

Report to stakeholders on the progress of the basic education case.

1. Introduction

Jean Pease, an activist in the education field, and the Progressive Principals Association (PPA) have launched an application in the Western Cape High Court concerning the dire state of the basic education system in South Africa. The application was served on government in November 2013 and was heard in court between 19 and 21 May 2014. Judgment in the matter has been reserved, the court wishes to take time to consider the issues before delivering its reasons for what will be the most wide ranging decision yet in the field of basic education as a human right guaranteed to all in the Bill of Rights.

2. The issues in the case.

The applicants have raised their concerns about the poor Annual National Assessment results across the board both as regards literacy and numeracy. They regard the scores reflected in the results as proof that the basics of education are not being delivered to the learners in public schools in an alarmingly widespread fashion. This, they contend, is a violation of the right to basic education which has been claimable in full since the dawn of democracy and is not subject to progressive realisation in the same way as access to other socio-economic rights is rolled out to everyone under the Bill of Rights and in the light of available resources.

Relying on the research of Nic Spaull, an economist, they point out that the basic education system, by any and all relevant measures, has evolved into a double humped camel with about 25% of schools (mainly former model C schools) functioning well and pushing up averages while 75% of schools are dysfunctional, especially in mathematics and science. Half of the learners entering the system drop out before reaching national senior certificate level and too many, including some matriculants, emerge from the basic education system short of the skills required for functional literacy and numeracy. The traditional three Rs – “reading, ‘riting and ‘rithmetic” are not being taught in the majority of schools to the extent and level that can be reasonably expected of a schooling system that requires nine years of compulsory attendance. The fact that three quarters of the unemployed people of working age in SA are under 35 years of age is, at least in part, the consequence of the failure to deliver basic education to all. The skills required to participate at all in our modern economy are simply not being imparted to around half of the learners in public schools.

Four main themes are identified by the applicants: the Cinderella status of early childhood development (ECD) in SA, the paucity of mother tongue education in the foundational phase, the need to professionalise teachers and the inability of the system to secure delivery of learning and teaching support materials on time, every time in the right quantities and right languages to every child at our public schools.

3. The relief claimed

Three forms of legal relief are claimed in the case. The declaratory, mandatory and supervisory relief is complementary and overlapping. It is designed to point to where the most serious challenges arise in basic education, to compel the government to take

steps to address areas of weakness and to subject the authorities' plans for remedial steps to the scrutiny of the court, and possibly Chapter Nine Institutions, so as to supervise the constitutionally compliant adjustment of the conduct of the basic education system in order to render it constitutionally compliant.

4. The defence to the merits of each claim

In essence the Minister of Basic Education denies that the system, for which she is responsible, is functioning in a manner that is inconsistent with the Constitution. The legacy of apartheid is blamed for the state of play and the prioritization of the provision of quality basic education by the first Zuma administration is relied upon as proof of the good intentions of government.

It is denied that there is a problem with materials delivery (despite Limpopo litigation, Eastern Cape maladministration of workbook delivery to the chagrin of the Public Protector who has written a scathing report entitled "Learning without Books" and statistics that indicate that on average 6.6% of households countrywide in all provinces complain of lack of books).

The introduction of a third (African) language is regarded as a panacea for the lack of mother tongue educational facilities for about 70% of the children attending the foundational phase of schooling.

The National Development Plan to transfer responsibility for ECD to the Department of Basic Education is regarded as unconstitutional by the two ministries involved and no steps to implement the transfer have been taken despite its soundness. The professionalization of teachers is well in hand according to the Minister.

5. The technical defences raised

A number of legal points in limine, or technical defences, were taken by the authorities in a stratagem to avoid having to deal with the information placed on record by the applicants. There was an application to strike out some of the material, urgency, mootness, staleness, jurisdiction, legal standing of the PPA, non-joinder and a number of subsidiary points were taken and argued. The applicants resisted all of the technical points.

6. The hearing before Mr Justice Nathan Erasmus

The matter was heard by Mr Justice Nathan Erasmus of the Western Cape High Court during the period 19 to 21 May 2014. The judge indicated his intention to deliver a judgment as soon as possible in which he would deal with all of the points raised in the matter. He also invited the parties to supplement their submissions should any new material come to hand at any stage prior to delivery of the judgment.

7. Judgment day

It is likely that judgment will be handed down either shortly before or just after the mid-year court vacation which is from the end of June to the beginning of August this year.

8. The future of the case

The judge is mindful of the fact that whoever is dissatisfied with his judgment will want to consider taking the matter further on appeal. The public interest nature of the case and its importance to the way in which the delivery of basic education is attended to in SA in the future makes it virtually inevitable that there will be resort to appeal procedures no matter what the outcome of the case in the Western Cape High Court.

There has yet to be a definitive judicial description of the right to basic education; the legislation on schools avoids defining the substantive content of basic education. The case has been pitched at the relatively low level of functional literacy and numeracy, these being the applicants' identified hallmarks of the basic education to which everyone is entitled. The idea of seeking a supervision order is not to have the courts tell the executive and legislature how to run the public schools and ECD system or make laws for the basic education system so as reasonably to deliver the right to basic education. Instead the applicants seek the reassurance that what is being done, and is to be done regarding the delivery of the right to basic education to all, is consistent with the Constitution.

The right to basic education involves many other rights such as dignity, equality, language rights, rights to a profession or occupation, the right to psychological integrity and the right to have the best interests of children regarded as paramount in all matters concerning them. The papers in the matter, including those filed on behalf of the government, tend to show that there is wholesale infringement of these rights coupled to and because of the failures which the applicants, their researchers and their expert witnesses have identified as violations of the right to basic education enshrined in the Bill of Rights. The duty of the state to respect, protect, promote and fulfil these rights is honoured in the breach in the current set of circumstances brought about by the way in which the authorities conduct themselves in delivery of ECD, mother-tongue education, learning and teaching materials and in the provision of training aimed at the professionalization of our teachers.

Irrespective of the outcome of the litigation, the case has focused attention on areas in which there are serious problems in the basic education system. If this concentrates the minds of those responsible for the conduct that has caused the challenges and the failures identified by the applicants and brings energy and attention to their remediation, then the effort put into mounting the legal challenge will have served the purpose of improving the lot of the poor and marginalised who enter the basic education system only to be let down by its numerous dysfunctional characteristics.

By shining a light into the darker recesses of the system currently in place the applicants have boldly taken the struggle for basic education of reasonable standard into areas not yet explored in litigation aimed at holding the state accountable for delivering on the promises set out in the Bill of Rights and requiring responsiveness to the needs of ordinary learners who are being let down by the system in its current form and operations. In short, the applicants argue that the conduct of the basic education system fails to deliver the right to basic education to far too many learners who enter the system in poor, rural or township schools. The promotion of the achievement of equality, one of the foundational values of the new dispensation, is not well served by the failures in the system which the applicants have highlighted in the papers before the court. All of the papers filed of record are available to the public in electronic form at www.ifaisa.org on the "basic education case" page.

Thanks are due to all who gave of their resources, time and talents to make it possible to mount the challenge to the constitutionality of the conduct of the basic education

system and the provision of ECD facilities to all according to the standard of reasonableness contemplated by the Constitution.