

# The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law

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## OPSOMMING

### **Die Rol van die Howe om die Reg op Basiese Onderwys in 'n Demokratiese Suid-Afrika te Verweselik: 'n Kritiese Ontleding van Onlangse Onderwysregspraak**

Hierdie artikel ontleed onlangse regspraak aangaande die reg op basiese onderwys. Die “vier A-skema”, wat deur 'n voormalige spesiale rapporteur op onderwys van die Verenigde Nasies voorgestel is en deur die Komitee op Sosiale-, Ekonomiese- en Kulturele Regte in sy *Algemene Kommentaar 13* ondersteun is, vorm die raamwerk vir die ontleding. Die vier A-skema omvat beskikbaarheid (*availability*), toeganklikheid (*accessibility*), aanvaarbaarheid (*acceptability*) en aanpasbaarheid (*adaptability*). 'n Kritiese ontleding van die regspraak dui aan dat daar probleme in die lewering van basiese onderwys in Suid-Afrika bestaan met betrekking tot elkeen van die vier verwante elemente. Sommige van die hindernisse het betrekking op die versuim om noodsaaklike vereistes soos infrastruktuur, skryfbehoeftes en vervoer te voorsien. Ander uitdagings hou verband met geskille rakende die magte van skoolbeheerliggame en skole teenoor die magte van provinsiale departementshoofde, lede van provinsiale uitvoerende komitees en, ten opsigte van nasionale beleid, die nasionale Minister van Basiese Onderwys. Die artikel wys dat litigasie 'n belangrike rol speel om die reg op basiese onderwys te verweselik, geskille te besleg en die toewysing van dienste en middele aan leerders te verseker. Die slotsom is dat die soms noodsaaklik en gepas is om die geregtelike roete wat binne 'n grondwetlike demokrasie beskikbaar is, te volg om die reg op basiese onderwys te verweselik.

## **1 Introduction**

The delivery of the right to a basic education in a democracy is a task that engages all arms and spheres of government. Once the legislative framework has been established, the executive must ensure that the right is achieved through practical measures such as the provision of sufficient schools, classrooms, transport where necessary, properly trained teachers, appropriate learning materials and the delivery of teaching and assessment in an environment conducive to the endeavour. Due to constitutional and legislative mandates, the effective provision of a basic education requires a co-operative governance approach involving the national and provincial departments as well as a partnership with school governing bodies which are democratic, largely independent entities. In situations where the executive fails to carry out

its mandate or when there are disputes between the different spheres of school governance, the third arm of government may be engaged, namely the judiciary. This article evaluates recent case law developments regarding delivery of the right to a basic education. A number of important cases were brought before the superior courts during the years 2010 to 2012. These cases reveal a great deal about the progress and the impediments to fulfilling the right to a basic education. The “four A-scheme”, established by the former UN Special Rapporteur on Education<sup>1</sup> and endorsed by the Committee on Social, Economic and Cultural Rights in its *General Comment 13*<sup>2</sup> is used in this article as the framework for the analysis: The four A-scheme comprises availability, accessibility, acceptability and adaptability. A critical analysis of the case law demonstrates that there are problems in the delivery of basic education in South Africa in relation to each of these four interrelated features. Some of the impediments relate to non delivery of essential ingredients such as schools, stationery, textbooks, teachers and transport. Other challenges relate to disputed powers of school governing bodies and schools versus those of the provincial head of departments, members of the provincial executive councils (MECs) and, with regard to policy, the national Minister of Basic Education. The article demonstrates that litigation, or in some cases, the threat of it, does play an important role in the realisation of the right to a basic education, through resolving disputes and ensuring the allocation of services and resources for learners. It is concluded that it is sometimes necessary and appropriate to use the judicial avenue which is available in a constitutional democracy towards the achievement of the right to a basic education.

## 2 The Nature of Basic Education

It is important to consider the meaning and ambit of the right to a basic education. In the matter of *The Governing Body of the Juma Masjid Primary School v Essay NO (Centre for Child Law and Another as amici curiae)*,<sup>3</sup> the judgment of the Constitutional Court threw a direct light on the nature of the right to basic education.

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1 Katarina Tomasevski was the United Nations (UN) Special Rapporteur on the Right to Education from 1998 to 2004. She developed the 4 A-scheme and the UN Committee on Social, Economic and Cultural Rights (CESCR) adopted it in their *General Comment on the Right to Education*, issued in 1999. Tomasevski subsequently developed the scheme in her publications: See Tomasevski *Human Rights Obligations: Making education available, accessible, acceptable and adaptable* (2001); *Human Rights Obligations: The 4-A scheme* (2006).

2 CESCR *General Comment 13* (1999). UN Bodies such as the Committee on Social, Economic and Cultural Rights, and the Committee on the Rights of the Child issue *general comments* on a fairly regular basis. *General comments* provide an authoritative interpretation of the right contained in the articles of Conventions and they are valuable contributions to the development and application of international law. See further [www.crin.org/NGOGroup/CRC/GeneralComments](http://www.crin.org/NGOGroup/CRC/GeneralComments) (accessed on 2012-03-12).

3 2011 7 BCLR 651 (CC).

Nkabinde J, who penned the judgment on behalf of a unanimous court, stated the following:

It is important, for the purposes of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'.<sup>4</sup>

The judgment furthermore refers to the provisions of section 3(1) of the South African Schools Act<sup>5</sup> (SASA) which makes school attendance compulsory for children from the age of 7 years until the age of 15 years or until the learner reaches the ninth grade, whichever occurs first. The judgment views this legal provision to be "following the constitutional distinction between 'basic' and 'further' education".<sup>6</sup>

The court's confirmation of the fact that the right to basic education is an immediately enforceable right, not subject to progressive realisation is of course fairly self-evident from the reading of the relevant section in the Constitution of the Republic of South Africa, 1996 (the Constitution) itself, and many authors have already interpreted it this way.<sup>7</sup> Nevertheless, there had been concerns that the court might prefer to opt for a narrower interpretation of the right.<sup>8</sup> Furthermore, in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*<sup>9</sup> Moseneke DCJ stated that the power to decide on language policy in schools must be understood

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4 Par 37.

5 84 of 1996.

6 Par 38. It would have been preferable if the judgment had not linked "basic education" so closely to s 3(1) SASA as the courts have yet to pronounce on whether the right of a child who is older than 15 years and beyond grade 9 is still entitled to enjoy and enforce his or her right to basic education. However, the judgment does not close the door on that debate.

7 Veriava & Coomans "The Right to Education" in *Socio-Economic Rights in South Africa* (2005) (eds Brand & Heyns) 60; Woolman & Fleisch *The Constitution in the Classroom: Law and Education in South Africa 1994-2008* (2009) 9.

8 Berger "The Right to Education under the South African Constitution" 2003 *Columbia LR* 614 638; Seleane "The Right to Education: Lessons from Grootboom" 2003 *Law, Democracy and Development* 137 140-142; Woolman & Bishop in *Constitutional Law of South Africa* 2nd Edition, Original Service 11-07 (eds Woolman *et al*).

9 2010 2 SA 415 (CC).

within the broader constitutional scheme to make education progressively available and accessible to everyone, taking into consideration what is fair, practicable and enhances historical redress.<sup>10</sup>

This reference to “progressively available and accessible” was concerning, but the context and the references to practicability and historical redress suggested that the court’s reference to progressive availability and accessibility related to education in the language of the learner’s choice,<sup>11</sup> and not to the right to a basic education in general.<sup>12</sup> The *Juma Masjid* judgment has now made it clear that the court’s interpretation of the right to a basic education in section 29(1)(a) is that it is immediately enforceable, subject only to limitation in terms of section 36 of the Constitution.

However, the legal claim that the right to a basic education is immediately enforceable does not wave a magic wand. The delivery of basic education to all of South Africa’s children, particularly in the context of the legacy of our apartheid history is a gargantuan challenge.<sup>13</sup> There are huge backlogs in infrastructure, there is an ever-increasing demand for more schools and classrooms amongst a socially and geographically mobile population, there are acute concerns about quality.<sup>14</sup> These are some of the issues that have caused litigants to prepare and bring court applications in recent years, and it is these efforts, and their role in the struggle for the right to a basic education that the remainder of the article considers and evaluates.

### 3 The Four A-scheme

The cases considered in this article are divided according to the interrelated and essential features of education to be provided to all children as set out by the United Nations Committee on Economic, Social and Cultural Rights concerning the right to education in their *General Comment 13*.<sup>15</sup> These form a useful benchmark against which to measure government’s performance towards the realisation of the right to

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10 Par 61.

11 S 29(2) Constitution.

12 S 29(1)(a) Constitution.

13 This description is used by Mbha J in *Governing Body of Rivonia Primary School v MEC for Education, Gauteng Province* [2012] 1 All SA 576 (GSJ) par 31. See further Fleisch *Primary Education in Crisis* (2007) 1-2; Spaul *A Preliminary Analysis of SACMEQ III South Africa* (2011) 1: “The strong legacy of apartheid and the consequent correlation between education and wealth have meant that, generally speaking, poorer students perform worse academically”.

14 Woolman & Fleisch 114: “Hard as it may seem to believe this rich nation often finishes last when 45 to 50 developing nations are compared with one another”. See further Bloch *The Toxic Mix: What is Wrong with South Africa’s Schools and How to Fix It* (2009) 58-87; Taylor *Priorities for Addressing South Africa’s Education and Training Crisis: A Review Commissioned by the National Planning Committee* (2011).

15 CESCR *General Comment 13* (1999).

education.<sup>16</sup> The four A-scheme is used as a framework for the analysis in this article because it embodies international law principles,<sup>17</sup> and although South Africa has not yet ratified the International Covenant on Economic, Social and Cultural Rights,<sup>18</sup> the international law context remains an important consideration in measuring South Africa's performance regarding the fulfilment of the right to a basic education.<sup>19</sup> This is also relevant to a discussion of case law due to the fact that section 39(2) of the Constitution enjoins the courts, when interpreting a right in the Bill of Rights, to consider international law. Furthermore, a court must prefer any reasonable interpretation of the law that is consistent with the international law over any alternative interpretation that is inconsistent with international law.<sup>20</sup> *General Comments* issued by UN bodies have been utilised by the Constitutional Court.<sup>21</sup>

As explained in *General Comment 13*, availability requires that functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.<sup>22</sup> Accessibility requires that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.<sup>23</sup> Acceptability has to do with the form and substance of education, including curricula and teaching methods.<sup>24</sup> This is where quality comes into the equation. Adaptability directs that education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students<sup>25</sup> within their diverse social and cultural settings.<sup>26</sup>

When considering the appropriate application of the above-mentioned "interrelated and essential features" the *General Comment* proposes that the best interests of the student shall be "a primary consideration".<sup>27</sup> This is a child-centred consideration, and accords with the same principle in the Convention on the Rights of the Child, which has been ratified by

16 Malherbe "Education Rights" in *Child Law in South Africa* (2009) (ed Boezaart) 402.

17 Beiter *The Protection of the Right to Education by International Law* (2006).

18 The South African government signed the treaty on 3 October 1994, and although there have been many commitments to ratify, the UN ratification status chart 2012 reflects that it had not been ratified at the time of writing (<http://treaties.un.org/pages/viewdetails> (accessed 2012-12-17)).

19 Mbazira *Litigating Socio-Economic Rights in South Africa* (2009) 15.

20 S 233 Constitution.

21 See, for example, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 31.

22 CECSR *General Comment 13* par 6(a).

23 CECSR *General Comment 13* par 6(b). Accessibility has three overlapping dimensions: Non-discrimination, physical accessibility and economic accessibility.

24 CECSR *General Comment 13* par 6(c).

25 The word "student" is used in the *General Comment* and therefore repeated here, but in the remainder of this article the word "learner" is used in line with the terminology introduced by SASA.

26 CECSR *General Comment 13* par 6(d).

27 *Idem* par 7.

South Africa.<sup>28</sup> This is a weaker standard than set out in section 28(2) of the Constitution which asserts that “a child’s best interests are of paramount importance in every matter concerning the child”. Due to the “expansive guarantee” provided by section 28(2),<sup>29</sup> it is clear that this principle – which has also been interpreted by the Constitutional Court to be a self-standing right<sup>30</sup> – is a central feature in litigation relating to children’s right to education. Its importance emerges from the first case to be discussed under the first A in the four A-scheme, namely availability.

### 3 1 Availability

In addition to making the important statement mentioned in the introduction of this article regarding the nature of the right to basic education, the *Juma Masjid* judgment also reflected the importance of section 28(2) of the Constitution – the child’s best interests clause – in relation to the right to a basic education. The judgment links to availability of education. The school was a public school on private property, owned by the Juma Masjid Trust in KwaZulu-Natal. The trust permitted the school to occupy the property subject to a lease agreement between the school and the trust. The province and the trust, however, failed to agree on the terms of the lease. The trust then successfully applied to the High Court to evict the school from the premises. The matter was thereafter taken on appeal to the Constitutional Court by the governing body of the school.

The Constitutional Court found that although the responsibility for making available the facilities for education falls squarely within the remit of the MEC for Basic Education (and the MEC was found to have failed dismally in that duty), the trust, which had involved itself by allowing the school to operate on its premises also bore a negative responsibility not to impair the children’s right to education. This, significantly, indicated recognition by the Constitutional Court of the horizontal application of the right to education.<sup>31</sup> However, the court found that the trust had acted reasonably, having made several attempts to solve the problems by engaging with the Department before seeking the eviction order. The Constitutional Court found that the court *a quo* had erred in finding that the trust owed no constitutional duty to the children, and also in granting the eviction without properly considering

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28 Adopted by the UN General Assembly 1989-11-20, entered into force Sept 1990, ratified by South Africa 1995-06-16.

29 *Sonderup v Tondelli* 2001 1 SA 1171 (CC) par 29.

30 *Minister of Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) par 17.

31 The State’s responsibility to fulfil any rights obligation, including the right to a basic education, applies vertically – operating between the individual rights bearer and the state. The horizontal application here refers to the responsibility that accrues to a private entity – the Trust – and the rights bearers.

the effects that its decision would have on the children's best interests.<sup>32</sup> Although the case ended with the children having to leave the Juma Masjid Primary School and being placed in alternative schools, the case has set a new level of protection required for children attending public schools on private property. This reflects the Constitutional Court's recognition of the importance of the right to a basic education. It further indicates how the judicial arm of government must be engaged through considering children's best interests when deciding on evictions from schools. In an interim order, the court enjoined the parties to attempt "meaningful engagement" to determine whether it was possible for the parties to reach agreement and thus render eviction unnecessary.<sup>33</sup> The parties were unable to reach agreement, and eviction was thus ordered, with a requirement that the children would all be placed appropriately in alternative public schools. Although the engagement was not fruitful, it was a significant indication that the court wanted the parties to find their own solution to the problem, if at all possible.

Availability of education is also an issue that was engaged in the case which is commonly referred to as the "mud schools" case.<sup>34</sup> Seven schools in the Eastern Cape had battled for almost a decade to get any attention from the provincial department about their severe infrastructure problems. Schools must be maintained in a condition that makes teaching and learning possible.<sup>35</sup> The schools faced problems of firstly, dilapidated mud buildings (in some cases roofs missing and classes being held in neighbourhood dwellings), secondly, no running water or sanitation and thirdly inadequate seats and desks for the number of learners attending school. The Legal Resources Centre in Grahamstown took up the matter on behalf of the seven schools, and the Centre for Child Law which acted in the public interest, and on behalf of other learners in schools similarly situated. The national Minister of Basic Education (in addition to the provincial MEC) was joined as respondent and the relief was framed to benefit not only the 7 schools but all schools suffering from similar infrastructure backlogs. The matter was settled, resulting in a far-reaching "memorandum of understanding" which pledged a total of R8.2 billion over a 3 year period, specific amounts earmarked for the 7 schools, a plan for infrastructure to be managed by

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32 The court made reference to its earlier judgment *S v M (Centre for Child Law as amicus curiae)* 2007 2 SACR 539 (CC) which established the requirement that a court, when considering the sentencing of a primary caregiver, must pay specific attention to the best interests of the children in the weighing exercise.

33 South African courts have adopted "meaningful engagement" to force parties to find their own solutions in housing cases, such as *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road and 197 Main Street v City of Johannesburg* 2008 3 SA 208 (CC); *Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 BCLR 847 (CC).

34 *Centre for Child Law v Government of the Eastern Cape Province*, Eastern Cape High Court, Bisho, case no 504/10. The memorandum of understanding between the parties was signed 2011-02-04.

35 Department of Basic Education *The National Policy for an Equitable Provision of an Enabling School Physical Teaching and Learning Environment* (2010) 9.

the national Department of Basic Education, undertakings about interim arrangements such as prefabricated buildings and the installation of water tanks. An important term of the agreement provides that if there should be a serious breach of the agreement, the parties can, giving two weeks notice, go back to court to force compliance. The Legal Resources Centre is monitoring compliance with the order. The interim measures have been put in place, but there has been some delay in the commencement of the long term plan. Thus far the parties have managed to keep the case out of court.

The “mud schools” litigation became necessary because repeated requests by the seven schools had fallen on deaf ears. Once faced with a legal challenge, however, the government saw fit to enter into a significant memorandum of agreement. This proves that sometimes litigation – in this matter the application went no further than an initial exchange of papers – plays the role of getting the attention of the executive. This is valuable where even repeated written requests can be ignored amongst the many competing claims and demands that the executive must deal with. The Minister acknowledged her responsibilities and, through her officials and representatives, responded with a plan which was subsequently reflected in the memorandum of agreement. Thus, whilst litigation is often seen as adversarial, it can open the door to an appropriate exchange with the executive, which results in improved access to the right to a basic education.<sup>36</sup>

Another infrastructure case which was settled during 2012 was Equal Education’s application, launched by the Legal Resources Centre on their behalf, to force the Minister to draft norms and standards. After an initial demur, the Minister agreed to publish norms and standards as part of a court recorded settlement. The first draft was issued for public comment and has met with much criticism from the education sector, but nevertheless, the process of drafting standards is now underway.<sup>37</sup>

Impediments to availability of education also include the failure to provide educational materials and stationery. This was the theme of a matter in which the Centre for Child Law, represented by Legal Resources Centre, Grahamstown, entered as *amicus curiae*. In *Freedom Stationery (Pty) Ltd v MEC for Education, Eastern Cape*<sup>38</sup> the applicants successfully sought interim relief pending review of a procurement decision, namely that the Department would be interdicted from entering into any agreements with other stationery suppliers in relation to this particular tender. The tender related to the provision of school stationery for the 2011 school year to 2,380 schools, affecting 688,482 learners. Freedom Stationery had tendered but later learned that the

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36 For a more detailed discussion on non-court centric approaches in the achievement of the right to a basic education see Isaacs “Realising the Right to Education in South Africa: Lessons from the United States of America” 2010 SAJHR 356 374-379.

37 See further <http://www.equaleducation.org.za> (accessed 2012-12-17).

38 Unreported (59/2011) [2011] ZAECBHC1 (2010-03-10).

tender had been cancelled due to no acceptable tenders being received, their tender having been rejected due to a shortcoming in their tax affairs. The Department had in the meanwhile concluded a contract with another service provider, bypassing the tender process, ostensibly because they were concerned about the fact that the school year had already started. Before the materials could be delivered, the urgent application was brought. The *amicus* argument was focused on ensuring that, whatever the outcome of the tender dispute which would ultimately be resolved by the review application in due course, the children should not be left without stationery as this was a critical part of the right to education. The *amicus* argued that the application for interim relief should be dismissed. Revelas J found that the problems were of the department's making, and she was not prepared to give an order that would appear to favour them.

The outcome of this matter was disappointing in two respects. Firstly, in response to the plea of the *amicus* that a plan should be made to ensure the children's stationery was delivered timeously, the judge stated that she assumed some interim plans had been made and that "charities could be approached for interim assistance in providing stationery". This is in stark contrast to the court's approach in another High Court matter where a provincial department of Education had failed to provide the basic provisions for children in a school of industries. In *Centre for Child Law v MEC for Education, Gauteng*<sup>39</sup> it was proposed by the legal representative for the MEC for Education that charities could be approached to provide sleeping bags to keep children warm who were living in parlous conditions in a school of industries run by the state. Murphy J's response to that was as follows:

The respondent's further proposal, that efforts be undertaken to raise funds from the Red Cross and the non-governmental sector, is way off the mark and reflects its fundamental misunderstanding of its constitutional duty.<sup>40</sup>

In the *Freedom Stationery* case the court was apparently satisfied with a lower level of compliance with the constitutional standard regarding the provision of stationery.

Secondly, the judgment on the interim relief failed to properly balance the public interest (that is the children's interest) separately from the government's interest. The court could have followed a more creative approach and ensured that the children received their stationery immediately rather than having to wait for the outcome of the tender review. Quinot<sup>41</sup> argues that the interim relief was not necessary and that the court should have followed the approach of the Supreme Court of Appeal in *CEO of the South African Social Security Agency NO v Cash Paymaster Services (Pty) Ltd*<sup>42</sup> and *Moseme Road Construction CC v King*

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39 2008 1 SA 223 (T).

40 *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) 227 D-E.

41 "Public Procurement" 2011 *Juta Quarterly Review*.

*Civil Engineering Contractors (Pty) Ltd.*<sup>43</sup> In these cases the court made it clear that not every error in the tender process will cause the courts to set decisions aside: “Considerations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside the administrative action or not”.<sup>44</sup> If the interim order had not been made government’s contract to provide the stationery would have remained in place and the children would have received their stationery far sooner than they in fact did. This would not have prevented the irregularities from being investigated and dealt with.

The *Freedom Stationery* case illustrates that engagement of the courts may be ineffective unless the courts take a transformative, rights driven and child-centred approach. As the Constitutional Court has explained, when it comes to issues relating to children the courts should not see their role as merely resolving a dispute between parties, but as safeguarding the best interests of the child or children involved.<sup>45</sup>

A far more successful outcome was achieved in the Limpopo textbooks case,<sup>46</sup> which firmly captured the public imagination during 2012. Public interest law centre Section 27<sup>47</sup> brought an urgent application before the North Gauteng High Court, seeking a declaratory order that the failure by the Department of Basic Education to provide textbooks to schools in Limpopo was a violation of the right to basic education, equality and dignity, and an order directing the department to urgently provide textbooks for Grades R, 1, 2, 3 and 10, by no later than 31 May 2012 to the schools that had not yet received textbooks. This application was the culmination of efforts by the applicants through correspondence and meetings, to ensure that the Limpopo Department of Basic Education would provide the required textbooks. Kollapen J, citing the *Juma Musjid* case, found that children have an immediately realisable right to a basic education.<sup>48</sup> The court also found that textbooks are an essential component of quality learning and teaching,<sup>49</sup> and that the failure by the respondents was a violation of the right to a basic education.<sup>50</sup> The court granted the declaratory order, ordered the department to deliver the textbooks, and also ordered a “catch up” plan to set out various remedial measures such as the provision of extra classes.

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42 [2011] ZASCA 13 (2011-03-20).

43 2010 4 SA 359 (SCA).

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

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

46 *Section 27 v Minister of Education* 2013 2 SA 40 (GNP).

47 There were two other applicants, the Dijannane Tumo Secondary School and Tandanie Msipopetu, a parent.

48 Par 21.

49 Par 22.

50 Par 32.

If buildings, water, sanitation, furniture and textbooks are all components of a basic education, what then can be said regarding teachers and other school staff members? This was the subject matter of another important case brought in 2012 by the Legal Resources Centre in Grahamstown, acting on behalf of the Centre for Child Law and several schools.<sup>51</sup> The applicants requested an order to compel the Department of Education to implement the 2012 post provisioning fully in the Eastern Cape Province. The application also requested that the 2013 post provisioning be declared by 30 September 2012 and implemented fully by 30 December 2012.

Post provisioning is the process that determines how many educators are allocated to specific schools. Due to the long standing failure by the Eastern Cape Department to establish and implement education posts in the Eastern Cape, substantive posts remain vacant resulting in unsustainable pressure being placed on individual schools who have to, amongst other things, appoint teachers at their own expense where possible. Consequently, schools and learners are severely prejudiced and pressure is also placed on the entire education system.

The parties settled all of the issues for which the orders were sought, save the question whether the Department of Education was under a statutory obligation to declare the post establishment on non-teaching staff at public schools and to fill the posts. The applicants argued that in terms of relevant legislation the department is under an obligation to establish posts for non-teaching staff at public schools and fill the posts.

The court found that the department is obliged to declare posts establishment for both teaching and non-teaching staff in public schools and fill the posts. The court supported this finding with emphasis that the department would have budgeted for the posts. The court gave a detailed order in line with this finding.

The courts have thus demonstrated that included in the right to a basic education being available to children are the core components such as buildings, water, sanitation, furniture, text books, teachers and non-educator staff. Stationery should, of course, be part of this list, the *Freedom Stationery* judgment notwithstanding.

### **3 2 Accessibility**

Accessibility refers to the child's ability to enroll and attend school.<sup>52</sup> A case about learner transport which was ultimately settled out of court links to this theme.

The application was brought to the North West Court in Mafikeng by 37 applicants and the Centre for Child Law, represented by the Legal

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51 *Centre for Child Law v Minister for Basic Education Eastern Cape* [2012] 4 All SA 35 (ECG).

52 Malherbe 402.

Resources Centre.<sup>53</sup> The 36 applicants were the parents or caregivers of children who attend the Rakoko High School in Mabeskraal, North West. The families all live in Siga Village which is 25 km from Mabeskraal. The children previously attended a local school<sup>54</sup> within walking distance of their homes in Siga Village until it was closed down by the government in 2009, as part of the rural “rationalisation” process.<sup>55</sup> Since transport was not provided some of the learners’ families could not afford the bus fare and had dropped out of school, whilst others struggled to eke out the transport costs from their meager income, mostly from pensions or grants. The relief sought in the application was the provision of adequate learner transport to learners, free of charge. The Centre for Child Law asked for the plans and programmes in the North West province for the provision of learner transport to be produced and for the details to be made public, so that learners and their parents could be made aware of their rights. The matter was settled, and a settlement agreement was made an order of court on 10 August 2011.

The agreement contained certain urgent interim measures, namely that the Department of Public Works and Transport, in conjunction with the Department of Education, were to provide learner transport for the children from Siga Village to their places of learning at Mabeskraal from 8 August 2011 for 3 months or until longer term measures are put in place, whichever occurred later. The transport was to be fully subsidised by the two departments and scheduled appropriately to the needs of the children.

The long term measures in the agreement were that the two departments, through a joint committee would prepare the necessary plans to ensure that learner transport, which shall be fully State subsidised and appropriately scheduled to cater for learners needs, would be provided to the children and to other learners similarly placed. The inter-departmental committee responsible for the development of a sustainable learner transport management plan would communicate with a nominated representative of the applicants, and would make copies of the plan available to the applicants upon its finalisation, and a meeting would be held to make the contents of the plan known to affected communities. The agreement also allows the applicants to contact the two departments to check on progress. If any terms of the agreement were not complied with, any party was permitted to approach the High Court on an expedited basis. Further settlement discussions were envisaged in the plan, relating to compensation, because of the

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53 *Adam Legoale v MEC for Education, North West*, North West High Court, Mafikeng, case no 499/11, unreported.

54 JC Legoale Commercial School.

55 In the Affidavit filed on behalf of the Centre it was pointed out that the closure of public schools is regulated by s 33 SASA, which involves a consultative process with the school governing body. Closure of a rural school should be governed by the underlying principles set out in the *Report of the Ministerial Committee on Rural Education: A new vision for rural schooling*, which also requires a consultative process.

financial losses suffered during the time when the transport was not provided.

The *Siga Village* case like the *Mud Schools* case discussed above, is another far-reaching settlement agreement. Although it does not involve superlative sums of money as did the *Mud Schools* case, the *Siga Village* case has ensured that learner transport plans are in place and are properly communicated. The involvement of an institutional client brought gains for a wider group of children than the 36 applicants, but in this case the result was limited to the province. The trend towards settlement, if two cases can be said to represent a trend, is a welcome one. Although the launching of litigation had the effect in this case of focusing attention on the plight of learners (where previous written entreaties on their behalf had met with no effective response), it was appropriate that the provincial government engaged with the applicants to reach agreement, rather than battling the matter out in court.

A further case dealing with accessibility was a matter concerning the exclusion of pregnant learners. *Welkom High School v Head, Department of Education, Free State Province*<sup>56</sup> pertains to two cases brought separately to the Bloemfontein High Court, but joined due to their similarities. In both cases the girls were instructed to stay away from school due to their pregnancies. In the first instance a girl, D, became pregnant in January 2010. She attended school throughout her pregnancy but was told to leave school in September 2010, and to stay away until the beginning of the second term in 2011. This meant she would miss exams and be required to repeat her grade.

The second girl, M, attended Harmony High School. She became pregnant during October 2009. She attended school during her pregnancy in the first half of 2010, and gave birth during the July holiday. She returned to school and attended classes for the entire 3rd term and part of the 4th term. In October 2010 she was told to go home and that she would only be admitted to school the next year, she would miss her exams and be required to repeat grade 11.

The decisions to deny these girls access to education was based on the “pregnant learner policy” adopted by the school governing body of each school. These policies were in turn based on a national Department of Basic Education policy dated 2007 entitled “Measures for the prevention and management of learner pregnancies”. In particular, both schools pointed to measure 22 which reads:

However, it is the view of the Department of Education that learners as parents should exercise full responsibility of parenting, and that a period of absence of up to two years may be necessary for this purpose. No learner should be readmitted in the same year that they left school due to a pregnancy.

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56 2011 4 SA 531 (FB).

The Provincial Department had, in response to complaints by the parents of the learners, replaced the schools' decisions with their own, and reinstated the learners. They relied on a Circular sent out in 2010 which clearly stipulated that a pregnant learner should return to school as soon as possible.

The *amici curiae*<sup>57</sup> in this matter strenuously argued that the Court should rule on the appropriateness of the policy, or at least direct the schools and the departments to redraft their policy in line with the Constitution. The Court resisted the temptation to do so, and Rampai J confined himself to the questions of legality and procedure, noting that he could find no legal avenue to address the questions of constitutionality. He accepted that the problem of the policy stems from the National Department's own "Measures for the prevention and management of learner pregnancies". However, as the National Minister had not been joined as a respondent, he could not make an order in this regard. He went as far as to set out the need for regulations to section 61 of SASA to regulate, specify and encode a national policy and uniform procedure on pregnant schoolgirls. He mentioned the relevant constitutional provisions that should be borne in mind, as well as the provisions of the Promotion of Equality and Unfair Discrimination Act,<sup>58</sup> and made some recommendations about what the regulations should contain. He urged (but could not order) the Minister to promulgate these regulations within 24 months of the order, or preferably sooner.

The Head of Department (HoD) of Education in the Free State appealed this decision. The Supreme Court of Appeal handed down its judgment on 28 September 2012.<sup>59</sup> The judgment focuses entirely on the exercise of administrative power and the principle of legality, and declines to make any findings regarding the constitutionality or lawfulness of the policy.

The court considered and rejected three arguments raised by the HoD. Firstly, the HoD argued that although the governing body has authority to adopt a code of conduct, it cannot adopt a code that has the effect of excluding learners. The HoD there contended that when his instruction to the school were challenged in court, he was entitled to launch a collateral challenge to the validity of the policy and the actions rising from it. The court found that such a collateral challenge could only be raised by a person or body threatened by coercive action by a public authority. The girls themselves might have been able to raise such a challenge, but the HoD was not at liberty to do so.<sup>60</sup> The second argument was that the court itself was obliged, in terms of section 172(1) of the Constitution to deal with the constitutional issues. The judgment stated that a court is only obliged to deal with the constitutional issue if

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57 The Human Rights Commission and the Centre for Child Law.

58 Act 4 of 2000.

59 *Head, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA).

60 Par 16.

it finds that issue to be relevant to the judgment. In such cases, the Minister responsible for the legislation must be joined as a party to the proceedings and there should be argument by the parties on that point. In this case, the court found that it was not necessary for the court to determine the question of constitutionality of the policy.<sup>61</sup> The third argument was that the HoD, as the employer of school principals, had the power to issue instructions not to implement and unlawful policy, and was in fact obliged to do so in terms of section 7(2) of the Constitution, if the policy was unconstitutional. The court found that the HoD could have requested the schools to rescind their pregnancy policies and when they refused to do so, he could have mounted a challenge in a court of law.<sup>62</sup>

In the final analysis, the Supreme Court of Appeal upheld the high court's reasoning that the HoD had no legislative power to determine or abolish the learner pregnancy policy, and could not replace their policy with his by overriding the decision of the school. The Supreme Court of Appeal did not find it necessary or appropriate to comment on the policy and did not remark on Rampai J's "suggestion" to the minister that she promulgate the regulations. At the time of writing, this case was headed to the Constitutional Court.

It is apparent from this case that, unless the Constitutional Court rules differently, or until the regulations are promulgated, pregnant girls remain at risk of being excluded from education during late pregnancy and after giving birth. This is an unsatisfactory state of affairs, and poses a real threat to accessibility. It is worth noting Rampai J's remarks that there are two groups of children affected by these decisions, the teenage mothers and their babies: "Perhaps the best gift that can be given to the two little babies of the two schoolgirls is to ensure that their mothers continue to learn, so that they can become better parents".<sup>63</sup> He called for an end to intolerance and moral prejudice against pregnant learners. According to the *General Comment*, accessibility means that education must be accessible to all, especially the most vulnerable, in law and in fact, without any discrimination on any prohibited ground.<sup>64</sup>

The focus in the *Welkom* case on the legality questions surrounding the relative powers of school governing bodies and Departments of Education is not new. Many cases have focused on governance questions, including several cases that have been brought regarding policies about education in the learner's preferred official language.<sup>65</sup>

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61 Par 20.

62 Par 22.

63 *Welkom High School v Head, Department of Education, Free State Province* 2011 4 SA 531 (FB) par 80.

64 CESCR *General Comment 13* par 6(b)(i).

65 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys* 2003 4 SA 160 (T), *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA), *Seodin Primary School v MEC of Education, Northern Cape* [2006] BCLR 542 (NC),

In 2010 the Constitutional Court dealt with such governance questions in *Head of Department, Mpumulanga Department of Education v Hoërskool Ermelo*.<sup>66</sup> The court found that the case concerned the right to learn in a language of choice and was not merely about the powers of the governing body. The Constitutional Court found that the HoD does have the power to withdraw powers of school governing bodies, but only where the school governing body ceases or fails to act<sup>67</sup> (which was not the case in the *Ermelo* matter), and in those circumstances the HoD must act on reasonable grounds and in a procedurally fair manner. The court went on to consider the broader scenario in and around the town of Ermelo with regard to the lack of education facilities. The court thus found that the decisions already made were of no force, and it made a supervisory order that the school governing body must reconsider its original position, taking into account the needs of the broader community, revise its language policy accordingly and report back to the Court.<sup>68</sup>

In *Hoërskool Ermelo* the Constitutional Court dealt squarely with the legality and procedural questions, but did so within a broader rights-based framework. Moseneke DCJ, who wrote the unanimous judgment, sketched the context of continuing deep inequality in our educational system, “a painful legacy of our apartheid history”. The judgment recognises that Afrikaans is a “cultural treasure” but also records that indigenous languages have languished in obscurity, with the ironic result that the learners whose mother tongue is not English are fighting for the right to be educated in English.<sup>69</sup> The judgment frames the powers of the school governing body within a broader transformative agenda that must ensure the provision of basic education for all. Thus, the extensive powers of the school governing body do not mean that the HoD is precluded from intervening, on reasonable grounds.<sup>70</sup> This initially opened the door to a new judicial approach to the legality questions occasioned by disagreements between school governing bodies and

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*Hoërskool Ermelo v Head of Department of Education, Mpumulanga* 2009 3 SA 422 (SCA).

66 2010 2 SA 415 (CC).

67 S 25 SASA. On this point, the Constitutional Court overruled the Supreme Court of Appeal case of *Minister of Education, Western Cape v Governing Body, Mikro Primary School* 2006 1 SA 1 (SCA) which had held that under s 22(1) SASA a Head of Department is entitled to revoke any function of a school governing body, and if it did, then s 25 SASA (which requires the appointment of an interim committee to govern the school) would be applicable. The Constitutional Court in the *Hoërskool Ermelo* case found that whilst s 22(1) SASA does allow the revocation of any governing body powers, the powers are then to be exercised by the Head of Department, and not by a committee in terms of s 25 SASA.

68 In similar vein, Bray “Education Law” in *Child Law in South Africa* (2009) (ed Boezaart) 462 has argued that “a public school must, on the one hand, govern itself in the interests of the school and its learners, but, on the other, reconcile its internal interests with the external interests of the wider political and bureaucratic education hierarchy”.

69 *Hoërskool Ermelo* par 48-49.

70 *Hoërskool Ermelo* par 81.

HoDs regarding the exercise of powers. However, the early positive signs in the high court judgments have been dimmed by the Supreme Court of Appeal judgments in the appeals of the *Welkom* case (already discussed) and the *Rivonia Primary* case, which will be discussed under the next heading.

### 3 3 Acceptability

Acceptability – which might also be referred to by another A-word, “adequacy”<sup>71</sup> – is the major theme in a current case regarding the admissions policy and the question of capacity in a suburban primary school, namely Rivonia Primary School.<sup>72</sup> The four A’s are interlinked, so the case also relates to availability and accessibility. By engaging with the question of capacity and class sizes, this case raises the issue of adequacy, or quality. But the case is also about availability because one of the questions posed by the case is whether the Department of Basic Education in the province is matching the demand to provide sufficient schools in the province, or whether functioning schools are being made to bear the brunt of the fact that there are insufficient schools. On the other hand, an equally important point raised by the case is that if the department can never be involved in decisions about capacity and admissions, patterns of privilege and impoverishment will continue, and these also link to quality.<sup>73</sup> It is these patterns that have been described by the Constitutional Court as “scars” that Apartheid has left behind in South Africa.<sup>74</sup>

The case in question is about a little girl who is referred to in the case simply as “the learner”. The learner lives with her mother within the catchment area of the school. The dispute arose from the fact that the mother applied for the learner to be admitted to the school in grade 1. The admissions process resulted in the learner being placed at number 20 on the “A” waiting list.<sup>75</sup> The learner’s mother appealed to the

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71 See, however, Woolman & Fleisch 135. The authors add adequacy to the list of four “A”s, rather than using the term as interchangeable with acceptability.

72 *Governing Body of Rivonia Primary School v the MEC for Education: Gauteng Province* [2012] 1 All SA 576 (GSJ). A court order directed that no information that reveals or may reveal the identity of the child may be published.

73 On the theme of the continuing effects of apartheid on quality in the current education system see Spaul “South Africa remains a tale of two schools: one which is wealthy, functional and able to educate students, while the other is poor, dysfunctional, and unable to equip students with the necessary numeracy and literacy skills they should be acquiring in primary schools.”

74 Per Moseneke DCJ in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) par 45.

75 The “A” waiting list is for children who live or whose parents work within the catchment area of the school, the “B” waiting list for those who live or whose parents work outside of that area.

provincial department of basic education, and on 2 February 2011<sup>76</sup> the department instructed the primary school to admit the child (who had been brought to the school on that day by her mother). According to the MEC, this decision was based on the “10th day statistics”.<sup>77</sup> The school had determined that the intake of grade 1 learners must be no more than 120, but the department said that the school was not full to capacity. When the school principal refused to place the learner, a departmental official arrived at the school, informed the principal that the admission function delegated to her in terms of a circular had been withdrawn, and that he had assumed the admissions function, and duly admitted the learner. He walked the child to a classroom and directed that she be accommodated. Attempts to resolve the issue through dialogue failed and the matter ended up in court.

The matter was argued in the South Gauteng High Court in October 2011. The governing body argued that the department’s decision to admit the learner was unlawful because it was inconsistent with the admissions policy of the school which determined that full capacity had been reached prior to the application being received. The department argued that the question of school capacity is not one which can legitimately be determined by the admission policy drawn up by an individual school governing body, but rather must be determined at a systemic level by the provincial education department so that public education resources of the province can be used in an efficient and fair manner. The governing body countered that the reason the school still has capacity according to the Department’s assessment is that they have kept their class sizes lower than average through the building of extra classrooms and the hiring of additional staff, financed through the payment of school fees by the parents. Two separately represented *amici curiae*, Equal Education and the Centre for Child Law also made written and oral submissions. The *amici* submissions focused on the constitutional question of whether, on a proper interpretation of the statutory framework for admissions in line with the spirit, purport and objects of the Bill of Rights and with due regard to the rights to equality and education, the governing body of a public school has the sole power to determine the capacity of a school as part of its power to determine the admission policy of a school.

Taking a cue from the *Hoërskool Ermelo* case, the High Court judgment in the *Rivonia Primary* matter<sup>78</sup> contextualised the legality and procedural questions raised by the case within a broader discussion of the right to education. Mbha J described the right as “an empowerment right that enables people to realise their potential and improve their

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76 The learner had been attending a private school since the start of the school year, 2011-01-12.

77 These statistics relate to the number of learners in the school on the 10<sup>th</sup> day of the new school year.

78 The judgment was handed down 2012-12-07.

conditions of living”,<sup>79</sup> and related this to *General Comment 13*.<sup>80</sup> The judgment also drew on the *Juma Masjid* judgment, citing paragraphs that record historical educational segregation in South Africa, and the lasting effects that it has left in society.<sup>81</sup> Against this backdrop, the court set out the powers of school governing bodies, observing that SASA makes provision for an important, but limited role for school governing bodies which, across a range of functions, are subordinate to the HoD and the MEC.<sup>82</sup> The school governing body is empowered to determine a school’s admission policy, but this must be done in a manner determined by the HoD.<sup>83</sup> The judgment stressed the fact that SASA places the obligation to realise the right of learners on the MEC and HoD,<sup>84</sup> and found that “[i]t would be extraordinary if the question of school capacity were to fall outside of the provincial education department when that department is statutorily bound by section 3(3) of the Act, to ensure that every child in the province can attend school”.<sup>85</sup> Ultimately, the court found that the HoD erred in the manner in which he withdrew the admission function delegated to the principal, because this was done summarily, was widely couched and was unnecessary in the circumstances.<sup>86</sup>

The court thus made declaratory orders to the effect that a school governing body does not enjoy the unqualified power to determine a public school’s admission policy, that the power to determine the maximum capacity of a school vests in the Gauteng department of education and not in the school governing body, and that the Gauteng department of education has the power to intervene with the school governing body’s power to determine the admission policy of a public school, and that the MEC for Education, Gauteng, is the ultimate arbiter of whether or not a learner should be admitted to a public school.<sup>87</sup>

The court also paid attention to the issue of policy, finding that school capacity is a matter that should be determined in terms of norms and

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79 *Rivonia Primary* par 26.1.

80 The judgment provides (par 28) this quotation from *General Comment 13*: “Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities”.

81 *Juma Masjid* judgment par 42, cited in *Rivonia Primary* judgment par 27.

82 *Rivonia Primary* par 47.

83 *Idem* par 55.

84 *Idem* par 56.

85 *Idem* par 66.

86 *Idem* par 93.

87 The judgment is binding only in Gauteng, and the court makes the point (par 76) that the court found the applicants’ dependence on the *Mikro* case and *Queenstown Girls High School v MEC, Department of Education, Eastern Cape* 2009 5 SA 183 (CK), primarily because of regulation 13(1)(a) of the Admission Regulations in Gauteng, which empowers the Head of Department to confirm or set aside the refusal of an admission of a pupil to a public school. This does not find application in the other provinces.

standards adopted by national and provincial governments. Mbha J observed that:

[i]t would provide significant guidance to school governing bodies and provincial governments on the issues raised in this matter of the National Minister of Basic Education were to act in terms of section 5A read together with section 58C and promulgate norms and standards on capacity.<sup>88</sup>

Furthermore, the court pointed out that the power to take steps at a systemic level should be embodied in a carefully developed policy that sets out the objectives of the relevant provincial government in respect of capacity, and that this would also guard against the arbitrary use of remedial power.<sup>89</sup> Unfortunately, however, these suggestions amount to no more than recommendations as they are not included in the court order, because the national Minister of Basic Education was not a party to the litigation.

The High Court judgment was overturned on appeal.<sup>90</sup> The Supreme Court of Appeal decontextualised the case, rejecting the idea that the history of education during apartheid and its legacy in today's unequal education system had any relevance to the case at all. Focusing narrowly on the relative powers of the governing body and the HoD, the court found that the governing body has the sole power to determine admissions policy and that capacity – or the numbers of learners to be admitted – forms part of admissions policy.<sup>91</sup> The respondents' argument that the MEC is responsible for placing all children requiring education at a public school in a province, and therefore must have some say in the admission of learners, was given short shrift by the Supreme Court of Appeal. The judgment concluded that governing bodies have the power to determine school policies, including capacity, while provincial departments are responsible for the professional management of the schools and the administration of admissions. The Supreme Court of Appeal did, however, recognise that the Minister may set norms and standards on capacity – which she has not yet done – and that determination of the capacity will have to be done in accordance with such norms and standards once they are in place. Furthermore, the judgment stated that while the governing body has the power to determine the school's capacity, it also has a discretion to exceed that capacity, which discretion is to be exercised on rational and reasonable grounds.<sup>92</sup> At the time of writing this matter is also on its way to Constitutional Court.

Much of the litigation in education law has been about school

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88 *Rivonia Primary* par 63.

89 *Idem* par 67.

90 *Governing Body, Rivonia Primary School v MEC for Education, Gauteng Province* 2013 1 SA 632 (SCA).

91 Par 37.

92 Par 54.

governing body powers, which remains contested terrain.<sup>93</sup> At the heart of these disputes is the self-governance model which the law grants to school governing bodies,<sup>94</sup> struggling against the pressure for more places in public schools, particularly in highly urbanised provinces such as Gauteng and the Western Cape. The narrative of these debates will be taken further, and perhaps concluded, once the Constitutional Court has ruled in both the *Welkom* and *Rivonia Primary* cases.

### 3 4 Adaptability

Adaptability – the last of the four words in the A scheme – indicates that the State has a responsibility to ensure that policies and practices are inclusive of all children. This raises the question as to whether South Africa’s education laws and policies are sufficiently flexible to respond to the needs of all learners, including those with disabilities. Thus, adaptability encompasses educational access for children with special needs.

This was the subject of the case of *Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa*.<sup>95</sup> The case was an important victory for children with severe or profound intellectual disabilities. The Forum provides schools, centres and other services for 1200 children with intellectual disabilities in the Western Cape, but receives no support or funding from the Department of Education. After years of attempting to engage with government about this, the Forum, represented by the Legal Resources Centre, decided to take their case to the courts and joined the national as well as the provincial government. The state argued that it provided education for children with moderate to mild intellectual disability (IQ levels of between 35 and 70) but did not bear the responsibility to immediately provide education for profoundly intellectually impaired children, and furthermore counsel argued that such children could not benefit from education. The applicants, to the contrary, demonstrated through internationally recognised research that such children do indeed benefit from education. The court found that the identified group of children had been marginalised and ignored, denied their right to basic education and had had their dignity infringed. The final court order was a supervisory order which directed the government to provide sufficient funds to organisations that provide services to these

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93 *Laerskool Middelburg v Departementshoof, Mpumalanga Departement van Onderwys supra; Minister of Education, Western Cape Governing Body, Mikro Primary School supra; Queenstown Girls High School v MEC, Department of Education, Eastern Cape supra; Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo supra; Welkom High School v Head, Department of Education, Free State Province supra; Governing body of Rivonia Primary School v MEC for Education, Gauteng Province supra.*

94 Woolman & Fleisch 165 have advanced the view that although school governing bodies “may be (somewhat) exclusive in nature ... these schools also create the conditions for a certain form of democracy”.

95 2011 5 SA 87 (WCC).

children to provide education, and to report on actions taken and to be taken in compliance with the ruling within 12 months of the judgment.<sup>96</sup>

#### 4 Conclusion

This article has indicated that the courts have played an important role in the progress being made with regard to children's right to a basic education in South Africa. Measured against the interlinked principles of availability, accessibility, acceptability and adaptability, the case law of the past few years has shown some significant advancements. The courts have outlined state and private responsibilities to provide or, where the latter is concerned, at least not to hamper children's rights to basic education. Although the *Juma Masjid* case did not realise any direct benefits for the children whose rights were being fought for, it did set a precedent about the need for children's best interests to be considered in applications for eviction, and sent a strong message about the unqualified nature of the right to a basic education and government's as well as private parties' obligations in that regard. The *Mud Schools* case about infrastructural and provisioning impediments garnered a far-reaching out of court settlement agreement which indicates political will and an appropriate degree of accountability – though the *Freedom Stationery* case leaves the reader with a sense that greater judicial transformation is required in order to guard the interests of children, rather than merely settle disputes between the government and paid service providers. Other core components of availability on which the courts made important pronouncements during the period of review were textbooks, teachers and non teaching staff. The courts also demonstrated a willingness to fashion new remedies, such as the “catch up” plan in the textbooks case and the time framed order of the post provisioning case.

With regard to accessibility, the *Siga Village* case brought positive results for the 36 learners concerned as well as the other children in the province. *Hoërskool Ermelo* appeared to herald an encouraging move away from a narrow focus on legality or governance arguments about the powers of school governing bodies. Moseneke DCJ did not allow the *Hoërskool Ermelo* case to end with an answer to the question of school governing body powers, and directed the school governing body to look beyond the narrow needs of learners in the school and to consider the broader needs of all children needing to access education in the community. In the High Court judgments of *Welkom* and *Rivonia Primary* the same spirit was evident. Rampai J carved out a recommendation to the Minister for the drafting of regulations, despite her not being a party in the case, and he made his thoughts about the lawfulness and constitutionality of the learner pregnancy policy known, though he had little legal room to manoeuvre. In the *Rivonia Primary* High Court judgment, Mbha J decided that the MEC's duty to place all children

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96 The order was handed down 2011-11-12.

needing education in Gauteng in schools necessarily implies a role for the executive in determining capacity, which is an aspect of admissions, previously considered the domain of school governing body. The Supreme Court of Appeal judgments, however, took the governance debates back to a pre-*Hoërskool Ermelo* discourse, divorced from context and focused narrowly on legality and procedural issues. The final pronouncements on the *Rivonia Primary* and the *Welkom* cases are not yet written, as an appeal to the Constitutional Court has been lodged in both cases and both will be heard in the first half of 2013.

Finally, the *Western Cape Forum for Intellectual Disability* case is an important victory for the growing awareness of the importance of adaptability. The supervisory nature of the order indicates that the court was prepared to play a transformative role, holding the executive to account.

The cases explored in these articles demonstrate that the fight for basic education in South Africa is a lively struggle. Civil society groups have demonstrated their willingness to play an active role in shaping the model. Litigation on children's rights to a basic education has been used to promote another important "A"-word: Accountability. In this regard the courts have played a significant role in shaping the contours of governance, as well as providing access to services. Although government performance is revealed to have been woefully inadequate in a number of the cases discussed, the settlement agreements indicate some political will – or enthusiasm to avoid far-reaching precedents – in what is arguably the most important challenge facing South Africa: The provision of an adequate basic education for all children.