merit as certainly now they have no direct or substantial interest in the subject matter of this application.

11. The remaining R40 million of the R100 million furniture budget is to be utilised to procure furniture in terms of the **RT1-2014** contract. This requires that the schools be identified from the list of schools requiring furniture and that orders be placed. Such lists are to be available by 30 September 2014 and orders are to be placed in October 2014. My understanding is that delivery should take place 45 days from order.

12. MS EDITH MAMATHUBA from the Directorate of Physical Resource Planning from DBE prepared a furniture report dated 25 August 2014 annexed **"CA10"**. Evidenced from the report is that the delivery of the furniture to the schools in the eight districts as contained in **Annexure "CA5"** is scheduled to commence in September 2014. Presently some of the furniture has been dispatched to warehouses for delivery to schools. It is anticipated that the delivery process will be completed by the end of 2014. The Provincial Department has assisted by providing warehousing in Mthatha and Algoa College in Port Elizabeth for central storage of such furniture prior to distribution to schools. In addition to the delivery to the aforementioned schools, DBE has delivered furniture to 49 ASIDI (previous mud schools) benefiting 9600 learners. **Annexure "CA11"** lists the schools that have received such furniture.

13. The report **Annexure "CA10"** records that the Department will require R34 200 995.00 as additional budget to meet the budget of R193 186 260.00 required to provide furniture to the schools in the Eastern Cape.

14. The approximately R17 million furniture deliveries from the warehouse as contained in **Annexure "CA7"** have not been factored in to the additional budget required. At this juncture, it is envisaged that 862 schools may remain after all deliveries have been completed as outlined supra. I have in the interim, in anticipation of this eventuality, addressed a letter dated 9 September 2014 to MR P. PADAYACHEE, the Acting Director General at DBE requesting assistance to provide such furniture. I annex a copy of the letter as **Annexure "CA12"**.

15. It is recognised that once all the deliveries have taken place as aforementioned the Department will need to verify and check the remaining needs of schools. Our projection is that such deliveries will realistically have been completed by 31 March 2015. Accordingly, the deliveries to the remaining schools should be achieved by the end of the second term in 2015.

16. It is respectfully requested that this Honourable Court takes cognisance of the fact that any audit or data obtained regarding the furniture needs of schools may realistically have a margin of error. The Department undertakes to address any inconsistencies as a matter of urgency and priority. It is similarly expected that there will be schools with excess furniture and the Department will work with the District Directors to re-route excess furniture to schools in need. MR MPONGWANA, an official in the Department, is to be assigned to the task of overseeing the provision of furniture to schools and discrepancies or problems will be routed through him.

(iii) "South African judge lays down the law on the right to a basic education"

BY CHRIS MCCONNAHIE

(Article by Chris McConnahie, 25 February 2014. Original article can be found at: http://ohrh.law.ox.ac.uk/south-african-judge-lays-down-the-law-on-the-right-to-a-basic-education/)

One of the most visible manifestations of the ongoing crisis in South African education is the severe shortage of desks and chairs in schools. Children in the Eastern Cape, South Africa's poorest province, are among the worst affected. A government audit in 2011 found that 1 300 of the province's 5 700 state schools lack adequate furniture, affecting over 605 000 children. Many sit on the floor, stand, or squeeze into desks shared with others, making basic reading and writing tasks virtually impossible. In *Madzodzo v Department of Basic Education*, handed down on Thursday last week, Judge Glenn Goosen of the South African High Court declared that the government's failure to address this problem is a violation of the section 29(1)(a) constitutional right to a basic education. He further ordered the government to deliver sufficient desks and chairs to all Eastern Cape schools by 31 May 2014.

Madzodzo is arguably the most significant judgment yet on the right to a basic education. At this stage, any judgment on this right is significant given the paucity of case law (discussed in a previous post). What makes Madzodzo so significant is that Goosen J has offered one of the clearest accounts of the nature and content of this right, and the most convincing demonstration yet of how to translate this right into appropriate remedies.

This judgment marks the end of three rounds of litigation over school furniture in the Eastern Cape. The first round resulted in a detailed consent order, handed down in November 2012, recording the government's undertaking to complete a full audit of Eastern Cape schools' furniture needs, to develop a comprehensive plan to address the shortage, and to deliver furniture to all schools in need by June 2013. The audit was completed three months late, its coverage was patchy, and there was no sign of the comprehensive plan or province-wide delivery. This non-compliance resulted in a second round of litigation in August 2013 and another consent order recording further promises of an independent audit and a comprehensive plan. The sticking point was whether the government should be bound to deliver furniture by a fixed deadline. This led to the third round of litigation heard by Goosen J in mid-February 2014.

In this round, the government readily conceded that its failure to provide sufficient desks and chairs was a violation of the right to a basic education. However, it argued that budgetary and logistical constraints meant that it would

take an indefinite time to provide adequate furniture, requiring an open-ended court order. A complication was that the Eastern Cape budgeted a mere R30 million (£1.6 million) for school furniture in the 2013/2014 financial year, a tiny portion of the estimated R360 million (£20 million) needed to address the shortage.

Goosen J rejected the government's arguments for an open-ended order. This was motivated, in part, by the government's consistent non-compliance with the previous court orders which necessitated more stringent judicial control. Furthermore, Goosen J emphasised that an open-ended order would fail to vindicate the right to a basic education. In setting out this argument, Goosen J provided one of the clearest accounts yet of the nature and content of this right. First, he emphasised that the right to a basic education is distinct from other socio-economic rights in the South African Constitution as it is 'immediately realisable' (Madzodzo [17] citing Juma Musjid [37], discussed further here). Second, Goosen J stressed that right to a basic education 'requires the provision of a range of educational resources', including desks and chairs, and is not merely a right to a place in a school (Madzodzo [20]). This makes explicit a point that has long been implicit in other judgments. Goosen J concluded that an open-ended order with no deadline for delivery would fail to provide effective relief [36].

Underpinning Goosen J's judgment and order is the important point that the immediately realisable right to a basic education cannot always translate into immediate relief (explained further here). Resource and capacity constraints are always important considerations in determining the appropriate remedy. Nevertheless, immediate realisability does require, at minimum, that remedies must offer a clear timetable for relief. Furthermore, Goosen J emphasised that mere assertions of budgetary incapacity cannot justify watering down remedies. Citing the Constitutional Court's judgment in Blue Moonlight [74], he emphasised that 'it is not good enough for [government] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its [constitutional] obligations'. Goosen J held that the government had been fully aware of the furniture crisis at least since 2011 and its budgeting decisions ought to have responded to this crisis (Madzodzo [35]).

The resulting order demonstrates how to balance the need for effective relief with the need for some flexibility to accommodate legitimate budgetary and capacity constraints. The government was ordered to provide furniture to all schools by 31 May 2014, but it may apply for an extension by giving 'full disclosure' of the steps it has taken, a full set of reasons for the delay, and a clear timeline for delivery (Madzodzo [41]).

The significance of Goosen J's judgment is not its finality. The government will undoubtedly request an extension, leading to further rounds of litigation. Instead, its significance is that it injects greater urgency, transparency and accountability into the delivery of adequate school furniture. All Eastern Cape children may not have a desk and a chair of their own by 31 May, but Goosen J's order ensures that the government will not escape its constitutional obligations lightly.

A vital ingredient in ensuring children receive a quality education is ensuring they are taught by passionate and skilled educators.

Teachers to teach

A vital ingredient in ensuring children receive a quality education is ensuring they are taught by passionate and skilled educators. Unfortunately, in the Eastern Cape, there have been persistent problems in making sure that quality educators are allocated to permanent posts, and are paid their salaries by the Department of Education. These failures have led to ongoing litigation to force the Department to appoint permanent educators.

In early 2012 it was clear that the state of education in the Eastern Cape was in dire need of reform. A major problem was that there were more than 4 000 vacant teaching posts, as well as over 7000 teachers in excess in the Eastern Cape. The result was that a number of schools were forced to take it upon themselves to appoint and pay temporary teachers, meaning that they faced financial crises, often having to rely on parents and donations from other sources to pay teachers. In other schools, teachers simply worked for little or no pay, or pupils went without teachers.

Since then, there have been numerous rounds of litigation. In August 2012, with the LRC representing the Centre for Child Law (CCL), agreement was reached and made an order of the court that all vacant posts should be filled on a permanent basis within three months of the court order, and that temporary educators be appointed to such posts within one month. There was also a condition that the salaries of the educators be paid from the date on which they assumed duty. This was in addition to a condition regarding the appointment of non-educators to posts (the only condition which the respondents did not agree to).

It soon became clear, however, that the Department was not going to comply with the court order, and as the beginning of the 2013 academic year approached, it was evident that the respondents were blatantly disregarding the order. The result was a further round of litigation, whereby a different approach was adopted by the LRC, in anticipation that the Department would not comply. The LRC provided a list of temporary educators who had already been appointed, and an order was made that they be remunerated from the date of duty. In effect, this meant that if the Department did not pay them by the date stipulated in the court order, the debt could be enforced under the State Liability Act. Secondly, the litigation provided for the appointment of permanent teachers. The same approach was taken, in that the schools could take the necessary steps to advertise and recommend teachers to the Department for appointment. If the Department failed to appoint them by a certain time, the posts would be automatically filled.

Again it was anticipated that the Department would fail to pay appointed teachers, and so provision was made in the court order that the failure to do so would become an enforceable debt.

First certified class action

Despite this litigation, problems ensuring that educators were in posts and paid by the Department continued, thus prompting further rounds of litigation. It became clear in late 2013 that, once again, schools were suffering as a result of teachers not being appointed to posts and, those teachers who were appointed not being paid by the state.

It was clear that a new strategy was required to force the Department to take action, having so flagrantly disregarded the previous court

orders. In L*inkside and Others v Minister of Basic Education and Others* initially, 32 schools asked the court to permanently fill all vacant teacher posts and reimburse them with R25 million for teacher salaries which the schools had been forced to pay out of school funds. These schools also asked the court to certify an opt-in class action so that all schools in a similar situation could become party to the application.

The certified class action, to which the Department agreed, meant that other schools in the Eastern Cape with vacant posts, or which required reimbursement for teacher salaries, could join the litigation as an applicant. In April 2014, the LRC posted an advertisement in the *Daily Dispatch* newspaper, which called on public schools facing these problems to join the class action voluntarily.

This was a historic step in the fight to ensure access to education for all children, and was the first certified class action of its kind in South Africa. By June 2014, the number of applicant schools had risen to 90, and included both rural and urban top public academic schools, as well as no-fee schools.

However, despite this, the Department continued to fail to move teachers in excess to those posts where they were needed, and continued to fail to reimburse the schools for the teachers' salaries. The case was back in court on 31 July 2014. Following the suspension of the Education Minister, and appointment of a new Education head, Ray Twakadi, the case was postponed until 30 October 2014, to allow Mr Twakadi opportunity to bring himself up to speed on the current crises in the Eastern Cape education system, including the problems regarding the appointment of educators.

Therefore these schools, along with others in the Eastern Cape were still largely in the same position they were in back in 2011, with vacant posts resulting in classes without teachers, or temporary teachers whose salaries are paid by parents and other school funds which are intended for other purposes. On 4 September 2014, the LRC gave the Department 14 days to pay the R28 million debt it owed to the initial 32 applicant schools and to issue the appropriate letters of appointment, before the LRC would issue a writ to seize state assets to justify the debt. The funds were paid within days.

On 12th December 2014, the court handed down a ground-breaking judgement in this matter. Using the example of other jurisdictions such as the USA, Canada and Australia, the LRC argued that a "Claims administrator" should be appointed to oversee implementation of the court order and ensure payment of the outstanding salaries. This would pre-empt the Department's failure to comply with the order. The court agreed with the LRC, and appointed a claims administrator to ensure the payment of R81 million in outstanding salaries to the 90 applicant schools. In addition, where the Department fails to permanently appoint a teacher, they shall be "deemed" to be appointed. This is the first order of its kind in South Africa, and demonstrates that courts are willing to impose stringent supervision to ensure compliance.

(i) Extracts from founding affidavit: Linkside and Others v Minister for Basic Education and Others

The annexes referred to in the court proceedings are too lengthy to include here. Please contact the LRC for the full court document.

IN THE EASTERN CAPE HIGH COURT, GRAHAMSTOWN (REPUBLIC OF SOUTH AFRICA)

CASE NO.

In the matter between:

LINKSIDE AND SCHOOLS LISTED IN ANNEXURE A1

And

MINISTER OF BASIC EDUCATION

DIRECTOR-GENERAL ("THE DG") NATIONAL DEPARTMENT OF BASIC EDUCATION

MEC, DEPARTMENT OF BASIC EDUCATION EASTERN CAPE PROVINCE

HEAD OF DEPARTMENT FOR BASIC EDUCATION EASTERN CAPE PROVINCE

I, the undersigned, state under oath the following:

SARAH SEPHTON

STANDING

15. The applicant schools approach this court in terms of section 38(a), (c) and (d) of the Constitution in their own interests, in the interests of their learners and the learners at schools throughout the Eastern Cape Province, and in the public interest.

16. The applicant schools seek relief in respect of the applicant schools themselves, as well as leave to certify an opt-in class action on behalf of all public schools in the Eastern Cape who may seek the same relief set out by the applicant schools. In this regard, the applicant schools act as representatives of the class of affected schools described more fully below.

III. NATURE OF THE PRESENT PROCEEDINGS AND URGENCY

17. This is an application that arises from the ongoing failure of the respondents to adhere to their statutory and constitutional obligations and to comply with orders made by this Court – various of which were made with the consent of the respondents.

18. It arises from a process known as "post provisioning". While this process is described in detail below, for present purposes, it suffices to say that it is a process whereby the respondents themselves determine, on an annual basis, how many teaching posts each public school in the province is entitled to. They do so having regard to the available resources, the numbers of learners at each school, and so on.

19. The respondents are then obliged to permanently appoint teachers to each of these posts and pay these teachers.

20. However, the respondents have repeatedly failed to adhere to their obligations in this regard. For example, in 2013, the respondents allocated set numbers of teaching posts to the applicant schools but then failed to:

20.1 Permanently appoint teachers to these posts; and/or

20.2 Pay the teachers appointed.

21 The same failures of the respondents occurred in respect of many other schools in the Eastern Cape beyond the applicant schools. Moreover, the failures in 2013 in this regard were on top of similar failures in 2011 and 2012.

22. The practical effect of this has been:

22.1 At worst, that the schools have been left without teachers in these posts – that is without enough teachers to function properly even on the respondents' own version; or

22.2 At best, that the parents of learners at these schools have had to pay, via their school fees, for such teachers, even though the respondents bear an obligation to pay for such teachers and had undertaken to do so by means of allocating the posts concerned, and even though this means there is no money left for other essential school activities.

This Court has itself remarked on the seriousness of the problem:

"It is no exaggeration to say that as a result of what, on the respondents' own admission, is a crisis of immense and worrying proportions, the right to basic education of those who attend public schools in the Eastern Cape province is affected or threatened."

Not only are the respondents' failures in breach of their constitutional and statutory obligations, they are also in breach of orders made by this Court. I refer in this regard to the following orders:

25.1 The order made by this Court on 3 August 2012

25.2 The order made by this Court on 8 November 2012

25.3 The order made by this Court on 6 June 2013

26. As indicated, the respondents have failed to fulfil their obligations to ensure an adequate educator complement at schools in the Eastern Cape in 2011, 2012 and 2013. It now appears inevitable that the respondents will fail to fulfil their obligations in respect of 2014 as well.

27. As I will demonstrate below, the respondents do not dispute the existence of their obligations, nor do they offer any valid defence to justify their breach of these obligations.

28. This application is not intended to deal with the full extent of the respondents' non-compliance with their obligations flowing form the Constitution, statutes and the orders of this Court. Rather it seeks to deal, in essence, with two critical and urgent issues in respect of the applicant schools and other schools similarly situated:

28.1 First, ensuring that the schools are paid back by the respondents for the money that the schools have spent paying teachers whom the respondents ought to have paid; and

28.2 Second, ensuring that for the 2014 year, the respondents permanently appoint teachers to the allocated posts at the schools and pay such teachers.

29. The applicants expressly reserve their rights to return to this court on papers duly amplified to deal with all other issues, including the failure of the respondents to deal with the educators in excess and allocate non-educator post establishments to schools.

30. In an effort to render the present litigation manageable and practical and to ensure effective relief for all affected schools, this application is brought in two parts.

31. Part A of this application deals only with the applicant schools. It seeks immediate relief, on an urgent basis, to secure the permanent appointment of educators to the vacant substantive posts allocated to them by the respondents and to secure reimbursement of the payments that they have made to the educators filling vacant substantive posts.

32. Part B of this application deals with other similarly situated schools in the Eastern Cape. They face the same difficulties and unlawful conduct by the respondents as do the applicant schools. However, due to the number of schools involved and due to the fact that the precise details of their complaints are not currently available, it is not possible for substantive relief to be sought in respect of them immediately. Therefore, in respect of these schools, the applicants seek at this stage only urgent certification of an "opt-in" class action, in terms of which:

32.1 The respondents will be ordered to give notice to the members of the class of the proceedings;

32.2 Affected individual schools falling within the class will be permitted to deliver a notice, setting out details of their vacant substantive posts and amounts paid by the schools to educators occupying vacant substantive posts in 2013, in order to seek appropriate relief and further ancillary relief;

32.3 The court shall give directions regarding the conduct and hearing of the class action proceedings.

33. This will allow the other schools to claim relief in an effective manner as soon as possible.

IV. POST PROVISIONING – THE APPOINTMENT OF EDUCATORS

38. The central issue of concern in this application is the failure of the respondents to fill all vacant substantive posts at public schools in the Eastern Cape on a permanent basis.

39. The magnitude of the failure to appoint and place educators appropriately was recognised by the DBE as far back as 2003. A decade later, the only change has been that the situation has become increasingly dire, with learners and their parents in the Eastern Cape having to bear the brunt of the failure through vastly increased school fees or having to go without an educator. The persistent violation of their right to a basic

education has permanent consequences for the learners.

40. The implementation of educator post establishment is known as "post provisioning". As the only legal mechanism available to deploy educators, post provisioning is critically important because it determines the number of state-paid educators allocated to each public school. The process is intended to ensure that every public classroom has a permanently appointed educator paired to a reasonable number of learners, depending on grade and subject, and with an eye towards the need to redistribute resources and ensure equal and adequate access to education.

41. The first to fourth respondents' failure to implement the post establishment since 2010 has led to many schools being placed in a situation of crisis and financial peril. During the course of 2013 the Department had at various times in excess of 8 000 vacant substantive educator posts.

42. It is anticipated that in 2014 there will be 5 342 vacant substantive posts and close to 10 000 educators in excess. In 2013 the ECDOE first filled 2 354 of these posts with temporary educators as an emergency stopgap measure, and then authorised the appointment of a further 570 temporary educators and later a further 997 temporary educators and later a further 1 995 educators. These appointments were made at various stages of the year and the educator contracts were for a period of three, six and nine months.

V. LEGAL OBLIGATIONS TO APPOINT AND PAY EDUCATORS

THE CONSTITUTIONAL RIGHT TO A BASIC EDUCATION

46. At stake in this application is the first to fourth respondents' continual breach of a learner's constitutional right to a basic education.

47. Section 29(1)(a) of the Constitution provides that "everyone has the right to a basic education". The right to a basic education is immediately realisable and is not subject to progressive realisation in the light of available resources.

48. I submit that, in giving meaning to the content and scope of the right to a basic education, regard must be had to its unqualified nature, and to the purposes of the right.

51. Given the purposes of the right to a basic education, the importance of these purposes in a free and democratic society founded on the values of dignity, equality and freedom, and the unqualified wording of section 29(1)(a), I submit that the right to a basic education necessarily implies the right to a basic education that is adequate.

52. It is patently obvious that a classroom without a teacher cannot be characterised as an adequate education. As bright and curious as children are, they still require an educator to convey substantive knowledge and to guide their educational journey.

53. Section 29(1) must be read with the duty of the state to ensure accountability, responsiveness, and openness (section 1) and to respect, protect, promote and fulfil the rights contained in the Bill of Rights (section 7(2)); as well as with other constitutional rights, including the right to equality (section 9); the right to human dignity (section 10); the right to freedom and security of the person (section 12); the rights of children (section 28); the basic values and principles governing the public administration (section 195); and the duty on the state to perform its obligations diligently and without delay (section 237).

54. The failure of the respondents to fill the teaching posts allocated to a school creates a disproportionate burden for poor parents who are required to pay an excessively high proportion of their earnings in school fees when schools raise the cost of fees to cover the costs of the missing teaching posts. This constitutes indirect discrimination on the grounds of race contrary to section 9(3) of the Constitution because the parents adversely affected are overwhelmingly black.

55. This also constitutes direct discrimination on grounds of socio-economic disadvantage, which, although not enumerated, should be implied into the list of grounds in section 9(3), which is not exhaustive.

56. I submit that these constitutional rights and principles reinforce the duty imposed on the government under section 29(1)(a) of the Constitution to ensure that public schools have adequate conditions and resources conducive to learning, an irreplaceable component of which must be a suitably qualified teacher present in every classroom.

IX. PART B OF THE APPLICATION: OPT-IN CLASS ACTION

118. Part A of this application seeks relief relating to the appointment and payment of educators to the specific applicant schools as against the post establishment.

119. However, it is apparent that many other schools across the Eastern Cape are facing exactly the same problems.

120. Accordingly, In Part B of this application, an order is sought establishing the initial process for the determination of the claims of such schools by means of an "opt-in" class action.

121. In the Constitutional Court in Mukaddamv Pioneer Foods(Pty)Ltd2013(5)SA 89 (CC) stated at paragraph 40 that, in a class action that seeks to enforce constitutional rights, it is not necessary to obtain certification of the class action.

122. To the extent that certification is required and in any event to achieve certainty as to the process, the applicants seek an order under Part B of the application:

122.1 Certifying, to the extent necessary, a class consisting of public schools in the Eastern Cape Province which have vacant substantive posts on their 2013 and 2014 educator post establishment; and seek to ensure that these posts are filled on a permanent basis and that they are reimbursed for all amounts paid to educators to fill vacant substantive posts in 2013;

122.2 Ordering the respondents to publish a notice in accordance with **Annexure "D"** to the Notice of Motion by:

122.2.1 Posting a copy of the notice on a notice-board in every district office in the Province;

122.2.2 Delivering the notice to all public schools under cover of a circular issued by the ECDOE; and

122.2.3 Publishing the notice in two newspapers generally circulating in the Eastern Cape;

122.3 Permitting individual schools falling within the class definition to deliver a notice to the respondents, the Legal Resources Centre and to court in terms of which they "opt-in" to the class action in order to seek the appointment of educators to their vacant substantive posts and reimbursement of the cost of employing such educators in 2013;

122.4 Permitting the parties to approach the court for directions regarding the further conduct of the class action proceedings in due course.

123 Because of the urgency of the predicament of schools falling within the class, the initial order in terms of Part B – merely setting the procedural parameters for the actual class action – will be sought on an urgent basis together with Part A of this application. It is then envisaged that the process of actually determining the claims of the class will be conducted during the course of 2014 in the ordinary course but subject to reasonably expeditious timeframes.

124. The following considerations are relevant to the certification of a class action:

124.1 The definition of the class;

124.2 The cause of action;

124.3 Common issues of law and fact;

124.4 The determination and distribution of the award;

124.5 Representation of the class; and

124.6 Whether class action is appropriate.

THE DEFINITION OF THE CLASS

125. The class is defined as all public schools in the Eastern Cape Province which have vacant substantive posts on their 2013 and 2014 educator post establishments and seek to ensure that these posts are filled on a permanent basis and that they are reimbursed the full amount that they spent on educators filling vacant substantive posts in 2013. The class is limited to public schools in the Eastern Cape Province.

126. The class period is limited to the 2013 and 2014 post establishments.

127. It is submitted that the definition of the class is sufficiently clear to enable schools falling within the class to ascertain by reference to objective factors whether they fall within the class.

A CAUSE OF ACTION RAISING A TRIABLE ISSUE

128. I am advised that an applicant for certification must establish a prima facie case on the evidence that is legally tenable.

129. As set out above, the primary basis on which the applicants seek to pursue their action against the respondents is a breach of the right to education of all learners in the Eastern Cape Province and a breach of statutory obligations due to their failure to appoint educators to all vacant substantive posts in 2012, 2013 and likely in 2014.

130. The only question for this court, therefore, is whether the applicants have made out a prima facie case on the facts that is legally tenable.

LEGALLY TENABLE

131. With regard to the legal part of the test, it is sufficient for the applicants to advance a plausible argument that the respondents have a legal duty to appoint and pay educators to all vacant substantive posts. It is submitted that the obligation of the respondents to appoint and remunerate educators occupying substantive posts on the post establishment is not merely plausible, but not disputed by the respondents.

132. The question of appropriate relief in respect of vacancies at independent schools in the class does not fall to be determined at the stage of certification.

133. These issues will be addressed in legal argument when requesting the relief sought by the individual applicants.

134. The experience of the applicant schools set out in this affidavit and the accompanying supporting affidavits establishes that it is inevitable that other schools are in the same position – with unfilled posts and unpaid educators. It is apparent that the causes of these problems at the applicant schools are systemic, and would therefore extend to other public schools that may not have independent legal assistance and may not be aware of the LRC's work on behalf of some schools.

142. It is therefore submitted that the applicants have demonstrated a prima facie case.

COMMON ISSUES OF LAW AND FACT

143. There is no doubt that the determination of the claims of all the members of the class raises common issues of law and fact. The only material difference between the various members of the class is how many vacant substantive posts each of the schools have, how many educators have gone unpaid and what steps they have been able to take to remedy the situation.

REMEDY

144. A factor relevant to certifying a class action is whether there is a feasible remedy to right the wrong done to the class members.

145. It is submitted that the remedy sought in Part A of this application, suitably adjusted to address the specific circumstances of the class member schools, is a feasible remedy. It may also emerge from the evidence ultimately led in the class action, after the opt-in process, that a more systemic remedy is necessary, in addition to granting orders regarding the appointment and payment of specific educators at specific schools.

DISTRIBUTION OF THE AWARD

146. A further factor relevant to certification is whether it will be feasible to distribute any damages or award obtained as between class members, and whether there is a clear basis for such distribution.

147. There is no dispute about how to distribute the award as it is reward claimed by individual schools based on their entitlement to this relief.

REPRESENTATION OF THE CLASS

148. I am advised that there are two issues that are relevant to the capacity of the representatives to represent the class.

148.1 First, there must be no conflict of interest between the representatives and the members of the class. There is no conflict here.

148.2 Second, the representatives must have the capacity to represent the class. In relation to this issue:

148.2.1 There can be no doubt about the inclination of the applicants duly represented by the LRC to represent the class. The LRC has litigated against the ECDOE in a series of cases mentioned in the founding affidavit which seek to ensure that there is a teacher in front of every classroom.

148.2.2 The LRC is a not–for-profit law clinic that specialises in public interest litigation. The LRC has sufficient funds to conduct this litigation. The applicants will be represented by experienced attorneys and advocates throughout the litigation. I am the applicants' attorney of record. I have substantial experience in public interest and some experience of class action litigation, which is relatively new to South Africa.

A CLASS ACTION IS THE MOST APPROPRIATE MEANS TO DETERMINE THE CLAIMS

149. It is submitted that, in the absence of a class action mechanism, the claims of schools other than the applicants are unlikely to be enforced. Individual schools are unlikely to secure legal representation to bring their own claims for appointment and payment of educators. Each individual's claim is too small to justify litigation to enforce it. A class action is not only the most appropriate means to determine the claims, it is the only way to do so.

150. To the extent that certification is required, it is submitted that: (a) the class can be adequately defined; (b) the cause of action is plausible; (c) the remedy will predominantly transfer the benefit of the action to class members; and (d) that the applicants can represent the class, and accordingly that the above Honourable Court should certify the class action.

X. NOTIFICATION

151. If this Court decides to certify the class action, it will be necessary to notify potential class members so that: (a) they are aware of the class action and can obtain additional information; and (b) they can opt in if they wish to.

152. The applicants propose that notification be given to the classes within two weeks of the date of the order by the respondents circulating a note to all schools, in the terms set out in Annexure "D" to the Notice of Motion and by the advertisement of this order in both print and radio across the Eastern Cape.

153. The applicants submit that this form of notification is vital to ensure that all the class members are made aware of the class action. The applicants also submit that the respondents should be required to pay the costs of the notification. This is a matter for the discretion of the Court, but the applicants submit that the following factors should be taken into account:

153.1 The applicants are individual schools. The respondents are organs of state in breach of their statutory and constitutional obligations.

153.2 The class action is of considerable public interest. Many schools, teachers and learners are affected by the failure to fill all vacant substantive posts.

XI. CONCLUSION AND COSTS

155. Through its own actions and inactions, the first to fourth respondents have repeatedly shown that they are unwilling and/or unable to follow through with the necessary appointment processes and resolve their structural human resources problems.

156. Eastern Cape schools and learners cannot and should not have to stagger through another academic year waiting without the educators being appointed to the posts determined by the respondents themselves as being necessary to teach the public school learners of the Eastern Cape Province.

157. In the circumstances we pray for an order in terms of the Notice of Motion to which this affidavit is annexed, with costs including the costs of three counsel.

(ii) "Every Class Should Have a Teacher"

BY FARANAAZ VERIAVA

By Faranaaz Veriava, a human rights lawyer, based part time at public interest organisation Section27. She writes in her personal capacity.

Over the past few years, a core group of public-interest organisations has litigated a string of cases against the South African government to fight for improved education provisioning in under-resourced schools.

Cases have focused on improving school infrastructure, requiring the delivery of textbooks, desks and chairs and ensuring that there are adequate numbers of teachers in schools.

In essence, each of these cases has sought to compel the state to provide an essential component of the right to a basic education and ensure that pupils can enjoy a quality education that may enable them to prosper.

In many instances these legal interventions have produced tangible results. For example, litigation has ensured the promulgation of norms and standards for school infrastructure. Also, even though new rounds of litigation or appeals are ongoing in almost all these cases, improvements in education provisioning, despite being far from perfect, are nevertheless discernible.

This is evident, for example, in the Accelerated School Infrastructure Delivery Initiative, known more widely by its acronym, ASIDI, and in the improved delivery of textbooks in Limpopo.

The litigation has also provided useful insights into some of the structural problems that underlie poor educational provisioning. Many of these relate to failures of governance regarding planning, budgeting and management. These insights have informed renewed civil engagement and monitoring in the furtherance of good governance and delivery.

Perhaps, though, one of the most fraught and complex of all of these ongoing legal disputes is the teacher post provisioning saga in the Eastern Cape. Post provisioning refers to the process whereby the Provincial Department of education declares, every year, the number of state-paid teaching posts that are to be allocated to a public school.

The number of teacher posts allocated is determined according to a formula that weights certain specified factors, such as class size, the range of subjects a school offers and the poverty of the particular community in which a school is situated.

The Schools Act then provides that school governing bodies may establish extra posts and appoint additional teachers. The funding for these posts is generated through school fees and other fundraising initiatives. Schools catering for poor communities, in particular no-fee schools, generally do not benefit from this provision and of necessity have to rely solely on the teacher allocations that the state makes in terms of its post provisioning policy.

The post provisioning case is a particularly difficult one because, apart from the governance failures that beleaguer all areas of education provisioning, especially in the Eastern Cape, the matter of teacher allocation is further compounded by an underlying labour dispute. At the heart of the dispute between the government and teacher unions is the failure to move surplus teachers from some schools to other schools where they are desperately needed.

Since 2012, the Legal Resources Centre (LRC) in the Eastern Cape has spearheaded the post provisioning litigation, on which the *Mail & Guardian* has reported extensively.

According to the most recent figures the LRC has provided, there are about 3 200 vacant teacher posts affecting some schools, and almost 4 500 excess teachers at other schools in the province. The implication of this is that a significant number of classrooms in understaffed schools remain without a teacher, whereas other schools are overstaffed.

The LRC's latest court application, initiated in June, seeks to enforce the effective implementation of post provisioning on the basis that, as its papers before court say, it "is the only legal mechanism available to deploy and redeploy teachers. It is accordingly essential to the 'right-sizing' or rationalisation of the education sector and the establishment of a more equitable and effective educational system."

Yet, even though for the past few years posts for public schools have been declared, the government has failed to implement post provisioning – either by not appointing permanent teachers to declared posts or by not paying the teachers who have been appointed.

The effect of this for many public schools in the Eastern Cape has been that some have paid for teachers with monies from school fees that would have otherwise been allocated for other essential school activities.

As noted in the latest LRC application (in June): "Schools have spent literally millions of rands paying teachers who ought to have been paid by government. This has resulted in schools cutting other expenditures but has produced massive uncertainty in school planning and budgeting processes."

On the other hand, schools with no sources of alternative income, such as no-fee schools, have had to function without teachers or, in some instances, have relied on teachers who have worked without pay or have been paid only transport costs to and from school.

In 2012, in the case Centre for Child Law and Others vs Minister of Basic Education and Others, the Centre for Child Law and seven school governing bodies represented by the LRC launched an application compelling the government to implement the 2012 teacher post establishment and declare the 2013 teacher post establishment.

It also asked the government to appoint temporary teachers to all vacant posts by a specific date, make all temporary appointments permanent, pay teachers from the date on which they assumed duty and reimburse governing bodies that had been forced to pay the salaries of temporary teachers from their own budgets.

A settlement agreement was reached in favour of the applicants and made an order of court.

But the state failed to comply with the order to complete the teacher appointment process, citing a failure to move the "teachers in excess" as the reason.

This noncompliance resulted in at least two more rounds of litigation and settlement agreements that were made orders of court. The applicants in this latest round of litigation argue that there has never been sufficient compliance with these court orders.

Moreover, as a result of these cases, the LRC was approached by schools from other parts of the Eastern Cape that were experiencing similar difficulties in respect of post provisioning.

In the latest case (again in June), the LRC has, therefore, embarked on an "opt-in" class action litigation as a more "systemic remedy". Through a prior court process in March, the LRC obtained the permission of the court to publish – through the media and other sources – a notice to all schools in the Eastern Cape, inviting them to join the existing 32 schools in claiming the reimbursement of unpaid teacher salaries.

To date, 90 public schools have come forward and given notice to opt in to the class action litigation. The claims of these schools amount to slightly more than R81 million.

These applicants want the government to repay monies that the schools have spent on paying teachers that ought to have been paid by the state. They also demand that the government permanently appoints teachers to allocated posts at schools and pays them, as it is required to do.

This class action reflects a drastic and innovative attempt to address the desperate situation of teacher shortages in many schools in the Eastern Cape. Yet, although the litigation may ensure ongoing pressure to solve the problems of post provisioning, ultimately the impasse concerning the movement of surplus teachers requires a political commitment from the state and teacher unions to resolve it.

Indeed, until then, those who will remain prejudiced by this status quo will be the pupils and the teachers who are not being paid. For pupils to enjoy their right to a basic education, it is crucial that there is a teacher in front of every classroom, teaching.

(iii) Court makes unprecedented step appointing "claims administrator" to ensure State compliance with court order

BY SHONA GAZIDIS

(Article by Shona Gazidis: 13 January 2015. Original article can be found at: http://ohrh.law. ox.ac. uk/court-makes-unprecedented-step-appointing-claims-administrator-to-ensure-state-compliance-with-court-order)

A landmark Judgement handed down on 12th December 2014 in the case of *Linkside & Others v Minister of Education* sees a "claims administrator" appointed to oversee the payment of outstanding teachers' salaries (amounting to R81 million) in the first certified opt-in class action in South Africa.

The South African government has a duty to ensure that every child's right to education, as set out in the Constitution, is realised. However, all too frequently the state fails to meet its obligations. The Legal Resources Centre (LRC) has launched extensive litigation over the past six years to force the Department of Education to rectify these failures. A major hurdle is that once court orders are obtained (mostly by agreement), the Department does not comply with them. Foreign courts have often made use of "special masters" and "claims administrators" to oversee the implementation of court orders, but South African courts have been slow to utilise this mechanism prior to *Linskide*.

The factual background to *Linkside* can be found in a previous article: "*Victory in first Certified Class action sees teachers appointed and paid*" (Shona Gazidis, 18th April 2014), which explains that, based on research carried out by Oxford Pro Bono publico, the case was the first certified class action in South Africa. In brief, the case concerns the failure of the Department to appoint permanent teachers to vacant posts, and to pay their salaries, leaving schools having to raise funds to pay them. The initial case comprised of 32 applicant schools, salaries amounting to R28 million were finally paid, only after the court attached the amount as a debt to the Education Minister's assets. This case did not however address the outstanding salaries of 90 applicant schools that had opted – in to the class action, and it was clear that a solution that pre-empted the State's non-compliance was needed.

The LRC argued on behalf of the applicant schools that the appointment of a "claims administrator,"

i.e. a firm of accountants to verify and pay out each applicant school's claim would be the appropriate remedy in this case. The LRC drew the court's attention to foreign jurisdictions, including the USA, Australia and Canada who have already been using such mechanisms. In the US for example, a "master" (defined by Federal Rule 53 as "i*ncluding a referee, an auditor, an examiner, a commissioner, and an assessor*"), is often employed to oversee a claim. In addition, in the Canadian case of Peppiat v Nicol (SCJ, 27 Nov 1991), the Defendant was ordered to pay sum into court to be transferred into a trust held by the representative plaintiff's lawyer for distribution to class members.

In South Africa, the recent Supreme Court of Appeal Judgement *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another (767/2013) [2014] ZASCA 209* (at para 35), confirmed that courts need to be creative in forming remedies in socio-economic cases, and should secure on-going oversight to ensure implementation of the orders. The court referred to the example of the supervisory measures used in US courts.

The Department of Education's arguments were scrutinised and dismantled by the LRC. The Department's claim that progress had been made in appointing teachers in accordance with a previous collective agreement signed, held little weight as, in reality, very little had changed. Their argument of budgetary constraints could not be accepted, given that previous judgements had confirmed that the right to education was not subject to budgetary constraints, and that failure to budget properly was not a valid defence. The Respondent's final arguments that the Applicants should have referred to the Education Labour Relations Council (ELRC), and that trade union movements were opposed to the order, were simply without merit. Not only were their defence arguments untenable, but the Department failed to support their arguments with sufficient evidence.

The court agreed with the LRC, and Judge Roberson made the novel and unusual order that a "claims administrator" be appointed to oversee payment of the R81 million. The outcome of this case has extremely significant implications for future strategic litigation, where the South African government has so often failed to comply with court orders, secure in the knowledge that they were unlikely to be enforced. This judgement signifies that South African courts are willing to certify class actions, and to implement new and inventive mechanisms to monitor the compliance of the State. It will be possible to litigate future socio-economic cases based on a class of applicants, and to obtain stringent measures to implement long-term solutions.

Access to learning materials to assists teaching is central to the provision of quality education.

Learner-teacher support materials

Access to learning materials to assist teaching is central to the provision of a quality education. Learner-teacher support material (LTSM) provides essential teaching tools and materials required by each school. Schools are provided with a budget from the Department of Education with which to purchase these materials.

In 2012 the Eastern Cape Department of Education (ECDOE) informed schools that they were centralising the procurement of all LTSM. Use of this system was mandatory. The Department now handles the procurement and distribution of the text books and materials. The consequence of this decision was that the schools did not receive the full LTSM budget they were entitled to. Schools have received textbooks valued at just a portion of their budgets, but did not receive the difference. The schools require the full LTSM budget in order to purchase other LTSM products such as computer equipment, blackboards and support literature as well as to cater for any additional learners who may join the school after the text books have been delivered. Despite repeated requests to the ECDOE, the schools involved were not provided with the rest of their budget, leaving them short of LTSM materials, and, in turn, prejudicing the learners. Children would have to share textbooks, or schools would have to use funds to photocopy text books so that there were enough copies for all the children to use. There were absolutely no funds for items like computer equipment or maintenance, maps, posters and calculators.

Two schools, Maganise Junior Secondary School and Nyangilizwe Senior Secondary School approached the LRC regarding the problems they faced with their LTSM budget. The LRC currently represents these schools in proceedings, which were issued in May 2014. The application is twofold: firstly, that the ECDOE reimburse these two schools, as well as other schools in the Eastern Cape who come forward to claim monies owed to them, being the difference in the budget between the amount allocated and the value of the textbooks actually received for 2013 and 2014; and secondly, to enable the schools themselves to procure LTSM so that they can obtain materials they require, and not be limited to textbooks obtained by the ECDOE.

The department failed to file any papers in the matter. The LRC sought default judgment against the department which resulted in a settlement being offered to reimburse the schools. The settlement is likely to be made an order of court in the first quarter of 2015.

(i) Notice of Motion

IN THE HIGH COURT OF SOUTH AFRICA EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO.

In the matter between:

THE GOVERNING BODY OF
MAGANISE JUNIOR SECONDARY SCHOOL | *First Applicant*

THE GOVERNING BODY OF
NYANGILIZWE SENIOR SECONDARY SCHOOL | *Second Applicant*

and

THE MINISTER OF BASIC EDUCATION | *First Respondent*

THE DIRECTOR-GENERAL,
DEPARTMENT OF BASIC EDUCATION | *Second Respondent*

THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF BASIC EDUCATION
EASTERN CAPE PROVINCE | *Third Respondent*

THE SUPERINTENDANT GENERAL OF THE
DEPARTMENT OF BASIC EDUCATION
EASTERN CAPE PROVINCE | *Fourth Respondent*

and

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA | *First Respondent*

MEC FOR EDUCATION: EASTERN CAPE | *Second Respondent*

GOVERNMENT OF THE EASTERN CAPE PROVINCE | *Third Respondent*

SUPERINTENDENT GENERAL OF THE
EASTERN CAPE DEPARTMENT OF EDUCATION | *Fourth Respondent*

Notice Of Motion

KINDLY TAKE NOTICE that the applicants intend to make application at the hearing of this matter for an order in the following terms:

1. It is declared that the respondents' failure and/or refusal to pay the full amounts owed to the schools in terms of its 2012/2013 and 2013/2014 school budgets under the line item "Learner-Teacher Support Materials" (LTSM) is unlawful;

2. The respondents are directed to pay the outstanding LTSM monies owed to the applicant schools in terms of their 2012/2013 and 2013/2014 school budgets, in the amounts of:

2.1 R101 200.33 to the first applicant; and

2.2 R241 533.59 to the second applicant within thirty (30) days of this order; alternatively, in the event that the specific amounts payable are disputed, referring the determination of this issue to oral evidence.

3. It is declared that the amounts referred to in paragraph 2 constitute "debts" in terms of the State Liability Act 20 of 1957. If the respondents fail to make the payments in terms of prayer 2 above within thirty (30) days of the order, the applicants may secure satisfaction of the amounts due in accordance with the procedure set out in section 3(3) of the State Liability Act.

4. The fourth respondent is directed personally to ensure that all necessary steps to affect the payments timeously are taken;

5. The respondents are directed to pay all public schools in the Eastern Cape the balance of their declared LTSM budgets owed to them in terms of their 2012/2013 and 2013/2014 school budgets.

6. Within ten (10) days of the date of the order, the fourth respondent shall deliver notice to the applicants' attorneys and the court designating a named official who shall be responsible for administering the payments required in terms of this order.

7. In order for such payments to be made to schools seeking to be reimbursed, the school must provide the following information to the official designated in terms of paragraph 6 above:

7.1 The name and contact details of the school;

7.2 The school's "final paper budget" as determined by the Eastern Cape Department of Basic Education for the relevant financial year(s);

7.3 The CAPS Catalogue(s) (or equivalent documents) reflecting the money value of the orders placed through centralised procurement;

7.4 A declaration on affidavit by the chairperson of the school's governing body stating that the school has not received the balance of its LTSM budget, the amount(s) demanded, and confirming that the school requires the balance of its LTSM budget in order to purchase LTSM.

8. The respondents are directed to pay the amounts claimed by individual public schools in terms of paragraph 7 of this order, or to inform the affected public schools that the amount claimed is disputed, within thirty (30) days of delivery of the information provided for in paragraph 7 of this order.

9. In the event of a dispute regarding the amount due to any individual school in terms of this order, any of the parties (including any intervening party) may approach this court on reasonable notice and on duly supplemented papers to seek appropriate relief arising from this order. If necessary, the relevant party may request that the relevant issue be referred to oral evidence.

10. The respondents shall pay the costs of this application severally, the one paying, the other to be absolved.

TAKE NOTICE that the affidavits of NAMBITHA NKONYENI and ZOLILE BEEF, and the annexures accompanying those affidavits, will be used in support of the application.

TAKE NOTICE FURTHER that the applicants have appointed the Legal Resources Centre, Grahamstown as their attorneys of record and will accept service of all documents in these proceedings at the address set out below.

TAKE NOTICE FURTHER that should the respondents, or any of them, intend to oppose this application, they are required to:

(i) deliver notice of their intention to oppose within 10 days of the date of service of this application; and

(ii) deliver their answering affidavits, if any, within 15 days of the date of service of the notice of opposition referred to in paragraph (i).

TAKE NOTICE FURTHER that the applicants shall deliver a replying affidavit, if any, within 10 days of delivery of the respondents' answering affidavit(s), if any.

DATED AT GRAHAMSTOWN THIS
DAY OF MAY 2014

LEGAL RESOURCES CENTRE
Applicants' Attorneys
116 High Street
GRAHAMSTOWN
(Ref: Cameron McConnachie)

TO:
THE REGISTRAR
High Court
GRAHAMSTOWN

AND TO:
FIRST TO FOURTH RESPONDENTS
c/o State Attorney,
29 Western Road, Central
Port Elizabeth.

(ii) Extracts from founding affidavit

The annexes referred to in the court proceedings are too lengthy to include here. Please contact the LRC for the full court document.

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH DIVISION: GRAHAMSTOWN

CASE NO.

In the matter between:

THE GOVERNING BODY OF
MAGANISE JUNIOR SECONDARY SCHOOL | *First Applicant*

THE GOVERNING BODY OF
NYANGILIZWE SENIOR SECONDARY SCHOOL | *Second Applicant*

and

THE MINISTER OF BASIC EDUCATION | *First Respondent*

THE DIRECTOR-GENERAL,
DEPARTMENT OF BASIC EDUCATION | *Second Respondent*

THE MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF BASIC EDUCATION
EASTERN CAPE PROVINCE | *Third Respondent*

THE SUPERINTENDANT GENERAL OF THE
DEPARTMENT OF BASIC EDUCATION
EASTERN CAPE PROVINCE | *Fourth Respondent*

Founding Affidavit

I, the undersigned,

NAMBITHA NKONYENI

state under oath the following:

1. I am the chairperson of the School Governing Body for Maganise Junior Secondary School ("Maganise JSS"). **SUMMARY OF APPLICATION**

12. This application is concerned with the need of the applicant schools, and other public schools in the Eastern Cape that are similarly situated, to be provided with LTSM in order to provide an adequate education to their learners. LTSM consists of textbooks and numerous other items which assist teachers and learners.

13. During 2012 and 2013 the Eastern Cape Department of Education (ECDOE) determined the operating budgets for each school in the province for the following year, and informed the schools thereof in writing. The budgets are calculated using the "National table of targets for the school allocation (2011–2013)" as published in Government Gazette No. 33723 dated 5 November 2010. The notice is attached as **Annexure NN2.**

14. The applicant schools' operating budgets for the 2013 and 2014 school years are attached as **Annexures NN3 – NN6.** As can be seen from the budgets, the schools were advised that they would receive certain amounts for the procurement of LTSM. Maganise JSS was advised through their paper budget for 2012/13 that they would receive R156,735.00 and Nyangalizwe SSS would receive R267,178.50.

15. Schools were subsequently informed that the ECDOE was enforcing a system of centralised procurement whereby schools would order textbooks using a catalogue, and the department would handle the procurement and distribution of textbooks. Despite the applicant schools' opposition to having their power to procure LTSM revoked, centralised procurement became mandatory.

16. The new system is unlawful and prejudicial to public schools in the Eastern Cape for two main reasons:

16.1 First, it is limited to the procurement of textbooks, to the exclusion of all the other items of LTSM that schools require in order to provide an adequate education to learners; and

16.2 Secondly, the ECDOE has effectively appropriated the LTSM budgets of public schools and is spending only a reduced portion of those budgets on textbooks. This has the effect of unlawfully reducing the determined LTSM budgets of public schools such as the applicant schools.

17. The two problems are inter-related. The ECDOE states that it has been able to effect savings through centralised procurement as it receives discounts for bulk buying and distribution. The savings, however, are not passed on to the schools. More importantly, schools do not receive the amount of money for LTSM which has been prescribed by law. Instead they receive only a certain quantity of textbooks. If the textbooks are valued at less than a school's LTSM budget, the school does not receive the difference. This severely prejudices no fee schools as they have no other source of income to procure any of the other items which make up LTSM in addition to textbooks. It also undermines the objectives of the pro-poor-school funding model that has been designed to address past and present inequalities in the provision of education.

18. I submit that the ECDOE's insistence on centralising LTSM procurement and limiting their LTSM procurement to textbooks, and refusal to give schools their entire LTSM budget, undermines the applicant schools' ability to provide quality education. It also constitutes a breach of the rights of learners at those schools to equality and to basic education. This application is not intended to challenge the decision to centralise the procurement of textbooks, but only to challenge the unlawful consequences of the implementation of this decision. While the respondents may have the power to determine, as a matter of policy, that

the procurement of LTSM should be conducted centrally, they do not have the power to reduce declared LTSM budget allocations in the process of centralising procurement.

19. The two central purposes of this application are to obtain:

19.1 An order directing the department to reimburse the applicant schools and all schools in the Eastern Cape Province, the difference between the budgets amounts allocated to the schools for LTSM for the 2013 and 2014 years and the value of the textbooks actually ordered and delivered by the Department;

19.2 An order enabling the applicant schools and any other affected schools in the Eastern Cape to procure LTSM in future, not limited to textbooks, to the full value of their approved school allocation for LTSM in accordance with each school's budget allocation.

BACKGROUND TO APPLICATION

20. Every year, government schools across the Eastern Cape province need to acquire LTSM in order to operate. LTSM includes textbooks, teacher guides and workbooks. It also includes supplementary resource materials used to assist with teaching and learning. Paragraph 96 of the Amended National Norms and Standards for School Funding 2006 ("the funding norms") states that

"Learning support materials (LSMs), including textbooks, library books, charts, models, computer hardware and software, televisions, video recorders, video tapes, home economics equipment, science laboratory equipment, musical instruments, learner desks, chairs."

21. This definition of LTSM is not a closed list. Other basic items that fall within LTSM include chalkboards and chalk dusters, photocopiers and printers. Relevant pages of the funding norms are attached as **Annexure NN6a.**

22. It is clear that the above items are crucial for ensuring that the learners receive a quality education in all areas of the curriculum. Relevant pages from "Basic Financial Management in Schools" provided by the ECDOE are attached as Annexure NN7 which set out the materials which are classified as LTSM. This is repeated at paragraph 6.2.2 of Circular No.4 of 2008 which sets out the "Guidelines for Regulating the Provisions of Norms and Standards For School Funding Policy". The Guidelines are attached as Annexure NN8.

23. Since 2008, section 21 schools (those schools whose SGBs qualify to carry out allocated functions in accordance with section 21 of the South African Schools Act 86 of 1996) have had full autonomy to order and pay for LTSM as is clear from paragraph 6.4.3 of the Guidelines attached as annexure NN8. The provincial government deposited the amounts prescribed in terms of a school's allocation as determined by the ECDOE into each school's bank account, and the school handled the procurement of all LTSM. While textbooks were a priority material, LTSM included many more items. For many schools, including the applicant schools, this system was very effective and enabled us to obtain the LTSM we required for the learners.

PROCUREMENT OF LTSM IN 2012 FOR THE 2013 SCHOOL YEAR

24. In June 2012, the SG sent a circular to all section 21 schools in the Eastern Cape which explained that the section 21 power conferred on the SGBs to obtain LTSM was to be revoked, and that all schools would have to obtain LTSM under the centralised procurement system. The circular is attached as **Annexure NN9.**

25. We were opposed to participating in centralised procurement and wrote numerous letters to the department indicating our opposition and setting out our concerns regarding the department's capacity to deliver textbooks on time. We were asked to complete a catalogue to order textbooks. We wrote to the department on 19 July 2012 seeking clarity on why we were being asked to complete the central procurement catalogue when we had rejected

the proposed system. This letter is attached as **Annexure NN9a.**

26. On 31 July 2012 we completed the department's approved LTSM catalogue for the books that we needed for the 2013 school year. The catalogue is known as the "CAPS Catalogue (2013)" and lists all of the approved publications schools may choose from. The catalogue system is used by all schools regardless of whether they are part of the centralised procurement system or not. Proof of our submission is attached as **Annexure NN9b.**

27. After receiving no response, we called our district office to find out why the form indicated that the supplier was "Central Procurement (Prov Office)" and asked whether we could delete that and insert the name of the supplier that we intended using. The district office said we could not change the name, that we should send the form in unchanged, but that the money would be deposited into our school's bank account and we would procure our own LTSM.

28. As indicated on the form, our LTSM budget allocation for the 2013 school year was R156,735.00, but the value of the books we ordered was only R83,828.39 (a difference of R72,906.61). We then waited for our LTSM budget to be deposited into our bank account so that we could purchase the books we had identified in the catalogue, and purchase all of the other LTSM items needed by the school that were not textbooks and therefore not in the catalogue. We intended to use the remainder of the school's approved LTSM budget to procure the other necessary items of LTSM.

29. I am aware that many schools opposed the plan to centralise the procurement of LTSM. Our attorneys in the present application wrote to the first and third respondents on 2 August 2012 on behalf of dozens of schools opposed to the revocation of their LTSM procurement powers, and asked that the SG not impose the proposed new system. A copy of this letter is attached as **Annexure NN10.**

30. In a written response dated 10 August 2012, the Minister agreed that the schools' section 21 powers to procure LTSM could not be revoked in the manner the SG had done so, and directed that centralised procurement be optional for those section 21 schools. A copy of the Minister's letter is attached as **Annexure NN11.**

31. The state attorney then wrote to our attorneys of record stating that schools could elect whether or not to participate in centralised procurement and attached circular number 16 of 2012 dated 27 August 2012 which set out the procedure to be followed if schools decided to procure LTSM for themselves. The letter and circular is attached as **Annexure NN12.**

32. Maganise JSS elected to opt out of centralised procurement and informed the department of our decision in writing. A copy of the letter dated 4 September 2012 is attached as **Annexure NN13.** The school wanted to retain control of the process and was worried that if the procurement and delivery of LTSM was left in the hands of the department, the delivery of materials would be delayed.

33. Despite electing to opt out of centralised procurement, our election was ignored. Numerous officials exerted pressure on our school to participate in centralised procurement.

34. The district director at the time was Mr A.S. Nuku. Nuku strongly advised us in numerous meetings to opt into the centralised procurement process. The SG also personally advised us to participate in centralised procurement. The SG visited our school on 25 October 2012 and told us we had to participate in centralised procurement and had no option. At a meeting held at Ndamase Senior Secondary School in the afternoon of the same day, the SG informed all principals and SGB chairpersons of schools in the district that they had to participate in centralised procurement. The ECDOE appeared determined to ensure that our school opted in. We were determined, however, to exercise our option not to participate in the centralised procurement process.

35. The LTSM budget was not transferred into our school's bank account. Unexpectedly the majority of the books we had identified in the catalogue arrived at our school in October 2012. When I

enquired from the district office, Mrs Ngandi, the official handling LTSM in our district, advised us that we had no option but to accept the books and that the balance owing to us would be paid into our school's bank account shortly.

36. Our circuit manager, Mr BB Peyana, and our district director, Mr Nuku in separate meetings said the same thing as Mrs Ngandi – that we had to accept the books and that the difference between our budget and the value of the books ordered would be deposited into our school's bank account. The circuit management meeting was held on 23 January 2013 with principals in our circuit attending. The district meeting was held on 26 September 2012 in Port St Johns and was convened by the District Director Mr Nuku.

37. Because there were only three months until the start of the 2013 school year, we did not think there was enough time to reject the books delivered and procure books for ourselves. In any event, we had no money to order and pay for textbooks. We therefore accepted the delivery of the textbooks and waited for the balance of our LTSM budget to be deposited into our school's bank account.

38. Despite making repeated verbal and written requests to the district and circuit offices at numerous meetings, and being told to speak to an official in the East London office, the payment was never made and we were unable to purchase the numerous other LTSM materials desperately needed by the school. As a no-fee school without any other source of income, this was a massive setback. Losing almost half (46,5 percent) of our LTSM budget for the 2013 school year has severely constrained the resources we can provide to our teachers and learners and consequently had a negative impact on the quality of education provided to learners.

39. The department's failure to give us our full LTSM budget has meant that we have been unable to pay for:

39.1 natural science and technology textbooks for grades 4, 5, and 6;

39.2 reference materials (maps, atlases, dictionaries);

39.3 five much needed chalkboards for the grade 1, 2 and 3 classes;

39.4 a photocopier and printer we desperately need;

39.5 the servicing and maintenance of the school's 20 computers for learners and five for the teachers – the children's computers are now completely unusable, and two of the teacher computers are not working;

39.6 top-up material needed to assist learners with difficulties in spelling and general remedial work.

40. The school cannot operate effectively without the above items.

PROCUREMENT OF LTSM IN 2013 FOR THE 2014 SCHOOL YEAR

41. The sequence of events in 2013 when we ordered LTSM for the 2014 school year was similar to those of 2012. We submitted a letter, which is attached as **Annexure NN14** and dated 23 April 2013, confirming that the SGB wished to procure LTSM for 2014 on its own. We were informed, however, that centralised procurement was now compulsory. We again completed the catalogue – this time entitled "CAPS Requisitions/ Orders 2014". This is attached as **Annexure NN15.** As indicated on the order form, our budget was R179,597.70, but the value of our order was only R151,303.98. This amounts to a difference of

R28,293.72. This is 16 percent of our school's LTSM budget. The school cannot purchase numerous important LTSM items such as those listed above without those funds.

42. We again repeatedly requested that the difference in the amount ordered and our school's LTSM budget be paid to the school.

43. To date, these monies have not been paid to the school and we have been unable to purchase the required items. The refusal of the respondents to pay the applicant schools the amount owed to them for LTSM, an amount which has been determined by statute, is unlawful and unconstitutional.

44. I submit that the school is owed an amount of R72,906.61 for the 2013 school year, and R28,293.72 for the 2014 school year. I submit that the first applicant, acting in the best interests of its learners, has a claim against the ECDOE in the amount of R101,200.33.

LEGAL BASIS FOR RELIEF SOUGHT

45. The applicants submit that there is a statutory and constitutional obligation on the respondents to provide adequate LTSM to schools in order for them to function properly. The respondents' decision to reduce the funding available for LTSM and at the same time to limit it to textbooks only, is a retrogressive and unlawful measure. These are matters for legal argument and will therefore not be addressed in detail in this affidavit.

46. I emphasise, however, that these legal and constitutional obligations flow from a range of sources, including:

46.1 The right to a basic education contained in section 29(1)(a) of the Constitution;

46.2 Further constitutional provisions, including:

46.2.1 The duty of the state to ensure accountability, responsiveness, and openness (section 1);

46.2.2 The duty of the state to respect, protect, promote and fulfil the rights contained in the Bill of Rights (section 7(2));

46.2.3 The right to equality (section 9);

46.2.4 The basic values and principles governing the public administration (section 195); and

46.2.5 The duty on the state to perform its obligations diligently and without delay (section 237).

46.3 The Schools Act, including sections 20(1)(a), 20(1)(e), and 34 thereof;

46.4 The Public Finance Management Act 1 of 1999;

46.5 The Eastern Cape Schools Education Act 1 of 1999, including section 4(1)(a), 4(1)(c), 4(1)(d), 5(d) thereof.

47. Again without seeking to anticipate or limit the detailed legal argument that will be advanced at the hearing of this matter, I emphasise that the right to a basic education necessarily implies the right to a basic education that is adequate. The failure to fund schools on a sufficient basis to purchase LTSM while also preventing procurement of any LTSM other than textbooks results in inadequate education and disproportionately affects children from poor, predominately black schools.

48. In addition, I am advised that the schools have a reasonable expectation to be paid (or permitted to spend) the amounts allocated to them for LTSM in the school allocation and are entitled to rely on the "promise" embodied in the budget allocation.

49. The funding norms provide that :

"In terms of our Constitution and the government's budgeting procedure, the Ministry of Education does not decide on the amounts to be allocated annually for Provincial Education Departments. This is the responsibility of provincial governments and legislatures, which must make appropriations to their education departments from the total revenue resources available to their provinces. Thus, each province determines its own level of spending on education, in relation to its overall assessment of needs and resources." (para 33)

50. Once the Eastern Cape legislature has determined the amount to be spent on education, the ECDOE uses a formula to determine the overall amount of funding for each school (the "school allocation") to finance "non-personnel non capital expenditure items" (para 87 of the funding norms).

51. That formula is set out at paragraph 6.1 of the Guidelines attached above as annexure NN8.

These stipulate that 45 percent of a school's budget is to be spent on LTSM. Immediately thereafter the Guidelines emphasise that "Where the SGB considers that there is a need to deviate from the prescribed manner in which funds are to be utilised, written approval to do so must be obtained from the District Director."

52. It is clear from the department's own policy on expenditure of the budget that the formula cannot be arbitrarily altered. The current application illustrates how the department's failure to fund LTSM fully has unilaterally, and substantially, reduced the portion of a school's budget that can be spent on LTSM.

53. The province determines the school allocation using the number of learners at a school and a pro-poor funding poverty index that is set by the national department and known as the "national table of targets for the school allocation (or the 'targets table')". This sets out the per-learner monetary targets for the school allocation. The department's decision to withhold LTSM funding undermines the pro poor funding poverty index's aims.

54. The Minister has expressly recognised the importance of the school allocation to empower schools and enable them to deliver a quality education:

> *"Government sees the school allocation as a key means of empowering school communities, and realising democracy at the level of the school. It is important for the local level to participate in decision-making relating to what non-personnel inputs to purchase for particular schools. For this reason, Government supports the gradual transfer to the school level of decision-making powers relating to the school allocation. This must obviously occur in a controlled manner, in accordance with the important sections 19 to 22 of the SASA, and in such a way that public funds are not squandered, and are spent in a manner that fully supports the national curriculum." (para 90 of the funding norms)*

55. In addition, the funding norms provide for SGBs to exercise control – subject to the restrictions in the norms – of the school allocation made to them in the provincial budget. The norms provide that "nothing in this policy prevents PEDS or SGBs from devoting funds derived from the school allocation towards needs described in paragraph 97, if this is regarded as being in the interests of education in the school, and if this occurs in accordance with the general policy governing the school allocation." (para 98 of the funding norms) The needs described in para 97 of the funding norms, in respect of which para 98 recognises the need for some flexibility, include "shortages of LSMs", among other items.

56. In the circumstances, it is submitted that the conduct of the ECDOE is unlawful in two principal respects:

56.1 First, it is limited to textbooks, to the exclusion of all the other items of LTSM that schools require in order to provide an adequate education to learners; and

56.2 Secondly, the ECDOE has effectively appropriated the LTSM budgets of public schools and is spending only a reduced portion of those budgets on textbooks. This has the effect of unlawfully reducing the determined LTSM budgets of public schools such as the applicant schools.

RELIEF SOUGHT

57. As we have already foreshadowed, the applicants seek an order:

57.1 declaring that public schools in the Eastern Cape have the right to obtain LTSM as defined in the funding norms, including items of LTSM other than textbooks that are required to provide an adequate education to learners in accordance with the full budgetary allocation of each school;

57.2 declaring that the decision to withhold the balance of the budget for LTSM of the applicant schools be declared unconstitutional and invalid;

57.3 directing the ECDOE to pay the balance of the declared LTSM of the applicant schools

budgets for the 2013 and 2014 school years to the applicant schools within 30 days of the date of the order to enable them to purchase the additional LTSM materials that they require:

57.3.1 in the amounts of R101,200.33 to Maganise JSS and R251,533.59 to Nyangilizwe Senior Secondary School,

57.3.2 alternatively, only in the event that the respondents dispute the correctness of these amounts, referring the issue of the amounts payable to oral evidence;

57.4 declaring that the amounts referred to in paragraph 53.2 constitute "debts" in terms of the State Liability Act 20 of 1957 and authorising the applicants to recover the amounts in accordance with the provisions of that Act;

57.5 directing the respondents to pay the equivalent amounts to other affected public schools in the Eastern Cape and setting out the information to be provided and process to be followed in respect of such claims;

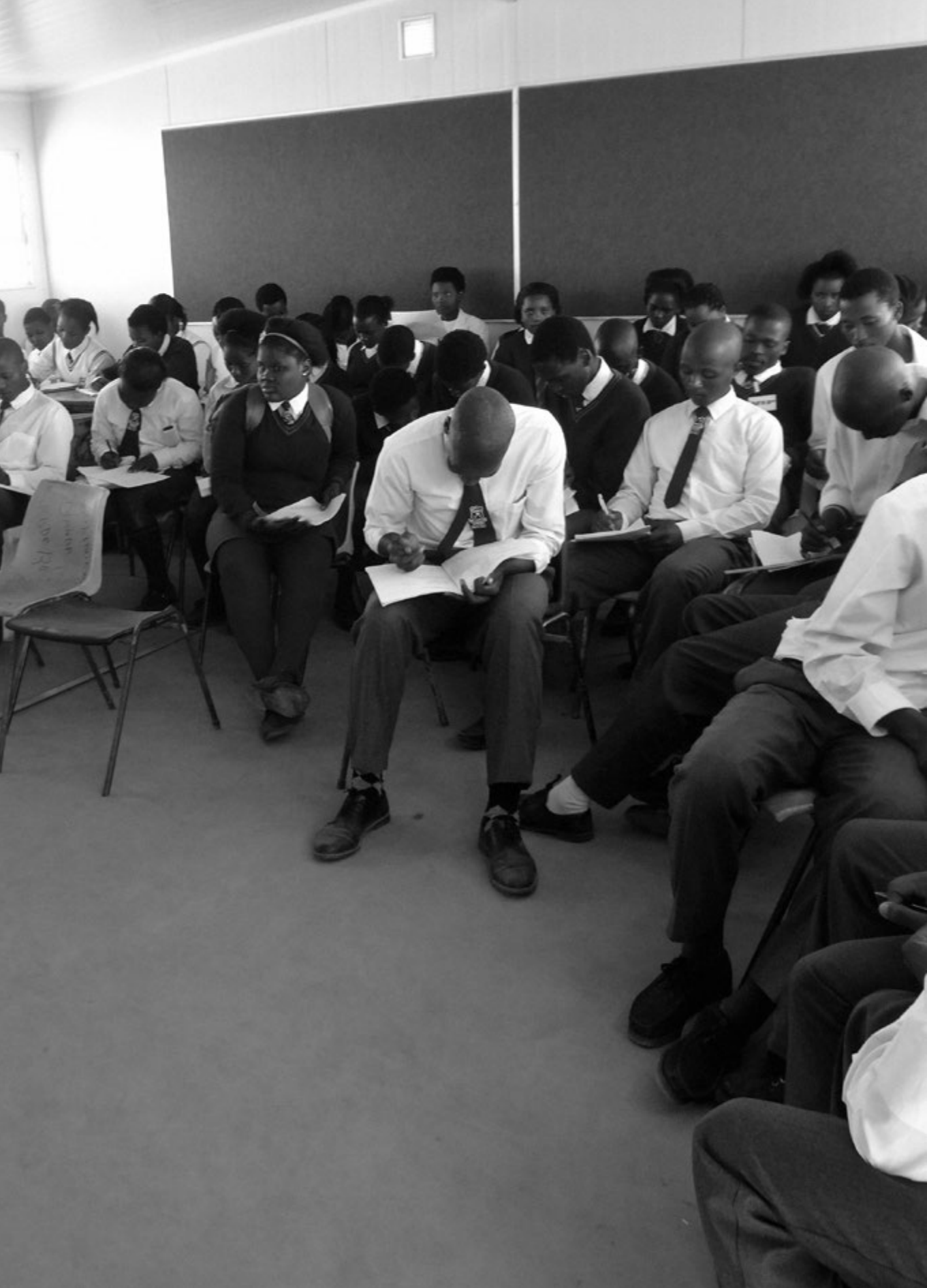
57.6 ordering the respondents to pay the costs of this application.

58. We therefore pray for an order in terms of the Notice of Motion to which this affidavit is attached.

NAMBITHA NKONYENI

SIGNED and SWORN to BEFORE me at MTHATHA on this the day of MAY 2014, after the deponent has acknowledged that she knows and understands the contents of this Affidavit, that it is the truth, that she has no objection to taking the prescribed oath and that she regards the prescribed oath as binding upon her conscience.

COMMISSIONER OF OATHS



The Millennium Development Goals committed nations to a new global partnership, which would seek to reduce poverty and set out targets to be achieved by 2015.

Reflection on the Millennium Development Goals and looking forward to the post-2015 development agenda

In September 2000, a decade of United Nations conferences and summits culminated in world leaders coming together to formulate the United Nations Millennium Declaration, which became known as the Millennium Development Goals (MDGs). The goals committed the nations to a new global partnership, which would seek to reduce poverty and set out targets to be achieved by 2015[1]. Two of the MDGs focus specifically on education; one stating that by 2015, children everywhere should be able to complete a full course of primary school education, and another focussed on promoting gender equality in education.

In addition, education has undoubtedly played an important role in achieving the other MDGs. Any reflections on education post-2015 must therefore take into account the link between education and development[2].

UNESCO has examined the role of education in the Development Goals. The main points highlighted can be summarised as follows:

Goal 1
Eradicate extreme poverty and hunger
One year of schooling can increase that person's chance of gaining employment by 10 percent[3]. It provides people with the knowledge and skills needed to increase their income and expand employment opportunities.

Goal 2
Achieve universal primary education
Enrolment in primary school education reached 90 percent in 2010, compared to 82 percent in 1999, in developing regions. However, by 2011, 57 million children of primary school age were not attending school, and, by 2012, one in ten children were still not attending primary schools[4].

Goal 3
Promote gender equality and empower women
Equality in education plays an important role in empowering women, and the enrolment of girls in schools has increased in countries such as Bangladesh and India. However, there is still a significant imbalance and 54 percent of the world's out-of-school population are girls.

1 http://www.un.org/millenniumgoals/

2 Unesco: "Position paper on Education Post – 2015"

3 http://www.unesco.org/new/en/education/themes/leading-the-international-agenda/education-for-all/education-and-the-mdgs/goal-1/

4 Data from http://www.un.org/millenniumgoals/education.shtml

Goal 4
Reduce child mortality
Evidence shows a strong link between educating women and girls and higher maternal and child life expectancy, as well as improvements in their child's general health and nutrition.

Goal 5
Improve maternal health
Girls who are educated are more likely to seek antenatal care, and to make better health-related decisions, reducing the chances of fatality during child birth.

Goal 6
Combat HIV, Aids, malaria and other diseases
Education provides knowledge and information, which can greatly improve the chances of a person protecting themselves against diseases such as HIV and Aids.

Goal 7
Ensure environmental sustainability
Education for sustainable development (ESD) is important in ensuring that education covers key issues such as climate change, poverty reduction and protection of indigenous people, among other issues. Education can make people think about the effect that their behaviour in the present day may have on future generations.

Goal 8
Develop global partnerships for development
In working together and making education a priority for both developed and developing countries, the financial gap which currently hinders education can be reduced.

Education clearly, therefore, has had a positive impact on the achievement of the MDGs. In many respects, the MDGs have been successful; by 2010 the number of people living in extreme poverty had reduced by half, and in 2014 the number of children enrolled in primary school education has increased dramatically, and treatment for illnesses such as malaria and AIDS has greatly increased[5].

However, it is difficult to know exactly how much closer the world is to fulfilling the goals, largely due to the fact that most figures are based on projections and estimates, rather than actual data[6], which can be very costly and difficult for developing countries to collect.

POST-2015 AGENDA

Focus is now on a post-2015 development agenda and putting sustainable development goals in place. In respect of education, a major hindrance of the MDGs has arguably been that they focus on primary school education rather than primary

5 McArthur, John: "Own the Goals: What the Millennium Development Goals have accomplished," http://www.brookings.edu/research/articles/2013/02/21-millennium-dev-goals-mcarthur

6 Lomborg, Bjorn, "Monitoring progress towards Sustainable Development Goals" Mail & Guardian, 16th October 2014: www.mg.co.za

and secondary education. Keeping children in education through secondary as well as primary school is essential to ensuring that they do receive adequate education.

A further problem with the MDGs is that the focus of the goals has been enrolment numbers. These numbers become insignificant when the children are enrolled to begin with, and are then taken out of school and fall out of the education system. In focussing on the numbers of children enrolled in education, the MDGs detract from improving the quality of education that children receive. While it is evidently important that the numbers of children attending school increase, it is equally important that once they are actually attending school, they are receiving a quality education.

It has been widely recognised that the primary enrolment goal of the MDGs is an inadequate way of assessing primary education, and is not a reflection on learning. That there has been an increase in enrolment is, of course, an achievement, but it does not tell us whether children are actually learning[7].

There also need to be methods for monitoring which give a true reflection of progress on a timely basis so that corrective action can be taken. The current goals have focussed on averages, rather than the performance of the poorest sections of society[8].

The strategic litigation undertaken by the LRC has undoubtedly improved education for children in South Africa, and has obliged the government to invest in education when it otherwise would have delayed or failed to have done so.

It should not be the case that a child is forced to resort to the courts to be able to realise his or her right to education. The post-2015 agenda should reaffirm the fundamental principle of education as a human right, essential to the realisation of other rights, sustainable development and the eradication of poverty. Education needs to be placed at the forefront of governments' priorities and implementation strategies – including the securing of sufficient financial and other resources necessary. This is essential to secure the right of all children and youth to education that enables effective learning for life and livelihood.

7 Interview with Richard Morgan, UNICEF Senior Adviser on the post-2015 development agenda, in "Post – 2015 Education MDGs," Results for Development Institute, August 10 2012

8 "Post–2015 Education MDGs," Results for Development Institute, August 10 2012

Class actions, special enforcement proceedings and supervisory orders are just some of the mechanisms that we have employed in order to seek systemic solutions that reach even the most isolated rural schools.

Conclusion

In this publication, we seek to share the work done by LRC lawyers, school communities and partner organisations in our quest to realise the right to a basic education. We have been forced to adopt new and creative legal strategies to complement the political struggles of poor school communities and unlock bureaucratic blockages. Class actions, special enforcement proceedings and supervisory orders are just some of the mechanisms that we have employed in order to seek systemic solutions that reach even the most isolated rural schools.

The problems of education delivery in South Africa are enormous and touch on virtually every aspect of the "inputs" necessary to give learners a chance at receiving a basic education. Each sector of the system – from school infrastructure, to teachers, to furniture and textbooks – presents different challenges.

In each of the areas, our priority is to ensure that the litigation results in concrete relief for client schools and learners; whether it is the construction of a safe classroom or the delivery of desks and chairs. But we litigate always with a view of the systemic challenges and seek to leverage individual victories into systemic relief for all schools and learners that face similar challenges. Thus, our cases often run in stages, with the first stage securing immediate relief for client schools and the subsequent stages broadening that relief to all schools in the province and addressing systemic blockages.

Class actions now provide a special mechanism to extend access to justice. In early 2014, the LRC's *Linkside* case became the very first class action to be "certified" by the High Court in South Africa – that is, permitted to go to trial. Already, it has secured the payment of close to R30 million in unpaid teachers' salaries and the appointment of hundreds of teachers to vacant posts, with more schools to seek relief in late 2014, in the second phase of the class action.

Enforcement of court orders has also been a challenge requiring novel legal solutions. Examples of new approaches that have succeeded are the attachment of the Minister of Basic Education's personal motor vehicle, to secure payment of teacher salaries, and the High Court's grant of orders "deeming" teachers to have been appointed, where the department fails to process appointments.

The systemic challenges of education are also taking LRC lawyers into the terrain of budget analysis, public administration and finance, collective bargaining processes and intra-governmental systems of co-operative governance. In these complex sectors, it is necessary to continue to develop skills and knowledge, as well as crucial partnerships, with communities, experts and other stakeholders.

The work is ongoing and many challenges remain, but as the accounts and photographs of schools inside the book reveal, the Constitution offers the real prospect of ensuring that learners have an environment conducive to learning: a safe classroom, with a place to sit and write; a teacher who is properly appointed and paid by the government; and prescribed LTSM.

We undertake this work conscious that education, albeit a pivotal right, forms but one component of the development challenges facing South Africa. The steps taken to realise the right to basic education need to complement the delivery of other socio-economic rights, such as water, housing and social assistance. The realisation of these rights serves to strengthen our participatory democracy. As with other developing countries and mixed economies, South Africa pursues its development goals in a global context. It will be crucial to monitor the fulfilment of the Sustainable Development Goals in the post-2015 period.

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Centre for Child Law

ELMA Foundation

Equal Education

Ford Foundation

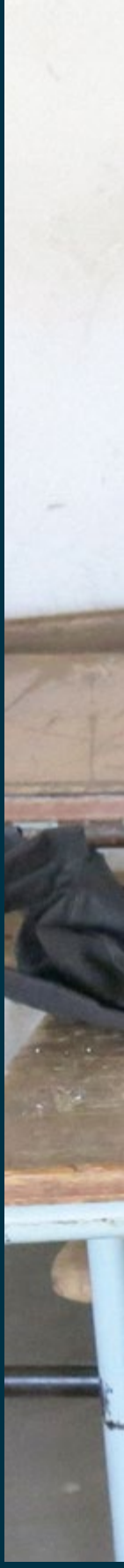
LRC Staff

Open Society Foundations

Twenty years since the first democratic elections in South Africa, vast inequalities remain in the classrooms of the rainbow nation.

The generous rights as set out in the South African Constitution remain elusive to most students, whose daily struggle for knowledge is hampered by poor conditions and a lack of resources in schools.

At the end of 2014, 1 100 schools in South Africa still had no electricity supply, with over 600 schools without a water supply. 7 500 schools still only had pit toilets, with nearly 500 having no sanitation at all. 71% of schools have no library, 82% have no laboratory, and 35% have no sports facilities. Although the litigation detailed in this book has improved the situation for many learners, there is still evidently a long way to go before every child in South Africa is able to realise their constitutional and basic human right to an education.



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