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1. – Introduction

1.1. Background

Section 29(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that “everyone has the right to a basic education, including adult basic education.” It is undoubtedly a right which is a prerequisite for the enjoyment of a number of other rights,¹ and the provision of which forms an integral part of the country’s social and economic policies. Education consumes the largest proportion of the South African budget and has done so in every year since the advent of South Africa’s non-racial, democratic dispensation in 1994. It is also arguable that the right to education, along with the other socio-economic rights, is intricately linked to the value of human dignity² which is so highly prized by our Constitution and the Constitutional Court³ (the Court). As the former Minister of Education Kadar Asmal said:

“... a measure of our humanity is inextricably related to how we treat our children. Apartheid tried to rob us of our humanity. By condemning every black child to a life of deprivation, they sought to deprive us of our dignity... Everyone involved in education has a responsibility to restore the humanity and dignity in the way we treat our children.”⁴

But what exactly is the content of the right to education? While it is an absolute right that is phrased in a manner that, theoretically, makes it unqualified and capable of founding a justiciable, directly enforceable claim (as opposed to those socio-economic

¹ Veriava and Coomans “The Right to Education” in D Brand and C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 57 at 57. The authors argue that the right to education is a prerequisite for properly enjoying rights such as freedom of information, the right to vote, the right to choose work, or the right to take part in cultural life.

² Section 10 of the Constitution: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

³ See Liebenberg “The Value of Human Dignity in Interpreting Socio-Economic Rights” (2005) 21 *SAJHR* 1. Currie and De Waal submit that human dignity is “perhaps the pre-eminent value” in the Constitution (*The Bill of Rights Handbook* (5ed) 2005 at 272). Also see *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 144; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (6) BCLR 726 paras 28 and 29 and A Chaskalson “Human Dignity as a Foundational Value of our Constitutional Order” (2000) 16 *SAJHR* 193.

⁴ Address by Professor Kader Asmal, Minister of Education, at the launch of the School Register of Needs 2000, Johannesburg South Mega Education District, Pimville, Soweto, 20 November 2001. www.info.gov.za/speeches/2001/011121346p1002.htm (accessed 28 July 2007).

rights which the state may progressively realise⁵), to date, our courts have not been called upon to circumscribe the scope of the right. And nowhere is it explicitly stated what the scope of “basic education” entails. The question then arises: what set of circumstances would have to be in existence for the state to be in breach of its constitutional obligation to provide “basic education”? Would a teacher-student ratio of 1 – 100 be unconstitutional? Would it be a denial of a child’s right to basic education if they received no tuition due to an absent teacher for two months, two weeks, or two days? Is a school without access to potable water in breach of its constitutional duty? How far must a child have to walk before their access to basic education is being denied? Is the provision of a dilapidated, mud structure school building with a zinc roof that leaks, no ceilings, insufficient desks, and so few chairs that many of the learners sit on tree stumps, sufficient to satisfy the state’s constitutional obligation? Unfortunately, for far too many children in South Africa, these questions need to be answered urgently.

1.2. Purpose

The purpose of this paper is to focus on the scope of the right to basic education as it pertains to physical resources in education, and in particular, the provision of school buildings and usable classrooms in the Eastern Cape. Building infrastructure (along with other resources such as desks, textbooks, stationary, and toilets) forms part of the “availability” aspect of education.⁶ The factors or inputs⁷ which make up what is generally understood to constitute “education” are numerous and complex, and there is certainly no consensus on which inputs are most important. Input variables include, *inter alia*, the level of teacher qualifications, teacher-learner ratios, teacher remuneration, years of teaching experience, the number of deputy principals, textbooks, computer centres, science laboratories, building conditions, stationery, and media centres. Another factor gaining recognition in South Africa is the importance

⁵ For example, the right to housing (s26), the right to health care, food, water and social security (s27) or the right to further education (s29(1)(b)). Here, the state need only take reasonable measures, within its available resources, to achieve the progressive realisation of each of these rights.

⁶ Accessibility, acceptability and adaptability are the other three features of the right which analysts use as a device to analyse the basic content of the right to education. (See Veriava and Coomans “The right to education” 64).

⁷ This term is used by L Crouch in “South Africa equity and quality reforms” (2005) 1 *Journal of Education for International Development* www.equip123.net/JEID/articles/1/1-2.pdf (accessed 15 July 2007).

of leadership and successfully managing a school's physical and human resources, whatever those resources may be.⁸

Many schools in South Africa do not have appropriate buildings for the provision of basic education. The situation in the Eastern Cape is particularly dire. What have become known as “mud structure schools” and “disaster schools”⁹ have gained publicity in the Eastern Cape and national press.¹⁰ Despite the state's recognition of the extreme need exhibited by these schools nationally (even from the State President¹¹), plans to eradicate them in the Eastern Cape have been thwarted by an inadequate budgetary allocation, under-spending, mismanagement, and the siphoning off of funds earmarked for infrastructure in order to address overspending on personnel budgets.¹² Even though there is continuous debate in education reform circles and state education departments about which inputs are the most valuable, one cannot ascertain with certainty (at this stage) whether redistributing resources will definitely result in improved performance by the learners who are the beneficiaries of those resources.¹³ Nonetheless, this paper will begin with the premise that investment in education is good and necessary, and that s29 of the Constitution obliges the state

⁸ The extent to which resources or good management can improve education outcomes and overcome poverty, unemployment, and social inequalities is not easily discernible. For a discussion of research on measurable inputs see Crouch and Mabogoane “No magic Bullets, Just Tracer Bullets: The role of learning resources, social advantage, and education management in improving the performance of South African schools” (2001) 27 *Social Dynamics* 60. Also see Motala *et al* “Review of the Financing, Resourcing and Costs of Education in Public Schools: A Commentary” (2003) 10 *Quarterly Review of Education and Training in South Africa* 1 at 5, for comments on the limitations of using input and outputs to assess progress towards equity and quality in education.

⁹ “Disaster schools” range from mud structures that have collapsed, to existing structures where roofs have been damaged and which “pose extreme danger to the lives of learners and educators” Eastern Cape Department of Education, Annual Report, 2004/05 at 107, as quoted in Dalton “Classroom Crisis: The State of School Infrastructure in the Eastern Cape” (2005) PSAM Research Report www.psam.org.za/Docs/264.pdf (accessed 20 June 2007).

[PSAM stands for the Public Service Accountability Monitor which is an independent research and monitoring institute based in Grahamstown. The PSAM provides information on the management of public resources and the delivery of public services in an attempt to strengthen democracy.]

¹⁰ “EC schools tour gives legislators a bleak view” *Daily Dispatch* 23 February 2007; “Principal calls for his ‘sick’ school to be shut” *Daily Dispatch* 1 March 2007; “Mud school deadline ‘not possible’, says official” *Daily Dispatch* 18 April 2007; “Eastern Cape schools in dire straits” *Sunday Times* 22 July 2007; “R87 million lost in schools scandal” *Daily Dispatch* 8 August 2007.

¹¹ “By the end of this financial year we shall ensure that there is no learner and student learning under a tree, mud-school or any dangerous conditions that expose learners and teachers to the elements” *Address of the President of South Africa, Thabo Mbeki, to the first joint sitting of the third democratic Parliament, 21 May 2004.* www.dwaf.gov.za/Communications/OtherSpeeches/2004/MbekiParl21May04.doc (accessed 29 July 2007).

¹² Dalton 2005 “Classroom Crisis” 12.

¹³ Crouch 2005 *Journal of Education for International Development* 14.

to invest in resources.¹⁴ The paper will argue that a school building which protects teachers and learners from the elements, is capable of storing stationery, textbooks and other resources, and which is not offensive to the human dignity of teachers and learners, is a prerequisite for absorbing most of the other possible education inputs mentioned above. So regardless of how education policy debates apropos optimum inputs develop and change - a school building is a prerequisite for the delivery of basic education.

1.3. The Paper's Method

This paper uses X School¹⁵, a mud structure school in the Libode district of the Eastern Cape (in the former Transkei), as a case study to analyse the merits, obstacles, possible strategies, and likely outcomes of a *Grootboom*¹⁶-styled challenge against the Eastern Cape or National Department of Education (or both) where the claim is that learners' basic right to education is being denied. The paper addresses whether litigation of this nature is desirable and the possibilities for success. To answer these questions, this paper briefly examines the formation of the Eastern Cape Department of Education (EC DoE), the reasons it has struggled to provide adequate infrastructure in the province, and the seemingly hollow policy steps it has introduced to address the provision of infrastructure. The grassroots impact of these policies is then analysed in more detail by looking at the circumstances and experiences of one Eastern Cape school.¹⁷ Using pertinent legislation, case law and literature, an argument will be put forward that approaching a court for relief would be an appropriate strategy to try and remedy X School's infrastructure problems in light of the EC DoE's failure to do so

¹⁴ This premise is supported in the case of *Ex Parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), 1996 4 BCLR 537, where the Court held at para 9 that the right to basic education "creates a positive right that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education."

¹⁵ Confidentiality has been maintained in an attempt to draw out an open discourse from the school and to protect the teachers from any possible negative responses from the EC DoE.

¹⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC).

¹⁷ While it is acknowledged that this constitutes qualitative data, the government itself recognizes that the experiences of schools such as X are not uncommon when it publicises that there are 572 disaster schools in the Eastern Cape, and sets timeframes for the eradication of mud structure schools nationwide (Eastern Cape Department of Education, Annual Report, 2004/2005 at 107.) It is therefore submitted that the lessons learnt from this research may have value for all South African schools with infrastructure needs.

of its own accord. The paper then attempts to predict the likely outcome of the hypothesised litigation by canvassing the Court's approaches in other socio-economic rights based cases and examining the concepts of "minimum-core content" and "reasonableness review". All of these issues are examined against the back-drop of the Court's decisions in the five cases where socio-economic rights have come before it in the Court's 11 year history.¹⁸

2. – Problems with Education Infrastructure in the Eastern Cape

2.1. Legislative Lacuna

The legislative framework that guides the EC DoE in its provision of basic education is minimal as it takes its cue from national legislation which is equally meagre. The White Paper on Education and Training drafted in 1995 recognised that "[s]ince the term 'basic education' is not defined in the Constitution, it must be settled by policy in such a way that the intention of the Constitution is affirmed."¹⁹ As a result, the South African Schools Act²⁰ makes no mention of what basic education entails in material terms. In the section dealing with compulsory attendance, the Act does provide that the MEC for Education must ensure that there are enough "school places" for every child in the province,²¹ and that if they cannot comply with this provision, they must take steps to remedy any such lack of capacity.²² Nothing, however, is said about the condition of schools or what constitutes a "place". Thus, if a court had to decide whether the state's policy is congruent with the intention of the Constitution, it would be obliged to consider international law as directed by s39(1)(b) of the Constitution.²³ A court, however, would glean little from the international instruments that deal with the right to education either. Article 26 of the

¹⁸ *Ex parte Chairperson of the Constitutional Assembly In re: Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (11) BCLR 1419 (CC) para 76-78; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696; *Grootboom*; *Minister of Health v Treatment Action Campaign* 2002 (5) 721 (CC), 2002 (10) BCLR 1033 (CC); *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

¹⁹ Department of Education 1995 "White Paper on Education and Training" chapter 7, para 12 www.info.gov.za/whitepapers/1995/education1.htm (accessed 10 August 2007).

²⁰ Act 84 of 1996.

²¹ Section 3(3).

²² Section 3(4).

²³ This section provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law..."

Universal Declaration of Human Rights, Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 11 of the African Charter on the Rights and Welfare of the Child, all define the right to education in terms which rarely say anything about the provision of resources, save that education at the primary level should be compulsory and free to all. The only reference to physical resources is in Article 13 (2)(e) of ICESCR which provides that “[t]he development of a system of schools at all levels shall be actively pursued...and the material conditions of teaching staff shall be continuously improved.” It is therefore submitted that even if South Africa were to ratify the ICESCR,²⁴ the Convention would provide no guidance on the obligations which the state must fulfil in terms of infrastructure provisioning for Eastern Cape schools. It is not surprising that the Rapid Assessment of Service Delivery and Socio-Economic Survey (RAS), commissioned by the Premier of the Eastern Cape in 2006, stated that one of the “key messages” for education was that “there must be a defining of free basic education.”²⁵ The problematic history of the EC DoE exacerbated this need for clarity.

2.2 Funding Shortfalls and Mismanagement

In 1994 the Eastern Cape Department of Education (EC DoE) was formed by amalgamating six racially distinct education departments, the largest being the Transkei administration which accounted for 60.9% of the new system. The Transkei school system was hopelessly under-funded during the apartheid era:

“It had the lowest level of funding per learner in South Africa, learner-educator ratios of between 50:1 and 80:1, and learner-classroom ratios of between 80:1 and 100:1. Dilapidated wattle-and-mud structures, built with the meagre resources of communities, passed as classrooms and schools lacked basic teaching and learning materials.”²⁶

Coupled with Eastern Cape’s problematic history was its problematic size – the Eastern Cape had the most number of schools in the country (5879, or 22% of the

²⁴ South Africa signed the ICESCR on 3 October 1994 but has not ratified it. Seleane “The Right to Education: Lessons from *Grootboom*” (2003) 7 *Law, Democracy & Development* 137 at 145.

²⁵ Province of the Eastern Cape, Office of the Premier, “Summary Report on Rapid Assessment of Service Delivery and Socio-Economic Survey” (abridged version) undated, section 4 page 25.

²⁶ Godden “Falling at the first hurdle: The case of the Eastern Cape Department of Education” (2005) 12 *Quarterly Review of Education and Training in South Africa* 7 at 7.

nations' schools in 1996).²⁷ An even more serious problem was that the EC DoE did not have a common payroll with much of the information regarding personnel being incomplete or inaccurate.²⁸ Calculating total expenditure on teacher salaries was therefore not possible and by the time a common payroll was formulated in 1998, R900 million had unwittingly been overspent.²⁹ Budgetary woes were compounded by the recruitment of approximately 10 000 teachers in the province between 1994 and 1997 (in an attempt to bring learner-educator ratios in line with national targets).³⁰ While personnel expenditure quickly expanded, the EC DoE's overall budget did not.

Even though the National Treasury allocated substantial resources to reducing the classroom shortfall in the Eastern Cape³¹ from 20733 in 1996, to 11557 in 2000,³² expenditure on personnel made up 95% of the 1999/2000 provincial education budget, “effectively ‘crowding out’ vital non-personnel items such as teaching equipment, learning materials and school services.”³³ This effectively set the financial trap for the province – a trap which it has not been able to extricate itself from without severely limiting the finances available for discretionary non-personnel costs. The province has been forced to operate on a severely limited budget in order to control expenditure and repay its overdraft. Jonathan Godden argues that the Eastern Cape received disproportionately low funding from national government between 1994 and 2002 compared with other provinces. This was caused firstly by the continued effects of the unequal budgets of apartheid governments (1994/1995), secondly, by education budget limits which impacted upon poorer provinces trying to “catch up” particularly severely (1996/1997),³⁴ and thirdly by the Equitable Shares Formula (ESF)³⁵ which Godden submits

²⁷ School Register of Needs (SRN) 2000, Department of Education 2001, cited in Wildeman “Infrastructure Provisioning in Schools and the Right to Basic Education” *Education Rights Project* (2002) Issue Paper 2, 9 www.law.wits.ac.za/cals/lt/pdf/Wildeman_postRefGrp.pdf (accessed 25 April 2007).

²⁸ *Ibid.*

²⁹ Godden 2005 *Quarterly Review of Education and Training in South Africa* 7.

³⁰ Those targets were 40:1 in primary schools and 35:1 in secondary schools (Godden 2005 *Quarterly Review of Education and Training in South Africa* 8.)

³¹ Through conditional grants, the National Treasury assists infrastructure development in provinces. Wildeman 2002 “Infrastructure Provisioning in Schools and the Right to Basic Education” 5.

³² SRN 2000, Department of Education 2001.

³³ Godden 2005 *Quarterly Review of Education and Training in South Africa* 8.

³⁴ For an interesting comparison of per capita expenditure for children in each province between 1991 and 2002, see Crouch 2005 *Journal of Education for International Development* 4. By comparing the Eastern Cape and Gauteng for example, one can see the cumulative disparity between the two provinces and how the Eastern Cape was under-funded by national government.

“...does not take significant account of backlogs (only 3% of ESF funding), does not include poverty weighting to account for the greater dependence of the poor on social services, and does not include the cost of delivering basic minimum standards in education. Neither does the ESF take into consideration the higher “own revenue” raised by richer provinces.”³⁶

In terms of infrastructure development, this has resulted in the Eastern Cape having the highest proportion out of all the provinces of “disaster schools”. In 2005 the EC DoE stated in their annual report that there were 572 such schools in the province which “pose extreme danger to the lives of learners and educators.”³⁷ They vary from mud structures that have collapsed, to structures that have serious damage to their roofs. The EC DoE has not quantified the funding required to eradicate these specific buildings, but in the 2004/2005 EC DoE Annual Report it was estimated that R12,7 billion was necessary to overcome the province’s entire school infrastructure backlog.³⁸ In the 2004/2005 EC DoE budget, however, a paltry R462 million was earmarked for infrastructure, and even this amount was then reduced to R277 million as the EC DoE was forced to hand over monies to the Provincial Treasury to clear the EC DoE’s overdraft. It has been submitted that this is in contravention of section 43(4)(c) of the Public Finance Management Act³⁹ which provides that a department may not use a savings made in an amount allocated for capital expenditure to subsidize current expenditure.⁴⁰ It has also been highlighted that,

“According to the Department (EC DoE), 99 projects were put on hold, and no new projects commenced in 2004/2005. Effectively, the Department’s “belt tightening” measures meant that it would not meet previous infrastructure service delivery commitments, nor Presidential Priorities regarding mud structure schools and sanitation. The Department had aimed to eradicate the sanitation backlog by 2006,

³⁵ “The ESF is the government’s main redistributive formula; it aims to create equity across provinces through a weighted formula in favour of the poor” Motala *et al* 2003 *Quarterly Review of Education and Training in South Africa* 5.

³⁶ Crouch 2005 *Journal of Education for International Development* 4.

³⁷ Eastern Cape Department of Education, Annual Report, 2004/2005 at 107.

³⁸ This estimate includes classrooms needed, as well as water, sanitation, electricity, resource centres, computer and science laboratories, office space, and maintenance budgets.

³⁹ Act 1 of 1999. The section provides that: “This section does not authorise the utilisation of a saving in... an amount appropriated for capital expenditure in order to defray current expenditure.”

⁴⁰ Dalton 2005 “Classroom Crisis” 12.

and mud/unsafe structures by 2008, as well as the total infrastructure backlog by 2010.”⁴¹ (Citations omitted)

In 2007, both the Premier of the Eastern Cape⁴² and the MEC for Education in the Eastern Cape⁴³ have made public assertions that mud structure schools will be eradicated by the end of the 2008 financial year. This, however, has been contradicted by the Chief Financial Officer in the EC DoE who said that the only practical deadline was 2013, unless alternative funding was sourced.⁴⁴ The likelihood that the 2008 target will be met is diminished further in light of the recent administrative shortcomings in the EC DoE’s provision of infrastructure. Not only is the National Treasury unlikely to release additional funding to the EC DoE due to the 11 consecutive audit disclaimers⁴⁵ it has been issued with by the Auditor General,⁴⁶ but also, an independent audit recently uncovered gross irregularities which resulted in the suspension of the two most senior officials involved in the implementation of the programme to eradicate mud structure schools in the province.⁴⁷ Regardless of what the ultimate outcome of the audit is, the suspension of the officials will undoubtedly delay the implementation of the school building programme.

The picture that emerges is one of under-funding (exacerbated by a degree of under-spending), perpetually shifting deadlines for delivery, and ongoing hardship for teachers and learners who are forced to work and learn in conditions which make the provision of basic education extremely difficult, if not impossible. The Eastern Cape Education Standing Committee lauded the EC DoE’s efforts to provide infrastructure for schools but ultimately concluded that the condition of educational infrastructure in

⁴¹ *Ibid.*

⁴² Balindlela, “State of the Province Address of the Premier of the Eastern Cape, Nosimo Balindlela, 16 February 2007” www.ecprov.gov.za/modules/documents/download_doc.php?id=27 (accessed 22 September 2007).

⁴³ “Mud school deadline ‘not possible’, says official” *Daily Dispatch* 18 April 2007.

⁴⁴ *Ibid.*

⁴⁵ An audit disclaimer is issued when the Auditor-General cannot confirm whether the auditee’s resources were procured economically and utilised efficiently (s 20(3) of the Public Audit Act 25 of 2004). An audit disclaimer may also reflect that the auditee’s financial statements are inaccurate, or have not complied with relevant financial legislation.

⁴⁶ “Mud-structures unlikely to be eradicated by 2009” PSAM press release, June 26 2007 www.psam.ru.ac.za/ptlpressreleaseshow.asp?qs=fld.pressreleaseid,op,e,sv1,210&ob=Date (accessed 22 September 2007).

⁴⁷ “Mud school deadline ‘not possible’, says official” *Daily Dispatch* 18 April 2007.

many rural areas was “pathetic”.⁴⁸ While the statistics proffered above regarding needs and capital backlogs should be treated with some circumspection (largely due to the manner in which the School Register of Needs 2001 was compiled using self-reporting measures in schools),⁴⁹ there is undoubtedly a critical need for urgent intervention in a number of Eastern Cape Schools.⁵⁰ The case study of X School below will illuminate the history and current experience of one of these mud structure schools.⁵¹ It will also serve as the hypothetical litigant in a socio-economic rights challenge of the state’s failure to comply with section 29(1) of the Constitution and provide basic education.

3. - The Experience of X School

X School is located in the Municipal District of Libode in the Eastern Cape which is situated between Mthatha and Port St Johns in the former Transkei. The school is in one of the poorest areas of the country and monthly household expenditure is calculated to be R885.⁵² The main sources of income for families in the area are old-age pensions, maintenance grants, and remittances sent home from a few men who work on mines. There is no industry in the area. X School was started in the early 1930s as a community school and was built by the community using mud bricks and originally comprised just one building.⁵³ In the 1960s a second mud structure was built by the community, and again in the 1970s a third mud structure was added to cope with expanding numbers. The school fell under the administration of the state in

⁴⁸ Announcements, Tablings and Committee reports of the EC Provincial Government, 15 March 2005. Cited in Dalton 2005 “Classroom Crisis” 12.

⁴⁹ Wildeman 2002 “Infrastructure Provisioning in Schools and the Right to Basic Education” 8.

⁵⁰ The most recent information released by the National Department of Education states that 19% of Eastern Cape Schools are in a “very poor” condition. *National Assessment Report (Public Ordinary Schools) National Education Infrastructure Management System (NEIMS)* September 2007, 8 www.polity.org.za/attachment.php?aa_id=7378 (accessed 21 September 2007).

⁵¹ Attempts to find out from officials in the EC DoE whether X School was classified as a “disaster school” as well as a “mud structure school” were unsuccessful. During an interview in Bhisho on 24 August 2007, a senior official in the infrastructure section of the EC DoE stated that it would be difficult to ascertain this and that it was unlikely that a “priority list” existed. It appears that the terms “disaster schools” and “mud structure schools” are sometimes used interchangeably by the EC DoE.

⁵² Statistics South Africa and the World Bank, using 2001 census data <http://www.statssa.gov.za/publications/statsdownload.asp?PPN=PovertyReport&SCH=2349> (accessed 10 September 2007).

⁵³ All information on the school and its history was obtained during a group interview held at X School on 23 August 2007. The information was provided by the current principal, the former principal from 1993-2002, and six members of the school governing body which comprised four community members and two teachers. See Appendix 4 for a list of the questions asked during the interview.

1993, but to date, the school's infrastructure has not changed. At present there are 250 learners enrolled in the school which caters for grades 1 to 6,⁵⁴ and according to the teachers, no learner resides more than 1 ½ kilometres from the school. The school's enrolment has been steadily increasing over the last seven years⁵⁵ and the teacher learner-ratio currently stands at 1: 46.

Grades 1 and 3 share a structure⁵⁶, the grades 2 are taught in the oldest building⁵⁷, and grades 4 to 6 are taught in the largest building which is partitioned by a wall that does not go up to the ceiling (grade 4 is on one side of the wall and grades 5 and 6 are on the other)⁵⁸. The floors of all the classrooms are made of dirt and cow dung,⁵⁹ and are occasionally re-smearred by the community, though the teachers and Governing Body say that parents are becoming less and less willing to help in this regard. The roofs of the buildings are made of corrugated iron and there are no ceilings to help regulate the temperature.⁶⁰ All of the zinc roofs are more than 15 years old and all have numerous holes with beads of sunlight shining through them on fair days. The principal lamented, however, that “when it is raining, the roofs are all leaking.” The school does not have electricity and therefore light from windows and doors becomes very important. All of the classrooms had either 3 or 4 windows and a door to let light in, but even on sunny days they are all fairly gloomy inside.

The school's principal and Governing Body highlighted a number of problematic issues at the school, including the absence of electricity and the resultant difficulty in preparing worksheets for learners without a photocopier. The school's leadership also stated, however, that the EC DoE had effected a number of improvements in the recent past: a tap was installed at the school in 2006; the daily feeding scheme which had almost come to a complete stop in the past was now running smoothly; being designated as a “no-fee school” had resulted in the school having a slightly higher operating budget and had dispensed with the onerous task of trying to collect school fees from an indigent community; and proper iron, pit-toilets with zinc roofs had been

⁵⁴ See Appendix 1 for a breakdown of numbers per grade.

⁵⁵ See Appendix 2.

⁵⁶ See Appendix 3a.

⁵⁷ See Appendix 3b.

⁵⁸ See Appendix 3c.

⁵⁹ See Appendix 3d.

⁶⁰ See Appendix 3e.

installed which were a vast improvement on the previous toilets. This paper's focus, however, is the building infrastructure at the school – something which the school's leadership unanimously agreed was (along with a lack of furniture) the biggest obstacle facing the school.

The principal stated,

“You can't put posters up on the wall, because when it is raining these animals push open the doors and come in and destroy everything in the class. You can't make your classroom clean. The doors aren't strong enough and we have no locks for the doors. Even the floors are made of mud. Our classrooms are accessible to all the animals and to anyone who wants something from inside the class.”

The teachers felt certain that an improvement in the school's buildings would result in an improvement in learner and teacher performance, particularly in winter when learners are “shivering so much that they cannot concentrate”. Coupled with the problem of poor buildings is the dire lack of furniture:

“We don't have enough chairs and we are short of tables and benches. The department gave this school furniture only once, and that was in 1993. We have received nothing since then. A few of these chairs were donated by other schools in the area, but most of our learners up to grade 3 have to sit on wooden stumps...⁶¹ Desks and tables are the same story, we just don't have enough.”

The three structures used to house the school's 250 learners are also derided as being wholly inadequate:

“We have to combine classes. There is no office or staffroom. If we ever want to have a meeting...we have to tell the children to go outside. And if the one teacher wants to teach in this classroom (the grade 1 and 3 classroom), then the other grade of learners have to go outside and learn under the tree...We need proper classrooms made out of bricks and we need one classroom per grade. We also need an office, a staff-room, a library, and a store-room.”

The third major problem highlighted by the school, after poor buildings and a lack of furniture, was the need for a fence to keep animals out.⁶²

⁶¹ See Appendix 3f.

⁶² See Appendix 3g.

When asked about the school's relationship with the local offices of the EC DoE, the leadership team said that it was positive and that there was good communication. This, however, was tempered when the principal pointed out that,

“The department has good communication with us. They ask us to fill out forms saying what it is that we need, they are phoning us [on the principal's cell phone], they are coming to visit us, but they never send us anything. The communication is 100 per cent but the delivery is zero.”

It is clear that X School has lost all faith in the EC DoE's ability to provide infrastructural improvements. This is largely because EC DoE officials have visited the school on various occasions to photograph and take measurements for a fence and new buildings, have asked them to fill out forms giving details about their school, and have been told that they will have a new school “between year 2008 and 2010”. But as the head of the school's governing body put it,

“This is not going to happen. This is another one of their long stories. These people (the EC DoE) have been promising us for years but it just doesn't happen, it ends there... They have just come here because they are afraid of what is published in the press.”

After being told by the EC DoE in 2006 that the school was in line to receive a fence, the principal followed this up with the EC DoE in April 2007 only to be told that their school was no longer on the list as they had been given toilets and that the money earmarked for their fence had been redirected to another school. The school's feeling of powerlessness and marginalisation is understandable. It is submitted that while there are undoubtedly problems with the EC DoE's capacity to deliver improved services and infrastructure,⁶³ there is also, at a more basic level, an enormous dearth of funds necessary to provide basic education in a manner that is respectful of learner's and teacher's human dignity. The eradication of “mud structure” schools in the Eastern Cape, such as X School, will not happen in the foreseeable future as long as the total infrastructure budget for all school buildings in the province is R729 million,⁶⁴ and the EC DoE is thwarted by maladministration and a lack of capacity.

⁶³ “Eastern Cape schools in dire straits” *Sunday Times* 22 July 2007.

⁶⁴ The infrastructure budget was provided by a senior official in the EC DoE during an interview on 24 August 2007. The budget is arrived at by using a “provincial equitable share formula” which employs a weighting system to influence the allocation of resources to service delivery departments. Poor performance and management by a provincial department will decrease their chances of successfully motivating to the National Treasury for increased allocations. (Email correspondence with Jay Kruse, PSAM lawyer, 25 September 2007.)

4. – Why Litigation?

It has been pointed out on numerous occasions that South Africa's Constitution is "transformative" in nature. Liebenberg comments that, "its primary concern is not to restrain state power, but to facilitate a fundamental change in unjust political, economic and social relations in South Africa."⁶⁵ The Constitution makes it clear that the position of the judiciary in relation to the other branches of state is fundamentally different in nature to the often deferential relationship the judiciary had with the executive and the legislature in the pre-Constitutional era, and envisions a far more proactive role for the courts. The supremacy of the Constitution⁶⁶ combined with the justiciability of the Bill of Rights⁶⁷ highlight the active role which the courts are expected to take when required to.

4.1. A New Role for the Courts

The decision to include socio-economic rights, such as the right to education, in the Constitution has served to establish these rights as needs which the state is constitutionally mandated to meet.⁶⁸ Ensuring a substantive interpretation of those rights, one which pays more than mere lip-service to them, is an ongoing challenge but one that constitutional court jurors are aware of. In the Fourth Bram Fischer Memorial lecture, Chief Justice Dikgang Moseneke highlighted the importance of social justice in constitutional adjudication:

“(A) creative jurisprudence of equality coupled with substantive interpretation of the content of ‘socio-economic’ rights should restore social justice as a premier foundational value of our constitutional democracy side by side, if not interactively with, human dignity, equality, freedom, accountability, responsiveness and openness.”⁶⁹

⁶⁵ Liebenberg “Needs, Rights and Transformation: Adjudicating Social Rights” (2006) 17 *Stellenbosch Law Review* 5 at 6. She cites Mahomed J’s judgment in *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) para 262, and three other cases where this transformative agenda of the Constitution is mentioned.

⁶⁶ Section 2 of the Constitution: “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

⁶⁷ Section 8 of the Constitution: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

⁶⁸ Liebenberg 2006 *Stellenbosch Law Review* 13.

⁶⁹ Moseneke “Fourth Bram Fischer Memorial Lecture: Transformative Adjudication” (2002) 18 *SAJHR* 309 at 314.

Is this mere “rainbow rhetoric”⁷⁰ or does it signify a willingness to engage with the problems faced by the learners in a school such as X?

More recently, it has been pointed out that,

“Given the executive’s stranglehold over the legislature, citizens increasingly look to the judiciary to ensure executive accountability and for the protection of their basic interests.”⁷¹

While there are undoubtedly possible drawbacks to litigating over socio-economic rights (which have been highlighted by Wilson⁷²), recent socio-economic cases in South Africa suggest that there is great potential to use these rights as conduits for change. Liebenberg submits that the inclusion and enforcement of social rights in a Constitution

“can help to infuse a substantive dimension into the Bill of Rights as a whole...Social rights have an important role to play in securing civil and political participation while civil and political rights in turn can help facilitate greater equity in resource distribution.”⁷³

It is submitted that the right to education is a good illustration of this symbiotic relationship between social and civil rights. In supporting the realisation of quality education in conditions that do not undermine the human dignity of learners, not only would the judiciary be ensuring that the state meets its Constitutional obligations in terms of s29(1)(a) and s10, but it would also potentially be helping learners to fully engage with a whole range of other rights which are included in the Bill of Rights.⁷⁴

There are, however, other potential advantages to litigation.

⁷⁰ This term was coined by Patrick Lenta who used it to describe the early jurisprudential language of the Constitutional Court which he submitted was excessively rhetorical and lacking in substantive content. “Rainbow Rhetoric” in M Du Plessis S Pete (eds) *Constitutional Democracy in South Africa 1994-2000* (2004).

⁷¹ Pieterse “Coming to Terms with Judicial Enforcement of Socio-Economic Rights” (2004) 20 *SAJHR* 383 at 388.

⁷² Wilson “Taming the Constitution: Rights and Reform in the South African Education System” (2004) 20 *SAJHR* 418 at 420. Wilson draws attention to Scheingold’s characterisation of rights as “myth”. According to Scheingold, the conservatism of judges, the tendency of litigation to over-particularise issues, and the inclination of parties to over-simplify complex social processes, all stand in the way of meaningful change at a grassroots level.

⁷³ Liebenberg 2006 *Stellenbosch Law Review* 17.

⁷⁴ These include the rights to equality (s9), human dignity (s10), freedom of expression (s16), freedom of trade, occupation and profession (s22), access to information (s32), just administrative action (s33), access to courts (s34), as well as the enjoyment of political rights (s19).

While the doctrine of the separation of powers and the standard of reasonableness review which the courts have adopted in socio-economic rights litigation serve to limit the extent which courts may intervene in the state's distribution of resources, the extent of the limitation is by no means clear. The variedness of different South African courts' approaches to challenges based on the infringement of socio-economic rights illustrates the inconsistency of the courts. Therefore, trying to guess how willing a court will be to make an order with substantial budgetary implications is not easy. For X School, the best outcome would undoubtedly be a court order that forces the EC DoE to build new classrooms for the school and provide them with furniture. The ramifications of such an order may, however, be financially extensive and suggest that such an order is unlikely. A brief look at the most recent National Department of Education's survey of school needs reveals that 19% (or 1278) of schools in the Eastern Cape are in a "very poor" state; 3862 of the Eastern Cape schools have more than 10% of their learners without desks; 4140 of Eastern Cape schools have more than 10% of their learners without chairs; 4057 of the Eastern Cape schools have no fence (or a fence in very poor condition); and 605 Eastern Cape schools have no toilets of any kind on site.⁷⁵ A court order that granted X School infrastructural improvements ahead of other schools may raise serious questions about "queue jumping" of the kind which the Court in *Grootboom* was so clearly opposed to⁷⁶ (assuming of course that the EC DoE could provide a priority list of schools needing improvement, and that X School was not top of that list).

4.2. Additional Benefits of Litigation

Nonetheless, even if a court was reluctant to intervene in a manner that had large-scale, direct budgetary implications for the state, a court order which impacted on the transparency, administrative efficacy, and planning clarity of the EC DoE's school infrastructure programme, could have a positive impact on the fortunes of X School indirectly. Improved planning, auditing, and delivery performance on the EC DoE's part is likely to result in more funds being released from the National Treasury. While the possibility of a court granting an order with immediate and positive

⁷⁵ *National Assessment Report* 2007.

⁷⁶ *Grootboom* paras 81 and 92.

infrastructure ramifications for X School should not be completely discounted, the prospect of having to accept a court order with less direct, and more long-term or incremental results needs to be acknowledged. The possibility also exists, however, for gains that are less tangible materially to be made from the proposed litigation.

It has been argued that litigation has the ability to draw out a “transformative discourse” from the courts which serves to expose “the underlying patterns of social injustice that generate the deprivations in question”.⁷⁷ The court’s discourse can also “serve as a constant reminder that the redress of poverty and inequality are questions of political morality and a collective social responsibility.”⁷⁸ Drawing on Justice Langa’s ruling in the *Modderklip*⁷⁹ case, Liebenberg points out that one of the important roles of the court “is to keep at the forefront of public consciousness the vast chasm between the vision of a just society reflected in the Constitution and social reality.”⁸⁰ The expression of disgruntlement with the performance of the EC DoE that is found in the press needs to be bolstered by other sources/institutions.

In contrast with the well organised Treatment Action Campaign that successfully used the courts to achieve the country-wide roll-out of anti-retroviral drugs to help ameliorate the HIV-Aids pandemic⁸¹, the voice of the rural-poor education lobby is virtually non-existent. The Public Service Accountability Monitor completed a report on the status of infrastructure provisioning in rural Eastern Cape schools in 2005 and found, *inter alia*, a pervasive lack of communication between the EC DoE and schools. The situation at Sibuyele Combined School was indicative of the plight of many schools in the region.

“The principal argued that they were “treated like kids”. She observed that whatever the Department gives them, they take with or without explanation, ‘because we have nothing,’ she said. According to Mrs Njuli (the principal), the

⁷⁷ Liebenberg 2006 *Stellenbosch Law Review* 31.

⁷⁸ *Ibid.*

⁷⁹ *President of RSA and another v Modderklip Boerdery (Pty) Ltd (Agri SA & others, AmiciCuriae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) para 36.

⁸⁰ Liebenberg 2006 *Stellenbosch Law Review* 32.

⁸¹ *Minister of Health and Others v Treatment Action Campaign and others* 2002 (5) 721 (CC), 2002 (10) BCLR 1033.

school had been assessed, but after making his assessment the Department employee never returned.”⁸²

Pervasive maladministration in the Eastern Cape education sector has not been met with a groundswell of publicised discontent due to the absence of a unified and proactive rural education lobby in South Africa. This situation is mirrored at a national level where there has been no real legal challenge to the state’s national or provincial school funding policies – something that Wilson believes is attributable to “the infancy of the education rights movement in South Africa, and to the absence of a grassroots organisation with the capacity and political will to mount such a challenge.”⁸³ While there may be doubts about the willingness of a court to define the right to basic education in terms of bricks and mortar, the Education Rights Project submits that

“by employing the correct tactics, it may be possible to press (the Constitutional Court) to give an account of the right that is both meaningful and puts the state under an immediate obligation to deliver improved services and to build capacity.”⁸⁴

There may also be other benefits to the proposed litigation.

Stuart Wilson identifies three “readings” of the right to a basic education that have been utilised by various groups in different ways.⁸⁵ The first reading is characterised as a “discourse of rights” or the “naming injustice” and has been utilised by numerous groups⁸⁶ to draw attention to the issues of poverty and inequality within South Africa’s education sector. They have done this by contrasting the results of participatory research, reports of particular cases and personal narratives in the media, with the constitutional and legal guarantees for basic education. Wilson says that these groups have

“employed rights discourses as a way of translating positive statements about the education system into normative claims linked to urgent demands for change, and raising consciousness of education inequality among the general public.”⁸⁷

⁸² Dalton 2005 “Classroom Crisis” 19.

⁸³ Wilson 2004 *SAJHR* 423, footnote 12.

⁸⁴ Wilson “The Rights to Basic Education and Equality” *Education Rights Project* (2002) Issue Paper 3, 1 www.erp.org.za/htm/issue3-4.htm (accessed 25 April 2007).

⁸⁵ Wilson 2004 *SAJHR* 435.

⁸⁶ These include the Campaign for Education (GCE), the Anti-Privatisation Forum (APF), the Centre for Applied Legal Studies (CALs), the Education Policy Unit (EPU), the Alliance for Children’s Entitlement to Social Security (ACCESS) and the Congress of South African Students (COSAS).

⁸⁷ Wilson 2004 *SAJHR* 436.

It is submitted that litigation by, or on behalf of X School, would serve the aims of these groups.

The second reading is characterised as the “all here and all now” approach which views section 29(1)(a) as an immediate entitlement to substantive entitlement. Wilson says that this is the most radical interpretation of the right as it views the right to a basic education as an entitlement to “equal access to equally well-resourced educational institutions”.⁸⁸ This reading obliges the state to implement a comprehensive programme that ensures the enjoyment of the right for all rights bearers and argues that state must aggressively fund such programme. In order to sustain it, the state must, if necessary, “borrow more, raise taxes (for the rich) or divert funding from areas of government spending with no constitutional protection, or a combination of these.”⁸⁹ While it may be a radical interpretation and only one of a possible range of interpretations, Wilson points out that it is “entirely consistent with the text of s29(1)(a).”⁹⁰ It is clear that the “all here and all now” reading of the right would be supportive of any litigation which attempts to put the state to task, and which puts pressure on the state to approach its duty to provide basic education in a less tight-fisted manner.

The third reading of the right is that of a “policy structuring device” and is concerned more with how the right is used and less with what it means. This approach wants to see government begin by analysing the meaning and purpose of the right, and to develop policies that give substance to that meaning – instead of the state’s current approach where the macro-economic policy is used as the starting point and an assumption is made by education officials that the education budget is a non-negotiable and fixed entity.⁹¹ According to Wilson, this reading is used to

“lobby policy makers, often pre-occupied by abstract notions of efficiency and budgetary constraints, to take the Constitution seriously enough to consider how rights might impact on economic policy. It is also intended to provide progressive

⁸⁸ Wilson 2004 *SAJHR* 435.

⁸⁹ Wilson 2004 *SAJHR* 437.

⁹⁰ Wilson 2004 *SAJHR* 438.

⁹¹ Wilson 2004 *SAJHR* 441.

policy makers with ammunition in the political wrangling which often accompanies inter-departmental budgetary negotiations.”⁹²

While a court may be reluctant to force the state to adjust its budget, it is submitted that an adverse ruling for the state could force Parliament to reassess its willingness to approve a budget which does not make provision for the eradication of mud structure schools, but that does provide for the acquisition of billions of rands worth of submarines or fighter aircraft, contributes to luxury projects like the “Gautrain”, and authorises a R1,93 billion contribution towards the building of the Green Point Stadium in Cape Town.⁹³

It is hoped that the proposed litigation will result in a finding that the rights of learners at X School have been violated and that the state must remedy the violation by providing adequate infrastructure. However, the litigation is not proffered as an elixir that will necessarily result in new buildings for X School, an appropriately restructured national budget and a competent EC DoE. As Wildeman argues

“What is certain is that whatever content is given to the right to basic education, no one single judgement is likely to be the answer to the massive resource constraints and deficiencies that face poor learners every day.”⁹⁴

It is submitted, however, that the litigation does have the potential to focus the state’s, the public’s, and civic society’s attention on the problem of mud structure schools, and give education rights groups an interpretation of the right that they can begin to interrogate and interact with. The litigation has the potential to serve a multiplicity of purposes which will serve to enhance the infrastructure resourcing of rural schools in the Eastern Cape, and perhaps elsewhere in South Africa also.

5 - The Constitutional Court’s Approach to Socio-Economic Rights

Understanding the Court’s approach to socio-economic rights in the past is important in order to determine, firstly, whether there are any prospects of success in challenging the EC DoE’s provision of education infrastructure as inadequate (based upon section 29(1)(a) of the Constitution), and secondly, how such a challenge should be framed if it were to be brought before the courts. After briefly looking at the

⁹² Wilson 2004 *SAJHR* 440.

⁹³ “Green Point delays raise concerns” *Mail & Gaurdian* 28 October 2007.

⁹⁴ Wildeman 2002 “Infrastructure Provisioning in Schools and the Right to Basic Education” 39.

inception and early development of socio-economic rights jurisprudence in South Africa, this section of the paper will analyse X School's hypothesised litigation in the light of more recent socio-economic cases. Two approaches which the Court has canvassed in this regard will be looked at: the "minimum core content" of socio-economic rights and "reasonableness review".

In 1996 the Constitutional Court accepted that socio-economic rights could indeed be included in the Bill of Rights and rejected the view that the possible budgetary implications that may attach to the adjudication of these rights would necessarily result in a breach of the doctrine of the separation of powers.⁹⁵ The Court highlighted that enforcing many civil and political rights also has budgetary implications but that this did not mean that the doctrine was violated. In the socio-economic cases which subsequently came before the Court this was put into practice and resulted in the South African model of separation of powers being described as radically different from the traditional or "stark" model.⁹⁶ Nevertheless, the Court still has to

"achieve a critical balance between effectively protecting the socio-economic rights of the poor, while also respecting the roles of the legislature and executive as the primary branches of government responsible for realising socio-economic rights."⁹⁷

Not surprisingly, in the first socio-economic rights based case to come before the Court (*Soobramoney v Minister of Health (KwaZulu-Natal)*⁹⁸), the availability of scarce resources was central to the Court's decision not to grant an order that the applicant be admitted to the state hospital's dialyses treatment program for renal failure.⁹⁹ It was held that the right to receive emergency medical treatment (s27(3) of the Bill of Rights) did not cover the present situation and that the hospital authority was the correct body to determine who should receive treatment in line with pre-determined guidelines and limited resources. The case did little to further socio-economic jurisprudence in the country except to confirm that such rights were indeed

⁹⁵ *Certification of the Constitution of the Republic of South Africa* para 76-78.

⁹⁶ Pieterse 2004 SAJHR 404.

⁹⁷ Liebenberg "Basic Rights Claims – How Responsive is 'Reasonableness Review'?" (2004) 5 *ESR Review* 7 at 7.

⁹⁸ 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696.

⁹⁹ "What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have I already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled." *Soobramoney* at para 11.

justiciable, and to suggest that courts would be reluctant to rearrange the budgets of democratically elected bodies in order to enforce rights. The case of *Grootboom* a few years later, however, provided a more concrete idea of how the Court would approach socio-economic challenges such as the one potentially envisioned by, or on behalf of, X School.

In *Grootboom*, more than 900 squatters, the majority of whom were children, were left homeless after being evicted from their informal homes on privately owned land which was earmarked for formal low-cost housing. They successfully applied to the Cape High Court for an order requiring the government to provide them with tents, latrines and potable water which would constitute the bare minimum to satisfy the children's rights to shelter in terms of s28(1)(c),¹⁰⁰ in addition to the applicants' right to housing as provided for in s26 of the Constitution.¹⁰¹ On appeal to the Constitutional Court, the questions to be answered that are relevant to this paper were two-fold. Firstly, could (or should) courts determine what a core-minimum content of a right entailed with a view to ordering the state to provide applicants with that core content, and secondly, what did taking "reasonable measures", within its available resources, to achieve the progressive realisation of this right, as the qualification contained in s26(2) of the Constitution provides for, really mean? In other words, what did "reasonableness review" entail?

5.1. The Courts Approach to Minimum Core Content

Regarding the minimum core content of a right, Yacoob J, writing for a unanimous bench, held that

"There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a Court to enable it to determine the minimum core in any given context. In this case, we do not have

¹⁰⁰ Section 28(1)(c) provides that: "Every child has the right to basic nutrition, shelter, basic health care services and social services."

¹⁰¹ *Grootboom v Oostenberg Municipality and Others* 2000 (3) SA 277 (C).

sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.”¹⁰²

So while the possibility of adopting the minimum core approach in the future was not completely precluded, Yacoob J seemed to suggest that it would not be done lightly. Despite this, it is worth considering the court’s views on the minimum core approach lest it should be considered in the context of basic education. In *Grootboom*, the Court found that the minimum core approach was not suitable when determining the scope of the right to housing due to the complex and varied nature of the needs and opportunities for the enjoyment of the right. The opportunities would differ according to factors such as income, unemployment, the availability of land, poverty and the location of the person (rural or urban), while the needs would differ according to whether the person needed land, housing, financial assistance, or some combination thereof.¹⁰³

It has been argued, however, that the Court exaggerated the need for having extensive information before it in order to determine the minimum core content of a right and the concomitant obligations of the state. Bilchitz submits that

“[s]uch information may be necessary in order to decide on particular actions that the state is required to take in particular circumstances. ... But it is not necessary in order for us to understand what the basic needs of people are. ... Yacoob overstates the matter when he depicts this as involving enormous complexity.”¹⁰⁴

Wesson, despite being a critic of the minimum core approach, also feels that “the difficulties inherent in defining the minimum core are not insurmountable” and feels that Davis J’s judgment in the court *a quo* virtually achieved this.¹⁰⁵ In any case, would the complexities related to the right to housing (real or perceived) be present if the Court was deciding the minimum core content of the right to basic education? It is submitted that they would not be.

While there are undoubtedly complex issues revolving around how to provide the best quality, standard, and content of education, the basic needs of the vast majority of

¹⁰² *Grootboom* para 33.

¹⁰³ *Grootboom* para 32-33.

¹⁰⁴ Bilchitz “Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance” 2002 (119) *SALJ* 484 at 488.

¹⁰⁵ Wesson “Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court” 2004 (20) *SALJ* 284 at 301.

learners are not dependant on contextual factors such as those mentioned by the Court in the context of housing.¹⁰⁶ (Almost all schools are located on state land¹⁰⁷ and the implicit aim of the National Department of Education is to provide a high quality, equitable and uniform curriculum based on national norms and standards.) Describing the minimum core content of basic education in a way that includes, *inter alia*, the provision of adequate structures to protect learners from the elements, a chair and a desk is not complex. Nonetheless, it is submitted that the Court is unlikely to assess a socio-economic rights challenge from the “minimum core” perspective. Yacoob J’s stated reasons for rejecting the minimum core approach were based on the dearth of information before the court, but the real reasons may have had more to do with a wariness of imposing an order on the state with extensive budgetary implications, than with the difficulty of adjudicating on a polycentric issue.

In *TAC II*, where the Court had to determine whether the government’s decision to not make the drug Nevaripine available as part of their HIV/AIDS programme was reasonable, the Court reaffirmed the *Grootboom* decision to reject the minimum core approach.¹⁰⁸ Even if it could be shown that including the provision of infrastructure and furniture in a definition of the minimum core content of the right to basic education was not a complex matter, it is submitted that should the case of X School come before the Court, the “minimum core” approach may be rejected for less opaque reasons. Defining the “minimum core” for basic education may have budgetary implications that would ultimately have the effect of pitting the right to basic education against the other socio-economic rights. The *Grootboom* judgment emphasises the interconnectedness of these rights,¹⁰⁹ and as Wildeman points out, it is highly unlikely that the court would interpret the right to basic education in a way that

¹⁰⁶ “The State’s obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.” *Grootboom* para 37.

¹⁰⁷ According to the *National Assessment Report* September 2007, only 11% of public schools are on private land.

¹⁰⁸ “It should be borne in mind that in dealing with such matters the Courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second *amici* should be, nor for deciding how public revenues should most effectively be spent” *TAC II* para 37.

¹⁰⁹ *Grootboom* para 24.

undermines the provision and recognition of the others.¹¹⁰ Wildeman also argues, however,

“The denial of the absolute prioritisation of basic education relative to other socio-economic rights does not negate advocacy or legal recourse for more funding, especially for the vast majority of poor learners.”¹¹¹

So while the “minimum core” approach is likely to be eschewed by the Court,¹¹² this is not necessarily a bad thing¹¹³ and does not mean that the Court should not be approached. It is therefore important to examine what has been labelled “reasonableness review” as this, it is submitted, would be the likely lens through which the Court would examine the state’s programme for providing basic education.

5.2. Reasonableness Review

A number of the socio-economic rights entrenched in the Constitution are qualified by the proviso that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of (that) right.”¹¹⁴ As alluded to earlier, some argue that because the right to basic education is framed in a way that is not subject to progressive realisation, “the state has to act immediately in order to give full effect to the right.”¹¹⁵ This would imply that reasonableness review would not come into the picture because even if state action to provide basic education was deemed “reasonable”, it would not necessarily be sufficient. If this approach was adopted, it is submitted that the “minimum core” approach would become much more important in determining whether the state was doing enough to give full effect to the right to basic education. As mentioned earlier, however, it is

¹¹⁰ Wildeman 2002 “Infrastructure Provisioning in Schools and the Right to Basic Education” 31.

¹¹¹ *Ibid* 7.

¹¹² For more reasons why the court may reject the minimum core approach see Wesson “Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court” 2004 *SALJ* (20) 284 at 302 - 305. Also see Liebenberg 2004 *ESR Review* 8 for a summary of the Court’s reasons for rejecting the concept of “minimum core obligations”.

¹¹³ It is possible that the state is already providing X School with the minimum core content of the right to basic education. The possibility always exists that the Court could define the right to basic education in a manner that does not necessitate more spending on the part of the state. While unlikely, it is possible that the provision of a teacher and rudimentary materials for learning is sufficient to comply with the constitutional obligation. This would be a serious set-back for the lobby to improve infrastructure in schools.

¹¹⁴ For example, the right to housing (s26(2)), the right to health care, food, water and social security (s27(2)), and in similar words, the right to further education (s29(1)(b)).

¹¹⁵ Seleoane 2003 *Law, Democracy & Development* 141.

unlikely that that the Court will adopt an approach that pits various socio-economic rights against each other. It is therefore more probable that the “reasonableness review” approach used in assessing the state’s actions in relation to the other socio-economic rights would also be used in assessing the state’s provision of basic education for the learners of X School.

So what does “reasonableness review” entail? As has been pointed out by Liebenberg, the Court has made it clear that

“its standard of scrutiny in socio-economic rights cases is more substantive than simply enquiring whether the policy was rationally conceived and applied in good faith...”¹¹⁶

Liebenberg goes on to neatly summarise the meaning of a “reasonable programme” by drawing on the Court’s judgments to highlight that,

“it must be comprehensive, coherent, coordinated;¹¹⁷ balanced and flexible and make appropriate provision for short, medium and long-term needs;¹¹⁸ reasonably conceived and implemented;¹¹⁹ transparent and its contents must be made known effectively to the public;¹²⁰ appropriate financial and human resources must be made available for its implementation;¹²¹ and it must provide relatively short-term measures of relief to those whose needs are urgent.”¹²²

The national, provincial, and local state organs responsible for housing were found, in the main, to have acted reasonably in the case of *Grootboom* in fulfilling the Constitutional right of access to adequate housing.¹²³ It was only in relation to the state’s failure to make appropriate provision for the short-term housing needs of the most desperate sectors of the population “living in intolerable conditions or crisis situations” that they had failed¹²⁴ and which resulted in a declaratory order to this effect. In *TAC II*, the Court found that the government’s decision to restrict the provision of the drug Nevaripine to HIV positive pregnant mothers was not

¹¹⁶ Liebenberg “Towards a Transformative Adjudication of Socio-Economic Rights” forthcoming *Speculum Juris* 2007 (1).

¹¹⁷ *Grootboom* paras 39 and 40.

¹¹⁸ *Grootboom* para 43.

¹¹⁹ *Grootboom* paras 40 – 43.

¹²⁰ *TAC II* para 123.

¹²¹ *Grootboom* para 39.

¹²² Liebenberg 2007 forthcoming *Speculum Juris* 3.

¹²³ *Grootboom* paras 53 -55.

¹²⁴ *Grootboom* paras 63 – 69, 99.

reasonable as it was inflexible,¹²⁵ and unreasonably conceived in that making mothers wait for a protracted period did not make sense.¹²⁶ The Court ordered that these shortcomings in the policy be remedied.

While the nature of the Court's orders in *Grootboom* and *TAC II* have been criticised as being ineffectual because the shelter and drugs awarded in the judgments have been slow to materialise,¹²⁷ the Court's *method* of reaching their decisions ("reasonableness review") has been widely acclaimed for

"its potential to be a flexible, context-sensitive tool for assessing the State's compliance with its socio-economic rights obligations. By not fully specifying the core components of the various socio-economic rights, the Court leaves space for democratic deliberation on the concrete programmes needed to realise socio-economic rights by the executive and legislative branches of government as well as the general public."¹²⁸

While this may be true, it presupposes that the Court will have ruled against the government and found their programme to provide infrastructure in the furtherance of the X School learner's right to basic education to be unreasonable. And this is where one of the most trenchant criticisms of "reasonableness review", particularly from X School's standpoint, becomes apparent. The applicant bears the burden of showing that the EC DoE's programmes are unreasonable and would be "required to review the whole panoply of government programmes and assess their reasonableness in the light of the resources available to the State..."¹²⁹ It is submitted that this would be a sizeable task for most litigants anywhere, but that it would be particularly difficult for the rurally based X School having to make sense of the EC DoE's disjointed, inconsistent and politically sensitive programme which has seen numerous officials suspended and/or fired in recent months.¹³⁰ In order to overcome this difficulty, Liebenberg suggests that the Court's review standard of "reasonableness" would be

¹²⁵ *TAC II* para 80.

¹²⁶ *TAC II* para 81.

¹²⁷ Swart "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor" 2005 (21) *SAJHR* 215 at 215.

¹²⁸ Liebenberg 2007 forthcoming *Speculum Juris* 4.

¹²⁹ Liebenberg 2004 *ESR Review* 10.

¹³⁰ Fumba "Mud-structures unlikely to be eradicated by 2009" PSAM press release, June 26 2007 <http://www.psam.ru.ac.za/ptlpressreleaseshow.asp?qs=fld.pressreleaseid.op.e.sv1.210&ob=Date> (accessed 22 September 2007).

greatly strengthened if the government bore the onus of justifying the exclusion as being reasonable in the circumstances.¹³¹ This suggestion is strongly supported.

There are undoubtedly positive and negative aspects to “reasonable review”. But, as it stands, how would the EC DoE’s programme of providing (or failing to provide) infrastructure to the learners of X School for the enjoyment of the right to basic education stand up to scrutiny using this standard? It is submitted that it would fall short on a number of counts. Firstly, the EC DoE policy is not transparent and has definitely not been made known to the public.¹³² Apart from a very vague (and uncorroborated) assertion by departmental officials that X School may receive some type of refurbishment or improvement between 2008 and 2010, the school is left in the dark as to the EC DoE’s plans.¹³³ While a revised plan for infrastructure provisioning and the eradication of mud structure schools is currently being prepared, at the time of writing it was not available. The EC DoE could also not say whether X School was on any waiting list for infrastructure improvement.¹³⁴ Secondly, the appropriate financial and human resources have not been made available for the EC DoE’s programme. The pledge to eradicate mud structure schools in the Eastern Cape by 2006 has been pushed back to 2010 and yet it is apparent that the funds are not available for even this revised target to be met.¹³⁵ Thirdly, the programme does not provide relatively short-term measures of relief to those whose needs are urgent (like the needs of X School).¹³⁶ There is no provision of roof patching material to stop the leaks in the zinc roofs, nor is any form of furniture provided, temporary or otherwise, to deal with the seating and desk crises at the school. As Liebenberg points out, this last requirement of a “reasonable programme” comes closest to a threshold requirement and is justified because it supports the constitutionally entrenched right (section 10) to have one’s human dignity respected.¹³⁷ It is submitted that this is

¹³¹ Liebenberg 2004 *ESR Review* 10.

¹³² *TAC II* para 123.

¹³³ As mentioned above (page 14), the school did not think that this was likely to happen. The need for disclosure, communication and consultation is particularly pertinent in light of the emphasis which the Court placed on them in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA SA 217 (CC), 2004 (12) BCLR 1268 para 39, and *TAC II* para 123.

¹³⁴ Interview with Acting Chief Director of Infrastructure in the Eastern Cape, Mr Duma Ncanya, in Bhisho on 24 August 2007.

¹³⁵ Fumba 2007 PSAM press release.

¹³⁶ *Grootboom* para 69.

¹³⁷ Liebenberg 2004 *ESR Review* 9.

where the learners of X School may have their strongest claim that the EC DoE's programme is not reasonable. As highlighted by Yacoob J in *Grootboom*

“To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹³⁸

Therefore, even though the EC DoE may be able to show some statistical improvement in infrastructure provisioning, this does not mean that their failure to assist the plight of X School can be condoned. The state's failure to provide adequate infrastructure for X School is particularly distressing when one considers that learners are compelled to attend school from the age of seven until the age of fifteen (or until grade nine, whichever comes first) by section 3(1) of the South African School's Act.¹³⁹ In effect, they are being forced to attempt to learn in conditions that, arguably, deny them their human dignity. It is submitted, therefore, that EC DoE's programme to improve the infrastructure of X School is not a reasonable one for numerous reasons, and that it results in the denial of the right to basic education.

6. - Conclusion

The physical infrastructure of X School (and schools like it) calls for an urgent response from the state. The problem of mud structure schools has been acknowledged at both provincial and national level, but it is clear from the experiences of X School that the state's response has been inadequate in relation to the s29 right to basic education contained in the Constitution. The difficulties facing X School have not developed overnight and the EC DoE has had over a decade to address the situation. While it is acknowledged that the magnitude of the problem facing the state has sizeable budgetary implications, the EC DoE's response thus far

¹³⁸ *Grootboom* para 44.

¹³⁹ Act 84 of 1996.

has failed to meet its Constitutional obligations in terms of both the resources earmarked for the eradication of mud structure schools, as well as the administrative and organisational efforts made to utilize the resources that are available. The effect of the EC DoE's poor performance in this regard is that another generation of South African rural learners are being denied basic education – something which they now have a Constitutional right to receive.

The effect of this denial is not dissimilar to the tragic outcomes brought about by the system of “Bantu education” that was promoted by successive apartheid regimes. When the comments of the former state president HF Verwoerd are read today, it is clear that they have a chilling pertinence for all the wrong reasons:

“Racial relations cannot improve if the wrong type of education is given to Natives. They cannot improve if the result of the Native education is the creation of frustrated people who, as a result of the education they received, have expectations of life which circumstances in South Africa do not allow to be fulfilled immediately, when it creates people who are trained for professions not open to them, when there are people who have received a form of cultural training which strengthens their desire for white-collar occupations to such an extent that there are more such people than openings available. Therefore, good racial relations are spoilt when the correct education is not given.”¹⁴⁰

Our Constitution holds out the promise of a non-racial and equitable society, but these goals are undermined by the provision of school infrastructure which is inadequate and ill-suited to providing basic education. As Veriava and Coomans pointed out in the introduction to this paper,¹⁴¹ basic education's interconnectedness with so many other rights means that state action (or inaction) which undermines its enjoyment has repercussions far beyond just education. The Bill of Rights provides that “Every citizen has the right to choose their trade, occupation or profession freely.”¹⁴² For the learners of X School, however, this right is unrealistic given the inferior standard of education they receive. As a result the education system is still creating “frustrated people” but for different reasons – professions are supposedly open to everyone, but the education received by many learners is inadequate for the pursuance of many

¹⁴⁰ Quoted in C Dlamini “Culture, education, and religion” in D van Wyk *et al* (eds) *Rights and constitutionalism: The new South African legal order* (1994) 580 at 589.

¹⁴¹ See fn1.

¹⁴² Section 22 of the Constitution.

professions. As a result, the EC DoE is precipitating the failure and frustration of X School's learners by not providing them with an education environment that respects their human dignity nor affords them equal opportunities.

This paper argues that one of the tools available to improve the circumstances of X School is litigation. The fact that the learners of X School have a constitutionally - protected right to "basic education" provides them with a strong claim for improved resources that would enable them to benefit from the right. Since the right to basic education has yet to be given definite scope or content by our courts, it is submitted that the circumstances encountered by schools such as X provide an opportunity for the courts to do so. It has been highlighted that the right to basic education is not qualified in the manner that most of the other socio-economic rights in the Constitution are. It is hoped, therefore, that the hypothesised litigation would result in an interpretation of the right that leads a court to order immediate infrastructure improvements for X School. It has also been argued, however, that the Court's stance in other cases dealing with socio-economic rights could mean that a "minimum core" approach is not adopted. The separation of powers doctrine, even in a less rigid form, is likely to discourage the Court from granting an order with major budgetary implications. This may mean that the EC DoE's overall programme to eradicate mud structure schools, as part of its mandate to provide basic education, will be scrutinised by a court to determine if it is reasonable. Even though "reasonableness review" may be criticised for its deference to the state's policies, it is submitted that the experiences of X School highlight numerous shortcomings in the EC DoE's approach and that a court would, at the very least, demand an improvement in that department's organisation, planning, use of available resources, and communication of its policy. While the impact of such an order on X School in the latter scenario may not be as pronounced or immediate, it would still result in an improvement on the current situation which is shrouded in uncertainty.

Regardless of whether the "minimum core" or "reasonableness review" approach is adopted, it is submitted that litigation will add value to the policies of the EC DoE. Fredman points out that courts have a vital role to play in shaping the government's duty to provide for the needs of marginalised groups, even if policy development has

traditionally been located in the realm of law-makers.¹⁴³ She suggests that a court's unwillingness to intervene shields the state from having to justify distributive decisions and argues that

“the role of reasoned explanation is considerably enhanced when courts are dealing with socio-economic rights. ...[T]he way forward is not judicial deference but judicial intervention which supports rather than usurps the decision making powers of elected representatives. This is achieved by insisting on reasoned justification for distributive decisions burdening or excluding disadvantaged groups.”¹⁴⁴

It is clear that the manner in which the needs of X School have been eschewed by the EC DoE demand reasoned justification. It is submitted that the EC DoE's policies in respect of eradicating mud structure schools would be enhanced by judicial intervention that is supportive and constructive. The EC DoE needs to be assisted in performing its constitutionally mandated task of providing basic education.

In light of the Eastern Cape's history, it would be judicious for the courts to heed the opinion of Pieterse. He argues that when a court interprets the text of the Constitution and gives content to its obligations,

“...courts must guard against imposing unrealistic or overly onerous duties on the state. ...Ideally, the interpretive task should be viewed as courts assisting other branches of government to establish the precise content of their obligations rather than as an antagonistic mandate from the judiciary to the legislature and executive.”¹⁴⁵

Because of the scope of the problem, the provision of adequate infrastructure for all schools such as X will necessarily entail onerous and challenging duties for the EC DoE. Despite this, the courts can, and must, play a meaningful role in ensuring that those duties are defined, and those challenges met.

¹⁴³ Fredman “Providing Equality: Substantive Equality and the Positive Duty to Provide” (2005) 21 *SAJHR* 163 at 163.

¹⁴⁴ *Ibid.*

¹⁴⁵ Pieterse 2004 *SAJHR* 383 at 406.

Appendix 1: Learners enrolled in X School in each grade, 2007.

Grade	Number of learners
1	50
2	45
3	40
4	36
5	40
6	39

Appendix 2: Learner enrolment in X School from 2001-2007.

Year	Numbers of learners in the school
2001	123
2002	140
2003	165
2004	203
2005	210
2006	231
2007	250 ¹⁴⁶

¹⁴⁶ Neither the teachers nor members of the School Governing Body could provide any explanation for the increase in enrolment.

Appendix 3: Photographs of X School



3a. Grade 1 and 3 classroom.



3e. Inside view of corrugated iron roof.



3b. Grade 2 classroom.



3e. Inside view of corrugated iron roof.



3c. Grades 4, 5 and 6.



3f. Wooden stump seating in Grade 2.



3d. Teacher's desk on dung floor.



3g. Schools grounds without fence.

Appendix 4 –Interview Questions for X School Principal and governing body.

- 1. Tell me about your own qualifications and teaching experience (principal).**
- 2. Please tell me about the history of NPS and the community it serves.**
- 3. Is the school growing in numbers, getting smaller, or staying the same? (How has the school's population changed in the last 15 years?)**
- 4. What are the best things about your school, and what are the worst things?**
- 5. How do you think the learners in your school perform? Why?**
- 6. What is the breakdown of teachers and learners in the school and how do you make use of the classrooms?**
- 7. Please describe the school's buildings.**
- 8. Please describe the school's supply of chairs, desks, books, stationery, water supply, electricity, teacher education, and feeding scheme.**
- 9. Please describe the school's budget.**
- 10. How is school maintenance dealt with?**
- 11. Are the buildings sufficient for the school's needs? Explain your answer.**
- 12. What do you think the school needs in terms of buildings/classrooms? Explain your answer.**
- 13. How do you think an improvement in buildings would impact on (change) teacher or learner performance?**
- 14. What has the department told you about any plans for building new classrooms or doing renovations?**
- 15. How do you think the school building needs of your school compare with the needs of other schools in this area?**
- 16. Describe your relationship with the Department and how they respond to your needs. What is communication like?**
- 17. Is there anything else you would like to add?**

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