

THE 2012 LIMPOPO TEXTBOOK CRISIS

A STUDY IN RIGHTS-BASED ADVOCACY, THE RAISING
OF RIGHTS' CONSCIOUSNESS AND GOVERNANCE

Written by Faranaaz Veriava | Commissioned by SECTION27 | September 2013



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PROFILES

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Faranaaz has worked as a lawyer at the South African Human Rights Commission (SAHRC) and has practised as an advocate of the Johannesburg Bar. In 2002, she joined the Centre for Applied Legal Studies (CALS) at Wits University, where she helped establish a project to conduct research, litigation and advocacy to realise the right to basic education for the poorest learners.

SECTION27 is a public interest law centre and registered law clinic that seeks to influence, develop and use the law to protect, promote and advance human rights through research, advocacy and legal action to change the socio-economic conditions that undermine human dignity and development and prevent vulnerable and marginalised people from reaching their full potential.

The organisation focuses on the following work areas: reform of public and private health systems; implementation of the NSP 2012-2016; realizing the right to quality basic education; improved access to sufficient food and regulation of public and private power in the interests of equality.



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LIMPOPO TEXTBOOKS TIMELINE



Cartoon reprinted courtesy of Jonathan Shapiro

5 DECEMBER 2011	PASA addresses a letter to Director-General Soobrayan informing him that textbooks had not yet been ordered
11 JANUARY 2012	First media reports of non-delivery of textbooks to Limpopo schools. DBE spokesperson Panyaza Lesufi confirms that the matter would be addressed urgently with "a minimum of disruptions"
18 JANUARY 2012	The academic year starts and schools are still without textbooks
20 JANUARY 2012	Spokesperson for LDoE confirms in the media that textbooks will be delivered "as late as" the end of March 2012
23 JANUARY 2012	SECTION27 starts looking at the issue of the non-delivery of textbooks at schools in Limpopo province.
2 FEBRUARY 2012	The SECTION27 education team visits several schools in Limpopo and discover that poor learning and teaching conditions in Limpopo schools extends beyond the lack of textbooks – many schools had not received their funds for operational costs; sanitation conditions in some schools were shocking and the overall infrastructural conditions at many schools were very poor. Each school visited also confirms that textbooks have not been delivered.
16 – 17 FEBRUARY 2012	SECTION27 conducts a follow-up visit to Limpopo schools. The schools confirmed that they had still received no textbooks, and no indication from the DBE or LDoE as to when textbooks would be delivered
28 FEBRUARY 2012	SECTION27 addresses a letter to the DBE and the LDE about its concerns that textbooks had not delivered.
14 MARCH 2012	SECTION27 meets with Dr. Karodia (the then Head of the Intervention Team) to discuss some of the challenges in Limpopo schools, including textbooks, norms and standards funds and infrastructure. Dr Karodia gives an undertaking that textbook delivery will be complete by mid-April at the latest.
15 APRIL 2012	1ST DEADLINE FOR TEXTBOOK DELIVERY SET BY LDE AND DR. KARODIA SECTION27 contacts nine schools in the Vhembe and Mopani Districts and establishes that schools are still without textbooks
20 APRIL 2012	CALS addresses a formal letter of demand to the LDE and the DBE on behalf of SECTION27, demanding an undertaking by 24 April 2012 that textbooks be delivered by 2 May 2012, failing which SECTION27 would initiate urgent court proceedings.
24 APRIL 2012	Deadline for undertaking by DBE and LDoE of textbook delivery by 2 May 2012. No such undertaking is provided
26 APRIL 2012	Dr. Karodia initiates a new bidding process for the procurement of textbooks over and above the bidding process preceding the publication of the national catalogue. Textbooks orders were to be compiled on compact discs and collected from Polokwane by publishers.
2 MAY 2012	DEADLINE FOR DELIVERY DEMANDED BY SECTION27 CALS addresses a follow-up to the LDE and the DBE requesting an urgent response to the letter of demand.

	In an email to SECTION27's Mark Heywood, Dr. Karodia now says "the supply of textbooks will now take place through the month of May, and definitely completed by the 15 June, 2012". The correspondence from Dr Karodia confirms that textbooks had not yet been ordered.
3 MAY 2012	The Director-General, Mr. Bobby Soobrayan, responds to SECTION27 and indicates that the matter has been passed onto Dr. Karodia Dr. Karodia emails CALS to indicate that he is unable to deal with the matter before 7 May.
4 MAY 2012	SECTION27, with two co-applicants (Hanyani Thomo Secondary School and Tondani Lydia Masiphephethu) launches an urgent application.
14 MAY 2012	DBE files answering affidavit undertaking to complete textbook delivery by 15 June 2012
15 MAY 2012	North Gauteng High Court hears the urgent application brought by SECTION27, Hanyani Thomo Secondary School and Tondani Lydia Masiphephethu relating to the failure by the DBE and the LDE to procure and deliver textbooks to schools across Limpopo for the first half of the 2012 academic year. The applicants are represented by the Centre for Applied Legal Studies (CALS) in this matter.
17 MAY 2012	Judge Jody Kollapen orders the DBE and LDE to commence the delivery of textbooks by 31 May 2012 and to complete delivery of textbooks by 15 June 2012. He also orders the submission of a catch-up plan for grade 10 learners by 8 June 2012, and monthly reports detailing the progress in implementation of the catch-up plan.
31 MAY 2012	Textbook delivery due to commence in terms of court order of 17 May 2012
1 JUNE 2012	First orders for textbooks submitted to publishers
7 JUNE 2012	First batch of textbooks delivered to central warehouse in Polokwane
8 JUNE 2012	DBE files catch-up plan indicating that learners would be provided with study guides to close the gaps in their syllabus. SECTION27 is of the view that this does not comply with the court order of 17 May 2012.
11 – 15 JUNE 2012	SECTION27 and NASGB visit 14 schools across Limpopo to monitor compliance with the court order of 17 May 2012. None of these schools had received textbooks or any communication from DBE or LDoE
14 JUNE 2012	First movement of textbooks from central warehouse in Polokwane to districts and then to schools
15 JUNE 2012	2ND DEADLINE FOR THE DELIVERY OF TEXTBOOKS ACROSS LIMPOPO
14 JUNE 2012	SECTION27 makes an unexpected visit to the office of Mr. Mzwandile Matthews, new head of the intervention team. Mr. Matthews explains that there have been delays in procurement and assures SECTION27 that three warehouses in Polokwane are filled with textbooks ready for delivery, and that delivery had already commenced. He undertakes to complete the delivery of textbooks by 20 June 2012.
15 JUNE 2012	Minister Motshekga makes public statement confirming that deadline of 15 June 2012 will be met
20 JUNE 2012	DBE spokesperson, Mr. Panyaza Lesufi, states that the process of textbook delivery was 97% complete in a radio interview. Schools across Limpopo continue to report that they have not received their textbooks, despite undertaking by Mr Matthews that delivery would be complete by this date
21 JUNE 2012	SECTION27 meets with senior representatives of the DBE in order to avoid going back to court on a contempt of court charge given that textbook delivery had not been completed. The meeting agrees to a new deadline for delivery – 27 June 2012. The Department also undertakes to provide SECTION27 with daily progress reports of delivery to schools and to revise its catch-up plan to bring it in line with the court order of 17 May 2012. The parties agree to have this settlement agreement made an order of court
21 – 28 JUNE 2012	DBE provides reports to SECTION27 indicating progress in delivery of textbooks and confirming that full delivery will be complete by 27 June 2012 SECTION27 continues to receive numerous reports of non-delivery to schools and is concerned about the accuracy of the information contained in the progress reports provided by the DBE.

27 JUNE 2012	3RD DEADLINE FOR THE DELIVERY OF TEXTBOOKS
28 JUNE 2012	<p>DBE reports to SECTION27 that delivery of textbooks to Grade 10 learners is 99% complete and that delivery of textbooks to learners in Grades 1-3 had been completed.</p> <p>SECTION27 continues to receive reports of substantial non-delivery of textbooks, again raising concerns that progress reports are inaccurate.</p> <p>SECTION27 and DBE hold a joint press conference at which both parties agree that the progress reports provided by DBE officials are inaccurate. The parties agree to appoint an independent team to verify the information in the progress reports.</p>
4 JULY 2012	Professor Mary Metcalfe and her team commence work to verify the extent to which the delivery of textbooks to Limpopo schools had been completed by 27 June.
5 JULY 2012	SETTLEMENT AGREEMENT OF 21 JUNE 2012 MADE AN ORDER OF COURT.
16 JULY 2012	<p>The verification report is published and indicates that of the 10% sample of schools contacted, 22% had not received their books. The verification team also notes that it is not clear whether there were available funds to purchase textbooks for the 2013 school year and recommends that the DBE conduct its own full verification process in order to establish which schools are still awaiting textbooks.</p> <p>SECTION27 continues to receive reports from schools that had not received all their textbooks, with some schools reporting that NO textbooks at all were received. There is also no evidence of a meaningful catch-up plan in place.</p>
23 JULY 2012	CALS writes a letter to the DBE on behalf of SECTION27 to follow up on the recommendations from the verification team. No response is received.
4 JULY 2012	President Jacob Zuma appoints a five-member task team to look into the causes of the delays in delivery textbooks in Limpopo.
30 JULY 2012	DBE submits its second progress report on the catch-up plan to SECTION27. The report is silent on extra tuition time for learners and content knowledge support for teachers and only refers to the publication and distribution of study guides.
3 AUGUST 2012	DBE spokesperson Panyaza Lesufi provides updated catch-up plan to SECTION27. This plan was never filed with the court.
7 AUGUST 2012	<p>DBE presents its new '10-point catch-up plan' to the National Portfolio Committee on Basic Education. The Committee rejects the plan on the basis that it lacks both urgency and detail and is 'an insult to Limpopo learners'.</p> <p>CALS writes another letter to the DBE on behalf of SECTION27 requesting updates on textbook delivery for 2012, the catch-up plan and textbook procurement for 2013. No response is received.</p>
14 AUGUST 2012	DBE presents substantively the same catch-up plan to the Portfolio Committee. This time the Committee accepts it – despite no substantial changes being made.
15 AUGUST 2012	DBE makes public statements that textbook delivery is complete. Schools continue to report shortages, with some schools having reported that no textbooks had been delivered.
17 AUGUST 2012	CALS sends follow-up letter to DBE on behalf of SECTION27. No response to this letter is received.
31 AUGUST 2012	DBE submits its third progress report to SECTION27 and in this report it becomes clear that the promised study guides had not been delivered to schools. In this report, the DBE makes mention of a 'spring bootcamp' but provides no details of what this entails.
10 SEPTEMBER 2012	<p>SECTION27 files another application with the North Gauteng High Court for:</p> <ul style="list-style-type: none"> • A declaratory order confirming that the DBE failed to comply with the 17 May 2012 court order and the subsequent settlement agreement made an order of court on 5 July 2012; • An order directing the DBE to undertake an independent verification of textbook delivery in Limpopo; • Complete delivery of textbooks for 2012 by 31 October 2012; • Complete delivery of textbooks for 2013 by 15 December 2012; • Monthly progress reports on the procurement and delivery of textbooks for 2013; and a • Punitive costs order against the Minister of Basic Education, Angie Motshekga
2 OCTOBER 2012	Court hearing

4 OCTOBER 2012	Judge Jody Kollapen hands down judgement
5 OCTOBER 2012	The Ministerial Task Team publishes its report in which it recommends that the Public Service Commission should investigate the Director-General as well as the Head of Department and the Chief Financial Officer in the LDE.
12 OCTOBER 2012	4TH DEADLINE FOR DELIVERY OF TEXTBOOKS
15 OCTOBER 2012	DBE published Executive Summary Report on Delivery of Textbooks in Limpopo, indicating that delivery of textbooks for 2012 was complete by 11 October 2012. Schools continued to report textbooks shortages.
17 OCTOBER 2012	DBE files affidavit deposed to by Mr Matthews confirming that delivery of 2012 textbooks was completed by 12 October 2012. Schools continue to report textbooks shortages.
31 OCTOBER 2012	DBE files affidavit deposed to by Allan Subban confirming that textbook delivery for 2013 would be complete by 14 December 2012
14 DECEMBER 2012	DBE files affidavit confirming that textbook delivery for 2013 complete, save for minor discrepancies to be addressed by 19 January 2013
15 DECEMBER 2012	DEADLINE FOR DELIVERY OF 2013 TEXTBOOKS
DECEMBER/JANUARY 2013	SECTION27 and its partners monitor the delivery of textbooks for the 2013 school year. SECTION27 places adverts in community newspapers in Limpopo and North West.



LIST OF ABBREVIATIONS

ALP	AIDS Law Project
ANA	Annual National Assessments
CALS	Centre for Applied Legal Studies
CAPS	Curriculum and Assessment Policy Statements
DBE	Department of Basic Education
IECSR	International Covenant on Economic Social and Cultural Rights
LTSM	Learner Teacher Support Materials
LDoE	Limpopo Department of Education
MSI	Monitoring Support and Intervention
NASGB	National Association of School Governing Bodies
NCS	National Curriculum Statement
NSC	National Senior Certificate
PASA	Publishers Association of South Africa
PFMA	Public Finance Management Act
PDE	Provincial Department of Education
PSC	Public Service Commission
SAQMEC	The Southern and Eastern African Consortium for Monitoring Educational Quality
SAHRC	South African Human Rights Commission
SASA	South African Schools Act
TAC	Treatment Action Campaign

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1 INTRODUCTION

1.1 Outline and purpose

In January 2012, the public interest organisation SECTION27 initiated an investigation into the non-delivery of textbooks at schools in the Limpopo province. This followed media reports that schools in the province had not received their textbooks at the beginning of the 2012 academic year. On 23 January 2012, Nikki Stein, an attorney with SECTION27, sent an e-mail to her colleagues. It read:

“I’ve been looking into the Limpopo textbook issue, and it seems to be something that we should get involved in. Perhaps at our meeting tomorrow we can talk about the best way to do this. There is a lot of finger pointing but in the meantime nothing is actually being done to address the lack of textbooks and other things.

The Limpopo Department of Education has still not ordered text books for this year – they should have done so months ago, but are blaming the fact that they were placed under administration in December and that the National Department of Basic Education should have taken over the ordering function when this was done. The DBE is saying it should have been done long before. There is also a problem with the appointment of the company through which they should be ordering text books – not only did they not follow a competitive bidding process in terms of the PFMA, but they also seem to have failed to implement the contract properly. I need to find out more information on this though and to get a better understanding of the ordering process.”

The events that followed this innocuous e-mail would, together with Nkandlagate¹ and the Marikana massacre², become the main issues to dominate the local socio-political landscape in 2012. In both the media and in public discourse the non-delivery of textbooks in Limpopo were infamously referred to as the “Limpopo textbook debacle”, because of the manner in which the National Department of Basic Education (DBE) mismanaged the delivery of textbooks.

This publication documents the many facets of the case of *Section 27 & Others v Minister of Education & Another*³ (“Section 27 & Others” or commonly referred to as the “Limpopo textbook case”). It is a case study of the litigation and the subsequent three court orders to protect learner rights. At the same time it is a case study into dysfunctional governance and corruption, and its effect on state delivery and accountability. It also examines the rising media tide in the Limpopo textbook case, and the domino effect on increasing mobilisation that seeks to address the national education crisis in the country.

The publication also provides an overview of the events that led to the Limpopo textbook case. Finally, the publication analyses some of the strategies employed by SECTION27 in the course of the litigation as possible lessons for future rights-based advocacy.

The **second section** provides an overview of the current national crisis in education. It also gives insight into the state of education in the Limpopo province that ultimately culminated in SECTION27 taking legal action to ensure the delivery of textbooks to schools in 2012. **Section three** sets out the scope and meaning of the state’s constitutional obligations to provide basic education. It also highlights the state’s legislative and policy obligations to provide each and every learner with textbooks. **Section four** discusses the litigation in the Limpopo textbook case. It addresses some of the events that occurred as a result of this crisis, but did not fall within the ambit of the actual litigation to protect learners’ rights. **Section five** analyses some of the strategies employed in the course of the mobilisation and litigation as lessons for enhancing future civil society campaigns and rights-based advocacy.

¹The reference in the media to public funding of President Zuma’s private residence at Nkandla.

²The killing by police of protesting mineworkers at Marikana.

³[2012] 3 All SA 579 (GNP); 2013 (2) BCLR 237 (GNP).

The research for this publication included a close study of the extensive court papers, a review of press statements released by SECTION27 and the DBE, the extensive media coverage of the case, and minutes of meetings and correspondence between SECTION27 and the DBE. It also includes a record of certain correspondence internal to SECTION27. The publication also draws on discussions and interviews with SECTION27 staff, including Mr Mark Heywood, Executive Director of SECTION27, and the legal team comprising of Adila Hassim, Nikki Stein and Nthabi Poee.

1.2 SECTION27 as catalysts for social justice

SECTION27 is a public interest organisation that spearheaded the Limpopo case, and which was the first applicant in this case.

SECTION27 was established in 2010 as a public interest law centre that seeks to influence, develop, promote, and advance human rights. It draws its name from section 27 of the South African Constitution, which places the right to health in a context of mutually supporting and intersecting rights.

The organisation's activities include research, advocacy and legal action to change the socio-economic conditions that undermine human dignity and development, prevent poor people from reaching their full development and lead to the spread of diseases that have a disproportionate impact on the vulnerable and marginalised.

SECTION27 incorporates the AIDS Law Project (ALP). As such SECTION27 has a strong focus on human rights in relation to HIV/AIDS. The ALP together with the Treatment Action Campaign (TAC) have led several campaigns and cases that have produced some of the most significant broad-based changes in post-apartheid society. An example of this is the seminal case of *Minister of Health v Treatment Action Campaign (the TAC case)*⁴. The effective combination of mobilisation and litigation in this case led to an eventual change in government policy in respect of HIV and Aids to roll-out anti-retroviral drugs for persons living with HIV and Aids.⁵

SECTION27 is therefore a forerunner in South Africa in establishing a tradition of combining legal and extra-legal strategies in right-based advocacy. In recent years SECTION27 has extended the ambit of its work to include education rights, in particular, in pursuing legal remedies to ensure that the constitutional rights of learners are protected and that the concomitant obligations of the relevant government bodies are discharged.

SECTION27 has provided legal assistance to organisations such as Equal Education. It also provides assistance to schools, learners and bodies such as the National Association of School Governing Bodies (NASGB). NASGB is comprised of members of schools governing bodies (SGBs) of approximately 7 000 of the country's poorest schools. During the course of the Limpopo textbook case, a vital partnership was established between SECTION27 and NASGB, which contributed to outcome of the case.

1.3 Target audience

This publication is intended for anyone with an interest in education and human rights, governance and accountability. Thus, while this publication may serve as a useful case study to human rights advocates interested in public interest litigation, it may also appeal to a much wider non-legal audience as a case study for forms of popular mobilisation and rights' based advocacy.

⁴2002 (5) SA 721(CC). In this case the Constitutional Court held that the government decision to restrict the use of the anti-retroviral drug nevirapine to selected pilot sites in its mother-to-child programme to prevent HIV was unreasonable and, as such, violated the right to health care in terms of section 27 of the Constitution.

⁵For a discussion of this case see M Heywood "Preventing mother-to-child HIV transmission in South Africa: Background strategies and outcomes of the Treatment Action case against the Minister of Health" (2003) 19 *SAJHR* 28.

2 THE SOCIO-POLITICAL CONTEXT LEADING UP TO THE LIMPOPO TEXTBOOK CASE

2.1 The state of education in South Africa – “a national crisis”

General overview

According to the 2011 Diagnostic Report of the National Planning Commission (NPC), “Education is perhaps where the apartheid legacy casts the longest shadow”.⁶ While reforms in public education since 1994 have led to the desegregation of schools and improved access to schools for poor and predominantly African learners through measures such as the introduction of fee-free schooling, huge inequalities persist in the provision of quality education at historically disadvantaged schools. This has led to the South African education system being described as in a “state of crisis”.

Historically disadvantaged schools exist in a state of under-resourcing and the problems experienced are manifold. Some of these include appalling learning conditions because of poor schooling infrastructure⁷, mismanagement of schools, insufficient teachers, or teachers who are unqualified or under-qualified in the subjects that they teach.⁸

Increasingly, too, analysts link poor teaching and learning conditions with poor academic performance.⁹ The DBE’s Annual National Assessment (ANA) is a standardised assessment system for numeracy and literacy in Grades 1 to 6 and which in 2012 was extended to include Grade 9. The results of the ANA illustrate that the average child struggles with numeracy and has failed to master reading and writing. The 2012 results show that Grade 6 learners receive an average of 36% and 27% in literacy and numeracy respectively. When these results are disaggregated according to the wealth of a school, the link between poverty and poor educational outcomes is more evident. Quintile 1 schools are the poorest schools, while quintile 5 schools are the most affluent schools. The average mathematics result for a Grade 6 learner in quintile 1 is 23.7% while for the quintile 5 learners this is 39.6%. In Grade 9 pupils scored an average of 13% in mathematics with only 2.3% of learners across the country obtaining more than 50% in mathematics.¹⁰

In terms of the National Senior Certificate (NSC) or “matric” exam, every year the state boasts of a rise in the national pass rate. In 2011 this was 70.2% and in 2012 73.9%. However, commentators treat these “improvements” with scepticism arguing that the results mask many South African realities. They argue that the bar is set extremely low, in terms of which 30% is considered a pass. This has produced what some have described as a “culture of mediocrity”, in which young matriculants are set up for failure.¹¹ The pass rate also does not take into account that only about 50% of learners who started school in 2001 actually matriculated in 2012. Nor does it consider that the least resourced provinces, Limpopo and the Eastern Cape produce the worst results, while the better resourced provinces Gauteng and the Western Cape have the best results. It also does not take into account that of the 73.9% of matriculants only 26.6% actually passed with an exemption, enabling them to study at a tertiary institution.¹²

⁶National Planning Commission Human Conditions Diagnostics Document (2011) 23.

⁷See for example Department of Education *National Education Infrastructure Management Report (NEIMS)* 2011. In 2011, out of 24 793: 3 544 schools had no electricity supply, while 804 had an unreliable electricity supply; 2 402 had no water supply, while 2 611 had an unreliable water supply; 913 schools did not have any ablution facilities while 11 450 still used pit-latrines; 2 703 had no fencing; 79% were without any library and only 7% had stocked libraries; 85% were without any laboratory and only 5% had stocked laboratories; 77% were without any computer centre and only 10% were stocked.

⁸J Jansen “South Africa’s Education System” in M Mbeki (ed) *Advocates for Change* (2011).

⁹*Poverty and educational outcomes in South Africa* (2008) Centre for European Governance and Economic Development Research. See also N Spaull *Poverty and Privilege: Primary School Inequality in South Africa* (2012).

¹⁰Department of Basic Education “Report on the Annual National Assessments” 3 December 2012. B Nkosi & V John “Do the Maths, we’re facing a national crisis” *Mail & Guardian* 3 December 2012. See also V John “Improved annual national assessment results impossible say academics” *Mail & Guardian* 7 December 2012.

¹¹Jay Naidoo “Matric pass rate on the road to nobody”. www.jaynaidoo.org/matric-pass-rate-on-the-road-to-nobody/ (24 January 2013).

¹²See Reuters “Look at bigger picture – education analyst” www.engineeringnews.co.za/article/look-at-bigger-picture---education-analyst-2013-01-03

Textbooks a national concern

Studies also suggest that the lack of textbooks is not unique to the Limpopo province and it is not unusual for learners elsewhere to go without textbooks. In the Southern and Eastern African Consortium for Monitoring Educational Quality (SACMEQ) III study, textbooks are classified as an “essential classroom resource” on the basis that effective teaching and learning cannot take place without them. They provide a minimum standard of educational environment to which all learners

are entitled. The study found that in 2007, the average South African Grade 6 learner was in a school where only 45% of learners had reading books and 36.4% mathematics textbooks.¹³ This is significantly different from South Africa’s neighbours. In Swaziland 100% of learners have their own mathematics textbooks and 99% have their own reading textbooks. Similarly, 62% of learners in Botswana have their own mathematics textbooks and 63% their own reading textbooks, and in Lesotho 56% of learners have their own mathematics textbooks and 56% their own reading textbooks.



Cartoon reprinted courtesy of Jonathan Shapiro

According to the SAQMEC III, South Africa performs worse than any these countries in terms of educational outcomes in literacy and numeracy.¹⁴ In considering the impact of textbook availability on performance, analyst, Nic Spaull finds that learners with their own reading textbooks perform significantly better than learners who have to share their textbooks with more than one other learner. He states:¹⁵

Given that the reading-performance gains to reading textbooks are only evident when students either have their own textbook or share with not more than one other, policy should focus on ensuring that no student need share with more than one student. Given the well-defined, and relatively low costs of this policy option, it would seem that providing reading textbooks where they are in short supply – particularly in poor schools – is the low hanging fruit of the South African primary education system.

2.2 Defensiveness, denialism and the rise of an education movement

The government’s response to the education crisis has largely been inadequate. Where civil society advocacy has attempted to engage government to address issues of systemic inequality in schooling, these efforts have often been met with defensiveness or denial. Utterances made by the Minister of Basic Education, Angie Motshekga, often appear to reflect insensitivity to the plight of poor learners. She has been infamously quoted as denying that there is a crisis in education.¹⁶ Government responses to individual crisis situations, such as where learners are exposed to dangerous learning conditions and require emergency interventions, have also often been slow and the result of threats of litigation.¹⁷ Where cases have been instituted to initiate reform, government’s efforts to cooperate with these have also been insufficient.¹⁸

¹³Department of Education and SAQMEQ *The SACMEQ III project in South Africa: A study of the conditions of schooling and the quality of education in South Africa country report* (2010). See also M Gustafsson “All textbooks deserve attention” *Mail & Guardian* 2 November 2012.

¹⁴See also N Spaull *Poverty and Privilege: Primary School Inequality in South Africa* (2012) Presented at Conference for Strategies to overcome poverty and structural inequality in South Africa: Towards Carnegie 3, 24-08-2012 (copy on file with author) 3.

¹⁵S N Spaull “A preliminary analysis of SAQMEQ iii South Africa” (2011) Stellenbosch Economic Working Papers 11/11. Stellenbosch University and Bureau for Economic Research 19.

¹⁶T Monama & K Tskikene “No crisis in education” *Sowetan* 15 June 2012. SAPA “South Africa: Motshekga denies textbook accountability.” <http://allafrica.com/stories/201301180863.html>. 18 January 2013.

¹⁷As an example of this see the discussion of the “muds schools case” in C McConnachie and C McConnachie “Concretising the right to basic education.” *SALJ* (2012) 129(3) 554-590

¹⁸See F Veriava “Angie’s cop-out on school quality” *Mail & Guardian* 25 January 2013 which details state efforts to backtrack on efforts to develop effective norms and standards for school infrastructure.

This has led to what has been termed “the new denialism”¹⁹ – a comparison to the AIDS denialism of Thabo Mbeki and the then Minister of Health Manto Tshabalala-Msimang. The response to this denialism and the urgent imperative to improve the quality of public schooling for South Africa’s poorest learners has in turn spawned a burgeoning rights-based education movement.²⁰ This rights-based education movement locates its claims for improved educational quality within the unqualified right to basic education under section 29(1)(a) of the Constitution. This education movement appears to be evolving as a civil society cluster that sometimes operate independently of each other, but which also act collaboratively.²¹

2.3 Dysfunctionality and the section 100 intervention

If the national state of education is bleak, the picture has been even bleaker for learners in the Limpopo and Eastern Cape provinces that have been placed under national administration in terms of section 100 of the Constitution because of maladministration and mismanagement. In terms of this section:

- (1) When a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
 - (a) issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
 - (b) assuming responsibility for the relevant obligation in that province to the extent necessary to-
 - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
 - (ii) maintain economic unity;
 - (iii) maintain national security; or
 - (iv) prevent that province from taking unreasonable action that is prejudicial to the interests of another province or to the country as a whole.’

Thus, in terms of this provision the National Executive assumed responsibility for the relevant function of the Provincial Executive of the Limpopo province from 5 December 2011. A similar intervention was made in the Eastern Cape province.²² In the case of *Centre for Child Law & Others v Minister of Basic Education & Others*²³ the court commented on the scope of the powers of the national government in an intervention in terms of section 100(1)(b). It said when the national sphere of government intervenes in terms of section 100(1)(b), “it assumes the powers of the provincial administration, and it also assumes its obligations”.

Relying on precedent from previous cases the court went on to comment on the scope of these powers, in terms of which, the court said:²⁴

Suffice to say that the national and provincial spheres are not entitled to usurp the functions of the municipal except in exceptional cases but then only temporarily and in compliance with strict procedures.

This suggests that a section 100(1)(b) intervention is designed for urgent or “exceptional” measures to be taken by national government for provincial failures. It also suggests that such an intervention is not a solution to be implemented over a period of time, but requires urgent and immediate steps to be taken to restore minimum standards of delivery.

¹⁹D Macfarlane “Civil society exposes government’s chronic denialism.” *Mail and Guardian* 19 January 2012

²⁰See “An open letter to Angie Motshega” 25 June 2012. www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=308110&sn=Detail&pid=71619. Some of these organisations include Section27, Equal Education, the Legal Resources Centre (LRC), the Centre for Child Law and the Centre for Applied Legal Studies (CALS).

²¹In several of the recent cases, the different organisations have acted collaboratively either by supporting cases as *amici*, or by providing legal representation to another organisation where that organisation is an applicant. A conference led by those civil society organisations at the forefront education rights advocacy was held in November 2012. This conference sought to further co-ordinate the work of these organisations: <http://www.section27.org.za/?s=education+conference&submit.x=0&submit.y=0&submit=Search>.

²²The Herald “Textbook crisis worse than Limpopo.” www.peherald.com/specialreport/Education-in-the-Eastern-Cape-rotten-to-the-core/category/Textbook-crisis 28 November 2012

²³[2012] 4 All SA 35 (ECG) para 8. This case dealt with the failure of the intervention team in the Eastern Cape to appoint sufficient numbers of teachers to schools. This is discussed in more detail later.

²⁴*Centre for Child Law & Others* para 7.

In a statement from the DBE, the intervention in respect of the Limpopo Department of Education (LDoE) was meant to address the weak controls in respect of the improper management of supply chain management systems of the LDoE, failure by the LDoE to order LTSM for 2012, unpaid invoices totalling R190 million, 2 400 excess teachers and 200 “ghost teachers”, as well as the failure to transfer funds to schools for the day-to-day running as required in terms of the norms and standards for school funding.

It also stated that the DBE had established an intervention team “to ensure that learner interests in Limpopo were not compromised”. The statement therefore claimed that the DBE had “assessed how it could and should intervene to ensure that learner resources such as textbooks and stationery are delivered to schools”.²⁵ The events that unfolded in the Limpopo textbook suggest, however, that the intervention team failed to fulfil this commitment for most of 2012.

During the course of the litigation in the Limpopo textbook case, the DBE alleged in its papers that the overspending and/or misappropriation of funds within the LDoE was estimated at a staggering R2.6 billion.²⁶ In March 2012, Dr Anis Karodia, former administrator of the Section 100 intervention task team in the LDoE, produced a damning report on the state of education in Limpopo. The report was not made public but a former LDoE employee leaked the report to SECTION27. As such it would not have entered the public domain if SECTION27 did not include it in its court papers. It would, however, be months before the media took proper note of the report’s explosive content and allegations of corruption and maladministration. The Minister of Basic Education is reported to have been very unhappy with the content of this report and reprimanded Dr Karodia for drafting it. Dr Karodia was eventually fired from his position in May 2012.²⁷

Dr Karodia’s report describes the non-delivery of textbooks in Limpopo as being a “symptom” of a system “in a state of morass and decay.”²⁸ The report reads as a litany into the state of dysfunctionality in the LDoE.

Dr Karodia provides an overview of the state of poor financial management in the LDoE with little oversight in budgeting and spending, and the non-alignment of spending with priorities and policy objectives. The report notes the complete breakdown in departmental systems such that some payments were made twice to service providers, while no payments were made to others. He notes the widespread irregular use of financial resources.

For example, even though a cell phone policy that capped usage for management staff existed, this policy was ignored and cell phone bills exceeded the limits. Telkom landline bills were also excessive. At the same time many schools in the province had to function without the most basic forms of communication. Dr Karodia’s report makes similar findings in other areas such as excessive transport costs.

It also raises concerns regarding a lack of training of the Bid Adjudication Committee to handle “mammoth tenders and procurement of services”. He also alleges that Bid Adjudication Committee members were influenced by other staff in awarding tenders and that the procedures set out in the Public Finance Management Act²⁹ (PFMA) were not followed.³⁰

On 13 May 2010, the Bid Adjudication Committee appointed EduSolutions as the preferred bidder for the procurement of Learner Teacher Support Materials (LTSM) in the Limpopo province. The contract was for R320 million.

²⁵Media statement: Joint Ministerial Team on Limpopo section 100 intervention. 19 January 2012.

²⁶Answering affidavit in the second application p 11.

²⁷The Minister of Basic Education is reported to have been very unhappy with contents of this report and reprimanded Dr Karodia for drafting it.

²⁸Founding affidavit para 64.

²⁹Act 1 of 1999

³⁰Dr Karodia Report, 12 March 2012. p 8

Solly Tshitangano, Acting Chief Financial Officer of the LDoE alleged that there were irregularities and numerous instances of non-compliance with the PMFA both prior to, and subsequent to awarding the tender to EduSolutions. He also raised several other red flags regarding financial mismanagement in the awarding of the tender. He was concerned, for example, that LDoE would lose millions of rands from the discount it could receive by contracting directly with the publisher, and, instead EduSolutions would benefit from the discount. He was also concerned about payments made to EduSolutions before it had fulfilled any of its contractual obligations such as the delivery of textbooks.³¹ Tshitangano was subsequently dismissed. His case has been referred to the Labour Court on the basis that the dismissal was unfair as he was fired for being a whistle-blower.³² The matter is yet to be heard by the Labour Court. Dr Karodia and SECTION27 have made numerous calls for the reinstatement of Tshitangano.

The allegations relating to the EduSolutions contract were unheeded for a long time. Dr Karodia finally terminated the contract on 26 April 2012. This happened shortly after SECTION27 initiated the Limpopo textbook case, and widespread media speculation and public pressure surrounding the tender mounted. This matter is discussed later. In his first judgment in the Limpopo textbook case, Judge Jody Kollapen described the tender as an “unscrupulous tender award”.³³

³¹Supporting affidavit in Labour Court of Solly Tshitangano. 1 May 2012.

³²SECTION27 has established a close relationship with Solly Tshitangano and has been actively campaigning for his reinstatement. They have also organised legal representation for him at his Labour Court hearing.

³³*Section 27 & Others* para 17.

3 THE OBLIGATION ON THE STATE TO PROVIDE TEXTBOOKS: A CONSTITUTIONAL, LEGISLATIVE AND POLICY OVERVIEW

3.1 The right to basic education

In the now often quoted constitutional court case of *Governing Body of the Juma Masjid Primary School & Another v Ahmed Asruff Essay NO & Others* (“the Juma Masjidcase”)³⁴, the court, drawing from General Comment 13 of the International Covenant on Economic Social and Cultural Rights (IECSR), acknowledges the value of education and the importance of entrenching education as a fundamental right. The court states:

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. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence. (own emphasis)

The right to basic education must therefore be interpreted to realise these objectives. Section 29(1)(a) of the Constitution states: ‘Everyone has the right to a basic education, including adult basic education’. This right is often referred to as an unqualified socio-economic right since it is not subject to qualifiers as are certain other socio-economic rights in the Constitution such as health, welfare and housing. These rights are qualified by the term ‘subject to progressive realisation within the state’s available resources’.

The unqualified nature of the right to basic education implies that the state is under a direct, or immediate, duty to provide a basic education and that an individual (unlike as is in the case of the qualified socio-economic rights) may have a direct claim in respect of the right. In the *Juma Masjid* case the court appears to have confirmed this interpretation. The Court said:³⁵

It is important, for the purpose 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’.

³⁴2011 (8) BCLR 761 (CC) para 41.

³⁵*Juma Masjid* para 37. At the same time while the Court acknowledges the absence of internal qualifiers to the right to basic education, it states that the right remains subject to the limitation clause in terms of section 36.

Despite the Constitutional Court having confirmed this interpretation of the right to basic education as an unqualified right, the DBE both in policy development and in outlining the state's obligations during litigation persists in an interpretation of the right as a right to be "progressively realised," and qualifies commitments it makes as being dependent on "available resources".³⁶

In terms of section 39(1) of the Constitution, when interpreting the rights in the Bill of Rights, a court 'must consider international law' and 'may consider foreign law'. The four 'A' scheme as elucidated in General Comment 13 to ICESCR, may then provide a foundation from which to begin to interpret the right. It states that, while the exact standard secured by the right to basic education may vary according to conditions within a particular state, education must exhibit the following features: (a) Availability; (b) Accessibility; (c) Acceptability and (d) Adaptability. Accessibility includes economic accessibility defined as education that "has to be available to all". Availability is defined as including "teaching materials", meaning textbooks.

The "South African Human Rights Commission Charter of Children's Basic Education Rights" building on this four "A" scheme develops this even further and state that each learner should have "a standardised workbook for literacy and numeracy," and "one textbook of their own for every subject". (own emphasis)³⁷

While the history of the litigation and a discussion of the judgment in the Limpopo textbook case occurs in section four, it is useful to set out Judge Kollapen's findings in respect of the right to basic education in this section. Judge Kollapen recognised textbooks as a component of the right to a basic education and by corollary therefore the state was under an obligation to ensure that learners did in fact have textbooks. He said:³⁸

[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.

3.2 A legislative and policy overview

The South African Schools Act³⁹ (SASA) distinguishes between two types of schools: schools that are granted powers under section 21 of the SASA ("section 21 schools") and those which are not ("non-section 21 schools"). Section 21 of the SASA provides that an SGB may apply to the Head of Department in a province to be allocated certain specific functions including, "to purchase textbooks, educational materials or equipment for the school". Those schools that are granted the relevant powers under section 21 of the SASA, procure their textbooks directly from service providers. Non-section 21 schools rely on the relevant PDE for the procurement and delivery of textbooks. They access their budgets through the completion of requisition forms, which are then submitted to the relevant district offices of the PDE for processing. The PDE will then arrange for the procurement and delivery of textbooks according to the requisition forms received. The vast majority of South Africa's historically disadvantaged schools are non-section 21 schools. The state is, therefore, obliged to provide textbooks to these schools.

³⁶The recently published Draft Norms and Standards for Public School Infrastructure GN6 in GG 36062 of 8-01-2013 is a clear example of this in policy development. In the DBE's answering affidavit in the case of *Equal Education and others v Minister of Education and others* (case no. 81/2012) that was later settled, the DBE similarly argued that the right was a right subject to progressive realisation.

³⁷South African Human Rights Commission "SAHRC Charter of Children's Basic Education Rights" (2013) 29. While this Charter is not binding on the state, it is a useful in the SAHRC's monitoring function in terms of section 184(3) of the Constitution in determining whether or not the state is in compliance with its socio-economic rights obligations.

³⁸Section 27 & Others para 25.

³⁹Act 84 of 1996

The state has also committed itself in various policy documents and statements to providing textbooks to every learner. In the first Limpopo textbook judgment, Judge Kollapen derived the obligation on the state to provide textbooks not only from what is in our view a correct interpretation of the right to basic education but also from these policy commitments. He points out it is clear that the state views textbooks as “an essential and vital component in delivering quality learning and teaching”, and refers to the following commitments.⁴⁰

In his State of Nation Address on 10 February 2011, President Zuma stated, “The Administration must ensure that every child has a text book on time”.

The DoE in its Annual Performance Plan for the year 2011 to 2012 articulates as one of its goals, “to ensure that every learner has access to a minimum set of textbooks and workbooks required according to National Policy”, and sets the percentage goal of learners that should have access to the required textbooks and workbooks for the entire school year at 100%.

Finally the curriculum strategy to improve education in Limpopo, issued by the LDoE of March 2011, makes the following observations:

The availability and retention of learning support materials is a vital ingredient in the delivery of quality learning and teaching. When resources such as learner and teacher support materials are insufficient, teachers experience great difficulty in planning and conducting lessons, even where there were enough of other resources. If one takes seriously the observation that in developing countries, the availability of text books is associated with student performance and pass rates than lack of learning materials in school, clearly points to our learners not performing well in their learning.

⁴⁰Section 27 & Others paras 22-23.

4 THE LIMPOPO TEXTBOOK CASE: CONTEMPT OR COMPLIANCE?

4.1 Background: The failure to procure textbooks in the Limpopo province

The significance of textbooks under the Curriculum and Assessment Policy Statement (CAPS)

The transition to democracy brought with it the imperative to transform the apartheid curriculum. Curriculum 2005 was subsequently introduced. While it was underpinned by strong social goals, its “pedagogical shortcomings” soon became evident and within a short period, the curriculum was again revised. The product of this revision was the introduction and implementation of the National Curriculum Statement (NCS) in 2002. In 2009 a third revision resulted in the shift to the new curriculum known as Curriculum and Assessment Policy Statement (CAPS).⁴¹

The CAPS curriculum provides a more structured guide to teachers in terms of how they plan their time and structure their lessons. It also provides them with an explicit elaboration of content knowledge. Underpinning the move to CAPS is an ethos that learning is dependent on teacher interpretation and transmission of content. The textbooks developed for the CAPS curriculum are therefore essential as a support aid to teachers, particularly in a context where teacher knowledge is an issue.⁴²

The Limpopo textbook case was thus not only about ensuring that every learner has access to a textbook; it was also about ensuring that teachers are adequately equipped in the classroom. Thus, the assumption that teachers could rely on NCS-aligned textbooks as alleged by the DBE in the media and in court papers undermines the very purpose for which CAPS was intended. The aim was to increase reliance on uniform textbooks, thereby minimising reliance by learners on variations in teacher content knowledge and transmission of content.

The CAPS curriculum was introduced to Grades R, 1, 2, 3 and 10 in 2012. Learners in these grades were to be most affected by non-delivery whilst other grades would have only required top-ups to their existing stocks. Thus, the fact that textbooks had not been ordered for learners in Limpopo for 2012 was detrimental to foundation-phase learning. This phase is increasingly acknowledged as a critical phase in a learner's education, especially in establishing the building blocks for numeracy and literacy that are the foundations for effective future learning. It was also detrimental to Grade 10 learners where complementing teacher knowledge with textbooks is essential.⁴³

The standard procedure for procuring textbooks⁴⁴

Every year, the DBE produces a central catalogue of recommended textbooks. PDEs collect requisition forms from schools in their province by September. PDEs then place consolidated orders for textbooks from this national catalogue.

⁴¹For a useful and informative discussion on post-apartheid curriculum reforms see Ursula Hoadley “Knowledge, knowers and knowing – Curriculum reform in South Africa” [www.lrc.org.za/images/stories/workshops/](http://www.lrc.org.za/images/stories/workshops/21%20November%202012.pdf) 21 November 2012.

⁴²Expert affidavits in the first and second applications of Bronwen Wilson-Thompson.

⁴³At the same time it must be emphasised that textbooks are not meant to supplement the essential role that teachers ought to play. At Hanyani Thomo Secondary School (the second applicants’ in the Limpopo textbook case) for example, teachers display incredible commitment by extending teaching to include Saturday classes as well.

⁴⁴Supporting affidavit of Mr Brian Wafawarowa, Executive Director PASA.

PDEs that order books by September receive their stock before schools close in December. Where PDEs order textbooks as late as December or January, those schools usually receive their books early in the academic year.

If the publishers of textbooks have those books in stock, the textbooks will be delivered within two weeks of the orders being placed. If the textbooks need to be printed delivery may take up to eight weeks.

Ordinarily, publishers deliver textbooks to a central warehouse, and the relevant PDE ensures that the textbooks are delivered to each school. On some occasions, publishers will negotiate with PDEs to deliver textbooks directly to schools. In these circumstances, it takes an additional one to two weeks for the textbooks to be delivered.

The contract with EduSolutions

The LDoE had entered into a contract with EduSolutions on 18 October 2010. In terms of this contract, EduSolutions took over the entire textbook procurement process. EduSolutions was to receive, process, place orders, effect payment and deliver all textbooks as specified in the contract. It would negotiate discounts with publishers. It would comply with the delivery timelines specified in the contract. This meant that the entire process for the procurement of delivery of textbooks had been outsourced. The LDoE book unit was at this point disbanded and the entire database containing the list of schools in the province was handed over to EduSolutions. Once the EduSolutions contract was cancelled, the DBE did not longer had access to the database of schools and did not know which school existed.⁴⁵

The budget for textbooks for the 2011/2012 school year was R126 393 000. However, the amount in terms of the contract with EduSolutions for textbooks was R343 226 224. This amount far exceeded the actual budget. Because of an outstanding payment of approximately R21 000 000 allegedly owed to EduSolutions, it failed to place orders for textbooks for the 2012 academic year.⁴⁶

On 5 December 2011, when no orders had been placed for textbooks, the executive director of the Publishers Association of South Africa (PASA), Mr Brian Wafawarowa addressed a letter to the Director General of the DBE, Mr Bobby Soobrayan to ascertain why there was a delay in ordering textbooks and to help where necessary to avoid the situation reaching a “crisis level”. PASA followed up with the Department on 5 December 2011, 14 December 2011 and 15 December 2011. No written response was received from the department. Much later, the report of the Presidential Task Team established to investigate the non-delivery of textbooks to Limpopo schools, which was released on 5 October 2012, would find that the Director General had failed to act on this information and would recommend that his role in contributing to the delay in procuring textbooks be investigated.

The academic year began on 18 January 2012. On this date, textbooks had still not been delivered to schools in the province. In April 2012, when the LDoE was under administration, Dr Karodia cancelled the contract because of alleged irregularities, including suspicions of fraud and corruption in the bidding process. The DBE has stated that this tender process is under investigation.

4.2 A paper trail of broken promises⁴⁷

As mentioned, SECTION27's attention was drawn the lack of textbooks in Limpopo schools through media reports at the commencement of the academic year. In February 2012, a team of SECTION27 staff visited several schools in Limpopo. It was apparent that poor learning and teaching conditions in Limpopo extended beyond the lack of textbooks.

⁴⁵In the first application for example the DBE's answering affidavit alleged that there were 5 297 schools in the Limpopo province. In the second application their papers alleged there were 4 078 schools.

⁴⁶See respondents' heads of argument in the second application.

⁴⁷The events leading up to the case are set out on the founding affidavit and the heads of argument of the first court application.

Given the state of bankruptcy of the LDoE, schools had not received their state allocations in terms of the “norms and standards” for school funding. These schools were therefore struggling without any money for their day-to-day expenses. The sanitation conditions at some schools were shocking and learners were forced to use toilets that were unsafe and unhygienic. The overall infrastructural conditions were also poor. Dilapidated and broken classrooms in some instances resulted in teaching and learning having to take place outside the classroom. In other schools overcrowding with up to 125 learners in some classrooms made teaching and learning very difficult.

Each of the schools visited confirmed that textbooks had not yet been delivered and that there was no indication as to when delivery would take place as schools had received no communication from the LDoE in this regard. This was despite schools throughout Limpopo having selected their required textbooks from the national catalogue and having submitted requisition forms to the relevant district offices of the LDoE during November 2011. The textbooks should have therefore been delivered in December 2011 or early January 2012. Poor communication between the LDoE and schools would feature strongly throughout the Limpopo textbook case. The Metcalfe verification report, which is discussed later, found that Limpopo schools have the “poorest communication infrastructure” and that communication on the non-delivery of textbooks had been non-existent. It recommended that “rapid and efficient mechanisms” such as SMS notifications be put in place as a matter of urgency to communicate with schools.⁴⁸

The fact that most schools had not received their “norms and standards” allocations also made it difficult to find ways to overcome the lack of textbooks. There was neither money to pay electricity bills and hence no electricity, nor money to buy paper or toner to photocopy worksheets or sample textbooks, or even chalk to write on the board.

It was within this context, perceiving the issue of the non-delivery of textbooks as the most urgent and requiring immediate attention, that on 28 February 2012, SECTION27 addressed a letter to the DBE and the LDoE, stating its concerns and requesting an indication as to when it would be delivered. Media reports up to then reflected on undertakings by the DBE that delivery of the textbooks was imminent and that a “minimum of disruptions” was expected. There was no suggestion in these reports that textbooks had not yet been ordered.⁴⁹

On 14 March 2012, SECTION27 was invited to a meeting with Dr Karodia. The purpose was to discuss the different challenges faced by schools in Limpopo. SECTION27 staff described this meeting as being the first of “several surreal conversations” with Dr Karodia. He portrayed himself as having to bear the brunt of all the public criticism, despite being the heroic and hidden hand trying to clean up the LDoE. He swung between cooperating with SECTION27 by explaining how the intervention team was attempting to address and overcome the precarious financial position the LDoE had created, to antagonistically lecturing SECTION27 on other points. Quotes of two statements made by Dr Karodia in the meeting illustrate the sermon-like tone of the meeting.⁵⁰

Well I invited you here, so clearly I know what you want. I have uncovered so much. I don't know why you don't bring me my accolades. I am paying as best as I can. We didn't make this problem. I can't be expected to wipe every tear from every eye.

You can go tell the media and I will correct you and tell them what I told you. I don't know why I left the greenery for this mad house. I don't know who is who in the zoo. This is the wild wild west and everybody has a horse and a gun.

Despite this seesawing Dr Karodia gave an undertaking that textbook delivery would be completed by mid-April. However, follow-up visits to Limpopo schools by SECTION27 in mid-April revealed that books had still not been delivered. This was confirmed by several media reports. SECTION27 therefore continued communicating with Dr Karodia to try to resolve the textbook crisis. On 2 May 2012 in e-mail correspondence to Mark Heywood, Dr Karodia undertook that, “the supply of textbooks will now take place through the month of May, and definitely [be] completed by the 15 June, 2012”.

⁴⁸Prof M Metcalfe *Report: Verification of textbook deliveries in Limpopo* (2012) 4.

⁴⁹For a summary of these media articles see the founding affidavit in main application. p 10

⁵⁰SECTION27 minutes of meeting with the Head of the Intervention team. (14 March 2012) On file with SECTION27.

In a follow-up e-mail Heywood attempted to establish whether orders for textbooks had been placed with publishers. The e-mail response from Dr Karodia stated that no firm orders had been placed and while he had earlier indicated that textbooks would definitely be delivered by 15 June, he now stated that the DBE “is hoping to complete the process” by 15 June 2012.

On 26 April 2012, Dr Karodia addressed a letter to the textbook publishers, initiating a bidding process for the procurement of textbooks. While the letter indicated a step towards the resolution of the case, it did not demonstrate any urgency on the part of the DBE to ensure that textbooks were delivered to classrooms as soon as possible. On the contrary, the process proposed by Dr Karodia included numerous unnecessary delays, including an “unprecedented bidding process”, requiring publishers to collect orders from Polokwane and requiring delivery of textbooks to a central venue in the province.⁵¹

On 20 April 2012, SECTION27’s attorneys addressed a formal letter of demand to the LDoE and the DBE, demanding that textbooks be delivered to Limpopo schools by no later than 2 May 2012, failing which they would institute proceedings. Neither the DBE nor the LDoE responded to this letter until 3 May 2012. On 2 May 2012 the Applicants’ attorneys addressed a follow-up letter to the LDoE and the DBE, requesting an urgent response to the letter of demand. On 3 May 2012, the Director General responded to this letter, indicating that the matter had been passed on to Dr Karodia. This contradicted earlier correspondence from Dr Karodia in which he informed SECTION27 that the issue of textbooks has been removed from his purview. On 3 May 2012, Dr Karodia e-mailed SECTION27’s attorney of record, indicating that he was unable to deal with the matter before 7 May 2012.

What became evident to SECTION27 from this paper trail of unfulfilled undertakings was the following: Firstly, it did not appear the DBE fully grasped the negative impact of learners going without textbooks. That is, without textbooks, learning and teaching was compromised. Thus, while learning was taking place, learners were not adequately able to prepare for their lessons, do their homework or study for examinations. Teachers were also unable to adequately prepare for their lessons and ensure that the learners’ curriculum was adequately covered. Secondly, and related to the first, was that the situation was becoming more urgent. Learners had been without textbooks for almost half the year and were about to sit for the June examinations without learning material that would prepare them. It was in this context that SECTION27 decided to institute an urgent application to compel the delivery of textbooks in Limpopo.

4.3 SECTION27 initiates an urgent application

On 4 May 2012, SECTION27 together with two co-applicants launched an urgent application. The Centre for Applied Legal Studies (CALS) acted as the attorneys of record in the matter. The second applicant was Hanyani Thomo Secondary School. Hanyani Thomo was attended by 1 516 learners in Grades 8 to 12 in 2012. At the time of launching the application, the school had not received any textbooks for the 2012 academic year. The school principal Mr Hlongwane, was primarily concerned with the impact of non-delivery for Grade 10 learners who would be starting the CAPS curriculum. The third applicant was Tandani Lydia Msipiphethetu, a mother of two learners at Lutandale Primary School in Grades 6 and 3 respectively. Neither of her two children had been provided with textbooks for the 2012 academic year. She alleged that without textbooks she was struggling to assist her children with their schoolwork.

The Minister of Education as head of the DOE and the MEC for Education in Limpopo were cited as the first and second respondents respectively. Given the section 100 intervention and the assumption of the obligations of the LDoE by the DBE, this article refers mainly to the DBE as the respondent party in the litigation. Judge Jody Kollapen heard the case on the 15 May 2012 in the North Gauteng High Court in Pretoria.

The remedy sought by the applicants was highly innovative in several respects. First, it recognised, that while the failure to deliver textbooks would affect all grades, the biggest impact would be felt by those grades that had just started the CAPS curriculum. The relief was therefore limited to require delivery of textbooks to Grades R, 1, 2, 3 and 10 by 31 May 2012. Secondly, the applicants required that the state develop a “catch up” plan for Grade 10s in the Limpopo province.

⁵¹Mr Wafawarowa’s states in his supporting affidavit: “The initiation of a negotiation process is both unprecedented and unnecessary: the bidding process was conducted at the stage of compilation of a national catalogue of textbooks, at which stage both book titles and prices were agreed on.” para 14

Section 27 threatens court action over Limpopo textbook situation

Wednesday 24 April 2013 19:11

SABC



Delivery of school textbooks has always been a thorny issue in Limpopo since last year. (SABC)

TAGS:

Department of Basic Education Section 27 HRC
Textbooks Nikki Stein Panyaza Lesufi

Civil rights group Section 27 says it will be compelled to go to court again if the delivery of textbooks doesn't improve in Limpopo. Section 27 says some schools are still experiencing a shortage of textbooks, four months into the academic year.

According to Section 27, the Department of Basic Education is in breach of a court order in this regard. Spokesperson Nikki Stein says they've written a letter to the department, demanding full delivery of textbooks by no later than April 26.

Stein confirms that in their letter, they "asked for an undertaking to deliver textbooks listed in our letter by April 26, which is this Friday, as well

as to appoint an independent person to verify the state of textbooks delivery". Section 27 says such a process will ensure that the verification can be provided by April 30, thereafter any additional textbooks that are identified in that verification process will be delivered by May 7.

<http://www.sabc.co.za/news/a/bfb11c804f617106a1a0e93fdb56b4e8/Section-27-threatens-court-action-over-Limpopo-textbook-situation-20130424>

The catch-up plan is completely unique and without precedent. The rationale for it was to place learners in the position they would have been in had they had the necessary textbooks for the entire academic year. Thus, the catch-up plan acknowledges that while learners had not missed out entirely on sections of subject matter in their syllabus, the absence of textbooks meant they were unable to *adequately* cover the relevant syllabus. The applicants therefore alleged that to overcome the disadvantage suffered by the learners, to prepare them for the for the end-of-year exam would necessitate a revision of the content of the syllabi in all subjects that had been covered in the first half of the academic year.

Third, to ensure DBE compliance with the catch-up plan the applicants also requested a supervisory order requiring that the state lodge a copy of the plan with the court and provide monthly reports to the court in respect of the progress on the catch-up plan.

Finally, the applicants sought a declaration that the failure to deliver textbooks to learners in Limpopo was a violation of the right to basic education in terms of section 29(1) (a), the right to equality in terms of section 9 and the right to dignity in terms of section 10 of the Constitution.

At the hearing the DBE claimed that the procurement processes had commenced and undertook that the delivery of textbooks would take place between 31 May and 15 June 2012. The applicants agreed to a new deadline for the complete delivery of textbooks. The DBE nevertheless continued to oppose the matter. The DBE disputed that it had violated the rights of learners, or that the matter was urgent. The other main sticking point was the terms of the catch-up plan.

In terms of whether or not learners' rights had been violated, the DBE did not dispute that that textbooks were not delivered rather it alleged that the non-delivery was not the result of bad faith but due to difficulties that ensued as a result of the provincial mismanagement of education. The DBE blamed the non-delivery on the combined circumstances of the state bankruptcy within the LDoE, and the fact that the entire textbook procurement had been handed over to EduSolutions through an "irregular tender process". The DBE further alleged that it had taken all the necessary steps to remedy the non-delivery following the section 100 intervention by cancelling the contract with EduSolutions and by approaching treasury for additional funds to procure textbooks.

The DBE's opposition on the catch-up plan appeared to be far less coherent and inconsistent. In the DBE's papers, it appeared to vociferously reject the necessity of a catch-up plan. The DBE in its answering affidavit referred to the catch-up plan as a "monumental waste of time and limited resources". The DBE also, contrary to policy statements, denied that textbooks were essential to the learning process but described textbooks as being merely "complementary to the teaching process"⁵², thereby mitigating the need for remedial measures to address the harm caused by non-delivery.

In a surprising turnabout during the court hearing, despite having rejected the catch-up plan in the court papers, the DBE alleged it had already developed a catch-up plan. During the hearing, a DBE representative handed out a copy of a circular (not previously mentioned in court papers) addressed to all district managers, circuit managers and principals requesting them to assess the curriculum needs of their Grade 10 learners and to provide reports on those needs by 31 May 2012. The circular was not referred to in the DBE's answering affidavit, nor was its existence drawn to the applicants' attention prior to the hearing. It is dated 14 May 2012, which was the day before the hearing of this application. In essence, the circular required that individual schools identify gaps in curriculum and close these gaps. The applicants objected to this on the basis that the burden of "catch-up" was handed to the individual schools that in general, already faced significant resource constraints.

The DBE also objected to the applicants' decision to institute the case as an urgent matter, that is, outside of the usual times for the exchange of papers and the setting down of the application. In the answering affidavit, the DBE referred to the urgent application as a "self-created urgency", charging the applicants with engaging in "extensive letter writing" and questioning the applicants' decision not to institute the application at an earlier date as a basis for challenging the urgency. This was notwithstanding that the applicants had repeatedly attempted to engage the DBE and had relied on several undertakings over a three-month period in the belief that the undertakings made would be complied with.⁵³

Judge Kollapen's judgment was handed down two days later on 17 May 2012. His judgment affirmed the applicants' case in each and every aspect.

He ruled that given the fact that almost halfway through the year, schools in Limpopo did not have textbooks, rendered the matter urgent. He went on to say that, [a] "week or even a day is material under the circumstances".⁵⁴

He stated that textbooks are an "essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right".⁵⁵

Judge Kollapen explored the particular challenges faced by the state and the measures taken to deliver textbooks and came to the conclusion that:⁵⁶

[T]he measures they took were not reasonable, having regard to the urgency of the situation and having regard to their own targets and indicators they had set in respect of delivery of textbooks.

On that basis, he held that the Limpopo learners' rights to a basic education had been violated.

He ordered the DBE to deliver textbooks to learners in Grades R, 1, 2, 3 and 10 urgently, commencing 31 May 2012 and concluding no later than 15 June 2012.

On the catch-up plan, Judge Kollapen ruled that the absence of textbooks for the first half of the year had an adverse effect on learners' rights that ought to be remedied. If this did occur he stated, "it would render the vindication of rights hollow".⁵⁷ He therefore ordered the state to immediately develop a catch-up plan for learners in Grade 10. He also provided the DBE with a set of guidelines to adhere to in developing the catch-up plan, and for monitoring the plan.⁵⁸

⁵²Answering affidavit in the first application para 4.4

⁵³DBE's answering affidavit in first application para 5.

⁵⁴Section 27 & Others para 20.

⁵⁵Section 27 & Others para 25.

⁵⁶Section 27 & Others paras 28-32.

⁵⁷Section 27 & Others para 45.

⁵⁸Section 27 & Others para 41.

Thus, the plan had to:

- (a) Identify the gaps in the curriculum in terms of what should be covered as opposed to what was covered.
- (b) Identify the extent to which the quality of teaching in areas where it occurred was compromised because of the non-availability of books.
- (c) Identify remedial matters to address the shortcomings identified in (a) and (b) and the role players to be involved.
- (d) Provide the timeframes in which the plan was to be implemented as well as the monitoring mechanisms that would be put in place to monitor the implementation of that plan.
- (e) Ensure that the plan was comprehensive to the extent that it covers all affected Grade 10 learners, whilst recognising that the nature of the interventions may differ from school to school.
- (f) Recognising that the plan would invariably involve extra classes, to indicate when this would happen.
- (g) Indicate the delineation of function between the LDoE and DBE.

In terms of reporting, the catch-up had to be lodged with the court by 8 June 2012, and monthly reports were to be submitted until 30 November 2012.

Judge Kollapen's order also provided that the applicants be entitled to approach the court on the same papers, or supplemented as may be required for further relief. In hindsight, relief was indeed necessary. Finally, Judge Kollapen ordered the state to pay the costs of the application.

SECTION27 and its partner organisations wrote an open letter to the Minister of Education after she denied that there was a crisis in education

OPEN LETTER TO THE MINISTER OF BASIC EDUCATION AND THE DIRECTOR GENERAL OF THE DEPARTMENT OF BASIC EDUCATION FROM CENTRE FOR CHILD LAW, CALS, EE, EE LAW CENTRE, SECTION 27 AND LRC

Monday, 25 June 2012

At a meeting of the LRC, the Centre for Child Law, Equal Education, Equal Education Law Centre, Section 27 and CALS all civil society organisations deeply concerned about the significant problems facing the Department of Basic Education that stand in the way of ensuring every learner's Constitutional right to education a decision was taken to write an open letter to the Minister and Director General of Basic Education. The aim of this letter is to respond to the press conference held by the Department of Basic Education on Friday 15 June 2012 in which the Minister denied there was a crisis in education and indicated that the numerous litigation against her Department was not for any reason other than the urgent need to address critical lapses in the administration of education in this country.

In the recent past, all of these NGO's have represented learners, school governing bodies, crisis committees, and other non-governmental organizations in litigation against the Department of Basic Education.

This letter highlights the serious concerns that these organisations and their clients have about the state of education in South Africa and states that they believe that these problems represent a catastrophic failure in the public education system, are a direct consequence of the government's failure to adequately deal with long-standing systemic issues. Many of these issues are a direct result of poor administration by district offices, which are either unresponsive to the needs of the schools or lack the administrative capacity to attend to those needs.

LRC, the Centre for Child Law, Equal Education, Equal Education Law Centre, Section 27 and CALS invite the Minister, to convene an urgent meeting of the relevant role players, including the signatories to the letter, to discuss a sustainable strategic plan which moves beyond litigation to address the immediate and long term systemic failures in the provision of the right to education. This meeting should identify short and long-term interventions that will ensure the continuation of services and processes that must be implemented to resolve the many systemic barriers to the provision of education in this country. While we believe that the problems besetting the education sector can best be resolved outside of legal processes, we do not rule out litigation as a means to securing the right to education should circumstances demand this.

A full copy of the letter sent to the Minister is attached herewith.

OPEN LETTER TO THE MINISTER OF BASIC EDUCATION FROM CENTRE FOR CHILD LAW, CALS, EE, EE LAW CENTRE, SECTION 27 AND LRC

21 June 2012

Dear Minister Motshekga and Director-General Soobrayan,

We write to you as a group of civil society organisations deeply concerned about the significant problems facing the Department of Basic Education that stand in the way of ensuring every learner's Constitutional right to education. In the recent past, we have represented learners, school governing bodies, crisis committees, and other non-governmental organizations in litigation against your Department. Our aim with this letter is to respond to the press conference held by you on Friday 15 June 2012 in which you denied there was a crisis in education and to indicate that our litigation against your department is not for any reason other than the urgent need to address critical lapses in the administration of education in this country.

The difficulties the Department and education system face are manifold, including:

- the appalling state of school infrastructure at township and rural schools across the country, especially in regards to sanitation;
- the lack of norms and standards for school infrastructure;
- the critical shortage of desks and chairs in schools throughout the nation;
- the failure to combat the rise of sexual violence and corporal punishment in schools;
- the non-delivery of workbooks and textbooks to thousands of learners across the country;
- the lack of access to libraries, particularly where this means that home language texts cannot be accessed.
- the failure to revise the national policy on learner pregnancies;
- inadequate public school funding and the placement of schools in inappropriate quintiles, directly impacting the school's funding;
- the failure to provide learner transport in accordance with policy;
- the failure to issue norms and standards regarding admission policy;
- the delivery of education related services to children being interrupted through problems with tenders;
- the lack of any discernable success in the Department's section 100(1)(b) intervention in Limpopo and the Eastern Cape, where substantial problems remain in school nutrition, scholar transport, and textbook delivery;
- the failure to implement the 2012 post provisioning in the Eastern Cape, leaving many schools without enough educators; and
- the lack of a pro-poor teacher post-provisioning scheme, meaning a failure to draw quality teaching into township and rural schools, and the lack of training, support and accountability for teachers in these schools.

Based on our collective experience working in the education sector, we believe that these problems and more, the magnitude of which represent a catastrophic failure in the public education system, are a direct consequence of the government's failure to adequately deal with long-standing systemic issues. Many of these issues are a direct result of poor administration by district offices, which are either unresponsive to the needs of the schools or lack the administrative capacity to attend to those needs.

Letter continues on page 20

Many of the problems plaguing the Department began prior to your tenure as Minister of Basic Education. Post-apartheid South Africa inherited an education system beset by deeply entrenched inequality. Yet, 18 years since the right to education was constitutionally entrenched many of the structural inequities remain, some of which are outlined above. The non-delivery of services, endemic to the Departments of Education and their district offices, disproportionately impacts the poor and under-privileged, deepening racial and social inequality. Today only those who can afford to buy quality education receive it. This is not what the Freedom Charter intended and as you will no doubt appreciate this state of affairs has profound and continuously deepening negative ramifications for the majority of learners who are black and poor. We intend no exaggeration by stating that the long term effect of the failure of the government to address the structural imbalances in the provision of education is to consign an entire generation of young black South Africans into a life of poverty and inequality.

We appreciate that there are no simple solutions to these problems, but as representatives of civil society we could no longer stand by and witness the continued violation of the right to education in this country. The right to education should be immediately realisable as it is not subject to qualification. An integral component of the Bill of Rights, the right to education is fundamental to resolving the structural legacy of apartheid. It is within this context, and as a matter of last resort, that we have initiated litigation against the Department where other means of engagement have failed to secure an adequate response to the problems outlined above.

We therefore invite you, Minister, to convene an urgent meeting of the relevant role players, including the signatories to this letter, to discuss a sustainable strategic plan which moves beyond litigation to address the immediate and long term systemic failures in the provision of the right to education. This meeting should identify short and long-term interventions that will ensure the continuation of services and processes that must be implemented to resolve the many systemic barriers to the provision of education in this country. While we believe that the problems besetting the education sector can best be resolved outside of legal processes, we do not rule out litigation as a means to securing the right to education should circumstances demand this.

We urge you to fulfil your Constitutional obligation, in an open and transparent manner, to take the steps necessary to address the massive inequalities in the provision of education and to prevent the complete collapse of the public education system. We look forward to further engagement with you and welcome any opportunities to be involved in finding workable solutions.

Yours sincerely,

SECTION27

Contact: Nikki Stein

<file:///Users/apple/Library/Mail%20Downloads/Open%20Letter%20to%20the%20Minister%20of%20Education.webarchive>

4.4 The events necessitating a second order⁵⁹

Despite the judgment receiving widespread media attention and the court order being hailed as a victory for learners' rights, the court order did not immediately result in the relief that was sought. This could probably be attributed to two factors: Firstly, throughout the litigation, there appeared to exist an undercurrent of resistance and resentment on the part of the DBE in being compelled into action by the litigation.⁶⁰ Secondly, the absence of a database and the breakdown of systems for procurement and the delivery of textbooks impacted on the ability of the DBE to adhere to the court order.

⁵⁹Applicants' main affidavit and heads of argument in the second application.

⁶⁰Shortly after the first judgment was delivered, a media report suggested that the Department of Higher Education planned to ask the court to review its decision to compel the DBE to deliver monthly status reports on textbook delivery, as this could set a worrying precedent. The concern was that having a government department report to a non-governmental organisation on its policy decisions could be problematic in the long term as oversight was already being provided by Parliament. This was however denied by the DBE spokesperson, Panyaza Lesufi. See "Education Department wants review of court ruling," www.news24.co.za 29 May 2012. At another point the Minister of Education is reported to have said that she reports to Parliament and not to SECTION27. The DBE advertisement that is discussed later is another example of the DBE's recalcitrant attitude in the litigation.

Delivery

In terms of the court order textbook delivery was to commence on 31 May 2012 and end on 15 June 2012. A few days before the 15 June deadline a team from SECTION27 and the NASGB visited a number of schools in Limpopo. The visits again revealed that schools had not received textbooks, nor had they received any communication regarding the delivery status. Some of the schools visited were afraid to be named or to depose to affidavits as many of these schools had been threatened by government officials to discourage principals, teachers and learners from reporting the non-delivery. The issue of intimidation is discussed later in this publication.

Following these schools visits, SECTION27 made an unexpected visit to the office of Mr Mzwandile Matthews, the new head of the intervention team, on 14 June 2012. Matthews received SECTION27 and in what appeared to be a frank and friendly exchange, explained that there had been delays in the procurement and delivery of textbooks. He nevertheless reassured SECTION27 that on that date there were three warehouses in Polokwane that were filled with textbooks waiting to be taken to the five districts. He said that the first trucks were leaving from the district warehouses as they spoke and that textbooks would be taken directly to schools. He also stated delivery of textbooks would not be concluded by midnight on 15 June 2012 but undertook that delivery of all textbooks would be completed by 20 June 2012. This turned out to be untrue.

At the same time, on 15 June 2012, the Minister of Basic Education stated in the media that the deadline set in the order would be complied with that night. Again, this was not true. In the same statement, the Minister denied that teaching and learning had been compromised due to the failure to deliver textbooks, claiming that learners would have been using “old books” in the absence of their prescribed textbooks. As discussed, the reliance on “old books” was not suitable under the CAPS curriculum. On 20 June 2012, the DBE’s spokesperson, Panyaza Lesufi stated in a radio interview that the process of textbook delivery was 97% complete and that all schools would have their textbooks by lunchtime that day. This too was not true.

These statements made by DBE officials in the media continued to conflict with reports from schools being communicated to SECTION27. These reports suggested that grade 10 textbook delivery was not yet completed and the foundation phase had yet to receive books.

Catch-up plan

On 8 June 2012, the DBE filed the first catch-up plan with the court. In terms of this plan, the DBE would provide subject guides to learners during August, and, “schools that have not completed term 1 and 2 content will be expected to infuse the content from the guides in their teaching”. SECTION27 was of the view that this catch-up plan did not comply with the guidelines set out in the first court order. They were concerned that effective catch-up could not take place without extra tuition time for learners and extra content-knowledge support for teachers. The principals and teachers visited by SECTION27 and the NASGB echoed this concern.

This frustrating sequence of events with renewed, yet unmet undertakings, false statements in the media relating to state of delivery, as well as the concerns over the catch-up plan led to SECTION27 issuing a statement threatening to return to court. During this period SECTION27’s legal team had in fact contemplated bringing an application to hold the DBE in contempt of court for failing to adhere to the court order. They opted against this course of action on the basis that their main objective was to get the textbooks into schools while contempt of court proceedings are by nature more adversarial and therefore more likely to create animosity than foster cooperation. The media statement prompted an urgent meeting on 21 June 2012 between SECTION27 and DBE officials. DBE officials stated that they had up until then not had all the correct information to facilitate delivery but that this had now been rectified. They also stated that they had a direct mandate from the Minister to commit to a new delivery date. The parties therefore avoided further court action and reached a settlement that was made an order of court on 5 July 2012. This was a second court order in respect of the Limpopo textbook case.

This court order included a new date for the completion of delivery on 27 June 2012. Because this would be in the school holidays marking the end of the second term, the court order also directed that a circular be sent to principals informing them that delivery would be completed by 27 June 2012 and requesting the principals to make themselves available to accept delivery. School principals were also to be instructed to make arrangements with learners to collect their textbooks on 28 June 2012. The rationale being that learners would then have their textbooks for self-study over the school holidays. The DBE was also required to report to SECTION27 on 23 June, 25 June and 26 June 2012 on the progress of delivery of textbooks to learners in Grades 1, 2, 3 and 10. Finally, the new court order included an agreement between the DBE and SECTION27 that the first catch-up plan would be revised to include extra tuition time for learners and extra content-knowledge support for teachers.



4.5 The events necessitating a third court order⁶¹

Delivery

The DBE's progress report of 28 June 2012 indicated that delivery of textbooks to Grade 10 learners was 99% complete. The DBE also indicated on this date that delivery of textbooks to learners in Grades 1, 2 and 3 had been completed. However, these reports again conflicted with reports received from schools. The progress reports were also riddled with other inconsistencies. For example, delivery at a school would first be reported to be at 125% on one day, then 99%, then 99,7%. This did not make sense, particularly because Mr Matthews had assured SECTION27 that books were delivered in entire batches. This meant that if a school received one book, it received all its books. Anything less than this would mean service providers having to go to schools a few times to deliver books, which were both costly and time consuming.

On 28 June 2012, a meeting and joint press conference was held between SECTION27 and the DBE. Both parties agreed that the progress reports provided by DBE officials were inaccurate. It was agreed that an independent person would be appointed to verify the contents of the progress reports and to assess the status of textbook delivery to schools.

Prof Mary Metcalfe, a respected educationist and former MEC of Education in Gauteng, was appointed to conduct this verification process. Prof Metcalfe and her team commenced work on 4 July 2012. They were given two weeks to conduct an independent verification process of the progress reports. Prof Metcalfe's mandate was to determine the extent to which the delivery of textbooks to schools in Limpopo had been completed by 27 June 2012 and, at the date that the report was completed.

The report found that DBE had failed to meet the re-negotiated deadline for completion of delivery. The report indicated that on 28 June 2012 *"very few of the textbooks had reached schools"*. Of the 411 schools sampled by the task team⁶²:

- on 27 June 2012, only 15% of textbooks had been delivered to schools;
- on 3 July 2012, 48% of schools had received their textbooks; and
- on 11 July 2012, 22% were still awaiting delivery of textbooks.

The report found that orders for books were only placed with publishers in the first week of June 2012.⁶³ This finding was particularly illustrative of the history of misrepresentation that characterised much of the DBE's undertakings during the course of the case since it directly contradicted what the DBE had stated in court papers.

⁶¹Applicant's main affidavit and heads of argument in the second application.

⁶²Metcalfe Verification Report pp 43-45.

⁶³Metcalfe Verification Report p 4.

The verification team noted that a full audit of delivery could not be completed. The late ordering of textbooks had put enormous pressure on the system causing it to buckle. A large number of proof of delivery notes remained outstanding. It was not clear which schools had received their textbooks and which schools were still waiting. The report recommended that further auditing of the delivery process would need to be undertaken.⁶⁴

The report found that within the existing capacity of the DBE, it would ordinarily take an estimated six weeks to process textbooks into school-based delivery lots, generate the necessary paperwork to track delivery, transport them from the central warehouse to the district warehouses, and then deliver them to schools. To deliver the material in a two-week time frame would require a more comprehensive plan with greater resources, capacity and infrastructure than was made available.

The report further found that the 21 June 2012 settlement between the DBE and SECTION27 required delivery to, and receipt of books by schools by June 27. The DBE's response was that compliance required only dispatch to and from warehouses, it did not infer delivery to schools.⁶⁵

Following the Metcalfe report, SECTION27 continued to attempt to correspond with the DBE to ascertain whether all proof of delivery had been received from schools, and if it had verified whether the delivery process was complete. No responses were received to these letters. On 15 August 2012, the DBE was reported to have confirmed complete delivery of "all 1.2 million of the outstanding textbooks in Limpopo". Again, this conflicted with reports received by SECTION27.

SECTION27 was concerned that the DBE had failed to comply with two previous court orders. They were also concerned that the DBE had misrepresented when textbooks were said to have been procured, and when they were actually procured. Equally disconcerting was the obfuscation of the meaning of delivery. Moreover, there was the ever-present concern that time was running out. Some schools had not received textbooks by the third term. SECTION27 therefore felt it necessary that the DBE be compelled to take urgent steps to complete delivery. Against this backdrop, and pursuant to the recommendation in the Metcalfe Verification Report, SECTION27 also felt it was necessary to again conduct a verification process to determine which schools were still awaiting textbooks and to deliver them urgently.

In addition, there was the awareness that the next phase of the CAPS curriculum was to be implemented for learners in Grades 4, 5, 6 and 11 in 2013. At that stage it was not clear whether there were funds available for the procurement of these books. The DBE had ignored SECTION27's requests to provide information in this regard. SECTION27 therefore felt it was necessary to take steps to monitor the progress of textbook procurement for 2013. This would ensure that learners had access to the materials they required from the commencement of the academic year. The Metcalfe Verification Report has also recommended that clarity be provided regarding funds for 2013 textbook procurement to enable planning to commence. There was a "sense of optimism" in the province that schools would start 2013 with all the textbooks that they need.⁶⁶

The catch-up plan

On 30 July 2012, the DBE filed the second progress report. This report neither complied with the guidelines established in the first court order, nor with the undertakings given by the DBE captured in the second court order. That is, it was silent on extra tuition time for learners and content-knowledge support for teachers. The progress report continued to refer only to the publication and distribution of study guides, the content of which was to be "infused" in day-to-day teaching.



The Limpopo textbook saga captured the attention of the nation. *The Star* ran this as its Headline article on Tuesday July 17 2012.

⁶⁴Metcalfe Verification Report p 5.

⁶⁵Metcalfe Verification Report p 4.

⁶⁶Metcalfe Verification Report p 22.

According to Mr Heywood, a second catch-up plan, which was not filed with the court or referred to in the progress reports, was handed to him by Panyaza Lesufi, the DBE spokesperson, in the car park of the ETV studios after a television interview in which they both appeared. Mr Lesufi told him that this catch-up plan was the “real catch-up plan”, and that it varied greatly from the catch-up plan filed with the court.

By the third progress report at the end of August 2012, the notion of a “spring boot camp” emerged but there was no detail as to what it would entail or if it would happen given that such a camp would necessitate negotiation and buy-in from the teacher unions.

Another concern was that the promised subject guides had not been delivered. In terms of the catch-up plan filed with this Court on 8 June 2012 these were to be delivered by 31 August 2012. The third progress report indicated that these study guides were still not available to learners. Given that the DBE was struggling to deliver textbooks, it was unlikely it would be successful in delivering the study guides. The DBE had at some point also suggested that study guides would be available online. This was, however, not feasible considering that many schools did not have electricity, computers or internet access.

On 7 August 2012, the DBE presented its new “10 point catch-up plan” to the National Portfolio Committee on Basic Education. This was the second catch-up plan that had been informally handed to Mr Heywood by Mr Lesufi. As it had never been filed in court in terms of the court order, its status remained unclear. This plan referred to spring vacation camps, the establishment of television viewing centres for grades 10 and 12, and DVD content supplied by the learning channel. The 9 members of the Portfolio Committee rejected the plan and found that it was lacking in both urgency and detail, and that it was “an insult to Limpopo learners”.⁶⁷

The main concern with this plan was that it sought to fit Grade 10 learners requiring catch-up into enrichment programmes designed for Grade 12 learners. The criticism was that the nature and purpose of these programmes for Grade 10 and Grade 12 were markedly different from each other. The plan failed to recognise and address the extraordinary measures required to assist Grade 10 learners who have been without textbooks for over half of the academic year. The plan also continued to fail to comply with the guidelines established by the first court order. On 14 August 2012, the new catch-up plan was again presented to the Portfolio Committee despite no substantial changes. Surprisingly the Portfolio Committee approved it.

Thus, prior to filing the final application, the DBE continued to appear to be inconsistent as to the nature and content of its catch-up plan and its implementation. Moreover, study guides had still not been delivered to all schools. A catch-up plan was meaningless without books. SECTION27 was also mindful of the fact that most of the 2012 academic year had elapsed and did not believe that meaningful catch-up was possible for the remainder of the school year for Grade 10s. The idea of extending Grade 10 catch-up into 2013 emerged.

In the original application the applicants did not seek catch-up in respect of learners in the foundation phase. The reason for this was that they did not believe that a catch-up plan over six months could accommodate the even and responsive pace of teaching and systematic concept development required for learners in this phase. However, given that learners in the foundation phase had missed out on almost a year of CAPS tuition, SECTION27 was of the view that it had become necessary for the development and implementation of a catch-up plan into 2013 for learners in the foundation phase as well.

4.6 A third court order and the second Kollapen judgment

Based on the combination of old concerns remaining unaddressed, together with new concerns emerging, SECTION27 decided to return to the court. A second application was filed on 10 September 2012. This application sought an order declaring that the DBE:

- failed to comply with the court orders of 17 May 2012 and 5 July 2012;
- should conduct an independent verification process to determine which schools in Limpopo had received textbooks for the 2012 academic year 2012;
- provide all outstanding textbooks to learners in Grades R, 1, 2, 3 and 10 in Limpopo schools on an urgent basis;
- complete the delivery of textbooks for all grades for the 2013 academic year by no later than 9 January 2013;

⁶⁷A Makinana “Parliament rejects Limpopo catch-up plan” *Mail & Guardian* 7 August 2012

- submit monthly reports to court on the process of procurement and delivery of textbooks for 2013 from 31 October 2012 until the delivery of textbooks for 2013 to all learners in Limpopo. This was clarified further during the hearing to say that reports must require progress reports in procurement and delivery only for Grades 4, 5, 6 and 11, who would be starting the CAPS curriculum in 2013.
- develop catch-up plans for Grade 10 learners that are in compliance with the first and second court orders. Such a plan must therefore include extra tuition for learners and content knowledge support for teachers
- develop a catch-up for learners in the foundation phase, and to lodge such a plan to this Court by 31 October 2012; and
- pay a punitive costs order.

The DBE again opposed this application and in (an unnecessarily) voluminous 650-page answering affidavit set out their case.⁶⁸ The affidavit contained an even more extensive elaboration of the difficulties pertaining to non-delivery than did the first answering affidavit. The DBE averred that because funds were not available within the LDoE, National Treasury had to be approached to pay for a host of services, including the procurement of textbooks. It also averred that the book unit within LDoE normally responsible for the procurement of textbooks had been dismantled when the tender was allocated to EduSolutions. Therefore, when the DBE took over the management of the LDoE it “had to reinvent the wheel” as far as procurement of textbooks was concerned.⁶⁹ The procurement was delayed by the finalisation of several cases against the DBE. EduSolutions had instituted a case against the DBE for contractual performance. This case was eventually dismissed. Several other cases had also been instituted by book publishers. The DBE alleged that these had to be resolved before procurement could take place. The DBE also set out several reasons for the shortages in delivery when this process was finally initiated. These reasons ranged from under-ordering or over-ordering of textbooks by schools, to requested textbooks not being available with publishers.

The DBE denied that there was a need for independent verification stating that, “An independent verification will just be a waste of public funds”, which it submitted it could “ill afford”. The DBE suggested that other channels such as reporting of shortages to district offices or the use of call centres would suffice.

The DBE’s opposition to the catch-up plan resurfaced. It stated “that a detailed catch-up plan is required is misplaced because that calls for a ‘one size fits all’ plan is impractical. It should be remembered that the plan may differ not only from school to school, area to area but even from teacher to teacher or class to class”.⁷⁰ The DBE averred further that certain books such as the foundation phase workbooks were CAPS compliant and sufficient for teaching and learning. The DBE also averred that teachers had received training in respect of the CAPS curriculum. These arguments contradicted both the findings in the first court order, and the undertaking given by the DBE that led to the second court order. It also did not make sense in light of the fact that the DBE had developed a catch-up plan, notwithstanding its shortcomings, which was presented to and accepted by Parliament.

With respect to the 2013 textbook procurement, the DBE alleged that it was on track to deliver textbooks for that academic year. The DBE stated that all requisitions were received from schools and that all orders had been placed.

Finally, given that the DBE believed that there was no necessity for continuing a catch-up plan into 2013 and that delivery for that year was on track, it was of the opinion that no further action by the court on these issues was necessary.

The application was heard on 2 October 2012. Before court started the parties attempted to resolve the matter. An agreement was reached on some of the issues. The DBE undertook to ensure the delivery of all outstanding textbooks by 12 October 2012. It agreed to timeframes for the delivery of textbooks for the 2013 school year. The deadline for the delivery of textbooks to Limpopo schools for Grades 4, 5, 6 and 11 was 15 December 2012. It also agreed to file further reports on the progress of the catch-up plan, as well as reports on the progress of the delivery of the textbooks for the 2013 school year. The issues that the DBE continued to oppose included: the declaratory relief stating that the DBE had failed to comply with the first two court orders, the necessity of an independent verification and the issue of costs.

On 4 October 2012 Judge Kollapen handed down his second judgment in the Limpopo textbook case. He found that an order declaring that the DBE had failed to comply with two previous court orders was indeed necessary. He said:

⁶⁸This answering affidavit was served late on the Friday afternoon prior to the application being heard. It was also filed out of time.

⁶⁹See DBE’s answering affidavit in the second application para 30

⁷⁰See DBE’s heads of argument in second application para 11.10.14

SOUTH AFRICA

Limpopo textbooks: Another judgment, another lesson

GREG NICOLSON SOUTH AFRICA 05 OCT 2012 02:42 (SOUTH AFRICA)



<http://www.dailymaverick.co.za/article/2012-10-05-limpopo-textbooks-another-judgment-another-lesson/#.UdQiy04rzdK>

[T]he deadlines for the delivery of 15 June and then 27, were dates that the respondents had offered and when they were so offered, there was the expectation that those deadlines would be met. That they were not met is unfortunate and distressing, particularly in a country where educational competence in areas of numeracy and literacy lack far behind international standards and in a province where numeracy/literacy levels lack considerably behind national standards.

He further found that there was non-compliance in respect of both delivery of textbooks and the catch-up plan. In terms of the latter he said:⁷¹

There is some dispute whether there was non-compliance with the catch up plan. My view is that an effective catch up plan could hardly be possible under the circumstances where textbooks remain undelivered and on this score alone, that a catch up plan without all text books in place, was hardly what the order of this court of 17 May and 5 July contemplated. In addition, the catch-plan and plans that were produced, were regarded as unsatisfactory, not only by the applicants but also by the Portfolio Committee on Basic Education who reportedly described the plan as poor and sloppy.

On the issue of the necessity for an independent verification report, Judge Kollapen was concerned about its "practical effect". He was of the opinion that since the state had undertaken to complete delivery by 12 October 2012, verification would occur very close to the end of the year and its value would therefore be diminished. He took the view that other processes such as the call centre should be utilised to deal with textbook shortages. No relief was therefore granted in respect of the independent verification.

⁷¹Section 27 & Others II (Case no.24565/2012, 23 December 2012) p 6

On considering whether or not to make a punitive cost order against the state, Judge Kollapen considered whether the applicants were justified in launching the application. He acknowledged that the DBE was dilatory in responding to letters. He said:⁷²

The failure to respond to letters, not only militates against the basic values and principles governing public administration found in section 195... In addition, it must be arguable that a proper and substantial response to the applicants' queries may have led to a different trajectory in these proceedings.

He also considered whether the applicants had achieved a measure of success justifying a cost award, and acknowledged that, "a significant measure of success" was produced by the institution of the application. In particular, he referred to the fact that it produced information regarding the status of delivery, which was previously not made available, it also resulted in the DBE expediting delivery to many schools. Judge Kollapen nevertheless chose not to award damages on a punitive scale on the basis that it could not be said that the "respondents did nothing post the orders of this court of 17 May and 5 July".⁷³

4.7 Textbook delivery since the third court order

The deadline for the delivery of textbooks for Grades 4, 5, 6 and 11 to Limpopo schools for 2013 was 15 December 2012. On 14 December 2012, SECTION27 issued a statement, a paragraph of which stated:⁷⁴

[M]any schools have reported that they received their full complement of textbooks for 2013 for Grades 4, 5, 6 and 11, some schools continue to report outstanding textbooks. Nonetheless we commend the Department of Basic Education for its efforts to comply with the Court order and to ensure that this year's crisis is not repeated in 2013.

Thus, SECTION27 noted that there had been substantial delivery in terms of the court order. At the same time they continued to have concerns. These pertained to schools in Limpopo still waiting for textbooks in other grades. Also where schools did not receive textbooks in terms of the court order, there were concerns that this would affect "top-up" orders for 2013 since there is nothing to top-up at certain schools. Nevertheless, SECTION27 was of the view that by and large its objective of ensuring delivery of textbooks had been reached. As media coverage continues to suggest however, the issue of schools not receiving textbooks in Limpopo and nationally remains with us, as does the need for ongoing civil society vigilance and activism.⁷⁵

4.8 Attempts to undermine and obstruct the applicant's case

The narrative of the case as a "waste of time"

Throughout the litigation, the DBE adopted a narrative, characterising the litigation as a "waste of time". This was an underlying thread in the DBE's court papers opposing the original and second application. Yet, the declarator in the second Kollapen judgment that the DBE had failed to comply with the two previous court orders, as well as Judge Kollapen's comments on the necessity of litigation affirmed the decision of SECTION27 to persist with litigation until delivery had been completed.

⁷²Section 27 & Others IIp 10

⁷⁶DBE's answering affidavit in the first application para 133.

⁷⁷See Department of Basic Education Press Statement "Response to the order of the North Gauteng High Court delivered on 4 October 2012 on the matter between Section 27 et al and the Minister of Basic Education et al." 7 October 2012

⁷³Section 27 & Others IIp 12

⁷⁴Press Statement Section 27 Update on Textbook delivery for 2013 www.SECTION27.org.za/2012/12/14/update-on-textbook-delivery-for-2013/ 14 December 2012

⁷⁵As part of an ongoing initiative by civil society to monitor textbook delivery, SECTION27, together with the Legal Resources Centre, the Centre for Child Law, The Centre for Applied Legal Studies and the Education Law Centre have placed advertisements advising schools to report book shortages so that the state of delivery for all learner teacher support materials (LTSM) in all provinces for 2013.

FACTS ABOUT THE LIMPOPO TEXTBOOKS HIGH COURT RULING: DONT BE MISLED.

STATEMENT BY THE DEPARTMENT OF BASIC EDUCATION REGARDING THE 2012 PROCUREMENT AND DELIVERY OF GRADE 10 TEXTBOOKS – RESPONSE TO THE ORDER OF THE NORTH GAUTENG HIGH COURT DELIVERED ON THURSDAY, 04 OCTOBER 2012 ON THE MATTER BETWEEN SECTION 27 ET AL AND THE MINISTER OF BASIC EDUCATION ET AL

The Department of Basic Education wishes to state that the decision by Section27 to litigate on the perceived non-delivery of Grade 10 textbooks, which were reported as shortages by school in Limpopo, was unnecessary and a waste of valuable time and resources.

Section27 had hoped that the North Gauteng High Court would grant an order against the Department and the Limpopo Department of Education for failing to comply with the two previous court orders, directing that:

- the delivery of Grade 10 textbooks for 2012 be completed by no later than 31 October 2012; to the procurement and delivery of textbooks for Limpopo schools for 2013 to be completed by no later than 9 January 2013
- the DBE report monthly on its progress in complying with this deadline; and
- there should be an independent verification process to be undertaken of the 2012 delivery process.

In fact, the Court did not attribute fault to the Department for the incomplete nature of the delivery of books to Limpopo. The Court indeed accepted that it was not the fault of the Department.

While there has been considerable coverage in the media regarding the so-called failure of the Department to meet the delivery targets, there has been little or no effort on the part of the media or indeed by Section27 to acknowledge the enormous nature of the task. In fact, it is important that the media should inform the public of the steps taken by the Department to procure textbooks not only from within South Africa, but also from beyond our borders. The facts are –

- 92% of Grade 10 textbooks (equivalent to 1,027,585 textbooks) were procured and delivered to schools in Limpopo around June/July 2012;
- the remaining 8% of Grade 10 textbooks (equivalent to 89,350 textbooks) constitute the shortages that were reported by schools around August 2012; and
- the reported shortages were due to circumstances beyond the control of the Department – a fact recognized and accepted by the North Gauteng High Court. These textbooks were either in short-supply or not printed at all by the publishers.

The Department in fact, conceded to the Court that there was a minimal percentage of Grade 10 textbooks still to be delivered to schools; and that the DBE would complete the outstanding deliveries by 12 October 2012. Indeed, the Department had undertaken without being compelled to do so, to provide to the Court with an affidavit by 17 October 2012, confirming that the deliveries will be completed. The Court accepted the Department's commitment. Thus Section27's application for an independent verification process was denied. This decision will save the Department millions of rands that can be better utilized.

In addition, it is important to inform the public that the Department's 2013 LTSM procurement process for Limpopo schools is already at an advanced stage. It is expected that all deliveries of CAPS-aligned textbooks will have taken place by 15 December 2012 for Grades 4, 5, 6 and 11.

Any suggestion made by Section27 of victory from the Court judgment, is an attempt to mislead the public. Section27's claim of victory is indeed hollow. The Department will continue to work towards normalizing and stabilizing the situation in Limpopo, a situation that was thrust upon the Department, and indeed will continue to ensure that the processes around the procurement and delivery of learning and teaching support materials (LTSMs), the responsibility of provincial education departments, are strengthened to prevent this unfortunate situation from re-occurring.

We call on all members of society, including Section27 and its allies, to work with the Department, rather than against it, in our quest to realize the goal of providing a textbook for every child by 2014.

Issued by the Department of Basic Education
Toll Free: 0800 202 933
www.education.gov.za

Textbook delivery:

<http://www.education.gov.za/Newsroom/MediaReales/tabid/347/ctl/detail/mid/1930/ItemID/3495/Default.aspx>

Revision Plan:

<http://www.education.gov.za/Learners/RevisionPlan2012/tabid/794/Default.aspx>



basic education

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Basic Education
REPUBLIC OF SOUTH AFRICA

A recalcitrance and defiance on the part of the DBE to cooperate with SECTION27 and its partners was also evident in other attempts to undermine the litigation in the media and during the court process. One such example is that of the DBE accusing SECTION27 during the second application of instigating the litigation as a fundraising stunt.⁷⁶ Another example was the defiant and even aggressive full-page advertisement taken out in the Sunday papers following the second judgment at a point when it appeared that the matter had been more or less amicably resolved. It began by stating that:⁷⁷

The Department of Basic Education (DBE) wishes to state that the decision by SECTION27 to litigate on the perceived non-delivery of Grade 10 textbooks, which were reported as shortages by school[s] in Limpopo, was unnecessary and a waste of valuable time and resources.

The advertisement goes on to claim that the court did not attribute fault to the DBE and in fact accepted that it was not the DBE's fault. At best this was an incorrect reading of the judgment, at worse it was a deliberate distortion of it. The Court did not state that there was no fault on the part of the DBE. Judge Kollapen expressly made no finding as to fault. In this regard the court order states that, "the court notes the justification for non-compliance offered by the [DBE] but makes no finding with regard to it given that these are not contempt proceedings."⁷⁸

The advertisement then charges the "considerable media coverage" and SECTION27 with failing to acknowledge the significant scale of the task of delivery. Yet acknowledging some of these challenges, SECTION27 contemplated instituting contempt proceedings against the DBE, prior to the second court order and again prior to instituting the final application but opted not to pursue the contempt of court route. Judge Kollapen noted this decision as being "unusual".⁷⁹ The reason why SECTION27 opted against such an overtly adversarial route was that its main objective was not to embarrass the DBE but rather to compel delivery. It was of the opinion that contempt proceedings would not help learners.

The department then goes on to charge SECTION27 with "misleading the public" if it claims the judgment as a victory. The advertisement also states: "We call on all members of society, including SECTION27 and its allies, to work with the department, rather than against it." Again, this statement fails to acknowledge that prior to instituting litigation, SECTION27 had made several attempts to encourage compliance with the court order before returning to court.

The placement of the advertisement has been widely criticised. According to media reports it is estimated to have cost R900 000. The Deputy Minister of Finance Nhlanhla Nene is quoted to have said:⁸⁰

As far as looking into whether the ad was necessary is for the auditor general to decide on. However, we could have set the record straight in a different way instead of putting out the advertisement. The way to have handled it was to deliver those textbooks.

Harassment and intimidation

A history of the Limpopo textbook case is incomplete without a reference to incidents of harassment and intimidation that have dogged the litigation since it began. On 8 March 2012, SECTION27 lodged a formal complaint to the office of the Public Protector against officials of the LDoE for issuing threats, and for committing other acts of intimidation against teachers, principals and in some instances even learners. There had been allegations of principals having had their job security threatened, or fearing disciplinary proceedings where they had accepted the assistance of SECTION27 to attempt to improve conditions at their schools.

⁷⁶DBE's answering affidavit in the first application. para 133

⁷⁷See Department of Basic Education Press Statement "Response to the order of the North Gauteng High Court delivered on 4 October 2012 on the matter between Section 27 et al and the Minister of Basic Education et al." 7 October 2012

⁷⁸Section 27 & Others Itp 6

⁷⁹Section 27 & Others Itp 6

⁸⁰A Fazel "Education ad unnecessary, just deliver textbooks." www.mg.co.za/article/2012-10-09-minister-dont-advertise-just-deliver-those-textbooks 9 October 2012.

Below is an extract from an e-mail received by SECTION27 from an anonymous teacher in Limpopo as late as 14 August 2012.

As an educator in Limpopo, I was deeply saddened and confused about what I hea[r]d today, the 14th August 2012, when I heard Panyasa Lesufi lying again on the Public broadcaster saying that textbooks were delivered to all schools in Limpopo. I can assure you that as far as I know, no single books were delivered to primary schools in Sekhukhune area up to now. You can come

and verify for yourself at any primary school in Sekhukhune District. Books were only delivered to secondary schools. When we ask the provincial authorities, they tell us it is not in their hands but in the hands of the basic education department.

I don't know how can they now talk about catch-up plans when textbooks are not yet delivered. The Minister of Education came to our district and threatened us not to talk to the media about the book shortages if we value our careers. Even now I don't want my name to be known cause I will risk losing my job.

I therefore appeal to you people to help us. We don't know who to turn to.

Yours in Education.
Concerned Educator.

At the height of the public pressure surrounding the Limpopo textbook case SECTION27 also received reports of principals being forced to sign delivery slips acknowledging receipt of delivery at their schools even though it had not been complete.

What had been particularly disturbing in this context are the circumstances that led to Mr Hlongwane, the school principal of the second applicant, to attend court in the final application on the basis that he may have to give evidence that he had not provided SECTION27 with a mandate to act on his behalf.

In the answering affidavit of the final application the DBE alleged that Mr Hlongwane had distanced himself from the application. The DBE alleged that members of the second applicant's school governing body and not Mr Hlongwane had been working with SECTION27 in the Limpopo textbook case. They further suggested that contrary to what was alleged by the applicants in the second application, the second applicant had received delivery of textbooks. A confirmatory affidavit from Mr Hlongwane was attached.

SECTION27's response alleged that since the main application was filed Mr Hlongwane had been continuously victimised by the LDoE and DBE officials. Specific incidents included: Mr Hlongwane being excluded from a principals' conference because he was a party to the litigation against the DBE; and his wife, a principal at another school also being harassed. There was also another incident following his attending of a meeting called by the Minister of Basic Education. In this instance, Mr Hlongwane was called by an official demanding an explanation as to why he did not identify himself. SECTION27 alleged further that Mr Hlongwane informed them that he no longer wanted to be part of the proceedings for fear of being intimidated.

The DBE brought an application to have these allegations struck from the court papers. They also brought Mr Hlongwane to court to testify if necessary. The negotiations and part-settlement of the case on the day meant that this issue of intimidation was not ventilated in court or pursued further.

It remains concerning, however, that school principals, members of SGBs and even learners may refrain from raising issues or seeking assistance because they fear victimisation or harassment when they do take a stand.

Section 27 calls for probe into textbook fraud

October 6 2012 at 03:13pm

By SAPA

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➔ Textbook shortage not a scandal - Angie

Johannesburg - Allegations of fraud and corruption surrounding the textbook debacle in Limpopo must be investigated, Section 27 said on Saturday.

"The crisis... occurred in the context of allegations of fraud and corruption," executive director of the rights group, Mark Heywood said.

He said the report of a presidential task team into the non-delivery of the textbooks "confirms these allegations".

"We maintain that it is essential that these allegations are fully investigated and that where necessary criminal proceedings are instituted and stolen monies recovered," said Heywood.

"In particular, the report confirms that there must be an investigation into the Limpopo Department of Education's contract with EduSolutions."



Photo: Itumeleng English

<http://www.iol.co.za/news/south-africa/limpopo/section-27-calls-for-probe-into-textbook-fraud-1.1397804#UdQXr44rzdk>

4.9 Unanswered questions

The litigation initiated by SECTION27 sought to ensure that the learners' right to a basic education be realised by the delivery of textbooks. The limiting nature of this litigation meant it could not directly address the issues of dysfunctionality and corruption within the LDoE, which ultimately resulted in learners not receiving their textbooks. At the same time this dysfunctionality and corruption have had a direct impact on learners' rights. Finding mechanisms to address these issues is therefore integral to realising learners' rights.

At the centre of the storm surrounding the Limpopo textbook case are the allegations of corruption in the EduSolutions contract. The allegations of irregularities are numerous. Some of these include that the procedures set out in the PMFA was not followed in awarding the tender, and that members of the Bid Adjudication Committee were unduly influenced in awarding the tender to EduSolutions. There are further allegations that when attempts were eventually made by the Bid Adjudication Committee to cancel the award, senior officials overrode these attempts. There are allegations of irregular approval of budget increases to the original contract with EduSolutions, as well as premature payments of 70% of the management fee being paid within 30 days of the commencement date of the contract. The widespread media interest in EduSolutions in the Limpopo textbook case also resulted in broader speculation of similar corrupt practices in other provinces such as in Mpumalanga where it is also alleged that EduSolutions was overpaid for distribution of learner materials. There has also been widespread media speculation of whether EduSolutions had been favoured in the awarding of government tenders because of close links between EduSolutions and government officials, including the Director General.⁸¹

⁸¹See S Evans and J Erasmus "How Masemola favored EduSolutions" www.mg.co.za/article/2012-07-19-how-mec-favoured-edusolutions 20 July 2012.

In June 2012, SECTION27 in coalition with civil society partners, the Khulumani Support Group, the CALS and the NASGB requested that non-governmental organisation Corruption Watch initiate an investigation into the appointment of EduSolutions by the LDoE and other PODs.⁸² Included in the letter are the allegations made by whistle-blower Solly Tshitangano. The DBE court papers also refer to an ongoing investigation into the allegations of irregularities in the EduSolutions contract. The nature of these investigations or their outcome is, however, not clear. EduSolutions has repeatedly sought meetings with SECTION27, but SECTION27 declined the requests.

The stockpiling and dumping of textbooks also featured strongly in the media as the Limpopo textbook case unfolded with much mystery and intrigue, including the official opposition party the Democratic Alliance, claiming on more than one occasion that it had uncovered a stockpile of dumped textbooks.⁸³ The Metcalfe report also notes the existence of warehouses of stockpiled textbooks from previous years - not textbooks published under the CAPS curriculum for 2012. The report also notes the allegation made in the DBE's answering affidavits of stockpiling being linked with EduSolutions inflating the number of books required in previous years to increase commissions. The report recommends that these allegations be investigated by a "competent authority".⁸⁴

Between July and September 2012, the media also regularly reported on dumped books being found in various locations throughout Limpopo. The DBE papers proffer two different and unrelated reasons for the dumping of textbooks. First they allege that LDoE officials, disgruntled by the termination of the EduSolutions contract sabotaged the delivery process by dumping textbooks. No clear evidence is provided for this, or of what steps were taken to address the matter.⁸⁵ In the same papers reference is made to textbooks that were dumped in a river in the Giyani district in Limpopo. It is alleged that the matter was investigated and it was determined that an official purported to use a vehicle for delivery of textbooks, but then used it for his own private use, and dumped the textbooks on each occasion. It is further alleged that this official was arrested and charged, and that the matter is being investigated.⁸⁶ The DBE's court papers do not clarify if these averments would account for all the textbooks dumped in the various locations in Limpopo, and what if any, investigation is underway in respect of allegations that some of the dumping was done by disgruntled LDoE officials.

The Metcalfe verification report in turn instigated the appointment of the Presidential Task Team on 4 July 2012 to investigate the delay in the delivery of textbooks. The report of the Presidential Task Team, published on 5 October 2012, made several noteworthy findings and recommendations. Some of the policy recommendations from this report are discussed later. The report also recommended that the Public Service Commission (PSC) investigate the roles of several high-ranking officials who failed to procure and deliver textbooks on time, and/or their respective roles in the alleged non-compliance with Supply Management and PFMA in the awarding of the contract to EduSolutions. These officials include the Director General, the Head of the Department of Education, the Chief Financial Officer in the LDoE, and the Head of Department of Treasury in Limpopo.⁸⁷ By May 2013 it was unclear to what extent, if at all, these recommendations have been taken forward.

Many unanswered questions appear to surround the widely publicised stories of the EduSolutions tender, the dumping and stockpiling of textbooks, and the accountability of high-ranking officials. The absence of full and proper investigations by competent authorities into these issues is therefore perturbing because of the direct impact that they have had on education delivery, and more importantly the necessity to prevent it from occurring ever again.

⁸²See Corruption Watch's series of articles on the education crisis: <http://www.corruptionwatch.org.za/content/unpacking-sa-s-education-crisis---part-one>.

⁸³See for example SAPA "More school textbooks dumped in Limpopo" www.mg.co.za/article/2012-07-10-more-textbooks-dumped-in-limpopo-da 10 July 2012

⁸⁴Metcalfe Verification Report pp 65-66.

⁸⁵DBE's answering affidavit in second application para 184.8.

⁸⁶See DBE's answering affidavit in second application paras 229-233.

⁸⁷The Presidency Report of the Presidential Task Team Established to Investigate the Non-Delivery and/or Delays in the Delivery of Learner, Teacher, Support Material (LTSM) in Limpopo Schools (2012).

5 LESSONS AND LEGACIES FROM THE LIMPOPO TEXTBOOK CASE

5.1 Strategies

To ensure that the learners in Limpopo would ultimately receive textbooks, SECTION27 relied on a multipronged strategy that was relentless and unabating in both its legal and extra-legal components.

Legal strategy

Certain key features characterised SECTION27's legal strategy. These include: (a) the establishment of a paper trail of inconclusive correspondence with the DBE, (b) the creation of a unique and innovative legal remedy in the form of the catch-up plan, and (c) a supervisory order to monitor compliance with the court order. Underlying this strategy was the dogged persistence of SECTION27's legal team in ensuring that textbooks were delivered to schools and that learners would not be disadvantaged by the ensuing delays.

SECTION27 created a paper trail that included formal letters of demand, requests for further information, and letters and e-mails confirming any and all undertakings given by officials of the DBE. This paper trail would serve as a record of attempts to resolve the dispute prior to resorting to litigation. It also proved critical in illustrating to the court that there was a history of misrepresentation on the part of the DBE, as well as lack of responsiveness to adequately address or respond to the applicants' requests. This paper trail evidencing misrepresentations, lack of responsiveness and non-compliance with undertakings and court orders would also provide the basis for a supervisory order that was eventually granted by the court.

Section 38 of the Constitution provides that anyone with standing "has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights". Section 172 of the Constitution provides that a court deciding a constitutional matter "must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency". In addition the court may "make any order that is just and equitable".

The legal team which took part in the Limpopo textbooks cases on behalf of the applicants



Muzi Sikhakhane



Zeenat Sujee



Nthabi Poee



Adila Hassim



Nikki Stein

In this regard the Constitutional Court held in *Fose v Minister of Safety and Security*⁸⁸ that courts may be required to fashion new remedies where existing traditional remedies do not provide sufficient redress. The relevant consideration is what steps are required to ensure the effective protection and enforcement of fundamental rights in the circumstances of each case.

⁸⁸1997 (3) SA 786 (CC) para 19.

The applicants sought a declarator that the rights of learners had been violated. They also sought an order mandating the delivery of textbooks in specific grades. More unusual was the relief mandating the DBE to develop and implement a catch-up plan to ensure the enforcement of the learners' rights. This was based on expert advice that the only practical way to catch up lost syllabus was to allocate extra time for the teaching and learning process, and to revise the entire syllabus. Thus, this remedy was tailor-made to attempt to place the learners in the position they would have been had the textbooks being delivered timeously.

The applicants then also requested the court to exercise supervisory jurisdiction over the court order through the imposition of a structural interdict. Thus, the request that the court order contain a provision requiring that the catch-up plan be lodged with the court. The applicants further requested that the DBE report to the court as to progress of the delivery and the catch-up plan.

In the TAC case the Constitutional Court did not include a structural interdict in the court order as it believed that the government would comply with the order. It stated:⁸⁹

In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other such relief granted by a Court in a particular case. We do not consider, however that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe it will not do so in the present case.

Roach and Budlender argue, however, that supervisory orders should not be limited to those instances where the court believes wilful non-compliance will ensue but also, "where the consequences of even a good-faith failure to comply with the court order are so serious that the court should be at pain to ensure effective compliance".⁹⁰

In neither judgments did Judge Kollapen find that the non-compliance was wilful. Indeed he acknowledged the difficulties experienced by the DBE following the section 100 intervention, including the absence of any systems for textbook procurement once the EduSolutions contract had been cancelled. Despite this, Judge Kollapen did, however, acknowledge the ongoing reticence in the actions of the DBE to effectively cooperate with the applicants. Therefore, considering the dire consequences that could arise from non-compliance with a court order, he granted the relief sought by the applicants in imposing a supervisory order.

Included in the first supervisory order was also relief that enabled the applicants to return to court on the same papers, or on supplemented papers to secure further relief if need be. When the DBE failed to comply with the first court order, SECTION27 relied on this aspect of the relief by first threatening to return to court on 21 June 2012. This produced a settlement agreement that was later made an order of court. Dissatisfied with progress in terms of both delivery and a catch-up, SECTION27 again relied on this provision when it filed a second application in September 2012.

Extra-legal strategies

Mobilisation and raising of rights consciousness

In the introduction it was noted that SECTION27 operates within the tradition established by TAC and the ALP by combining legal and extra-legal strategies in its rights-based advocacy.

A notably different feature from HIV/AIDS activism (in the Limpopo textbook case) is the absence of a mass-based organisation like TAC steering the litigation. SECTION27 could therefore not rely on strategies and tactics such as marches and other forms of protest action.

The litigation in the Limpopo textbook case did, however, act as a catalyst in the formation and cementing of the relationship with NASGB. Mark Heywood describes an event at the first court hearing on 15 May 2012, when, during an adjournment of a few hours, about 50 members of NASGB and SECTION27 "trooped off" to a nearby office and held an impromptu workshop on issues ranging from the state of the nation to the meaning of the right to basic education. This was followed by a joint demonstration outside the court. According to Mr Heywood, this was vital in building a relationship of trust between the two organisations.⁹¹

⁸⁹TAC para 129

⁹⁰K Roach & G Budlender "Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable" *SALJ* (2005) 333.

⁹¹This was particularly important, as traditionally NASGB has been a close political ally of the Minister of Basic Education.

The partnership that developed between NASGB and SECTION27 during the course of the Limpopo textbook case was crucial in the formation of the informal communication and information network that would provide “on the ground information” relating to the status of textbook delivery. The legal team of SECTION27 relied on information received from schools, teachers, and parent members of school governing bodies to monitor compliance with undertakings given by the DBE, and to monitor compliance with the court orders. This proved to be an informal but nevertheless reliable system of verification against which all DBE undertakings and reports were assessed. It was crucial in establishing whether or not there had been compliance.

A media strategy

The effective role of the media in generating public awareness in the Limpopo textbook case should not be underestimated. SECTION27 first became aware of the issue of the non-delivery of textbooks through media reports. Later, the media reported developments in the litigation, it exposed issues of corruption arising out of the textbook crisis and it reported on the mounting public pressure to hold government accountable for the failure to deliver.

SECTION27 maintained this media interest through a sustained media campaign that relied on both traditional and social media. During the course of the litigation and beyond, SECTION27 regularly released press statements, held press conferences, wrote opinion pieces and provided updates on the case through social media.⁹²

The fact that the litigation was kept in motion constantly helped sustain media interest in the case. This kept the public attention and helped apply pressure on government. Mr Heywood noted two events in particular that contributed to the rising media tide in the Limpopo textbook crisis and helped keep the crisis at the centre of the public’s attention.

In June 2012, SECTION27 and the DBE held two joint press conferences at the offices of SECTION27. The first press conference was to announce the settlement agreement between the parties.⁹³ This settlement agreement was later made a court order and became the second court order. The second press conference was to announce the Metcalfe inquiry and the dispute between SECTION27 and the DBE over whether textbooks had actually been delivered.⁹⁴ Both these press conferences were well attended by journalists and one was even carried live on eTV. At the second press conference, the Director General of Basic Education was also present and subjected to a media grilling over whether the DBE was telling the truth about delivery of textbooks.

These events helped focus the media’s attention on the issue of non-compliance with the court orders and the findings of Metcalfe inquiry. This led to a public outcry over the issue of accountability. Several calls for the Minister and Director General of Basic Education to step down ensued. This intense media scrutiny forced the national government to enter the fray and address the Limpopo textbook crisis. For example, at the ANC’s policy conference in June 2012, Minister Jeff Radebe admitted that government’s failure to deliver textbooks to Limpopo schools was “a national shame”.⁹⁵ In early July 2012, President Zuma, under increasing public pressure, announced the appointment of the task team to look into the causes of the delays.

Investigative journalism focused on the EduSolutions tender.⁹⁶ This has already been discussed to some extent. The media probed why EduSolutions had been awarded the tender despite early allegations of irregularities. It also investigated the possibility of potentially corrupt relationships. Media images exposing the stockpiling and dumping of books fuelled public scrutiny.

⁹²The SECTION27 twitter account, for example, provided regular updates of the case including during court proceedings.

⁹³Press statement Joint Statement by Department of Basic Education and SECTION27: Settlement Agreement Reached on the Provision of Textbooks to Learners in Grades R, 1,2,3 and 10 in Limpopo Textbook 21 June 2012. www.SECTION27.org.za./2012/06/21/settlement-agreement-reached-on-provision-of-tetxbooks-to-learners-in-grades-r-1-2-3-and-10-in-limpopo-province/ 21 June 2012

⁹⁴Press statement SECTION27 statement in Limpopo textbook crisis & state of delivery by deadline of 27 June www.SECTION27.org.za./2012/06/28/SECTION27-statement-on-limpopo-textbook-crisis-state-of-delivery-by-deadline-of-27-june/ 28 June 2012

⁹⁵S Masombuka, P Ratsatsi and A Chauke “Textbooks Crisis a National Shame” www.timelive.co.za/thetimes/2012/06/28/textbooks-crisis-a-national-shame 28 June 2012.

⁹⁶See for example B Nkosi & V John “EduSolutions boss: We gave Limpopo what it wanted” *Mail & Guardian* 19 October 2012.

5.2 Lessons and legacies of the Limpopo textbook case

The two judgments in the Limpopo textbook case confirmed that textbooks were an essential learning tool and formed an integral part of the right to basic education. As such, the judgment contributed to the normative development of the jurisprudence on the right to basic education. Most significantly, the tenacity and persistence of SECTION27's legal and extra-legal strategies ensured the delivery of textbooks to schools for learners being introduced to the CAPS curriculum in 2012 and 2013. But, the case's legacy has revealed the potential for ancillary benefits that extend beyond the direct gains in the case.

Litigation beyond textbooks

Towards the end of 2012, SECTION27 acting on behalf of NASGB and the school governing bodies of more than ten schools in Limpopo initiated a case requiring that government upgrade sanitation facilities at schools across Limpopo. Government responded by developing a "plan" for the upgrade of sanitation facilities at Limpopo schools in terms of which 215 Limpopo schools will receive new sanitation facilities by 30 June 2013.

Early reports are that construction at some schools has already begun. In addition, the DBE has committed itself to a broader plan to address the sanitation needs of all of the schools in Limpopo, 80% of which are still using basic pit toilets that are unhygienic and unsafe.

The government's swift and constructive response to SECTION27's letters regarding the sanitation crisis in schools resulted in litigation being stayed for the time being.⁹⁷ Their response is in stark contrast to the resistance and lack of co-operation that was apparent for most of 2012 in the Limpopo textbook case. It appears that the DBE has learnt its lesson and would rather avoid the public outcry that ensued against the DBE in the Limpopo textbook case. The unyielding mobilisation and rights-based advocacy in Limpopo therefore continues to bear fruit beyond the textbook case.

Litigation as a tool in mobilisation and raising rights consciousness

While the main objective of rights-based litigation is its ability to address the direct harm that occurs from the human rights violation, the litigation can also serve as a catalyst in raising rights consciousness to mobilise in broader campaigns for change. Thus, while the main objective of the litigation in the Limpopo textbook case was to ensure the delivery of textbooks to Limpopo schools, the litigation had a much wider impact.

The seminal case study on impact litigation is the 1954 case of *Brown v Board of Education*,⁹⁸ in which the United States Supreme Court declared segregated schooling to be unconstitutional. The criticism of the *Brown* judgment is that it was a "hollow victory" as it did not end segregation in schools and instead spurred a backlash of covert action in the various states in the United States to avoid enforcing the court order. The argument goes that formal segregation ended only with the passing of the Civil Rights Act a decade later as the result of the direct action of the civil rights movement rather than because of the declarator in *Brown*.⁹⁹ Proponents of public interest litigation argue, however, that the value of the *Brown* case was not that it ended segregation but that it provided the moral or "symbolic" victory that became a vehicle for political mobilisation for the civil rights movement.¹⁰⁰

In the second court judgment in the Limpopo textbook Judge Kollapen had to decide whether or not a declaratory order that the state disobeyed two previous court orders was necessary. He came to the conclusion that it was necessary and acknowledged that, "the *public interest* expressed in this issue with regard to how and under what circumstances learning and teaching takes place renders such a declarator important".¹⁰¹ (own emphasis)

⁹⁷Press statement: Department of Basic Education Presents Plan to Address Sanitation Backlog in Limpopo Schools: <http://www.SECTION27.org.za/2013/03/12/departement-of-basic-education-presents-plan-to-address-sanitation-backlog-in-limpopo-schools/>.

⁹⁸347 US 483 493 (1954)

⁹⁹GN Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (2008).

¹⁰⁰SA Scheingold *The Politics of Rights – Lawyers, Public Policy and Political Change* (1974).

¹⁰¹*Section 27 & Others* IIP5.

The mobilisation of public opinion and rights consciousness raising that occurred in the Limpopo textbook case has been unprecedented. This has been discussed to some extent in the section dealing with the media strategy. Almost since the inception of this case, it has been cited across the ideological divide. The victory in the Limpopo textbook case and the subsequent failure of the state to comply has generated an awareness of the scale of the education crisis. Discussions on the Limpopo textbook crisis are often located within a broader discussion on the inadequacies in public schooling. It has also led to a heightened awareness of the other ills in the education system. In short, it contributed to a national mobilisation against inferior education. This case has also generated somewhat of a domino effect inspiring new cases and highlighting ongoing campaigns for improvements to educational quality in public schools. The case is also regularly cited as proof of the absence of an accountable government, and of the failure of the current government to deliver.¹⁰²

A new model of governance: Litigation as a tool for enforcing transparency, delivery and accountability

Professor Metcalfe states in the verification report:¹⁰³

It is my view that the public interest litigation initiated by Section 27 has directed public attention to a component of the difficult conditions under which teachers teach, and learners learn. All energies must be directed to ensuring that all learners have adequate access to learning and teaching support material. This is in the spirit of the Kollapen judgment which indicated that one week or even one day without LTSM is material to the education rights of the affected children.

The litigation in the Limpopo textbook serves as an example of an emerging model of public interest litigation that potentially improves governance and facilitates “structured accountability”¹⁰⁴ to ensure that the state fulfils its socio-economic rights obligations, particularly in the face of government recalcitrance. This model is referred to in legal literature as “destabilisation rights,” which are defined as:¹⁰⁵

[claims] to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability.

A dominant feature of this model of litigation is the shift from “top-down”, rule-based remedies to a supervisory court order that establishes a structure for institutional reform without fixing the precise content of the reform. In terms of this order once there has been a declaration of a human rights violation, the court establishes a “regime of rolling rules” that can be periodically revised. It also specifies a process for reporting on the reforms. This mitigates concerns in respect of the separation of powers doctrine, as the court does not prescribe the nature of the reform to the government. Rather, the court order triggers a process of “supervised negotiation” between the parties to the negotiation as well as other stakeholders. This process is referred to as a “dialogic model of reform”.¹⁰⁶

Despite the many stumbling blocks that had to be overcome to deliver textbooks to the schools, including the reticence on the part of the DBE to cooperate with the applicants, the Limpopo textbook case nevertheless serves as an example of such a dialogic model of reform. The supervisory order in the Limpopo textbook case established an ongoing process of negotiation between the DBE and the applicants, whereby the DBE was required to provide a timeframe for the delivery of textbooks. Furthermore, the court order did not prescribe the content of the catch-up plan, but rather set guidelines to which the DBE had to adhere in the development of the plan. The reporting requirement enabled the applicants and the court to monitor the implementation of the court order, and to adjust the court order when there had been non-compliance. Also by crafting a court order that enabled the applicants to return to court, the court was able to facilitate a process for revising the original relief to ensure textbook delivery for 2013 and thereby prevent the recurrence of the 2012 textbook crisis.

¹⁰²An example of this is the overwhelming number of calls for the Minister of Education and her Director-General to step down for the mishandling of the textbook crisis. See for example N Baer “ANCYL threatens action if Angie doesn’t go.” *Mail & Guardian* 31 July 2012. Metcalfe Verification Report. p 5.

¹⁰³A Klein “Judging as nudging: New governance approaches for the enforcement of constitutional social and economic rights.” (2007-2008) 39 *Colum.Hum.Rts.L.Rev* 351. CF Sabel & WH Simon “Destabilization Rights: How Public Law Litigation Succeeds”¹⁰⁴(2004) 117 Harv LR 1016

¹⁰⁵CF Sabel & WH Simon 1020.

¹⁰⁶CF Sabel & WH Simon 1055 -1065

The litigation in the Limpopo textbook case has also provided an insight into government's *modus operandi*, thus making governance more transparent. The case has exposed dysfunctional governance and the rampant mismanagement and corruption in the LDoE. It also highlighted the difficulties that occurred in the section 100 intervention. These insights were revealed in the court papers and in argument in court when the DBE provided reasons for the non-delivery of textbooks.

It has already been noted that the litigation also resulted in the Metcalfe Verification Report, and the report of the Presidential Task Team to investigate the reasons for the delay in the delivery of textbooks. Both these processes have made findings, and pursuant to these findings, recommendations that if implemented, will potentially promote good governance and improve systems for the procurement and delivery of textbooks.

Prof Metcalfe's report makes several long-term detailed recommendations both in respect of governance and in respect of textbook procurement. Thus, for example the report recommends the adoption of a protocol to guide section 100 interventions prior to the passing of legislation regulating such interventions. It also recommends improved systems of communication between schools and the LDoE, and makes specific recommendations in this regard.

When the LDoE entered into the contract with EduSolutions, the entire book unit within the LDoE was dismantled and the database on textbook procurement was handed over to EduSolutions to be managed and maintained. When this contract was cancelled, the DBE had no access to the database that provided information as to which schools existed in the province and their textbook requirements. As mentioned, this proved to be one of the major obstacles to the timeous textbook delivery. Prof Metcalfe therefore makes an important recommendation in this regard. She states that if key functions of government such as the procurement of textbooks are outsourced, all data must remain the property of government.

Similarly, the report of the Presidential Task Team makes important recommendations, most notably in respect of lacunas in policy development especially that of education policy. It recommends that the DBE must develop a *national* policy for the standardisation of the procurement and distribution of LTSM. It elaborates further that this policy must contain mechanisms to strengthen contract and risk management, as well as develop an operation plan for the procurement and LTSM. Given the centrality of textbooks to the realisation of the right to basic education, the development of a national policy in this regard is crucial.

The report also recommends the expediting of the Monitoring Support and Intervention Bill (MSI). The purpose of this legislation is to provide clarity to national, provincial, and local government and executive authorities as to the delineation of the respective functions of these different tiers of government when there is a section 100 intervention.

More recently, in March/April 2013, as a result of the Limpopo textbook case, as well as reports from other provinces such as the Eastern Cape of non-delivery of textbooks, the South African Human Rights Commission (SAHRC) has embarked on an investigation into the state of children's access to learning materials. In a rare use of its powers, the SAHRC required national and provincial officials from all the provinces to provide submissions on the state of the delivery of learning materials across South Africa. The purpose of these hearings are said to be to establish a mechanism for the monitoring of the delivery of learning materials.¹⁰⁷ The SAHRC's interim findings were issued in May 2013.¹⁰⁸

¹⁰⁷ K Gernetzky Rights body probes delivery of learning materials." *Business Day* 3 April 2013.

¹⁰⁸ Interim Report of SAHRC Investigative Hearing: <http://www.sahrc.org.za/home/21/files/INTERIM%20REPORT-%20Investigation%20into%20the%20Delivery%20of%20Primary%20Learning%20Materials-%20FINAL.pdf>.

6 CONCLUSION: OVERCOMING COMPLACENCY AND DENIALISM

South Africa is now almost two decades into a constitutional democracy. This democracy guarantees that every learner has a right to a basic education. Yet, at the beginning of each academic year there are reports in the media of learners having to walk extraordinarily long distances to attend school, of schools not having textbooks, of learners being turned away from schools because those schools are full, or because they cannot afford to buy uniforms or pay the school fees. During the course of the year we see images of learners continuing to learn under trees or dilapidated school buildings. The Limpopo textbook case illustrates the importance of resisting complacency to this *status quo*. A media report followed up by a public interest organisation has created a ripple effect that has improved, and will hopefully continue to improve, the conditions of learning and teaching for the most disadvantaged learners in South Africa.

The year 2012 was characterised by unprecedented civil society action and litigation demanding improved educational quality.¹⁰⁹ The response of government to this activism has been to persistently deny or undermine these efforts. This is evident in the three important education cases that took place in 2012. The first was the Limpopo textbooks case. The second was Equal Education's case to compel the DBE to develop regulations for minimum norms and standards for school infrastructure. The DBE opposed the case until the eleventh hour when it agreed to develop the regulations. In January 2013 the regulations were published in draft form and made available for public comment. They have, however, been widely criticised as being vague and failing to establish minimum benchmarks to which provinces could be held accountable.¹¹⁰ The third was the case of the *Centre for Child Law v Minister of Basic Education*. In this case the DBE has been criticised for failing to comply with a court order requiring that teaching posts in the Eastern Cape be filled by a specific date, and also requiring that the DBE reimburse SGBs that had been forced to pay the salaries of temporary teachers from the own budgets.¹¹¹

These cases serve as a reminder that ongoing civil society activism and vigilance is necessary and must continue to ensure learners' rights to a basic education.

¹⁰⁹D Macfarlane "Civil society exposes government's chronic denialism." *Mail and Guardian* 19 January 2012.

¹¹⁰See F Veriava "Angie's cop-out on school quality" *Mail & Guardian* 25 January 2013 which details state efforts to backtrack on efforts to develop effective norms and standards for school infrastructure.

¹¹¹A Carlisle "Motshekga accused of defying court order." *The Times* 25 January 2013

