



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20793/2014

In the matter between:

MINISTER OF BASIC EDUCATION	FIRST APPELLANT
DIRECTOR-GENERAL OF BASIC EDUCATION	SECOND APPELLANT
MEMBER OF THE EXECUTIVE COUNCIL, LIMPOPO	
DEPARTMENT OF EDUCATION	THIRD APPELLANT
ACTING HEAD OF DEPARTMENT, LIMPOPO DEPARTMENT	
OF EDUCATION	FOURTH APPELLANT
HEAD OF THE INTERVENTION TEAM, LIMPOPO	
DEPARTMENT OF EDUCATION	FIFTH APPELLANT

and

BASIC EDUCATION FOR ALL	FIRST RESPONDENT
SCHOOL GOVERNING BODY, TLAME PRIMARY	
SCHOOL	SECOND RESPONDENT
SCHOOL GOVERNING BODY, MARESELENG	
SECONDARY SCHOOL	THIRD RESPONDENT
SCHOOL GOVERNING BODY, ARETHABENG	
PRIMARY SCHOOL	FOURTH RESPONDENT
SCHOOL GOVERNING BODY, GADABI PRIMARY SCHOOL	FIFTH RESPONDENT

SCHOOL GOVERNING BODY, MANKOPODI PRIMARY SCHOOL	SIXTH RESPONDENT
SCHOOL GOVERNING BODY, SHAKOLENG SECONDARY SCHOOL	SEVENTH RESPONDENT
SCHOOL GOVERNING BODY, TSWETLANE PRIMARY SCHOOL	EIGHTH RESPONDENT
SCHOOL GOVERNING BODY, DAVHANA SECONDARY SCHOOL	NINTH RESPONDENT
SCHOOL GOVERNING BODY, TSOGANG PRIMARY SCHOOL	TENTH RESPONDENT
SCHOOL GOVERNING BODY, SCHOONGEZICHT SECONDARY SCHOOL	ELEVENTH RESPONDENT
SCHOOL GOVERNING BODY, SEJADIPUDI PRIMARY SCHOOL	TWELFTH RESPONDENT
SCHOOL GOVERNING BODY, VHULAUDZI SECONDARY SCHOOL	THIRTEENTH RESPONDENT
SCHOOL GOVERNING BODY, TSHINAVHE SECONDARY SCHOOL	FOURTEENTH RESPONDENT
SCHOOL GOVERNING BODY, MOKOBOLA PRIMARY SCHOOL	FIFTEENTH RESPONDENT
SCHOOL GOVERNING BODY, MASHILOMPANE PRIMARY SCHOOL	SIXTEENTH RESPONDENT
SCHOOL GOVERNING BODY, KHUDUGANE SECONDARY SCHOOL	SEVENTEENTH RESPONDENT
SCHOOL GOVERNING BODY, TSHEHLWANENG SENIOR SECONDARY SCHOOL	EIGHTEENTH RESPONDENT
SCHOOL GOVERNING BODY, TSHABADIETLA SECONDARY SCHOOL	NINETEENTH RESPONDENT
SCHOOL GOVERNING BODY, MAKALA SECONDARY SCHOOL	TWENTIETH RESPONDENT
SCHOOL GOVERNING BODY, REBONE SECONDARY SCHOOL	TWENTY-FIRST RESPONDENT
SCHOOL GOVERNING BODY, THOROMETSANE PRIMARY SCHOOL	TWENTY-SECOND RESPONDENT
SCHOOL GOVERNING BODY, SEKABA	

SECONDARY SCHOOL
SOUTH AFRICAN HUMAN RIGHTS COMMISSION

TWENTY-THIRD RESPONDENT
TWENTY FOURTH RESPONDENT

Neutral Citation: *Minister of Basic Education v Basic Education for All* (20793/2014) [2015] ZASCA 198 (2 December 2015).

Coram: Navsa, Lewis, Cachalia, Petse and Dambuza JJA

Heard: 24 November 2015

Delivered: 2 December 2015

Summary: Constitutional law – right to education in terms of s 29(1)(a) of the Constitution – content of right discussed – Department of Basic Education adopting clear national policy that each learner must be provided with a textbook for each subject before commencement of the academic year – Department failing to do so in respect of some learners in Limpopo – held that the Department had given content to s 29(1)(a) – right immediately realisable – held accordingly that the Department’s failure to provide textbooks to each learner infringes their right to basic education – held further that failure to provide textbooks to a small number of students in Limpopo amounted to unfair discrimination against them – order of court a quo requiring Department to deliver textbooks and report to respondents accordingly confirmed and appeal dismissed – in addition, cross-appeal upheld and declaration made that Department in breach of previous court orders concerning delivery of textbooks.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tuchten J sitting as court of first instance).

The following order is made:

1. The appeal is dismissed with costs including the costs of two counsel.
2. The cross-appeal in relation to the failure by the court below to declare that there had been non-compliance by the Department of Basic Education with the court order granted by Kollapen J is upheld with costs including the costs of two counsel.
3. The following orders are substituted for the orders of the Gauteng Division of the High Court:
 1. It is declared that s 29(1)(a) of the Constitution entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.
 2. It is declared that it is the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.
 3. It is declared that the National Department of Basic Education and the Limpopo Department of Education violated the s 29(1)(a), s 9 (equality) and s 10 (dignity) right of learners in Limpopo in 2014 by failing to provide all of them with every prescribed textbook before commencement of the teaching of the courses for which they were prescribed.
 4. It is declared that the National Department of Basic Education and the Limpopo Department of Education failed to comply with paragraph 6 of the order made by

Kollapen J on 4 October 2012 that they “deliver all textbooks to schools for grades 4, 5, 6 and 11 for the 2013 year by 15 December 2012”.

- 5 The respondents are ordered to pay the applicants’ costs including the costs of two counsel.’

JUDGMENT

Navsa JA (Lewis, Cachalia, Petse and Dambuzza JJA concurring):

[1] Frederick Douglass, a former slave and eminent America human rights leader in the abolitionist movement understood the liberating power of books and their connection to education and the fulfilment of human potential. He said:

‘Once you learn to read, you will be forever free.’¹

More recently Kofi Annan, the former United Nations Secretary General, said:

‘Literacy is a bridge from misery to hope. It is a tool for daily life in modern society. It is a bulwark against poverty and a building block of development, an essential complement to investments in roads, dams, clinics and factories. Literacy is a platform for democratization, and a vehicle for the promotion of cultural and national identity. Especially for girls and women, it is an agent of family health and nutrition. For everyone, everywhere, literacy is, along with education in general, a basic human right.’²

The world has progressed from being limited to printed works and has moved to the technological wonders of electronic media. The advent of electronic reading materials has not lessened the impact of the expressions cited above. If anything, there has been an explosion of information which has rendered reading in the modern world all the

¹ Quoted in Dr Purushothaman *Words of Wisdom: 1001 Quotes & Quotations (Volume 64)*, at 146.

² This is contained in a press release from the United Nations entitled ‘Secretary-General stresses need for political will and resources to meet challenge of fight against illiteracy’, commemorating the celebration of International Literacy Day on 8 September 1997. Available at <http://www.un.org/press/en/1997/19970904.SGSM6316.html>, accessed 25 November 2015.

more important. This case is about the importance of textbooks in schools and it explores the role that they play in a child and adult's right to a basic education.

[2] The following extended definition of the term 'textbook' was supplied by the appellants in affidavits filed on their behalf in the court below:

'[A] publication of systematically organised activities and background and information on the content to be taught, comprehensive enough to cover the primary objectives outlined in the curriculum of a particular subject for the entire grade. A textbook contains exercises, problems, and practice material to clarify and reinforce the lessons presented by the teacher. Learners can use it to practise what they are learning in class. It contains learner activities that are graded, scaffolded and are based on the curriculum of the subject/grade. It also provides resource information and background reading on the subject, and, in the case of languages, it may provide texts for the different genre. Lastly, a textbook has assessment activities and rubrics.'

Textbooks in the South African context assume a special significance due to the fact that in prescribing textbooks the DBE laudably ensures, not only that cognitive development is taken into account, but also that Constitutional values are instilled.

[3] The recent countrywide protests by students enrolled at tertiary educational institutions, demanding further education free of charge, captured the nation's attention and has brought into focus the plight of those without the means to realise their full potential through further education. The present case however, addresses a more foundational issue. It concerns the rights of learners at public schools and the question that requires to be addressed is whether the right to a basic education, guaranteed by the Constitution, includes the right of learners at public schools to be provided with a textbook for each subject in time for the commencement of the teaching of the curriculum at the beginning of the school academic year. The appellants' assertion that the guarantee of the right to a basic education set out in s 29(1)(a) of the Constitution is not one cast in absolute terms and its justification for not providing a textbook to each learner in the geographical area in question will be considered. It must be said, at the outset, that it is common cause that the affected learners are from poor communities and are mostly, if not exclusively, located in rural areas. They are also overwhelmingly, if not exclusively, black learners. The schools in question are 'no fee' schools and were

not granted permission in terms of s 21(c) of the South African Schools Act 84 of 1996 (SASA) to purchase textbooks, educational materials or equipment for the school on their own. They are restricted to performing their functions in terms of s 20 of SASA.

[4] The answer to the question posed in this appeal can only follow upon a full interrogation of the obligations of the appellants in terms of s 29(1)(a) of the Constitution. Before embarking on that exercise, alongside a consideration of the genesis and background to the litigation, it is necessary at the outset to identify the litigating parties.

[5] The first appellant is the Minister of Basic Education (the Minister), cited in her capacity as the head of the Department of Basic Education (the DBE). She bears the responsibility for determining school education policies and for administering a budget sanctioned by Parliament. She also holds ultimate responsibility for ensuring Constitutional and statutory compliance. The second appellant is the Director-General of Basic Education who is responsible for the implementation of measures to that end. The third appellant is the Member of the Executive Council in the Limpopo Department of Education (the MEC), who would, in the ordinary course, have been responsible for the delivery of textbooks in the Province. It is common cause that at material times the Limpopo Provincial Administration was dysfunctional and the National Executive intervened in the Provincial administration in terms of s 100 of the Constitution³ and

³ Section 100 of the Constitution reads:

- (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 interest of another province or to the country as a whole.
- (2) If the national executive intervenes in a province in terms of subsection (1)(b) -
 - (a) it must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began;

consequently the Minister assumed responsibility for the Limpopo Department of Education (the LDOE).⁴ The fourth appellant is the Acting Head of the Limpopo Department of Education who, in the ordinary course, would have been tasked with the implementation of measures for the realisation of the right to basic education in the Province, which would include seeing to the procurement and delivery of textbooks. The fifth appellant is the head of the intervention team in the LDOE. For purposes envisaged in s 100 of the Constitution, the head of the intervention team acts on behalf of the Minister during the intervention period.

[6] The first respondent is Basic Education For All (BEFA), a voluntary association based in Limpopo. BEFA was inaugurated on 6 October 2012, in response to the education crisis in Limpopo. Its members include school principals, teachers, parents, members of school governing bodies (SGBs), learners and concerned community members. According to BEFA it seeks to promote and protect the right to basic education for learners in Limpopo. BEFA litigated not only in its own interest, but also in the interests of all public schools in Limpopo that were affected by the non-delivery of textbooks. The second to twenty third respondents are SGBs of 22 schools. The 22 schools are a mix of primary and secondary schools. The South African Human Rights Commission (the SAHRC), the 24th respondent, participated in the court below and before us because of its involvement in investigating the procurement and delivery of school textbooks in Limpopo and because in the view of the other respondents it could play a role in monitoring the delivery of textbooks pursuant to the order contemplated and sought by them.

[7] Save where it is necessary to make a distinction, I shall refer to the appellants as the DBE and the respondents as BEFA. I now turn to deal with the background to the litigation leading up to the present appeal.

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- (b) the intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and
 - (c) the Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.

(3) National legislation may regulate the process established by this section.

⁴ We were informed from the bar that the intervention came to an end in January 2015.

[8] During 2012 the DBE formulated and adopted a new national education curriculum, predicated on the new Curriculum and Assessment Policy Statements (CAPS). The new CAPS curriculum revised the content and learning material of each learning area. Consequently, new textbooks were prescribed and it was necessary to see to it that they were available for use in time for the ensuing academic year.

[9] The 'roll-out' of CAPS was structured incrementally and phased in over a three-year period. In 2012 grades 1, 2, 3 and 10 were taught under CAPS for the first time. In 2013 CAPS was introduced in grades 4, 5, 6 and 11. In 2014, to complete the picture, it was introduced in grades 7 to 9 and 12.

[10] It should be acknowledged that the Department of Basic Education faced the difficulty, during the phasing-in period, of running a new and old curriculum side by side for different grades. It also meant that considerable human and financial resources had to be harnessed to meet the challenge. The task was compounded when the Limpopo Provincial Government became dysfunctional and the National Executive intervened in terms of s 100 of the Constitution. In an affidavit filed on behalf of the SAHRC it acknowledges that the delivery of education in South Africa presented challenges of a peculiar kind. It became involved in investigating the associated problems because of the crisis in 2012 in relation to the non-delivery in Limpopo of learner and teacher support material including textbooks. It also registered as a major problem the lack of ability on the part of the DBE to monitor the delivery of textbooks in provinces. The problem was exacerbated by the failure to maintain an accurate database.

[11] In order to facilitate the roll-out of the new curriculum and to assist in meeting the logistical problems associated with the procurement and delivery of the necessary textbooks across extensive geographical areas a national catalogue of prescribed textbooks was compiled by the DBE, in-line with CAPS criteria, which included cognitive development and constitutional values. As the phasing-in of CAPS progressed, old Provincial Education Department catalogues were discarded. By 2014 the national

catalogue was completed so as to be utilised for the procurement of textbooks. It was left to each of the nine Provincial Departments of Education to procure textbooks at the start of each academic year. In Limpopo the procurement and delivery did not go smoothly. In fact it appears to have been chaotic. I will, in due course, deal with the DBE's version for the delay in procuring and delivering the full complement of textbooks required by public schools in order for each child in every grade to be in possession of a textbook for each subject before the commencement of the academic year.

[12] The problems in relation to the procurement and delivery of school textbooks were peculiar to Limpopo Province. Before us counsel on behalf of the DBE conceded that, to the best of his knowledge, the shortfall delivery of textbooks, which is the principal complaint in the current case, did not pertain to other provinces in South Africa. Counsel also admitted that at the time of the intervention by the National Executive referred to above, there was an education crisis in Limpopo.

[13] In 2012, with half of the academic year already completed, textbooks in respect of the introduction of the first phase of the CAPS for grades 1, 2, 3 and 10, had not been delivered to schools in Limpopo. It is undisputed that the delivery of textbooks only started taking place after the grant of a court order by Kollapen J on 17 May 2012, pursuant to an application launched in the Gauteng Division of the High Court, Pretoria, by SECTION 27, a public interest litigation entity, which in the present litigation, acts as the respondents' attorney. In terms of that order it was declared that the failure of the LDOE and the DBE to provide textbooks to those schools was a violation of the learners' rights to a basic education, equality, dignity, the SASA and s 195 of the Constitution. The LDOE or the DBE were also directed to provide textbooks for grades 1, 2, 3 and 10 on an urgent basis, commencing on 31 May 2012 and concluding by no later than 15 June 2012. Furthermore, the DBE and the LDOE were ordered to develop a catch-up or remedial plan for affected grade 10 learners. They were also ordered to submit monthly reports with regard to the implementation of the plan. The judgment in

that case is reported *sub nom Section 27 & others v Minister of Education & another* 2013 (2) SA 40 (GNP).⁵

[14] It is common cause that the time scales set out in the order referred to above were not met. The parties differed on the extent of the DBE's failure to comply with that order. It is, however, also common cause that the DBE had failed to comply in full with the court order. That failure necessitated further litigation during June 2012, resulting in a settlement agreement, in terms of which an amended time table was agreed for the delivery of textbooks and provision was made for further progress reports to be provided by the DBE in relation to the catch-up plan. In terms of that agreement, the appellants undertook to complete delivery of textbooks to learners by 27 June 2012. The appellants also undertook to provide daily progress reports on their efforts to deliver the required textbooks. That settlement agreement was made an order of court by Kollapen J on 5 July 2012.

[15] According to BEFA the progress reports did not match the complaints that SECTION 27 continued to receive relating to the shortfall in delivery of textbooks. The parties to the prior litigation had agreed to appoint an independent person, Professor Mary Metcalfe, to verify the progress reports, she reported as follows:

72.1 On 27 June 2012, only 15 % of textbooks had been delivered to schools, and not 99 % as reported by the DBE;

72.2 On 3 July 2012, 48 % of schools had received their textbooks;

72.3 On 11 July 2012, 22 % of schools were still awaiting delivery of their textbooks.'

Professor Metcalfe also made recommendations about the procurement and delivery of the textbooks. Notwithstanding the stated shortcomings in the report regarding the delivery of textbooks in the report, the DBE denied publicly that there were any textbook shortages. It is common cause that Professor Metcalfe's recommendations were not implemented.

⁵ The order in the reported judgment appears to be at odds with the order issued by the Registrar.

[16] In the face of the DBE's public denials regarding the short delivery of textbooks, yet further litigation ensued, resulting in Kollapen J granting another order declaring that there had been non-compliance with the prior orders. The DBE and the LDOE were also ordered to complete delivery of all outstanding textbooks for 2012 for grades 1, 2, 3 and 10 by 12 October 2012 and to deliver all textbooks for grades 4, 5, 6 and 11 for the 2013 school year by 15 December 2012. For present purposes the ancillary orders are not material. The time frames reflected in the order had been agreed by the parties.

[17] It is undisputed that in 2013 there was an improvement in textbook delivery, when compared to 2012. However, there were still instances in that year, of non-delivery of textbooks and it appears that by the time the school academic year commenced in 2013, some schools had still not received all the required textbooks for learners in grades 4, 5, 6 and 11. By March 2014 the delivery of textbooks to learners in grades 7, 8, 9 and 12 was not completed. There is a dispute about the extent of the shortfall in the delivery. However, on the DBE's own version, there was a total shortage of at least 22 045 textbooks across all grades in respect of the 39 schools. That figure may not take into account shortfalls from previous years in relation to other grades. The statistics supplied by the DBE are not entirely clear.

[18] BEFA alleged that they repeatedly and extensively engaged the appellants, through SECTION 27, in attempts to resolve the problems of under-delivery. These attempts ultimately proved unsuccessful. According to BEFA it provided the DBE with all the information required to facilitate delivery of outstanding textbooks. BEFA found it disturbing that the DBE was not in possession of crucial data, such as accurate details concerning learner numbers and a complete schedule of textbook procurement and delivery. As at 26 March 2014, two days before the end of the first school term, textbook delivery remained incomplete. BEFA stated that it was concerned that when learners returned to school for the commencement of the second term of school, on 7 April 2014, the violation of their rights would continue. BEFA considered that the non-delivery of textbooks would impact severely and negatively on the ability of learners to prepare adequately for mid-year exams at the end of the second school term. BEFA was

adamant that there could be no proper preparation without the essential prescribed textbooks. These concerns were heightened by continued reports from numerous schools experiencing textbook shortages and by media reports. This led BEFA to launch an urgent application in the North Gauteng Division of the High Court, Pretoria, on 27 March 2014 for an order in the following terms:

- '2. Declaring that the failure by the first to fifth respondents to ensure the complete delivery of textbooks to all schools in Limpopo is a violation of the rights to basic education, equality, dignity and section 165(4) and 195 of the Constitution.
3. Directing the first to fifth respondents to deliver all outstanding textbooks to the schools listed in Annexure A to this notice of motion on an urgent basis and by no later than 7 April 2014;
4. Directing the first to fifth respondents to lodge an affidavit with this Court by no later than 7 April 2014 confirming full delivery of textbooks to the schools listed in Annexure A to the notice of motion;
5. Directing the first to fifth respondents to lodge with this Court a plan indicating how they intend to address textbooks shortages at schools throughout Limpopo, such plan to be lodged by no later than 10 April 2014;
6. Directing the sixth respondent to monitor the full delivery of textbooks by the first to fifth respondents to the schools listed in Annexure A to this notice of motion, as well as their compliance with the plan referred to in paragraph 5 above, in terms of its mandate under section 184(1)(c) of the Constitution to monitor and assess the observance of human rights;
7. Granting leave to the Applicants to approach the above Honourable Court on the same papers, supplemented as the circumstances may require, for further relief if necessary.'

[19] The SGBs, who were among the applicants in the court below, set out the problem attendant upon mitigating steps employed by schools to deal with the non-delivery of textbooks. The assertions by the SGB's and BEFA bear repeating:

'136.1 Some teachers borrow textbooks from neighbouring schools so that they can write up notes for learners on the blackboard. This is unsatisfactory for the following reasons:

- 136.1.1. It is not possible to write all the relevant content in detail on the blackboard for each lesson.
 - 136.1.2. It is difficult for all of the learners in class to see clearly what is written on the blackboards, in the way that they would if they were reading a textbook.
 - 136.1.3 Because learners cannot take their learning materials home, they cannot complete their homework, prepare for lessons or consolidate what they learn in class.
 - 136.1.4. Requiring teachers to write out the content of lessons in full on the blackboard is unduly burdensome.
- 136.2 As such, this is not a satisfactory replacement for full textbook delivery.
- 136.3 Teachers borrow textbooks from neighbouring schools to photocopy the relevant content for learners. However, this is expensive and cannot be sustained.
- 136.4 Schools use outdated textbooks from the previous curriculum. However, the CAPS curriculum contains both new content and a new way in which the content is organised. This is therefore not an appropriate solution.'

[20] In seeking the orders set out in para 18 above and in asserting the centrality of textbooks in the realisation of the right to basic education BEFA relied on one of the DBE's own policy documents. I quote the material parts:

'We cannot expect proper learning and teaching to take place where learners do not have access to textbooks, workbooks, exercise books and stationery during *and after school hours*.'

(My emphasis.)

[21] BEFA insisted that the failure by the DBE to ensure full textbook delivery was in violation of the rights to education, equality and dignity guaranteed by the Constitution. Furthermore, so it was alleged, it offended against the basic values and principles concerning public administration in terms of s 195 of the Constitution. Save for the structural order, the SAHRC was in substantial agreement with the relief sought by the respondents.

[22] In opposing the relief sought by BEFA, the DBE set out the difficulties associated with the roll-out of a new curriculum and providing learner and teacher support materials. It explained, in some detail, how, in addition to textbooks, it provided

workbooks in which learners were required to write out answers to questions. In addition to the other materials, the DBE also provided mathematics and physical science books which are voluminous. According to the DBE it devised and implemented a procurement and delivery plan for the 2014 academic year. The plan provided for procurement and delivery to schools in all of the nine provinces. It appointed the South African Post Office (SAPO) as its agent for distributing textbooks in Limpopo. Its plan was based on learner numbers provided by the LDOE. Part of the problem in the distribution process is that publishers do not hold sufficient stocks of textbooks and print textbooks upon demand. Provincial departments were provided with the national catalogue devised by the DBE and requisitions by the provinces were required to be presented. The DBE insisted that the greater part of the problems associated with shortfalls in delivery was the incorrect learner numbers provided by schools in Limpopo, either to the LDOE or the DBE. The DBE increased the number of textbooks requested by schools by five per cent for grades 7 to 9 and 18 per cent for grade 12. This, according to the principal deponent on behalf of the DBE, was to correct discrepancies between the submissions from schools and data that the LDOE held on its Education Information System database. Significantly, no information by the DBE is provided for the failure to interrogate the discrepancies and to ensure the accuracy of its own database.

[23] The following part of the delivery programme, decided after a meeting between representatives of the LDOE, DBE and representatives of schools during December 2013, is noteworthy:

'In order to ensure 100 % delivery, the provision of information timeously by schools, circuits and districts is critical.

A circular and template was sent to schools, circuits and districts, with the reporting template for shortages.

All shortages and non-delivery must be reported immediately by 4 December 2013. All mop-up must be completed by 31 January 2014.'

[24] In short, the DBE's case on the logistics of the delivery and the failure to provide a textbook for every child appears to be that it took all the necessary steps to put in place a proper management plan and that the logistical failure should be laid at the door

of the 39 schools about which BEFA engaged the Department and other schools that provided incorrect data. The dysfunctional Provincial Government, according to the DBE added to logistical headwinds, complicating the delivery process. With the advent of the 2014 school academic year the DBE placed an order with publishers to print and deliver 406 520 textbooks during January 2014. On 20 March 2014, after further reported shortages, the DBE placed an additional order for a further 387 040 textbooks. The problems referred to above were compounded by difficulties that ensued with over-delivery to some schools by SAPO. Those books had to be retrieved and rerouted. The DBE also complained about under-retrieval of books from learners at the end of an academic year.

[25] As recorded above, there is an ongoing dispute between BEFA and the DBE concerning the precise number of outstanding textbooks. BEFA was adamant that it engaged on an on-going basis with the Department in respect of shortages reported to it and this appears to be borne out by correspondence between them. In its replying affidavit, BEFA is scathing about the failure by the DBE and the LDOE to maintain accurate statistics as to the number of schools and learner enrolment in each school. A reliable database, they contend, is essential to ensure proper procurement and delivery in advance of an academic year. BEFA insisted that it had supplied the details of textbook shortages to the DBE on at least seven occasions since January 2014.

[26] It is also necessary to record that, in opposing the relief sought by BEFA, the DBE adopted the attitude that it would take disciplinary steps against school principals and other officials for channelling their complaints about short delivery through SECTION 27 and BEFA rather than engaging directly with the DBE or the LDOE.

[27] At the time that the application was launched in the court below, on the DBE's own version regarding the 39 schools in respect of which it had engaged with BEFA, there was a total shortfall in excess of 20 000 textbooks across all grades. In a supplementary opposing affidavit dated 21 April 2014 the appellants indicated that they were awaiting a further 158 856 textbooks from publishers.

[28] The following part of the supplementary opposing affidavit by the DBE is worth noting:

'Having regard to the fact that the total number of 6 945 160 textbooks have been ordered in respect of the CAPS-aligned curriculum, the current shortfall is approximately 2,29 % thereof.'

According to the DBE, the shortfall of 2,29 per cent appears to relate to the total required textbooks for all schools within Limpopo across all grades. This is contested by BEFA, who assert that it only relates to grades 7, 8, 9 and 12. What is clear, however, is that on the DBE's own version, there is still a shortfall of at least 2,29 per cent.

[29] Having set out the logistical difficulties in relation to the delivery of textbooks and apportioning blame to schools, the DBE resorted to a further justification for failure to deliver textbooks before the commencement of the 2014 academic year, namely, budgetary constraints. It stated that the requisitions presented to it required an amount of R768 million to procure learner and teacher support materials for grades 7 to 9 and 12 alone, whilst only R480 million was made available to LDOE by the National Treasury for all grades. After an accommodation was reached between the DBE, National Treasury and the Provincial Treasury, a total budget of R620 million was raised, of which R475 million was utilised for CAPS aligned textbooks. This left the DBE and the LDOE with a shortfall of R293 million to procure learner and teacher support materials for grades 7, 8, 9 and 12. According to the DBE, because of budgetary constraints, the LDOE was not in a position to procure any 'top-up' textbooks for other grades in respect of which the CAPS curriculum was implemented during 2012 and 2013. Thus, a decision was taken that outstanding books could only be acquired from the 2014/2015 budget. The DBE's financial year commenced on 1 April 2014. The contention on behalf of the DBE is that if it were to have authorised expenditure beyond its budget, its accounting office would have transgressed the provisions of the Public Finance Management Act 1 of 1999. The concomitant appears to be that a court cannot make an order in the face of budgetary constraints which is within the province of one or both of the other arms of government. An allied basis for resisting BEFA's application

was that the order sought, if granted, would offend against the doctrine of the separation of powers. The relevant paragraph of the opposing affidavit is worth repeating.

'Should that finding be made by the above Honourable Court, the Respondents have been advised by their legal representatives, that a Court of law then will not interfere in the running of the affairs of a Department on the principle of a separation between executive and judicial powers.'

[30] In adjudicating the application in the court below, Tuchten J considered the provisions of s 29(1)(a) of the Constitution and had regard to the decision of the Constitutional Court in *Governing Body of the Juma Masjid Primary School & others v Essay NO & others (Centre for Child Law & another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) and said the following about the right to basic education as provided for in that subsection of the Constitution (para 52):

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

In paragraph 55 of his judgment, Tuchten J concluded as follows:

'It follows then, that because textbooks were not provided to all the learners in Limpopo before the commencement of the curricula for which they were required, ie at the beginning of the academic year, the rights of learners were violated. It is in my judgment appropriate, just and equitable that a declaration to this effect should issue.'

However, the learned judge declined to grant the structural relief sought by BEFA. He went on to make the following order:

- '1. It is declared that the content of the right to basic education in s 29(1)(a) of the Constitution includes:
 - 1.1 the right of every learner at a public school as contemplated in the Schools Act, 84 of 1996, in Limpopo to be provided with every textbook prescribed for that learner's grade;
 - 1.2 the right of every such learner to be provided with every such textbook before the teaching of the curriculum for which such textbook is prescribed is due to commence.

2. It is declared that the non-delivery to certain of such learners of certain textbooks prescribed for such learners' grades in the 2014 academic year before the teaching of the curricula for which such textbooks were prescribed was due to commence was a violation of such learners' right to a basic education in s 29(1)(a) of the Constitution and of their rights to equality and dignity in ss 9 and 10 respectively of the Constitution.
3. It is noted that the first to fifth respondents have undertaken to ensure that delivery to all such learners of all textbooks required for the 2014 academic year will be completed as follows:
 - 3.1 those textbooks required for grades 7-9 and 12 by 8 May 2014; and
 - 3.2 those textbooks required by the other grades by 6 June 2014;
4. The first and third respondents are both ordered, to the extent that each of them is able to do so, to provide the applicants, through the applicants' attorney of record, and the sixth respondent [the SAHRC] with an affidavit setting out:
 - 4.1 the submissions, with vouchers where reasonably possible, to the fiscal authorities of the national Department of Basic Education and the department of education within the provincial government of Limpopo in support of these departments' requests for funds for textbooks for learners at public schools in Limpopo for the academic year 2015; and
 - 4.2 particulars of the funds so to be made available for that purpose ("the Limpopo textbook budget allocation"), similarly with vouchers where reasonably possible.
5. The affidavit referred to in paragraph 4 of this order must be provided to the applicants by no later than one month after the last of such respondents has been informed of the Limpopo textbook budget allocation.
6. The first respondent must pay the applicants' costs in this application.'

[31] The DBE appeals against those orders and BEFA cross-appeals against the refusal by Tuchten J to find that the DBE had failed to comply with the previous court orders and against his refusal to grant the structural orders set out in para 18 above. Before us BEFA did not persist in pursuing the structural orders and the cross-appeal was confined to the refusal to hold that the DBE had failed to comply with the previous court orders. The appeal and cross-appeal are before us with the leave of the court below.

[32] For completeness, it is necessary to record that before us, BEFA applied to lead further evidence on appeal, which relates to the DBE's failure to comply with the undertakings captured in the order made by Tuchten J. There was no opposition to the application and the court allowed the new evidence. It appears from an investigation conducted by BEFA, which involved visits to a number of schools in Limpopo by its members and also by representatives of the SAHRC, that the undertakings referred to had not been complied with. Fifteen schools were visited between 15 and 16 May 2014, and it was revealed that eight of them had not received all the textbooks for grades 7 to 9, and 12 and that a total of 7 203 textbooks were outstanding. Fourteen other schools were visited from 17 to 19 June 2014, and this revealed that in ten of those there was a total of 3 320 textbooks for grades 1 to 6, 10 and 11 outstanding and a total of 5 685 outstanding for grades 7 to 9 and 12. When confronted about these breaches, the DBE's attorneys appeared to blame the publishers for not adhering to time frames. The facts stated in the new evidence that we allowed were not contested.

[33] It is difficult to discern from the affidavits in the court below what the parameters of the DBE's case are. At first blush it appears to be that it had attempted as best as possible to comply with its obligations to provide the necessary learner and teacher support materials, but was hampered by a lack of co-operation on the part of affected schools. It relied on budgetary constraints as a further justification and considered the relief sought to be beyond the reach of a court. In that regard it invoked the doctrine of the separation of powers. Before us counsel on behalf of the DBE was hard-pressed to present a coherent basis for resisting the relief sought by BEFA. Counsel submitted that the relief sought demanded a standard of perfection that could not be met. Primarily, though, the DBE's case appeared to be that s 29(1)(a) of the Constitution did not require of it that *each learner* in every school be provided with a textbook. The DBE considered the mitigating measures it had suggested and that had been taken by schools to deal with the shortage of textbooks, to be enough to meet the obligation to provide a basic education in terms of s 29(1)(a) of the Constitution. It will be recalled that, as reflected in para 19 above, teachers were required to write the content of textbooks on blackboards for those learners who did not have textbooks to copy and

schools that did not have textbooks were required to consider borrowing textbooks from neighbouring schools in order to photocopy the relevant content. Lastly, schools were required to use textbooks from the previous curriculum whilst bearing in mind the differences in methodology. BEFA and SGB's responses to these mitigating measures are as set out above.

[34] It was also contended on behalf of the DBE that the order granted by the court below was such that it involved an intrusion into the territory of the other arms of government and that it violated the doctrine of the separation of powers. I turn to deal with whether there is any merit to the DBE's resistance to the application by BEFA.

[35] As always, when there is an assertion of a violation of a fundamental right the starting point is the relevant provision of the Constitution. In this case it is s 29(1)(a) that requires scrutiny. Section 29 reads as follows:

'(1) Everyone has the right –

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

[36] In *Juma Masjid*⁶ the Constitutional court compared s 29(1)(a) to other socio-economic rights, for example, the right to housing under s 26 of the Constitution. Section 26(2) provides that the State 'must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. Section 29(1)(a) has 'no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures".' The Constitutional Court stated emphatically that the right to a basic education entrenched in s 29(1)(a) is 'immediately realisable' and may only, in terms of s 36(1) of the Constitution, be limited in terms of a law of general application that is

⁶ *Governing Body of the Juma Masjid Primary School & others v Essay NO & others (Centre for Child Law & another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC), para 37.

'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁷

[37] The right in s 29(1)(a) is distinct from the right to 'further education' provided for in s 29(1)(b). In *Juma Masjid*, the Constitutional Court considered it important that the legislature, in recognising the distinction between 'basic' and 'further education', made attendance at school compulsory in terms of s 3 of SASA for learners from the age of seven until the age of 15 or until he or she reached the ninth grade, whichever occurred first.⁸ The Constitutional Court took the view that the aforesaid statutory provision, read with the entrenched right to basic education in s 29(1)(a) of the Constitution, indicated 'the importance of the right to basic education for the transformation of our society'.⁹ In *Head of Department, Mpumalanga Department of Education & another v Hoërskool Ermelo & another* [2009] ZACC 32; 2010 (2) SA 415 (CC), the Constitutional Court recognised the importance of education in redressing the entrenched inequalities caused by apartheid and its significance in transforming our society. Moseneke DCJ said the following: (paras 45-47)

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

It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.

⁷ Para 37.

⁸ Para 38.

⁹ Para 38.

In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular.’

[38] The legislature took seriously its constitutional obligations in relation to the right to basic education. Section 12 of SASA makes it incumbent upon the MEC to provide public schools for the education of learners out of funds appropriated for that purpose by the provincial legislature. In the period of an intervention by the National Executive the Minister is required in terms of s 100 of the Constitution to take any ‘appropriate steps’ to ensure the fulfilment of a province’s executive obligations. Importantly, in terms of sections 44 and 104 read with Schedule 4 of the Constitution, education (excluding tertiary education) is a functional area of concurrent national and provincial legislative competence.

[39] In terms of s 3 of the National Education Policy Act 27 of 1996 (NEPA), the Minister is vested with the power to determine national education policy in accordance with NEPA and the Constitution. Significantly, sections 4(a)(i), (ii) and (iv) of this Act provide:

‘The policy contemplated in s 3 shall be directed toward –

- (a) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament, and in particular the right -
 - (i) of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever;
 - (ii) of every person to basic education and equal access to education institutions;
 - . . .
 - (iv) of every child in respect of his or her education.’

[40] The constitutional and statutory scheme applicable to education is one in terms of which there is an interconnection between national and provincial government to ensure constitutional compliance. The right to a basic education is thus constitutionally entrenched and statutorily enforced. Government, in recognition of its constitutional obligations has ensured that in the budget approved by it, basic education receives the single largest allocation. Its three year expenditure plan tabled as part of the 2015 budget envisages expenditure in relation to basic education during that period in excess of R640 billion.¹⁰ It cannot be emphasised enough that basic education should be seen as a primary driver of transformation in South Africa.

[41] Returning to the provisions of s 29(1)(a) it is necessary to recognise, as counsel on behalf of BEFA readily conceded, that it does not spell out the content of the right to basic education. The centrality of textbooks in the realisation of the right to a basic education is uncontested. The DBE, however, insisted that the right to a basic education did not mean that each learner in a class has the right to his or her own textbook. It adopts the position that its own policy documents indicate only that the DBE set itself the 'lofty' ideal of providing a textbook for each learner but that it could not be held to that ideal or what it describes as the 'standard of perfection'.

[42] I agree with counsel on behalf of BEFA that the DBE did not only set itself a 'lofty' ideal but that its policy and actions, as set out in the affidavits filed on its behalf, all indicate that it had committed to providing a textbook for each learner across all grades. The content of the s 29(1)(a) right is also determined in the DBE's 'Action Plan to 2014 – Towards the Realisation of Schooling in 2025'. That certainly is what it achieved in pursuit of its own policy in respect of the other eight provinces and on its version of events for almost 98 per cent of learners in Limpopo. I also agree with the contention on behalf of BEFA that in instituting the application in the court below, it was merely seeking to hold government to its own standard. Simply put, the DBE set out to provide a textbook to every learner before the start of the 2014 academic year but fell short in its

¹⁰ Nhlanhla Nene '2015 Budget Speech', delivered 25 February 2015, available at <http://www.treasury.gov.za/documents/national%20budget/2015/speech/speech.pdf>, accessed 26 November 2015.

planning. BEFA sought to hold the DBE to the standard it set for itself, practically and not idealistically.

[43] The truth is that the DBE's management plan was inadequate and its logistical ability woeful. One would have expected proper planning before the implementation of the new curriculum. This does not appear to have occurred. The DBE also had a three-year implementation period during which it could have conducted proper budgetary planning, perfected its database, and ensured accuracy in procurement and efficiency in delivery. It achieved exactly the opposite and blamed all and sundry. It lacked introspection and diligence. It is notable, and conceded by counsel on behalf of the DBE, that there is no single statement anywhere in the affidavits filed on its behalf to the effect that it would be unable to procure the funds necessary to meet the shortfall either at provincial or national level, utilising existing treasury legislation, including providing for budgetary changes during a financial year. The DBE's reliance on budgetary constraints and its complaint that the order granted by the court below violated the doctrine of the separation of powers is fallacious and appears contrived. The DBE, the State in the present case, had decided on a policy which it started implementing and shortly before the final, and on its version, minor hurdle, it stumbled. In the present circumstances, there is no intrusion by the judiciary into the domain of the other two arms of government. The undertaking by the DBE which is encapsulated in para 3 of the order by Tuchten J and the prior undertakings contained in orders by Kollapen J fly in the face of the contention on behalf of the DBE that it is restricted by budgetary constraints. For all the reasons set out in this paragraph the reliance by the DBE on budgetary constraints can rightly be discounted.

[44] There is in this case no impediment of any kind to the vindication of learners' rights in terms of s 29 of the Constitution. That right is, as determined by the Constitutional Court in *Juma Musjid*, immediately realisable.

[45] ‘Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting.’¹¹ Section 9 of the Constitution provides:

- ‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’

[46] I agree with Kollapen J in *Section 27*¹² that the failure to provide textbooks to learners in schools in Limpopo in the circumstances referred to above is a violation of the rights to a basic education, equality, dignity, SASA and s 195 of the Constitution. The Constitutional Court, in *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC), in dealing with s 8 of the Interim Constitution, which entrenched the right to equality and equal protection under the law and which prohibited unfair direct or indirect discrimination, said the following (paras 30–31):

‘Section 8(2) prohibits unfair discrimination which takes place “directly or indirectly”. This is the first occasion on which this Court has had to consider the difference between direct and indirect discrimination and whether such difference has any bearing on the s 8 analysis as developed in the four judgments to which I have referred.

¹¹ See in this regard, *Government of the Republic of South Africa & others v Grootboom & others* [2000] ZACC 19; 2001 (1) SA 46 (CC) para 23.

¹² *Section 27 & others v Minister of Education & another* 2013 (2) SA 40 (GNP). I note again that the order in the reported judgment is different to that issued by the Registrar.

The inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by s 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination and, if it does, that it falls within the purview of s 8(2).'

[47] In *Harksen v Lane NO & others* [1997] ZACC 12; 1998 (1) SA 300 (CC), the Constitutional Court set a two-stage enquiry to determine whether differentiation amounted to unfair discrimination. The majority of the court said the following (para 54): 'Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.'

[48] The State is prohibited from unfairly discriminating against any person whether on listed grounds or not. SASA and NEPA envisage equality of opportunity for learners. SASA's preamble recognises that historically, our education system was based on racial inequality and segregation and those past injustices have to be remedied. Before us the DBE conceded that presently, textbook shortages in other provinces is not a problem. On the DBE's version, approximately 97 per cent of student across the province have textbooks. This means that the approximately three per cent of the learners who did not receive textbooks were treated differentially. They were being discriminated against. There is no justification for such discrimination. BEFA is litigating on behalf of all the learners in the affected schools in Limpopo.

[49] Clearly, learners who do not have textbooks are adversely affected. Why should they suffer the indignity of having to borrow from neighbouring schools or copy from a

blackboard which cannot, in any event, be used to write the totality of the content of the relevant part of the textbook? Why should poverty stricken schools and learners have to be put to the expense of having to photocopy from the books of other schools? Why should some learners be able to work from textbooks at home and others not? There can be no doubt that those without textbooks are being unlawfully discriminated against.

[50] The DBE did not take issue with international publications cited by BEFA and the SAHRC¹³ which indicate that, particularly in respect of rural communities, research has shown that they benefit the most from the use of textbooks. The DBE's attitude was that in the developing countries in which the research was conducted (which included Uganda, Malaysia, Chile and Brazil) there was a ratio between the number of textbooks and learners and that not every learner was provided with a textbook. The countries involved are different from ours. Their constitutional and statutory schemes in relation to education are different. In this country the Minister, acting in terms of the Constitution and legislation, took a decision that textbooks were essential to promote and protect the right to a basic education and devised a plan towards providing a textbook for every learner. The plan was flawed. The law is clear. In the circumstances referred to above, the DBE is obliged to provide a textbook to every learner to ensure compliance with s 29(1)(a) of the Constitution. We must guard against failing those who are most vulnerable. In this case we are dealing with the rural poor and with children. They are deserving of Constitutional protection.

[51] Tuchten J should have granted the order sought by BEFA declaring that the DBE had failed to comply with the orders made by Kollapen J. It is clear that there was non-compliance by the DBE. The difficulties that they faced were largely of their own

¹³ We were referred to the following publications: Fuller, B (1986) 'Raising School Quality in Developing Countries: What Investments Boost Learning?' *World Bank Discussion Papers* (1985), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1985/09/01/000009265_3980623151915/Rendered/PDF/multi_page.pdf, accessed 26 November 2015; Paul Glewwe, Michael Kremer and Sylvie Moulin 'Many Children Left Behind? Textbooks and Test Scores in Kenya' (2009) 1(1) *American Economic Journal: Applied Economics* 112, available at <http://www.povertyactionlab.org/sites/default/files/publications/33%20Textbooks%20Kenya%20Jan%202009.pdf>, accessed 26 November 2015.

making. Moreover, similar to the time frames provided by the order of the court below, there were undertakings that were made an order of court by Kollapen J. These were not complied with.

[52] There is one further aspect that requires to be addressed. Parts of the order by Tuchten J have been overtaken by time. It is thus necessary to re-craft the order in order to deal with the obligation of the DBE before the advent of the 2016 school academic year, and successive years. For the reasons set out in para 43 above, there is no need in the re-crafting of the order to deal with budgetary issues. What is required is an order setting out in clear terms that s 29(1)(a) requires the State to provide each learner in Limpopo with a prescribed textbook per subject at the commencement of the academic year.

[53] The following order is made:

1. The appeal is dismissed with costs including the costs of two counsel.
2. The cross-appeal in relation to the failure by the court below to declare that there had been non-compliance by the Department of Basic Education with the court order granted by Kollapen J is upheld with costs including the costs of two counsel.
3. The following orders are substituted for the orders of the Gauteng Division of the High Court:
 - '1. It is declared that s 29(1)(a) of the Constitution entitles every learner at public schools in Limpopo to be provided with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.
 - 2 It is declared that it is the duty of the State, in terms of s 7(2) of the Constitution, to fulfil the s 29(1)(a) right of every learner by providing him or her with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.
 - 3 It is declared that the National Department of Basic Education and the Limpopo Department of Education violated the s 29(1)(a), s 9 (equality) and s 10 (dignity)

right of learners in Limpopo in 2014 by failing to provide all of them with every prescribed textbook before commencement of the teaching of the courses for which they were prescribed.

- 4 It is declared that the National Department of Basic Education and the Limpopo Department of Education failed to comply with paragraph 6 of the order made by Kollapen J on 4 October 2012 that they “deliver all textbooks to schools for grades 4, 5, 6 and 11 for the 2013 year by 15 December 2012”.
- 5 The respondents are ordered to pay the applicants’ costs including the costs of two counsel.’

M S Navsa

Judge of Appeal

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The South African Human Rights Commission, Bloemfontein