

## Minister for Basic Education v Basic Education for All (Supreme Court of Appeal; 2015 )

### Case at a glance

#### Full citation

[Minister of Basic Education v Basic Education for All \(20793/2014\) \[2015\] ZASCA 198; \[2016\] 1 All SA 369 \(SCA\); 2016 \(4\) SA 63 \(SCA\) \(2 December 2015\)](#)

#### Forum / Country

Supreme Court of Appeal, South Africa

#### Date of decision

2 December 2015

#### Summary of decision

In this decision, the Supreme Court held that the constitutional right to basic education was immediately realisable and that the failure by the Limpopo Department of Education and the National Department of Basic Education ('DBE') to provide textbooks to all learners in schools in Limpopo was a violation of that constitutional right. The Supreme Court further held that the failure to deliver the school books to some (but not all) learners amounted to unfair discrimination and infringed the constitutional right to dignity and equality.

#### Significance to the right to education

This decision confirms that the provision of textbooks to school pupils is inextricably linked to the fulfilment of the constitutional right to basic education in South Africa. The State administration has a constitutional obligation to protect and promote this right.

The decision also highlights that policy statements of the State and performance plans of the local education authorities published with the view to promoting this right create an obligation on the State administration and local educational authorities to meet the targets they themselves set out in those statements and plans, including with respect to the textbook delivery. This obligation may not be discharged merely by bona fide attempts to meet the targets.

The decision further underscores that the right to basic education should be distinguishable from other social and economic rights, which may only be progressively realisable, although it may be achievable by social and economic means (such as availability of school books and other learning support).

#### Issues & keywords

Right to education; Basic education; Textbooks; Learning materials, Non-discrimination

# Facts

In 2011, DBE adopted a new national education curriculum. The new curriculum revised the content and learning material of each learning area. Consequently, new textbooks were prescribed and it was necessary for textbooks to be available for use in time for the ensuing 2012 academic year.

In addition to the difficulties faced by DBE due to the considerable challenge of implementing the new curriculum, the task in the province of Limpopo was compounded when the national executive had to intervene as a result of the Limpopo Provincial Government having become dysfunctional in 2011. Consequently, a significant number of the prescribed textbooks failed to be ordered and delivered to schools in the Limpopo province in a timely manner before the start of the ensuing academic year.

Section 27, an organisation which describes itself as a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights, became involved with the above situation following reports in the national press in the first months of 2012 that textbooks failed to be delivered in the province of Limpopo. In the course of extensive correspondence by Section 27 with DBE, representatives of the Limpopo authorities undertook a number of times between February and May of 2012 to procure delivery of all outstanding textbooks within an agreed timeframe but this commitment was not met.

After the textbooks failed to be delivered by May 2012, Section 27 and two other applicants applied to the High Court for a court order against the Minister of Basic Education of the Republic of South Africa and the Executive Counsel of the Limpopo Department of Education to declare that the failure to deliver textbooks to schools in Limpopo was a violation of the South African Schools Act No 84 of 1996 and Section 195 of the Constitution of the Republic of South Africa (the 'Constitution') as well as the right to basic education, equality and dignity. The applicants further sought relief against that failure through a court directive to the respondents to provide textbooks for all relevant school grade learners on an urgent basis and develop and implement a 'catch-up plan' for at least the affected highest grade learners.

Kollapen J, sitting as the High Court, granted both remedies sought by the applicants. DBE and the Department of Basic Education of Limpopo were directed to deliver all outstanding books within the set deadline of approximately one month from the date of the order. In addition, the court directed the respondents to develop and implement a detailed 'catch up/remedial' plan for the learners in the highest affected grade, which was ordered to be filed with the High Court.

Following this, Basic Education for All ('BETA') and Section 27 reported a continuing failure by DBE and Limpopo education authorities to comply with the High Court order and deliver textbooks to all affected learners. Further High Court orders ensued reaffirming the original decision of Kollapen J and ordering compliance with the original order within a new timeframe.

BETA's concerns heightened further following reports about numerous schools continuing to experience textbook shortages shortly before the start of the 2014 spring term. BETA and other applicants (including school governing bodies), represented by Section 27, decided to launch another application against DBE in the High Court in March 2014.

As a result of that application, Tuchten J held that the continuing failure by DBE to deliver all prescribed textbooks to all affected school learners was in breach of the Constitution. However, the High Court did not rule, as requested by BETA, that DBE and the other respondents were in contempt of previous orders of the High Court having failed to deliver all textbooks within the agreed timeframe. The High Court also refused to grant relief to the extent it required DBE and others to report their compliance with the orders periodically to the court.

DBE appealed against this latest order of the High Court. The decision was also cross-appealed by BETA.

# Issue

In its appeal, DBE and other respondents asserted that the order of the High Court imposed an incorrect standard for DBE to satisfy in order to discharge its constitutional responsibilities with respect to the right to basic education. They contended that the standard should not be so high as to require DBE to deliver every textbook to every affected learner and that the standard had to take into account other circumstances such as lack of co-operation on the part of other stakeholders, budgetary constraints and mitigating measures such as availability of old textbooks and other materials.

On the other hand, BETA cross-appealed against the High Court's refusal to hold DBE and other respondents in contempt of the previous court orders.

# Decision

In a unanimous decision of five supreme court judges delivered on 2 December 2015, the Supreme Court of Appeal dismissed the appeal of DBE and held that Section 29 (1) (a) of the Constitution entitled every learner at public schools in Limpopo to be provided with every textbook prescribed for her/her grade before commencement of the teaching of the course for which the textbook is prescribed.

The Supreme Court also declared that it is the duty of the State, in terms of Section 7 (2) of the Constitution, to fulfil this Section 29 (1) (a) right and that the DBE and the Limpopo Department of Education violated the Section 29 (1) (a) right (as well as the right to equality (Section 9 of the Constitution) and dignity (Section 10 of the Constitution)) by failing to provide the prescribed textbook as stated above.

## Relevant legal instruments:

- Section 7 (2) of the Constitution of the Republic of South Africa (that the state must respect, protect, promote and fulfil the rights in the Constitution)
- Section 29 (1) (a) of the Constitution (setting out that everyone has the right to basic education, including adult education)
- Section 38 of the Constitution (regarding standing in court matters if acting in the public interest)
- Section 100 of the Constitution (regarding National Executive's intervention into the fulfilment of a province's executive obligations)
- Section 172 (1) (b) of the Constitution (regarding courts' power to declare, in the context of deciding on a constitutional matter, that any law or conduct which is inconsistent with the Constitution as invalid to the extent of that inconsistency and in that context to make an order which is just and equitable)
- Section 195 of the Constitution (regarding the responsibility of the executive to protect and promote constitutional rights)
- Article 13 of International Covenant on Economic, Social and Cultural rights
- Section 12 of South African Schools Act No 84 of 1996

# Impact

The key impact of the decision of the Supreme Court appears to be the continuing pressure on the education authorities to fulfil their constitutional responsibilities and the refusal of the courts to accept that administrative difficulties in carrying out the responsibilities could serve to discharge the duty to promote and protect the right to basic education.

**‘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.’**

- Para 50 of the judgment

## Commentary

The 2012 High Court judgment and the 2015 Supreme Court judgment cite international human rights laws and the declarations of the United Nations as an increasingly influential framework within which the compliance with and the implementation of the national laws declaring and promoting the right to basic education should be assessed, monitored and enforced. In both cases, however, it is the national laws and promulgations that constitute the basis of the court decisions.

The judgments are also notable to show the court’s wiliness to affirm the standing in court matters of bodies like Section 27 and BETA. The Court held that their standing was justified as in light of Section 38 of the Constitution they acted in both their own interest and in the public interest.

## Additional resources

- [South Africa: Back to Court for the Non-Delivery of Textbooks](#)
- [Success story: The Limpopo Textbooks Case](#)
- [#TextbooksMatter: Why Textbooks are a Crucial Part of Every Child’s Learning Journey](#)
- [#TextbooksMatter 2: On Textbooks and the Standard of Perfection](#)
- [#TextbooksMatter 3: The Supreme Court of Appeal Rules That #TextbooksMatter](#)

## Relevant cases

Cited:

- [Juma Masjid Primary School and another vs. Essay](#) N.O. 2011 (8) BCLR (regarding interpretation of the right to basic education and affirmation that the right to basic education is immediately realisable)
- *Rail Commuter Action Group and others vs Transnet Limited*, trading as Metro Rail, and others 2005 (2) SA (regarding the standing of the applicants in court)
- *A party and others v The Minister of Home Affairs* 2009, (6) BCLR (regarding legal costs against respondent if an applicant acts on a pro bono basis)
- *Harksen v Lane NO & others* [1997] ZACC 12, 1998 (1) SA 300 (CC) (Constitutional Court's decision re two stage inquiry to determine whether differentiation amounts to unfair discrimination)

Related:

- [Section 27 & others v Minister of Education & another](#) 2013 (2) SA 40 (GNP) (Decision of the High Court, Section 27 and others v. the Minister of Education, 17 May 2012)
- [Order of the High Court of South Africa](#), North Gauteng High Court, Pretoria, Case No 24565/2012, 2012-10-04
- [Basic Education For All and Others v Minister of Basic Education and Others](#) (23949/14) [2014] ZAGPPHC 251; 2014 (4) SA 274 (GP); [2014] 3 All SA 56 (GP); 2014 (9) BCLR 1039 (GP) (5 May 2014)

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