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# Slowly but surely: The substantive approach to the right to basic education of the South African courts post-*Juma Masjid*

Lorette Arendse\*

Senior lecturer, Faculty of Law, University of Pretoria, South Africa  
<https://orcid.org/0000-0002-2113-6279>

**Summary:** *This article assesses the extent to which the South African Constitutional Court's seminal findings in *Governing Body of the Juma Masjid Primary School v Essa NO* have bolstered the lower courts to give tangible content to the right to basic education. It is contended that the particular facts of *Juma Masjid*, which required the Constitutional Court to rule on the negative obligations of section 29(1)(a) of the Constitution, actually played a significant role in the Court's unequivocal pronouncement that the right is unqualified. The Court's ruling on the nature of section 29(1)(a) seems to have emboldened lower courts to adopt a substantive interpretation of the right. The article traces the lower courts' judgments over a period of almost a decade and explores in detail how the right to basic education has been 'filled out' incrementally by these courts. The connection between the incremental approach and a conceptualisation of transformation that is cognisant of the changing context of our society is also explored in the article. It is argued that a case-by-case approach to litigating potential violations of the right to basic education ensures that the right is never fixed but keeps on evolving to keep abreast of changing forms of (in)justice in our society.*

\* LLB LLM (Western Cape); [lorette.arendse@up.ac.za](mailto:lorette.arendse@up.ac.za)

**Key words:** *right to basic education; socio-economic rights; normative content; negative obligations; unqualified right; incremental approach; transformation; evolving right*

## 1 Introduction

The Constitutional Court (Court) has consistently refused to give normative content to socio-economic rights under the South African Constitution.<sup>1</sup> However, its confirmation of the unqualified nature of the right to basic education in *Governing Body of the Juma Masjid Primary School v Essa NO (Juma Masjid)*,<sup>2</sup> one of the most seminal judgments in education law jurisprudence, seemingly has emboldened lower courts to provide substantive content to section 29(1)(a) of the Constitution.

The particular facts of the judgment required the Court to rule on the negative obligations of the right to basic education. Taking into account that the Court has been more generous in its interpretation of negative obligation cases as opposed to cases where it was tasked to rule on the positive obligations of socio-economic rights, I argue that the facts of *Juma Masjid* actually represented the proverbial ‘blessing in disguise’. Not being confronted with making a ruling on the positive duties of the right to basic education, the Constitutional Court unequivocally pronounced that the right is unqualified and that it can only be limited in terms of the Constitution’s general limitation clause.

Post-*Juma Masjid* the lower courts<sup>3</sup> have given concrete content to the right to basic education, consistently referencing the Court’s seminal finding in *Juma Masjid* as a basis for their decisions to provide substance to the right. I trace the extent to which section 29(1)(a) has been developed by these courts over a period of approximately eight years.

1 The Constitution of the Republic of South Africa, 1996. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Mazibuko v City of Johannesburg* 2013 (6) SA 249 (CC).

2 2011 (8) BCLR 761 (CC). The case was appealed to the Constitutional Court in 2010 from the KwaZulu-Natal High Court (Pietermaritzburg) which sanctioned the eviction of a public school, operated on private property owned by the Juma Masjid Trust. The application to prevent the eviction was unsuccessful as the Constitutional Court ultimately granted the eviction order. See paras 63-64 for an explanation of the Constitutional Court’s finding that the eviction order sought by the Juma Masjid Trust was reasonable.

3 ‘Lower courts’ in this article is a reference to the courts below the Constitutional Court, namely, the High Courts and the Supreme Court of Appeal.

The article also examines the link between the incremental ‘filling out’ of the right to basic education and a particular conceptualisation of transformation that takes account of the ever-changing context of our society. The incremental approach ensures that the right is never fixed but keeps on evolving to keep abreast of changing forms of (in) justice in our society.

The article is divided into four parts. In part 2 I focus first on the significance of the unqualified nature of the right to basic education; second, I examine how the Constitutional Court’s ruling on the negative obligations of the right in *Juma Musjid* led to a more generous interpretation of section 29(1)(a) of the Constitution; third, I chronologically trace the judgments of lower courts to provide an account of how the right to basic education incrementally has been ‘filled out’. In part 3 I explore the link between the incremental approach and transformation. Part 4 provides the conclusion.

## 2 Right to basic education

Section 29(1) of the Constitution provides:

Everyone has the right –

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Although *Juma Musjid* was not brought before the Court with the intention of gaining clarity on what the absence of textual qualifiers in section 29(1)(a) means, the Constitutional Court in this judgment held that the right to basic education is distinguishable from other socio-economic rights in the Constitution.<sup>4</sup> Writing for a unanimous Court, Nkabinde J held as follows:<sup>5</sup>

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> *Juma Musjid* (n 2) para 37.

<sup>5</sup> As above.

Whereas the rights to housing, health, food, water, social security and further education are qualified to the extent that their realisation is subject to the internal limitations of 'progressive realisation', 'reasonable legislative measures', and/or 'available state resources', the Court held that the right to basic education is an immediately realisable right as it does not contain any of the qualifiers mentioned above.<sup>6</sup>

The Constitutional Court has adopted an approach of reasonableness in respect of qualified socio-economic rights in the Constitution. The reasonableness approach rejects a substantive interrogation of the right, and merely determines whether the state has acted reasonably in giving effect to the particular right.<sup>7</sup> The Constitutional Court provided an extensive explanation of the reasonableness approach in the seminal case of *Grootboom*<sup>8</sup> which dealt with the right of access to housing in terms of section 26 of the Constitution.<sup>9</sup> The Court rejected a substantive inquiry by refusing to interpret section 26(1) as giving rise to a minimum core content.<sup>10</sup> According to the Court, section 26(1) read in conjunction with section 26(2) merely imposes a positive obligation on the state 'to adopt and implement a reasonable policy, within its available resources' to ensure the progressive implementation of the right.<sup>11</sup> The Constitutional Court has since applied the reasonableness approach to the other qualified socio-economic rights in the Constitution.<sup>12</sup> The effect of the latter approach on individual rights bearers has been described as follows:<sup>13</sup>

6 As above. Sec 26(1) of the Constitution provides that '[e]veryone has the right to have access to adequate housing'. Sec 26(2) states: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' Sec 27(1) of the Constitution provides that '[e]veryone has the right to have access to – (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Sec 27(2) provides: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.' Sec 29(1)(b) states that '[e]veryone has the right to further education, which the state, through reasonable measures, must make progressively available and accessible'.

7 S Wilson & J Dugard 'Constitutional jurisprudence: The first and second waves' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2014) 38.

8 *Grootboom* (n 1).

9 As above. See also Wilson & Dugard (n 7) 39-40.

10 *Grootboom* (n 1) paras 34-36.

11 *Grootboom* paras 39-46.

12 See, eg, *Treatment Action Campaign v Minister of Health* (No 2) 2002 (5) SA 721 (CC).

13 C McConnachie & C McConnachie 'Concretising the right to a basic education' (2012) 129 *South African Law Journal* 562.

The implication is that individuals do not have a right to the provision of these socio-economic goods, but are merely entitled to have the state take reasonable steps to provide these goods progressively, within its available resources. In simple terms, the fact that a person is homeless, has insufficient food or water, has limited access to health care or social security is not sufficient to establish a limitation of her ss 26 and 27 rights. A limitation of these positive rights will have occurred only if the state's programmes to provide access to these goods are found to be unreasonable.

When juxtaposing the Constitutional Court's interpretation of section 29(1)(a) in *Juma Masjid* with its approach of reasonableness the importance of Nkabinde J's pronouncement in the latter judgment is underscored. The right to basic education secures a right to an actual public good, namely, 'basic education', and not merely to an entitlement that the state performs reasonably in their adoption and implementation of the goods related to the right.<sup>14</sup>

## 2.1 Enforcing the negative obligations of section 29(1)(a) in *Juma Masjid*: 'Blessing in disguise?'

The central issue in *Juma Masjid* revolved around a private owner's right to evict a public school from its property and therefore concerned the enforcement of a negative obligation in terms of section 8(2) of the Constitution.<sup>15</sup> The eviction order granted by the Court resulted in the affected learners being placed in other schools 'which meant the expense to the state of placing them in those schools was negligible'.<sup>16</sup> The Court therefore was not tasked with ruling on the positive dimensions of the right which would have carried a much higher 'price tag' for the state.<sup>17</sup> In such a case the Court would be cognisant of the possibility that the state would be unable to immediately comply with a court order that incurs significant costs.<sup>18</sup> As Skelton speculates, the Court then would probably circumscribe the right more tightly, as the authority of the Court is brought into question and the anticipated recipients are left with no benefit if the court order is not complied with.<sup>19</sup>

14 McConnachie & Mconnachie (n 13) 564.

15 *Juma Masjid* (n 2) para 1. Sec 8(2) of the Constitution provides: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'

16 A Skelton 'How far will the courts go in ensuring the right to a basic education?' (2012) 27 *Southern African Public Law* 397.

17 Skelton (n 16) 396.

18 Skelton 397. See also E Berger 'The right to education under the South African Constitution' (2003) 103 *Columbia Law Review* 614.

19 Skelton (n 16) 397.

Skelton's analysis confirms the view that the Constitutional Court is more cautious in its interpretive approach of the positive obligations stemming from socio-economic rights.<sup>20</sup> Brand brings up separation of power concerns as he points out that courts operate under the perception that 'enforcing negative duties require of them less interference in the sphere of power of the political branches than the enforcement of positive duties would'.<sup>21</sup> The enforcement of a positive obligation, unlike the enforcement of a negative obligation, is perceived as interfering in the executive or legislature's decisions on budgetary allocations.<sup>22</sup> This, coupled with 'institutional considerations sourced in the [Constitutional] Court's understanding of its own role, legitimacy and competencies',<sup>23</sup> time and again have resulted in the Court's refusal to provide normative content to socio-economic rights.<sup>24</sup> Therefore, it is suggested that the Court may have decided *Juma Masjid* differently, had it been confronted with a different set of facts which would have forced it to rule on the positive obligations of the right to basic education.

In hindsight, the fact that the Court was asked to rule on the negative obligations of section 29(1)(a) may have turned out to be the proverbial 'blessing in disguise'. To be clear: Since the Court was not tasked with ruling on the positive obligations of the right (and all the concerns that accompany it, as noted above) it was more inclined to provide a 'generous' interpretation of the unqualified nature of

20 Wilson & Dugard (n 7) 42.

21 D Brand 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 11. See also *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* para 78: 'The objectors argued ... that socio-economic rights are not justiciable ... because of the budgetary issues their enforcement may raise. The fact that socio-economic rights will ... inevitably give rise to such implications does not seem ... to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'

22 Brand (n 21) 11.

23 S Liebenberg 'Social rights and transformation in South Africa: Three frames' (2015) 31 *South African Journal on Human Rights* 454.

24 Liebenberg (n 23) 453-454. Wilson & Dugard compare the Constitutional Court's interpretive approach in positive obligations cases with those judgments in which negative obligations have been ruled upon. In *Jaftha* the 'Court considered whether the attachment and sale in execution of residential property without judicial oversight constituted a violation of the right of access to adequate housing'. The Court held that the lack of judicial oversight violated the right of access to adequate housing in terms of sec 26(1) of the Constitution and that the limitation was not justifiable in terms of the limitation clause. In coming to this conclusion, the Court relied directly on the international law concept of the minimum core content of a right to conclude that security of tenure was part and parcel of sec 26(1). In *Grootboom*, a case which concerned the positive enforcement of sec 26, the Court refused to interpret sec 26(1) as containing a minimum core content. The juxtaposition of these two cases clearly illustrates a more generous approach to interpretation when the Court is dealing with the negative duties emanating from socio-economic rights. See Wilson & Dugard (n 7) 41-42; *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 (2) SA 140 (CC) paras 25-34; *Grootboom* (n 1) paras 26-33.

the right, which of course it did. This, in turn, led to the lower courts using the Court's pronouncements on the immediate realisation of the right as a basis to provide concrete content to section 29(1)(a).

## 2.2 An incremental approach to 'fill out' section 29(1)(a): A chronology of cases (2010-2018)

As noted above, the *Juma Masjid* Court held that the absence of qualifiers in the textual formulation of the right to basic education means that section 29(1)(a) is immediately realisable, not subject to the availability of state resources and that the right may only be limited in terms of the Constitution's general limitation clause.<sup>25</sup> Furthermore, the Constitutional Court confirmed that the state bears the primary onus of providing a basic education.<sup>26</sup> However, what is the exact content of the state's duties in respect of section 29(1)(a)? The latter question was not before the Court. However, Nkabinde J provided some broad parameters in understanding the content of the right to basic education. First, she held that access 'is a necessary condition for the achievement of this right'<sup>27</sup> and that the state has a duty to ensure the availability of schools.<sup>28</sup> Whereas the *Juma Masjid* judgment provided some broad principles in guiding the content of the right to basic education, the High Courts and the Supreme Court of Appeal have been more specific in providing exact content to the right, albeit on an incremental basis. As stated by Skelton, the latter courts 'have begun to spell out, in case after case, what makes up the right to education'.<sup>29</sup> According to Veriava, the High Courts and the

25 *Juma Masjid* (n 2) para 37.

26 The Court found that the state incurred a positive obligation in terms of secs 7(2) and 8(1) of the Constitution to provide a basic education. Sec 7(2) of the Constitution provides: 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' Sec 8(1) states: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.' The Court held that the primary obligation to provide a basic education rests on the state, and that the Trust's duty was merely 'secondary'. According to the Court, private entities such as the *Juma Masjid* Trust incur mere 'negative obligations not to impair learners' right to a basic education [in terms of sec 8(2) of the Constitution]'. *Juma Masjid* (n 2) paras 45-62. In *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) the Constitutional Court held that '[the right to basic education in terms of sec 32 of the interim Constitution] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education'.

27 The Court held that 'access to school [is] an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution'. *Juma Masjid* (n 2) para 43.

28 Secs 7(2) and 8(1) of the Constitution read with sec 12 of the Schools Act impose a duty on the state 'to provide public schools for the education of learners'. *Juma Masjid* (n 2) para 45.

29 A Skelton 'Strategic litigation impacts: Equal access to quality education' Report commissioned by the Open Society Justice Initiative: Open Society Foundations Education Support Programme (2017) 66.

Supreme Court of Appeal have been engaged in developing a 'rich jurisprudence' based on the principles established in *Juma Masjid*.<sup>30</sup>

### 2.2.1 'Mud schools' case

The so-called 'Mud schools' case was one of the first noteworthy cases to focus on school infrastructure.<sup>31</sup> This case, launched in 2010 by the Legal Resources Centre (LRC) on behalf of the Centre for Child Law and several schools in the Eastern Cape, resulted in a settlement agreement with the state which eventually developed into the Accelerated Schools Infrastructure Development Initiative (ASIDI).<sup>32</sup> The objectives of ASIDI are to eradicate the 'Basic Safety Norms backlog in schools without water, sanitation and electricity and to replace those schools constructed from inappropriate material (mud, planks, asbestos) to contribute towards levels of optimum learning and teaching'.<sup>33</sup> Since a settlement was reached in this case, the Court could not explicitly find that infrastructure constitutes an element of the right to basic education. However, in my view the government's commitment to providing appropriate infrastructure in schools as per the terms of the programme indicates an admission on their part that school infrastructure is a key element of the content of section 29(1)(a). Furthermore, by stating that appropriate infrastructure will contribute to 'levels of optimum learning and teaching' in terms of ASIDI, the state recognises that there is a link between resources and the provision of quality education.

The meaning of 'quality education' is not defined in the Constitution or the South African Schools Act, and at an international law level 'quality' also is not clearly circumscribed in any human rights instrument. The former Special Rapporteur on the Right to Education, Kishore Singh, has developed a holistic approach to understanding quality, titled 'Normative action for quality education'.<sup>34</sup> Singh contends that the quality of education should not only be assessed in terms of the acquisition of 'knowledge, skills and competencies', but by a range of barometers. The holistic framework for quality education is summarised as follows: (i) a minimum level

30 F Veriava 'The contribution of the courts and of civil society to the development of a transformative constitutionalist narrative for the right to basic education' LLD thesis, University of Pretoria, 2018 14.

31 Skelton (n 29) 52.

32 Skelton 52-53.

33 <https://www.education.gov.za/Programmes/ASIDI.aspx> (accessed 28 February 2019).

34 K Singh 'Normative action for quality education' (2012) 5, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-21_en.pdf) (accessed 28 February 2019).

of student acquisition of knowledge, values, skills and competencies; (ii) adequate school infrastructure, facilities and environment; (iii) a well-qualified teaching force; and (iv) a school that is open to the participation of all, particularly students, their parents and the community.<sup>35</sup>

Singh's normative framework seemingly is backed by South African state policy. In terms of 'Action Plan to 2019: Towards the realisation of schooling 2030' a wide range of objectives have to be realised by 2030 in order to fulfil the vision of a 'post-apartheid schooling system'.<sup>36</sup> At the heart of this vision is the creation of an education system that provides 'quality schooling' to all young South Africans.<sup>37</sup> The Action Plan enumerates several elements that must be in place to achieve quality schooling, including competent teachers, learning and teaching materials 'in abundance' and of 'high quality' and school buildings and facilities that are 'spacious, functional, safe and well-maintained'.<sup>38</sup> The state therefore acknowledges Singh's holistic approach that quality not only is to be understood in terms of an academic outcome achieved by learners, but encompasses an environment that is conducive of adequate teaching and learning. The violation of quality education was alluded to in some of the cases discussed below.

### 2.2.2 Centre for Child Law & Others v Minister of Basic Education & Others

In *Centre for Child Law v Minister of Basic Education*<sup>39</sup> the Court held that teaching and non-teaching staff are core components of the right to basic education.<sup>40</sup> Plasket J, in particular, focused on the damaging impact of a deficient non-educator staff on learners as well as teachers.<sup>41</sup> He reasoned as follows:<sup>42</sup>

If the administration and support functions of a school ... cannot perform properly because of staff shortages, not only does this have a knock-on effect on the right to basic education but it also has the potential to threaten other fundamental rights. Where hostels are understaffed, for instance, or security is lacking, the rights to dignity and to security of the person, as well as children's rights in terms of s 28

35 As above.

36 National Department of Basic Education (NDBE) 'Action Plan to 2019: Towards the realisation of schooling 2030' (2015).

37 NDBE (n 36) 9 (my emphasis).

38 NDBE 9-10. See generally Skelton (n 29).

39 2012 (4) All SA 35 (ECG).

40 *Centre for Child Law* (n 39) paras 33-34.

41 *Centre for Child Law* paras 16-21.

42 *Centre for Child Law* para 21.

of the Constitution, may be implicated. When administrative capacity in a complex institution like a school is non-existent, administration either breaks down or has to be performed by teachers who have to deviate from their core functions to perform tasks that they are not trained or expected to perform.

This *dictum* confirms the approach by the Constitutional Court that socio-economic rights are not to be construed in isolation, but in relation to other rights.<sup>43</sup> All rights in the Bill of Rights are interconnected.<sup>44</sup> Therefore, a denial of certain core elements of section 29(1)(a), such as teachers and non-teaching staff, not only constitutes a violation of the right to basic education, but detrimentally impacts other rights, such as the right to dignity. Furthermore, Plasket J inadvertently alluded to the infringement of the right to quality education by highlighting the undue burden that is placed on teachers when there is a shortage of support staff at a particular school. Being compelled to carry the workload of non-teaching staff may force educators to cut classes and to be inadequately prepared for their lessons. This in turn leads to a low morale among educators and a downturn in the quality of education provided to learners.

### 2.2.3 *Madzodzo & Others v Minister of Basic Education & Others*

Quality was implicated In *Mazdodzo v Minister of Basic Education (Mazdodzo)*<sup>45</sup> in which the Mthatha High Court pronounced on the failure of the Eastern Cape Education Department to provide school furniture (in the form of desks and chairs) to destitute public schools in the province.<sup>46</sup> The Court described in detail the harmful effect that a scarcity or complete lack of furniture has on learners and teachers. The Court emphasised that learners are either 'forced to sit on the floor', 'compelled to stand throughout lessons with no writing service' or be 'squashed into desks like animals'.<sup>47</sup> This results in a multitude of problems. Learners become entangled in fights over the limited furniture available, which in turn leads to a struggle on the

43 In *Grootboom* (n 1) paras 22-23 the Constitutional Court explained the interrelated nature of rights in the Bill of Rights: '[R]ights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.'

44 As above.

45 2014 (2) All SA 339 (ECM).

46 *Mazdodzo* (n 45) para 1.

47 *Mazdodzo* para 20.

part of the teacher to maintain discipline in class. Furthermore, due to the limited writing space, teachers are not able to provide learners with writing exercises. The deplorable physical environment, 'not at all conducive to teaching and learning', inevitably results in learners not being able to concentrate on the work before them.<sup>48</sup> It therefore comes as no surprise that Goosen J described this poor state of affairs as an impairment of the dignity of the affected learners.<sup>49</sup> The Court subsequently found that an absence of desks and chairs 'profoundly undermines the right of access to basic education'.<sup>50</sup> Similar to the case of *Centre for Child Law v Minister of Basic Education*, the Court affirmed the interrelated nature of the rights in the Bill of Rights by considering the impact of a lack of appropriate furniture on the dignity of the learners.<sup>51</sup> Goosen J further alluded to an assault on the quality of education, brought on by the deplorable physical environment in which the learners were educated. Finally, the Court interpreted the provision of school furniture as part of the state's obligation to provide 'educational resources' which include 'schools, classrooms, teachers, teaching materials and appropriate facilities for learners'.<sup>52</sup>

*Madzodzo* therefore is significant to the extent that the Court went further than merely declaring that the state is liable to provide desks and chairs to learners. The Court expanded the content of the right by interpreting section 29(1)(a) as a right to school infrastructure and the various educational resources referred to above. Furthermore, *Madzodzo* interpreted the right to basic education as an entitlement to a physical environment that takes account of a learner's right to dignity.

#### 2.2.4 Textbook judgments'

Next, textbooks as a core component of section 29(1)(a) became the main issue of a trio of judgments. In the first of these judgments, *Section 27 v Minister of Education (Textbook 1 judgment)*,<sup>53</sup> the North Gauteng High Court considered the question of whether the state's failure to provide textbooks to public schools in the Limpopo province signified an infringement of the rights to basic education, equality and dignity.<sup>54</sup> In the end the Court did not

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48 As above.

49 As above.

50 As above.

51 As above.

52 As above.

53 Case 24565/12, 4 October 2012.

54 *Textbook 1 judgment* (n 53) para 21. This particular case was instituted by sec 27 as a direct result of the so-called 'Limpopo textbook crisis'. The root of this

make any pronouncements on the rights to equality and dignity. However, it zoomed in on the question of whether the right to basic education includes an obligation on the state to provide textbooks. Kollapen J answered in the affirmative by having recourse to a range of state policy statements and documents. For example, the Court emphasised former President Zuma's declaration in the 2011 State of the Nation Address that '[t]he Administration must ensure that every child has a textbook on time'.<sup>55</sup> Furthermore, the Court referred to the Limpopo Education Department's Annual Performance Plan for 2011-2012 which indicates as one of its objectives '[t]o ensure that every learner has access to a minimum set of textbooks and workbooks required according to National Policy'.<sup>56</sup> Finally, Kollapen J highlighted the Limpopo Education Department's Curriculum Strategy which essentially states that effective teaching and learning are impossible without 'learning support materials'.<sup>57</sup> The Court reasoned that the government has taken 'an unambiguous stance ... that textbooks are an essential and vital component in delivering quality learning and teaching'.<sup>58</sup> Drawing on the above, Kollapen came to the following conclusion:<sup>59</sup>

[T]he provision of learner support material in the form of textbooks, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of textbooks.

The *Textbook 1* judgment not only is valuable because of its contribution to developing the content of the right to basic education.

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crisis was found in the government's decision to implement a new curriculum, called Curriculum and Assessment Policy Statements (CAPS) in 2012. As a result of the change, new textbooks were required to implement the curriculum. The Department of Basic Education made the decision to introduce CAPS on a grade-by-grade basis: grades 1 to 3 and 10 in 2012; grades 4 to 6 and 11 in 2013; and grades 7 to 9 and 12 in 2014. Due to resource constraints the DBE decided to prioritise the procurement of textbooks for the grades in which CAPS would be implemented in 2012. The Department subsequently ran out of funds which resulted in some schools not receiving textbooks. Limpopo was particularly affected by the non-delivery of textbooks due to 'the general fraud, maladministration, corruption and incompetence in the provincial government'. In January 2012 the national executive exercised its sec 100 constitutional mandate to intervene in the Limpopo government by taking over the obligations of the province. See F Veriava 'The Limpopo textbook litigation: A case study into the possibilities of a transformative constitutionalism' (2016) 32 *South African Journal on Human Rights* 321-323.

55 *Textbook 1* judgment (n 53) para 23.1.

56 *Textbook 1* judgment para 23.2.

57 *Textbook 1* judgment para 23.3. The Department of Basic Education categorises textbooks as part of the broader Learner Teacher Support Materials (LTSM). See NDBE 'Draft National Policy for the Provision and Management of Learning and Teaching Support Material' (2014) 3.

58 *Textbook 1* judgment (n 53) para 23.3.

59 *Textbook 1* judgment para 25.

The judgment also provides clear guidance as to when the judiciary is willing to give content to socio-economic rights. Kollapen J consulted a range of policies to reach the conclusion that the right to basic education includes the right to textbooks. Wilson and Dugard argue that the courts are disposed to providing content to socio-economic rights when it requires 'the state to take steps provided for in, or consistent with, its own policy, or when expanding on the content given to the right by applicable legislation'.<sup>60</sup> In other words, the courts are more likely to give concrete content to socio-economic rights where legislation or policy giving effect to the applicable right already exists.<sup>61</sup> As will be discussed later in this article, the Supreme Court of Appeal adopted a similar approach as Kollapen J in relying on state policy to give content to section 29(1)(a).

Subsequent to the order in the *Textbook 1* judgment, the state failed to effect complete delivery of textbooks to all the affected schools in Limpopo. As a result, two more settlement agreements in terms of which the state undertook to deliver the textbooks by specified dates were reached.<sup>62</sup> When the state failed to comply with the latter time frames, another case in the continuous textbook litigation saga was instituted, namely, *Basic Education for All v Minister of Basic Education (Textbook 2 judgment)*.<sup>63</sup>

60 Wilson & Dugard (n 7) 59.

61 Brand explains why the courts are more inclined to define the content of socio-economic rights where legislation giving effect to the right already exists: 'Statutory entitlements are likely to be more detailed and concrete in nature than the vaguely and generally phrased constitutional rights forming their background, and are consequently more direct in the access to resources that they enable people to leverage. In addition, courts are likely to enforce statutory entitlements more robustly than they would constitutional rights, because they are enforcing a right, duty or commitment defined by the legislature itself, rather than a broadly phrased constitutional right to which they have to give content. As such they are not to the same extent confronted with the concerns of separation of powers, institutional legitimacy and technical competence that have so directly shaped and limited their constitutional socio-economic rights jurisprudence.' Brand (n 21) 14.

62 K Paterson 'Constitutional adjudication on the right to basic education: Are we asking the state to do the impossible?' (2018) 34 *South African Journal on Human Rights* 113-114.

63 Case 23949/14 (5 May 2014). Kollapen J's initial order required the state to deliver textbooks for grades R, 1, 2, 3 and 10 by no later than 15 June 2012. The failure by the state to meet the latter deadline resulted in a settlement agreement that extended the deadline with two weeks to 27 June 2012. The settlement also included an undertaking by the state to agree to an independent audit and to a 'catch-up' plan for 'at least Grade 10 learners'. The settlement also required monthly reports to be served, detailing progress on the plan. When the state still did not meet the 27 June 2012 deadline, the case was again placed by the initial applicants before Kollapen J. On 4 October 2012 a fresh order was issued by the North Gauteng High Court, requiring completion of delivery by 12 October 2012. According to BEFA, although textbook delivery improved in 2013, it remained incomplete. The NDBE, on the other hand, admitted that although 'there were shortfalls in deliveries in 2013 ... these were rectified'. However, by January 2014 Section 27 informed the NDBE of a number of 'textbook shortages' in Limpopo. Several schools also indicated that they 'had

At the time when the application was launched, the National Department of Basic Education (NDBE) had made significant strides in delivering textbooks to schools in Limpopo.<sup>64</sup> On the state's version, it had already delivered approximately 97 per cent of textbooks in the province at the time litigation was instituted.<sup>65</sup> The NDBE therefore argued that their failure to provide textbooks to the remaining schools did not amount to a violation of section 29(1)(a) because most of the textbooks had been delivered when litigation had commenced.<sup>66</sup> Thus, the Court was faced with the question of whether a violation of the right to basic education had occurred in respect of the minority of learners who had not received their quota of textbooks.<sup>67</sup>

Tuchten J confirmed the finding in *Textbook 1* that textbooks are an essential component of the right to basic education.<sup>68</sup> He rejected the state's argument that delivering textbooks to the majority of schools in the Limpopo province meant that they had complied with their section 29(1)(a) obligations. The Court held as follows:<sup>69</sup>

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

The NDBE subsequently appealed the *Textbook 2* judgment to the Supreme Court of Appeal and argued, inter alia, that the requirement of a 100 per cent delivery record is a 'standard of perfection' that they were not able to meet.<sup>70</sup> In other words, they 'insisted that the right to a basic education did not mean that each learner in a class has the right to his or her own textbook'.<sup>71</sup> The Supreme Court of

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not received their full quotas of books in 2012 and 2013'. By 20 March 2014, two months into the new school year, in a formal letter to the Minister of Basic Education Section 27 detailed a growing number of schools in the province without textbooks. The letter also indicated that Section 27 would institute an urgent application if learner support materials, including textbooks, were not delivered to the affected schools by 7 April 2014. The lack of a 'substantive response' to the letter by the NDBE resulted in a new application being launched by BEFA and 29 school governing bodies in Limpopo on 27 March 2014. This application resulted in the judgment delivered by Tuchten J on 5 May 2014. See Veriava (n 54) 321-343; *Textbook 2* judgment (above) paras 2-31.

64 *Textbook 2* judgment (n 63) para 44.

65 As above.

66 As above.

67 As above.

68 *Textbook 2* judgment (n 63) para 51.

69 *Textbook 2* judgment para 52.

70 *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) para 33 (*Textbook 3* judgment).

71 *Textbook 3* judgment (n 70) para 41 (my emphasis).

Appeal per Navsa JA rejected this argument and made the following pronouncement in the *Textbook 3* judgment:<sup>72</sup>

[T]he DBE did not only set itself a 'lofty' ideal but ... its policy and actions, as set out in the affidavits filed on its behalf, all indicate that it had committed to providing a textbook for each learner across all grades. *The content of the s 29(1)(a) right is also determined in the DBE's 'Action Plan to 2014 – Towards the Realisation of Schooling in 2025'*.<sup>73</sup> That certainly is what it achieved in pursuit of its own policy in respect of the other eight provinces and on its version of events for almost 98 per cent of learners in Limpopo.

Navsa JA clearly endorsed Kollapen J's interpretive approach by deriving the content of section 29(1)(a) from policy statements. The Court also went further than merely confirming the now uncontroversial stance that the right to basic education includes a right to a textbook.<sup>74</sup> The Court proceeded to launch an inquiry into the learners' right to equality by applying the constitutionally-mandated 'Harksen test'.<sup>75</sup> This test involves a two-stage inquiry to determine whether differentiation amounts to unfair discrimination in terms of section 9(3) of the Constitution<sup>76</sup> and has been framed by the Constitutional Court as follows:<sup>77</sup>

Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground [in terms of section 9(3)], then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

According to Albertyn and Fredman, 'dignity is generally recognised as the core value and standard of [the unfair discrimination enquiry

<sup>72</sup> *Textbook 3* judgment (n 70) para 42.

<sup>73</sup> The '2014 Action Plan' referred to here by the Court has been replaced by a new policy titled 'Action Plan to 2019: Towards the Realisation of Schooling 2030'.

<sup>74</sup> *Textbook 3* judgment (n 70) para 41.

<sup>75</sup> The 'Harksen test' was established in *Harksen v Lane* 1998 (1) SA 300 (CC).

<sup>76</sup> Sec 9(3) provides: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

<sup>77</sup> *Harksen v Lane* (n 75) para 54.

under] section 9(3)'.<sup>78</sup> For example, in *President of the Republic of South Africa v Hugo*<sup>79</sup> the Constitutional Court held:<sup>80</sup>

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded *equal dignity* and respect regardless of their membership of particular groups.

Applying Harksen to the facts of the Textbook 3 judgment, the Supreme Court of Appeal held first that differentiation occurred between those learners who had received textbooks (the approximately 97 per cent of learners in Limpopo as well as those in the rest of the country) and the roughly 3 per cent who did not receive textbooks.<sup>81</sup> The Court found that this differentiation amounted to discrimination.<sup>82</sup> A finding of unfair discrimination was justified as follows by Navsa JA:<sup>83</sup>

Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the *indignity* of having to borrow from neighbouring schools or copy from a blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.

Navsa JA, therefore, clearly considered the dignity of the affected learners as the benchmark for his finding of unfair discrimination. Moreover, by employing an equality analysis, the Supreme Court of Appeal underscored the fact that equal access to education is a vital component of section 29(1)(a). Important to note, also, is that the Supreme Court of Appeal did not explicitly base its finding of unfair discrimination on a listed ground in section 9(3), or on a comparable ground. However, as I will argue below, the Court did so implicitly.

First, Navsa JA argued that 'the approximately three per cent of the learners who did not receive textbooks were treated differentially ... were being discriminated against [and that there] is no justification for such discrimination' without ever mentioning the distinguishing ground(s) for differentiation.<sup>84</sup> However, at the

78 C Albertyn & S Fredman 'Equality beyond dignity: Multi-dimensional equality and Judge Langa's judgments' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 435.

79 1997 (4) SA 1 (CC).

80 *Hugo* (n 79) para 41 (my emphasis).

81 *Textbook 3* judgment (n 70) para 48.

82 As above.

83 *Textbook 3* judgment (n 70) para 49 (my emphasis).

84 *Textbook 3* judgment para 48.

beginning of the judgment the Court noted that 'it is common cause that the affected learners are from poor communities and are mostly, if not exclusively, located in rural areas. They are also overwhelmingly, if not exclusively, black learners.<sup>85</sup> Furthermore, it is indisputable that the affected learners were all from no-fee schools which are predominantly historically black schools.<sup>86</sup> White learners in the public education system were therefore never affected by the textbook crisis. An argument can therefore be made that the state's failure to deliver textbooks to those affected schools, amounted to unfair discrimination against black learners on the basis of race.

Navsa JA, also implicitly made a ruling of unfair discrimination on the comparable ground of socio-economic status. Subsequent to his finding of unfair discrimination, he stated that '[w]e must guard against failing those who are most vulnerable. In this case we are dealing with the rural *poor* and with children. They are deserving of constitutional protection.'<sup>87</sup> He also acknowledged that all the affected learners were from '*poor communities*'.<sup>88</sup> As established above, the children affected by the textbook crisis were all located in no-fee schools. Schools are allocated no-fee status based on the median household earnings, unemployment percentage and the standard of education of the community in which the school is located.<sup>89</sup> According to Paterson, '[i]t is therefore presumed that parents [or guardians] in these communities cannot afford to purchase textbooks. If the state does not provide textbooks, the learners must learn without them.'<sup>90</sup> The socio-economic status of these learners therefore differentiates them from those learners in fee-charging schools whose parents or guardians are assumed to be able to afford textbooks. Thus, although the Supreme Court of Appeal did not explicitly refer to socio-economic status as a differentiating ground on which it based its finding of unfair discrimination, the Court's emphasis on the poor and vulnerable as deserving of constitutional protection implies that unfair discrimination on the basis of socio-economic status indeed was implied.

In sum, *Textbook 3* is a significant judgment in the courts' approach to the interpretation of the right to basic education and the broader constitutional imperative of transformation. To start, the Supreme Court of Appeal confirmed that section 29(1)(a) entitles every learner in the public school domain to be provided with all the required

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85 *Textbook 3* judgment para 3 (my emphasis).

86 As above.

87 *Textbook 3* judgment para 50 (my emphasis).

88 *Textbook 3* judgment para 3 (my emphasis).

89 Paterson (n 62) 113.

90 As above.

textbooks for a specific grade.<sup>91</sup> According to Kamga the Supreme Court of Appeal ruling underscores the importance of textbooks as integral to the availability of section 29(1)(a).<sup>92</sup> In Stein's view, the judgment clarifies that the state is in violation of the right to basic education if it fails to comply with its obligation to provide textbooks to learners in public schooling.<sup>93</sup> For Veriava, Textbook 3 reinforces the High Courts' notion that education provisioning is immediately realisable.<sup>94</sup> She also contends that the decision of the Supreme Court of Appeal to interpret textbooks as an integral element of the right to basic education confirms the Court's substantive approach to the interpretation of section 29(1)(a).<sup>95</sup> Furthermore, the Supreme Court of Appeal found that equal access to textbooks (and impliedly to education as a whole) is a clear component of the right to basic education. Kamga argues that the Court has clearly shown that the provision of textbooks is 'extrinsically' connected to the achievement of the rights to equality and dignity.<sup>96</sup> Lastly, the Supreme Court of Appeal affirmed the pattern of disadvantage disproportionately skewed towards black, impoverished learners in the public school domain and delivered a judgment aimed at addressing this historical inequality.<sup>97</sup> In this regard, the Court implicitly found that the state's failure to provide textbooks to the affected learners amounted to unfair discrimination on the basis of race and socio-economic status.<sup>98</sup>

### 2.2.5 Tripartite Steering Committee v Minister of Basic Education

The judiciary's 'filling out' of the content of the right to basic education continued in *Tripartite Steering Committee v Minister of Basic Education (Tripartite Steering)*.<sup>99</sup> The Court was tasked with the question whether scholar transport, at state expense, should be provided to indigent learners who live a particular distance from school.<sup>100</sup> First, the Court highlighted the perils associated with the

91 *Textbook 3* judgment (n 70) para 53.

92 S Kamga 'The right to a basic education' in T Boezaart (ed) *Child law in South Africa* (2017) 528.

93 N Stein 'Textbooks' in F Veriava et al (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 270.

94 Veriava (n 54) 331.

95 As above.

96 Kamga (n 92) 528.

97 At para 48 of *Textbook 3* judgment (n 70) Navsa JA writes: 'The State is prohibited from unfairly discriminating against any person whether on listed grounds or not. SASA and NEPA envisage equality of opportunity for learners. SASA's preamble recognises that historically, our education system was based on racial inequality and segregation and *those past injustices have to be remedied*' (my emphasis).

98 *Textbook 3* judgment (n 70) para 49.

99 2015 (5) SA107 (ECG).

100 *Tripartite Steering* (n 99) para 2.

long distances that learners have to walk to and from school every day. At paragraph 14 of the judgment Plasket J states:

[A] great burden, both physical and psychological, is placed on scholars who are required to walk long distances to school. They are often required to wake extremely early, and only get home late, especially if they engage in extramural activities at school, with the result that less time than would be desirable is available for study, homework and leisure. That, in turn, has a knock-on effect on performance at school, attendance at school, particularly during periods of bad weather, and it increases the dropout rate.

The Court evaluated the interrelated nature of the right to basic education by claiming that ‘the fundamental right to freedom and security of the person, including the right to be “free from all forms of violence from either public or private sources” loom large in our shockingly violent, and often predatory, society’.<sup>101</sup> The Court subsequently emphasised the positive obligation on the state to fulfil basic education before relying on the reasoning in *Juma Musjid* that access to school is an essential component of the right to basic education.<sup>102</sup> The Court also had recourse to other judgments wherein the content of the right to basic education has been defined. In particular, Plasket J referred to *Textbook 1* which held that ‘the right to basic education, in order to be meaningful, includes such issues as infrastructure, *learner transport*, security at schools, nutrition and such related matters’.<sup>103</sup> Plasket J agreed with the latter judgment and came to the following conclusion:<sup>104</sup>

The right to education is meaningless without teachers to teach, administrators to keep schools running, desks and other furniture to allow scholars to do their work, textbooks from which to learn and *transport to and from school at State expense in appropriate cases*. Put differently, in instances where scholars’ access to schools is hindered by distance and an inability to afford the costs of transport, the State is obliged to provide transport to them in order to meet its obligations, in terms of s 7(2) of the Constitution, to promote and fulfil the right to basic education ... [T]he reality of the situation is that if the provincial government does not provide scholar transport ‘many thousands of scholars would simply not be able to attend school’.

<sup>101</sup> *Tripartite Steering* para 13.

<sup>102</sup> *Tripartite Steering* paras 15-16; *Juma Musjid* (n 2) paras 43-46.

<sup>103</sup> *Tripartite Steering* (n 99) para 17.

<sup>104</sup> *Tripartite Steering* paras 18-19.

## 2.2.6 Equal Education & Another v Minister of Basic Education & Others

One of the most recent judgments dealing with the courts' incremental approach to define section 29(1)(a) is *Equal Education & Another v Minister of Basic Education & Others*.<sup>105</sup> Equal Education (the applicant) disputed the validity of various provisions of the Norms and Standards for School Infrastructure, promulgated in 2013.<sup>106</sup> These regulations indicate various standards related to infrastructure that must be in place at public schools and stipulate deadlines as to when the state must provide schools with the required infrastructure.<sup>107</sup> In order to make sense of the judgment, it is imperative to discuss the history related to the promulgation of the Norms and Standards for School Infrastructure.

### *Historical context of the Norms and Standards for School Infrastructure*

In 2007 Parliament amended the South African Schools Act by introducing section 5A into the Act.<sup>108</sup> In terms of this section 'the Minister may ... by regulation prescribe minimum uniform norms and standards for school infrastructure'.<sup>109</sup> At the same time, Parliament inserted section 58C into the Act 'which imposes mechanisms to ensure that the provinces comply with the norms required under Section 5A by requiring MECs to annually report to the Minister on provincial progress'.<sup>110</sup> By 2011 the Minister still had not prescribed the regulations as envisioned by section 5A.<sup>111</sup> At that point in time, the Minister argued that she had a discretion to promulgate the regulations and therefore was under no obligation to do so.<sup>112</sup> In response to the Minister's recalcitrance, Equal Education embarked on a campaign of 'sustained activism' to force the Minister to publish the desired regulations.<sup>113</sup> After unsuccessful attempts to persuade the

<sup>105</sup> (2018) ZAECBHC 6.

<sup>106</sup> South African Schools Act 84 of 1996 'Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure' (29 November 2013). See *Equal Education* (n 105) paras 35-45.

<sup>107</sup> *Equal Education* (n 105) paras 35-45.

<sup>108</sup> As amended by sec 5 of Education Laws Amendment Act 31 of 2007.

<sup>109</sup> Sec 5A Schools Act.

<sup>110</sup> As amended by sec 11 of the Education Laws Amendment Act 31 of 2007. See also <http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards> (accessed 15 November 2018).

<sup>111</sup> *Equal Education* (n 105) para 41.

<sup>112</sup> As above.

<sup>113</sup> L Draga 'Infrastructure and equipment' in F Veriava et al (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 239. The Equal Education website reports: 'EE members have marched and picketed, petitioned, written countless letters to the Minister, gone door-to-door in communities to garner support for the campaign and have even gone so far as to spend nights fasting

Minister otherwise, Equal Education launched court proceedings in 2012, compelling the Minister to publish the Norms and Standards.<sup>114</sup> The latter application launched a protracted journey of court orders and settlements before the Minister finally on 29 November 2013 promulgated the Norms and Standards.<sup>115</sup> The publication of these regulations is significant because ‘these legally-binding standards set a standard for provincial education departments to work towards, and against which to be held accountable’.<sup>116</sup> Although Equal Education has rightly celebrated the promulgation of the Norms and Standards in 2013, it has consistently expressed its reservations in respect of certain regulations that form the basis of their dispute in the 2018 judgment, *Equal Education & Another v Minister of Basic Education & Others*. The disputed regulations are discussed below.

### ***Arguments before the Bhisho High Court***

The first disputed regulation stated that ‘the implementation of the norms and standards ... is subject to the resources and co-operation of other government agencies and entities responsible for infrastructure in general and making available of such infrastructure’.<sup>117</sup> *Equal Education* argued that this regulation subjected the implementation of the Norms and Standards to the co-operation and resources of other government agencies and, therefore, in effect provided the Minister with a mechanism to escape her obligation to provide school infrastructure.<sup>118</sup> It was further contended by the applicant that the regulation compromises the right to basic education because section 29(1)(a) includes the obligation to provide infrastructure at schools.<sup>119</sup> In response the Minister claimed that although, on the face of it, section 29(1)(a) is not subject to internal qualifiers, it is important to understand that the right can be limited by enabling legislation such as the Norms and Standards for Infrastructure.<sup>120</sup> The Minister’s

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and sleeping outside of Parliament. EE lobbied Parliament and politicians, and on Human Rights Day in March 2011, it led 20 000 learners and supporters in a march to Parliament to demand that the Minister and the DBE keep their promise and adopt Minimum Norms and Standards that will lay down the blueprint for ensuring that all learners in South Africa, regardless of race or wealth, are able to learn in schools with adequate infrastructure.’ See <http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards> (accessed 15 November 2018).

114 As above.

115 *Equal Education* (n 105) para 43.

116 <http://old.equaleducation.org.za/campaigns/minimum-norms-and-standards> (accessed 15 November 2018).

117 *Equal Education* (n 105) para 59.

118 *Equal Education* para 61.

119 *Equal Education* para 67.

120 *Equal Education* para 68. Sec 36(1) of the Constitution provides that any right in the Bill of Rights may be limited in terms of a law of general application. See P de Vos & W Freedman (eds) *South African constitutional law in context* (2014)

argument from this point on became perplexing and incongruous: She contended that the abovementioned enabling legislation points to the fact that the right to basic education, as other rights in the Bill of Rights, is subject to progressive realisation.<sup>121</sup> To justify the latter claim the Minister invoked the Constitutional Court's dictum in the *Ermelo* judgment where Moseneke J held that the determination of language policy (in terms of section 29(2) of the Constitution) must be understood 'within the broader constitutional scheme to make education progressively available and accessible to everyone'.<sup>122</sup> Subsequent to constructing the argument that section 29(1)(a) is a qualified right, the Minister changed course and admitted that the right to basic education indeed is unqualified and therefore not subject to progressive realisation.<sup>123</sup> However, despite the latter admission, she proposed that in this particular case, the Court make an exception by adopting an approach that allows the state to realise the 'positive dimension of the right', which includes the provision of school infrastructure, progressively.<sup>124</sup> Her insistence on this exception stemmed from the argument that she 'simply does not have unlimited resources' and is dependent on the Department of Finance and the Treasury to provide the necessary finances to discharge the obligations related to school infrastructure.<sup>125</sup> To this end, the Minister's excuse that the state financially is unable to comply with its obligations to provide school infrastructure seemed to echo the South African government's decision to enter a reservation in respect of article 13(2)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>126</sup>

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362; *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR (CC) para 47.

121 *Equal Education* (n 105) para 68.

122 *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 61.

123 *Equal Education* (n 105) para 72.

124 As above.

125 *Equal Education* (n 105) para 115.

126 Art 13(2)(a) of ICESCR obliges state parties to make primary education free and compulsory. Art 14 of ICESCR requires state parties to work out a detailed plan to realise primary education within a reasonable time. At the time of ratifying ICESCR in 2015, the South African government entered a reservation in respect of arts 13(2)(a) and 14 of the Covenant. In this regard, the qualification provides that '[t]he Government of the Republic of South Africa will give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and available resources.' Whereas the ratification of ICESCR was broadly welcomed in the country, disappointment was expressed at South Africa's decision to enter a declaration in respect of art 13(2)(a), especially in light of the decision of the Constitutional Court in *Juma Masjid* that the right to basic education is immediately realisable and not subject to the availability of state resources. Veriava interprets the South African government's decision to enter the reservation as an obvious attempt to construe sec 29(1)(a) as a progressively realisable right and to reduce the duties it has incurred in terms of the right to basic education. The civil society organisation, Section 27, views the reservation as a clear violation of the South

Equal Education also challenged Regulation 4(3)(a) which expressed that schools completely constructed from materials such as ‘wood, metal, asbestos and mud’ require ‘prioritisation’.<sup>127</sup> The applicant questioned whether the latter regulation implied that schools built partially from these materials were to be excluded from the Department’s list of prioritisation. A similar argument was made in respect of Regulation 4(3)(b) which provided that schools with no access to electricity, water and sanitary services must receive ‘prioritisation’.<sup>128</sup> Again, did the regulation imply that schools with limited access to power, water or sanitation would not be prioritised? In response to the applicant’s concerns, the Minister contended that she has the discretion to publish the regulations in the form that she chooses and that, therefore, she can prioritise certain schools over others.<sup>129</sup> In her view, this preference is dependent on ‘budgetary constraints’.<sup>130</sup> Furthermore, she claimed that the provision of water, sanitation and electricity falls ‘outside her scope of services’.<sup>131</sup>

### *Judgment by Mzizi AJ*

Mzizi AJ held that infrastructure is crucial in the provision of basic education.<sup>132</sup> The Court rebuffed the Minister’s contention that the implementation of the Norms and Standards can be subject to budgetary constraints and to the co-operation of other state entities.<sup>133</sup> Mzizi AJ correctly pointed out that the latter claim contradicts the immediate nature of the right to basic education.<sup>134</sup> Furthermore, the Court held that the Minister’s argument that she was thwarted to earmark resources for infrastructure should have been justified in terms of section 36 or section 172(1)(a) of the Constitution.<sup>135</sup> In this regard, Mzizi AJ relied on the Constitutional Court’s ruling that the right to basic education can only be restricted in terms of the limitation clause set out in section 36 of the Constitution.<sup>136</sup> Mzizi AJ did not explain how section 172(1)(a) of the Constitution could be applied in this particular case. However, it is possible that the

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African Constitution. See Veriava (n 30) 70-71; <http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/> (accessed 15 April 2020).

127 *Equal Education* (n 105) para 118.

128 *Equal Education* para 136.

129 *Equal Education* para 132.

130 As above. Various role players are involved in the budget process as it pertains to the sphere of public basic education. See, eg, D McLaren ‘Funding basic education’ in F Veriava et al (eds) *Basic education rights handbook: Education rights in South Africa* (2017) 37.

131 *Equal Education* (n 105) para 140.

132 *Equal Education* para 170.

133 *Equal Education* paras 180-185.

134 *Equal Education* para 185.

135 *Equal Education* para 185.

136 *Juma Musjid* (n 2) para 37.

Court mistakenly referred to section 172(1)(a). In my view, section 172(1)(b) is the more appropriate section as it provides that '[w]hen deciding a constitutional matter within its power ... a court may make any order that is just and equitable'. To that end, the Minister could then have argued that an order requiring her to comply with the obligations of section 29(1)(a) in full would not have been 'just and equitable'.<sup>137</sup> Furthermore, the Court rebuffed the Minister's contention that it was within her discretion to decide which schools are prioritised, and held that schools that are partially built from inappropriate materials presented the same dangers as schools built entirely from such materials.<sup>138</sup> The Court held as follows:<sup>139</sup>

The crude and naked facts staring [at] us, are that each day the parents of these children send them to school as they are compelled to, they expose these children to danger which could lead to certain death. This is [a] fate that also stares the educators and other caregivers in the schools in the face.

The Court subsequently amended Regulation 4(3)(a) to the effect that it now prioritises the replacement of all classrooms built entirely or substantially from mud, wood, asbestos or metal through reading in the desired changes to the Norms and Standards.<sup>140</sup> A similar remedy was effected in respect of Regulation 4(3)(b) which now requires that 'all schools that do not have access to any form of power supply, water supply or sanitation' must be provided such access.<sup>141</sup> Additionally, the judgment upheld the constitutional value of accountability by declaring the Regulations unconstitutional to the extent that they did not provide for the plans and reports specifying government's progress in implementing the Norms and Standards. The Court directed the Minister to amend the Regulations so as to provide for an accountability mechanism in this regard.<sup>142</sup>

In conclusion, it is important to emphasise the significance of this judgment with regard to the development of the particular content of section 29(1)(a). The Court's proclamation that infrastructure is essential for the delivery of basic education<sup>143</sup> confirms that infrastructure is a core component of the right to basic education.

137 The *amicus curiae* in this case, Basic Education for All (BEFA), argued that 'to the extent that the respondent is unable to discharge the right to basic education in full and immediately, it must justify such failure through the mechanism of section 36 of the Constitution. Also it could argue that an order compelling it to discharge the right in full and immediately would not be just and equitable.' See *Equal Education* (n 105) para 89.

138 *Equal Education* (n 105) paras 180-193.

139 *Equal Education* para 194.

140 *Equal Education* para 209.

141 As above (my emphasis).

142 *Equal Education* (n 105) para 209.

143 *Equal Education* para 170.

Veriava argues that '[this] judgment further develops the evolving jurisprudence in respect of the right to basic education by its explicit acknowledgment of school infrastructure as an important component of the right'.<sup>144</sup> Furthermore, by ordering an amendment of the Regulations as explained above, the right to basic education now applies to a wider range of learners who otherwise would not have benefited had the Regulations not been revised. In this manner, section 29(1)(a) has been expanded.

### 3 Incremental approach and transformation

In the seminal case of *Ermelo* Moseneke DCJ (as he then was) refers to the historical and social context of the public education system:<sup>145</sup>

Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. *Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception.* While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.

In response to the disparity created by the former regime's severe marginalisation of former black schools as opposed to the preferential treatment of former white schools,<sup>146</sup> the Constitutional Court states that '[i]n an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular'.<sup>147</sup> The

144 F Veriava 'A Bhisno High Court ruling gives effect to government's obligations to provide public school infrastructure. At last, we have an effective road map for improving school infrastructure in South Africa's under-resourced schools', <https://www.dailymaverick.co.za/article/2018-07-27-bhisno-court-judgment-makes-infrastructure-part-of-the-right-to-basic-education/> (accessed 22 May 2020). See also L Arendse 'The South African Constitution's empty promise of "radical transformation": Unequal access to quality education for black and/or poor learners in the public basic education system' (2019) 23 *Law, Democracy and Development* 115-117.

145 *Hoërskool Ermelo* (n 122) para 45 (my emphasis).

146 The Constitutional Court writes at para 46 of *Hoërskool Ermelo* (n 122): 'It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.'

147 *Hoërskool Ermelo* (n 122) para 47.

Court then refers to a 'cluster of warranties' that are aimed at bringing about this transformation, including the right to basic education.<sup>148</sup>

The Constitution does not provide a particular blueprint for transformation.<sup>149</sup> In other words, it does not provide a 'comprehensive model for a transformed society [and by implication a transformed education system], nor [does it articulate] the detailed processes for achieving this'.<sup>150</sup> However, Liebenberg denotes that the Constitution does present 'a set of institutions, rights and values for guiding and constraining the processes of social change'.<sup>151</sup> To that end, the courts have a specific, albeit limited, role to play in honouring the transformative aspirations of the Constitution.<sup>152</sup> This the judiciary does, *inter alia*, through the interpretation and enforcement of the Bill of Rights in general, and socio-economic rights in particular, which are regarded as conduits for facilitating social change in South Africa.<sup>153</sup>

Veriava and Skelton indicate that various civil city organisations have instituted a range of cases seemingly spurred on by the principle established in *Juma Musjid*, namely, that the right to basic education

148 As above. By referring to the social and historical context of education as well as the cluster of rights that are aimed at transforming the education system, the Court is employing a contextual approach to interpretation. This approach has been adopted by the Court when interpreting the rights in the Bill of Rights. This approach requires a consideration of the text (first leg of test) as well as the social and historical context of the right (second leg of test). The second leg requires that 'rights must be interpreted with a historically conscious transformative vision in mind'. In practical terms, this means that the interpretation of the right to basic education 'must be geared towards redressing this historical disparity [in the education system caused by the discriminatory education policies of the apartheid and colonial regimes]'. See F Veriava & F Coomans 'The right to education' in Brand (n 21) 60-61; *Grootboom* (n 1) paras 22-25.

149 S Liebenberg *Socio-economic rights: Adjudication under a transformative Constitution* (2010) 29.

150 As above. See also K Moyo 'The advocate, peacemaker, judge and activist: A chronicle on the contributions of Justice Johann Kriegler to South African constitutional jurisprudence' in N Bohler-Muller et al (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 78-79.

151 Liebenberg (n 149) 29.

152 Wilson & Dugard (n 7) 35. Liebenberg writes that the judiciary is 'not the institution directly responsible for making policy or advocating for social change. Nevertheless, they have a significant role to play in inducing and supporting the kind of fundamental transformative changes envisaged by the Constitution. They are constitutionally mandated to determine whether social policies and programmes are consistent with the Bill of Rights, and to provide "appropriate relief" when infringements are found [in terms of section 38 read with section 172 of the Constitution]'. See Liebenberg (n 23) 447-448.

153 Moyo (n 150) 81. According to Brand, '[a]part from requiring their implementation, the Constitution enables the enforcement of socio-economic rights, creating avenues of redress through which complaints that the state or others have failed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional socio-economic rights operate reactively. They are translated into concrete legal entitlements that can be enforced against the state and society by the poor and otherwise marginalised to ensure that appropriate attention is given to their plight.' See Brand (n 21) 3.

is immediately realisable and therefore is directly enforceable.<sup>154</sup> Moreover, these organisations have argued in each separate case that a particular component such as infrastructure or furniture is indispensable to the realisation of section 29(1)(a), thus calling for a substantive understanding of the right to basic education.<sup>155</sup> As explained in detail above, these cases have resulted in the courts ordering the state to provide tangible outcomes (for example in the form of textbooks or school furniture) to disadvantaged learners. By adopting a substantive approach to section 29(1)(a), the High courts and Supreme Court of Appeal have steered in the opposite direction of the Constitutional Court which has remained steadfast in a 'normative emptiness' approach of socio-economic rights.<sup>156</sup> The latter approach has been vehemently criticised by academic commentators as having an anti-transformative impact on the implementation of socio-economic rights.<sup>157</sup>

Although the substantive approach has undoubtedly been welcomed, it is not without criticism. First, it has been contended that while court orders set out the specific section 29(1)(a) entitlement(s) to be realised, the state often does not meet these requirements within the stipulated timeframes.<sup>158</sup> This means that civil society organisations have to repeatedly engage the court to ensure that the state complies with its obligations in respect of the right to basic education.<sup>159</sup> Furthermore, Veriava argues that despite the substantive approach of the courts to section 29(1)(a), there is no objective test laid down by the courts to determine all the entitlements that would constitute the content of the right to basic education.<sup>160</sup> In this regard, she specifically refers to the *Textbook 3* judgment noted above.<sup>161</sup> Although the Supreme Court of Appeal in this case endorsed a substantive approach to the adjudication of the right to basic education, it did not develop a test which could objectively establish which elements constitute the right to basic education.<sup>162</sup> The Supreme Court of Appeal suggested that it is within the discretion of government to define all the essential elements

154 F Veriava & A Skelton 'The right to basic education: A comparative study of the United States, India and Brazil' (2019) 35 *South African Journal on Human Rights* 3.

155 As above.

156 Veriava (n 54) 332.

157 See eg Dugard & Wilson (n 7) 37-42; D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' (2002) 119 *South African Law Journal* 484.

158 Veriava & Skelton (n 154) 4.

159 As above.

160 Veriava (n 54) 336.

161 As above.

162 Veriava (n 54) 336-337.

of the right through its policy frameworks.<sup>163</sup> In response to the Supreme Court of Appeal's stance and commenting on the courts' failure to develop an objective test, Veriava notes the following:<sup>164</sup>

[T]he absence of an objective test could impact on future education provisioning cases, particularly where there is a lack of clarity from the government as to its policy and provisioning. Indeed, by making government policy the sole determinant of the content of the right, government will be disincentivised from providing policy certainty in respect of education provisioning.

Liebenberg takes an opposing view to Veriava by arguing that the normative content of socio-economic rights should never reach a stage of completion, but 'space' should be allowed for rights to evolve so as to respond to 'changing contexts and forms of injustice'.<sup>165</sup> Moreover, in *Doctors for Life* the Constitutional Court explained that rights will degenerate if they remain fixed.<sup>166</sup> The Court further held that the meaning of rights should change to keep abreast with the continual shifts in the notion of justice and the evolving circumstances of society.<sup>167</sup>

I agree with Liebenberg that the content of socio-economic rights should not have an 'end point'. It should be developed continuously, particularly in an intolerant society such as South Africa with a history of marginalisation of people based on, *inter alia*, race, sex and gender. Although it is acknowledged that the absence of an objective test is very cumbersome for civil strategic litigators because they have to keep going back to the court to order the implementation of a specific component of section 29(1)(a), the latter strategy enables the courts to continuously expand on the content of the right. Such an approach ensures that a space always is left open to contest potential violations of the right to basic education (and other rights) in respect of groups that in future may need to have their rights litigated and enforced. Thus, it is submitted that the right to basic education should not remain static, but must be developed constantly so as to

163 As above.

164 Veriava (n 54) 337.

165 Liebenberg (n 149) xix.

166 *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 97.

167 As above. As an example of the Constitutional Court's observation in *Doctors for Life* and Liebenberg's argument, in the last few years, 'non-binary identity has been slowly seeping into societal consciousness'. In this regard, a person who adopts the label of 'gender non-binary' does not identify as male or female and thus does not conform to any gender stereotype. The 'coming out' of non-binary individuals is quite novel in society and these persons as a group tend to be discriminated against. See <https://www.nytimes.com/2019/06/04/magazine/gender-nonbinary.html> (accessed 23 January 2020); A Vijlbrief et al 'Transcending the gender binary: Gender non-binary young adults in Amsterdam' (2020) 17 *Journal of LGBT Youth* 89-90.

ensure that greater numbers of learners continue to benefit from the ambit of the right. Such an approach also is in keeping with Langa's view on the notion of transformation:<sup>168</sup>

[T]ransformation is not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.

## 4 Conclusion

This article focused on the progressive role of the High Courts and Supreme Court of Appeal in giving concrete content to section 29(1) (a). The substantive interpretive approach adopted by these courts seemingly has been influenced by the Constitutional Court's seminal ruling in *Juma Musjid* on the unqualified nature of the right to basic education. I contend that the particular facts of the *Juma Musjid* matter, which required the Court to rule on the negative obligations of the right, were tantamount to a proverbial 'blessing in disguise'.

The Constitutional Court's approach in cases concerning the negative obligations of socio-economic rights mostly has been generous as opposed to their approach in positive obligation cases. This is due to the fact that courts view negative obligation cases as less of a threat to their institutional integrity and capacity as well as a way to not interfere unduly in the domain of the other branches of the state. As a result, in *Juma Musjid* the Court ruled liberally that the right to basic education is immediately realisable and not subjected to other internal qualifiers such as budgetary constraints and 'reasonable and legislative measures'. The ruling in the latter judgment seems to have emboldened the lower courts to give direct content to the right to basic education. This content includes the following: adequate school infrastructure; teaching and non-teaching staff; appropriate school furniture; teaching materials such as textbooks; transport to and from school at state expense (in appropriate cases); a school environment that promotes the dignity of learners; and equal access to education.

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<sup>168</sup> P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 354.

The article further explored the link between the incremental approach and a conceptualisation of transformation that takes account of the ever-changing context of our society. The incremental approach entails that a case-by-case approach is adopted to litigate potential violations of the right to basic education. This ensures that the right is never fixed but keeps on evolving to keep abreast of changing forms of (in)justice in our society. Such an approach is in keeping with the idea that change always is constant in a society that will always be defined by transformation.