

## A textbook case for stronger action

The recent Limpopo textbook judgment could have been more helpful on the question of relief for the violation of rights.

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On May 7, Judge Neil Tuchten of the Pretoria high court delivered the most recent judgment in the ongoing Limpopo textbook saga.

The judgment is something of a mixed bag. It reaffirms the centrality of textbooks in the realisation of pupils' rights, but provides limited avenues for remedying the infringement of those rights.

This latest application was launched in March 2014 by civil society organisation Section27 on behalf of its clients, a community-based organisation called Basic Education for All and a number of Limpopo-based schools. Since the beginning of the 2014 school year, Section27 had supplied lists of textbook shortages at specific schools to the government, which then failed to remedy these shortages sufficiently.

The applicants therefore sought an order declaring that the failure to deliver textbooks to the 39 schools timeously constituted a violation of their pupils' rights, in particular the right to basic education. They also sought to make an agreed-to deadline for the delivery of the textbooks to the 39 schools an order of court.

87A

### **Supervisory relief**

Finally, they also sought supervisory relief – a powerful mechanism that requires the state to report to the court and other identified bodies on progress towards remedying the infringement of rights.

The applicants requested that the state be required to report on textbook delivery to the court, and to lodge with the court a plan indicating how it intended to address textbook shortages at all Limpopo schools. They also requested the court to direct the South African Human Rights Commission (SAHRC) to monitor textbook delivery to the affected schools and monitor compliance.

In court, the state argued that, because textbook delivery for 2014 had largely been completed in the province, the failure to deliver textbooks to a small number of affected schools did not constitute a violation of the pupils' rights. This made the case distinguishable from the 2012 situation, when delivery at the majority of Limpopo's schools had not taken place.

Tuchten rejected this aspect of the government's argument. He confirmed Judge Jody Kollapen's 2012 finding in the first Limpopo case that textbooks were a component of the right to basic education. He went a step further by stating that it is the right of every pupil to be provided with textbooks "before the teaching of the curriculum for which such textbook is prescribed is due to commence".

### **violation of rights**

He then declared that the government's failure to do this was a violation of the affected pupils' rights.

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

Unfortunately, the judgment was less helpful on the question of relief for the violation of rights.

The state's basic contention regarding the nondelivery of textbooks to the 39 schools was that budgetary constraints prevented it from completing delivery until additional funds were

made available by Parliament. It argued that, although the anticipated 2014 textbooks' needs had been met, where schools had a need for supplementary textbooks, because pupils from previous years had failed to return books, no funds were available for these extra copies.

88A

### **No capacity**

Responding to this justification, Tuchten adopted a noninterventionist stance. He refused to make the agreement between the parties on the delivery date for textbooks an order of court. This was despite the 2012 experience of the government's noncompliance with court-ordered dates for textbook delivery. The judge also rejected the supervisory relief sought. Concerning the SAHRC, he justified this largely on the basis that the commission had claimed it did not have the capacity to undertake the monitoring requested.

More perturbing, however, was the rejection of the request for court supervision. Tuchten took the view that, because budgetary allocations were within the purview of Parliament, the issue fell within the political domain and not with the courts. By raising concerns centred on the doctrine of separation of powers, in effect he washed his hands of the matter.

He said: "Because the issues raised involve polycentric policy considerations, they are, at least in part, political issues. Political issues require political solutions. Parliament is a more appropriate forum for the ventilation of political considerations than the courts."

The judge therefore made an order requiring the state to report to the applicants and the SAHRC the details of the "submissions for funds for textbooks for the academic year 2015" that it will make to the relevant fiscal authorities.

### **A misunderstanding**

While recognising the necessity of the alignment of rights obligations and budgetary allocations is important, the judgment appears to reflect a misunderstanding of the role of the courts in the adjudication of socioeconomic rights.

It is the function of the judiciary to enforce the Bill of Rights and to grant "appropriate relief" where there has been a rights violation. South Africa's evolving jurisprudence on socioeconomic rights has attempted to balance the concerns in respect of the doctrine of separation of powers against its mandate to enforce socioeconomic rights by adopting what has been termed a "cautious" approach to the adjudication of socioeconomic rights.

In previous socioeconomic rights judgments, courts have sought to determine whether or not the government has a reasonable plan to realise its rights obligations. Where such a plan is found to be lacking, the courts will often attempt to facilitate a dialogue between the parties by requiring that they "meaningfully engage" with each other, and may require the state to report to the court what it has done in order to remedy the rights infringement.

Within this "cautious" approach, a strong basis for granting supervisory relief is the

possibility of the government's noncompliance with an order, whether deliberate or not. An order for court supervision would therefore have been justified in the circumstances of this case.

### **Reasonable plan**

There also appears to have been very little scrutiny in the latest judgment of the existence, or not, of a reasonable plan.

The history of textbook procurement and delivery in Limpopo has been riddled with mismanagement and poor, ad hoc planning. The absence of a database of schools in Limpopo and poor communication with schools are but two issues that have in the past hampered textbook delivery.

A scrutiny of a plan by the court could therefore have included a determination as to whether some underlying causes for nondelivery had been addressed. Without ordering increased budgetary allocations, the court could also have enquired into whether or not there was provisioning for contingencies such as budgeting for supplementary textbooks.

The approach adopted by the court in this case may be contrasted with that of *Madzodzo v Minister of Basic Education*, which dealt with furniture shortages at schools in the Eastern Cape. Here the court took a tough stance towards poor planning.

That judgment, in February this year, rebuked the government for its failure to abide by previous court orders. It rejected budgetary constraints arguments as a justification for noncompliance with rights obligations.

Instead it found the state had failed to budget proactively for furniture shortages. Without ordering increased budgetary allocations, the court instituted a supervisory order requiring the state to return to court to explain legitimate delays if it was unable to comply.

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