

# LEADING BY EXAMPLE: WHEN SHOULD THE GOVERNMENT EXPROPRIATE FOR BASIC EDUCATION?

Dalit Anstey

## 1 Introduction

Socio-economic rights and expropriation as two distinct topics are typically dealt with as distinct topics by legal academics.<sup>1</sup> However, the link between these two concepts deserves more attention. Socio-economic rights are justiciable and enforceable in South Africa.<sup>2</sup> Expropriation is a constitutionally endorsed mechanism that enables the state to acquire resources from private owners for redistribution and reform purposes.<sup>3</sup> Therefore, expropriation can be used as a tool to realise socio-economic rights.

Under what circumstances are expropriation an appropriate mechanism to realise socio-economic rights? Literature has begun to explore this question in the context of the right to housing,<sup>4</sup> but the use of expropriation to realise other constitutionally entrenched socio-economic rights, such as the right to health care, food, water, social security, and education, are still open to legal debate.<sup>5</sup> Section 58 of the South Africa Schools Act (“the Schools Act”) empowers the Member of the Executive Council (“the MEC”) for education of each province, to use expropriation for educational purposes.<sup>6</sup> Section 58 was introduced as a mechanism to remedy inequality and insecure tenure in the school system that was created by colonialism and apartheid.<sup>7</sup> The legislature had a specific category of schools in mind when it created this section – public schools located on private property (“the PSOPP-

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<sup>1</sup> On socio-economic rights: S Liebenberg “Judicially Enforceable Socio-Economic Rights in South Africa: Between Light and Shadow” (2014) 37 *DULJ* 137; D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007); S Fredman & M. Campbell *Social and Economic Rights and Constitutional Law 1* (2016). On expropriation: B Hoops, E Marais, & H Mostert et al. *Expropriation Law I: Public Interest in Expropriation* (2016).

<sup>2</sup> *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 10 BCLR 1253 (CC) para 78.

<sup>3</sup> S25 of the Constitution of the Republic of South Africa, 1996 (“The Constitution”).

<sup>4</sup> S25 of the Constitution; S Viljoen “The Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 1)” (2014) 2 *TSAR* 359.

<sup>5</sup> S27(1)(a)-(c) of the Constitution.

<sup>6</sup> S58 of the South African Schools Act 84 of 1996.

<sup>7</sup> *Kobot Besigheid Trust v MEC and Governing Body Grootkraal Primary School*, case number 24611/11, Western Cape High Court 2017, A Gordon’s affidavit para 35.

context”). Even though section 58 is not only confined to the PSOPP context, it has never been used.

This article explores the relevant factors for determining when expropriation should be used to realise the right to basic education.<sup>8</sup> These factors are developed from existing jurisprudence on the right to basic education and regarding the enforcement of socio-economic rights in a more general context. These factors are developed for the situation where the MEC is considering whether to expropriate within a PSOPP-context. However, the factors listed can be extended to apply to general expropriations for education in a non-PSOPP context. The factors are applied to the facts of a matter currently being litigated in the Western Cape High Court, namely *Kobot Besigheid Trust v MEC and Governing Body Grootkraal Primary School* (“the *Grootkraal-matter*”).<sup>9</sup>

## 2 Context and background

To aid an understanding of the legislative framework that underpins expropriation for educational purposes, this section first considers the characteristics and advantages of expropriation that make it a uniquely attractive means to realise socio-economic rights. Following this, it discusses inequality and insecure tenure in the school system created by colonialism and apartheid, focusing on the PSOPP-context, after which it then describes the legislative framework, which introduces mechanisms to remedy historical injustices.

### 2.1 Expropriation: Characteristics and advantages

Expropriation is the compulsory acquisition of property (usually, but not exclusively, immovable) by an expropriating authority or an organ of state, upon request to an expropriating authority.<sup>10</sup> The ownership rights that are gained through the process of expropriation, is transferred either to the state, or to a third party.<sup>11</sup> In recognition of the severe consequences that expropriation holds for the former owner, two significant constitutional limitations are put in place, namely that expropriations must serve a public purpose or interest, and is subject to a payment of compensation

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<sup>8</sup> S 29(1)(a) of the Constitution.

<sup>9</sup> *Kobot Besigheid Trust v MEC and Governing Body Grootkraal Primary School*, case number 24611/11, Western Cape High Court 2017.

<sup>10</sup> *Harksen v Lane NO and Others* 1997 11 BCLR 1489 para 31; The Expropriation Bill 4D of 2015, section 1.

<sup>11</sup> B Hoops “The Public Purpose for the Expropriation of Land: A Framework for Assessing its Democratic Legitimacy” in B Hoops, E Marais, & H Mostert et al. *Expropriation Law I: Public Interest in Expropriation* (2016) 1.

to the owner who was deprived of their property.<sup>12</sup> In South Africa, the state expropriates for a variety of reasons, which includes the need to widen roads, to accommodate redress, restitution, and redistribution measures, or for administrative reasons.

Expropriation is a powerful tool at the state's disposal and has certain advantages. First, where a state is under-resourced, expropriation increases the state's resource base.<sup>13</sup> This is especially important in a society like South Africa, where 79.2% of all land is privately-owned, while only 14% is in possession or under control of the state or its organs.<sup>14</sup> Adequate state resources are essential for service delivery and building a functional and "thick welfare state."<sup>15</sup>

Secondly, where the state transfers the property that is the subject of the expropriation to a historically disadvantaged third party as a form of land redistribution, the third party's title to the property or right is potentially more secure than it would be under another arrangement such as a lease agreement. This is because ownership remains one of the most valued holding models in our society.<sup>16</sup> If the state holds the property on behalf of a third party, this can result in stronger tenure for the third party than their position was under a private party's title.<sup>17</sup>

Thirdly, expropriation is a means to speed up effective wealth redistribution and the transformation of society required by the Constitution.<sup>18</sup> It is attractive because it achieves redistribution in an orderly fashion. It contains internal limitations and fair procedures, especially with the proposed "investigation" and "consultation" procedures in the 2015 Expropriation Bill.<sup>19</sup> These procedures attempt to prevent anarchic land invasions. This is especially important considering the present contention that

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<sup>12</sup> Hoops "The Public Purpose" in *Expropriation Law I: Public Interest in Expropriation* 1; S25(2) of the Constitution.

<sup>13</sup> Bilchitz *Poverty* 229.

<sup>14</sup> Institute for Race Relations South Africa *Annual Survey* (2017) <<http://irr.org.za.ezproxy.uct.ac.za/reports-and-publications/south-africa-survey/south-africa-survey-2017/downloads/assets-and-incomes.pdf>> (accessed 03-05-2017).

<sup>15</sup> M Mutua "Human Rights in Africa: The Limited Promise of Liberalism" (2008) 51 *African Studies Review* 24.

<sup>16</sup> H Mostert & A Pope *The Principles of Property Law in South Africa* (2010) 89.

<sup>17</sup> For instance, the state can grant a right of use over its property to a third party. Alternatively, the position where the property is held by a private owner may have anomalous consequences for third parties and simply by transferring the property to the state, the position might be strengthened (see 2.2 below where farmers can unilaterally shut down PSOPP).

<sup>18</sup> Ss 25(5) and S25(6) of the Constitution.

<sup>19</sup> The Expropriation Bill 4D of 2015.

government is not doing enough to address meaningful transformation and historic white privileges.<sup>20</sup>

## 2.2 Public schools on private property (“PSOPP”)

Education is one area that requires radical transformation. South Africa is currently experiencing a multifaceted education crisis. Many public schools are inadequately resourced in terms of textbooks, sanitation, and educators, ultimately compromising the quality of education.<sup>21</sup> As a legacy of apartheid and colonialism, major inequality pervades the entire education system. Inequality lies between private and public schools, and between rural and urban schools.

Yet one category of schools has faced an additional problem: insecure tenure. PSOPP break the traditional public-private school paradigm. This category comprises certain religious schools and farm schools. In 2000, there were approximately 256148 pupils in over 2733 farm schools.<sup>22</sup> The status of PSOPPs has always been in “legal limbo” – the dual management system established under the Acts created uncertainty in terms of roles and responsibilities.<sup>23</sup>

The Bantu Education Act introduced the category of “state-aided schools” which encompassed a sub-category of schools that would accommodate black children living on farms.<sup>24</sup> Farm owners wielded extensive control over these schools, for instance, they could unilaterally close the school, while the Department of Education played a minimal role, merely financing some of the infrastructure.<sup>25</sup> The legal structure of farm schools aided the apartheid government’s policy that sought to secure white farm owners’ private property rights whilst simultaneously destabilising black children’s security of tenure and education. The Education and Training Act amended the position slightly by granting the school governing bodies more organisational power, taking some power away from farmers.

In 1994, the democratically elected government had a difficult task. It had to remedy the precarious position of a range of farm schools by ensuring their sustainability and security of tenure, without adopting a one-size-fits-all approach. On

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<sup>20</sup> J Musyoka “The state is sick and, while it’s ill, it can’t fix the economy” *Mail & Guardian* (14-02-2017) < <https://mg.co.za/article/2017-02-14-00-yes-south-africa-needs-radical-transformation-of-the-state> > (accessed 03-05-2017).

<sup>21</sup> N Spaul “South Africa’s Education Crisis: The quality of education in South Africa 1994-2011” *Centre for Development & Enterprise* 2013.

<sup>22</sup> Ministerial Committee on Rural Education Report, *A New Vision for Rural Schooling* 2005 49-51.

<sup>23</sup> 51.

<sup>24</sup> The Bantu Education Act 47 of 1953, which later became the Education and Training Act 90 of 1979.

<sup>25</sup> *Kobot Besigheid Trust* paras 11-12.

the one hand, the structure of farm schools was open to abuse – farmers could take advantage of the readily available source of extra child labourers<sup>26</sup> – and farm schools were largely characterised by poor conditions and resources.<sup>27</sup> However, on the other hand, some farm schools were viable.<sup>28</sup> The Hunter Committee<sup>29</sup> believed that the security of farm schools could not be achieved if the farm owner remained in control of the land and fundamental affairs of the school.<sup>30</sup> “The dominant approach to farm schools... has always been that of recognising the land upon which farm schools are situated as representing a public interest, with a public function and securing it as such”.<sup>31</sup> The Committee’s recommendations culminated in section 14 and section 58 of the Schools Act.

### 2.3 The legislative framework

Section 14 of the Schools Act regulates the existence and management of public schools on private land, and obliges the Member of the Executive Council (MEC) for education of the respective province to conclude lease agreements with farm owners within 6 months after the Schools Act came into effect. *Regulations Relating to the Minimum Requirements of an Agreement Between the Member of the Executive Council and the Owner of a Private Property* have also been promulgated since.<sup>32</sup> To enhance security and sustainability, the leases were intended to be concluded for long periods of time or in perpetuity.<sup>33</sup> However, in reality, hundreds of farm schools operate on farms where no leases have been entered into.<sup>34</sup> And where lease agreements have been entered into, the leases are short-term.

Where the farm owners are unwilling or the parties are unable to conclude section 14 agreements, or in instances where farm owners demand excessive rental from the department, the intention of the legislature was that section 58 would be at

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<sup>26</sup> *Kobot Besigheid Trust* para 16.

<sup>27</sup> Equal Education Heads of Argument *Kobot Besigheid Trust v MEC and Governing Body Grootkraal Primary School*, case number 24611/11, Western Cape High Court 2017, para 11.

<sup>28</sup> Centre for Child Law expert affidavit for *Kobot Besigheid Trust v MEC and Governing Body Grootkraal Primary School*, case number 24611/11, Western Cape High Court 2017, para 23.

<sup>29</sup> *Kobot Besigheid Trust* para 29.

<sup>30</sup> Para 27.

<sup>31</sup> Para 37.

<sup>32</sup> Schools Act Regulations *Regulations Relating to the Minimum Requirements of an Agreement Between the Member of the Executive Council and the Owner of a Private Property on Which a Public School is Situated* GN R1738 in GG 18566 of 19 December 1997.

<sup>33</sup> *Kobot Besigheid Trust*.

<sup>34</sup> Human Rights Watch Report *Forgotten Schools: Right to Basic Education for Children on Farms in South Africa*, 2004; Minister of Education Kader Asmal Conference on Farm Schools speech (2000).

the MEC's disposal to ensure the sustainability and security of tenure of the school in question.<sup>35</sup>

Section 58(1) of the Schools Act states that the MEC "may, if it is in the public interest to do so, expropriate land or a real right in or over land for any purpose relating to school education in a province". This national legislation has been transformed into provincial legislation as well (see for instance section 104 of the Gauteng School Education Act).<sup>36</sup> The first thing to note about this section is that "may" indicates a discretion that is conferred on the MEC to expropriate. Second, the MEC may expropriate either land or a real right in or over land. Third, the state can expropriate for educational purposes outside of the PSOPP-scenario as well. Fourth, on a close reading of section 58, it is unclear whether an expropriation for educational purposes is a public purpose or interest, as required by the Constitution. This is because section 58 juxtaposes "public interest" with educational purposes, suggesting that something in the "public interest" might outweigh the expropriation.

Although the section should have clarified whether an educational purpose is a public purpose or interest, it is conceivable that in the context of a widespread education crisis, an expropriation for educational purposes (whether it is to establish or protect a school) would be a valid public purpose or interest justifying an expropriation as per the Constitution.<sup>37</sup>

Section 58 does not discuss what factors should guide the MEC's discretion to expropriate for an educational purpose, nor does it discuss what it is in the public interest that might outweigh an expropriation for educational purposes. Arguably, as a result of this lack of guidance, section 58 has never been used. Instead, MECs in practice resort to other measures when section 14 agreements fail, such as merging or closing schools, or allowing the *status quo* to continue.<sup>38</sup> In 2005, the Ministerial Committee on Rural Education highlighted the need for "guidelines on the legal procedures required to expropriate land on which public schools are located".<sup>39</sup> Such guidelines have not been developed yet.

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<sup>35</sup> *Kobot Besigheid Trust* para 35.

<sup>36</sup> The Gauteng School Education Act 6 of 1995.

<sup>37</sup> This discussion is worthy of more attention but is beyond the scope of this submission.

<sup>38</sup> *Kobot Besigheid Trust* para 43.

<sup>39</sup> Recommendation 65 of Ministerial Committee on Rural Education Report, A New Vision for Rural Schooling 2005 page 56.

The MECs' present approaches towards failed section 14 agreements are inconsistent with the Schools Act's intentions. The correct approach is rather that when certain circumstances are present, the MEC has a duty to exercise her/his discretion to expropriate because failure to expropriate will unjustifiably limit the right to basic education.

### **3 Enforcement of the right to basic education**

The judiciary play an important role in South Africa's constitutional democracy. The judiciary interprets the nature and scope of socio-economic rights based on the cases brought before them. They also enforce socio-economic rights, develop remedies where the right is not being given effect to and expand on government's duties in respect of socio-economic rights. This all takes place within the context of the separation of powers. Judicial insights are therefore extremely valuable when considering the circumstances that give rise to the MEC exercising her discretion, as per section 58 of the Schools Act, to expropriate for basic education. Section 3 1 first considers the nature and content of the right to basic education. Following this, section 3 2 discusses general enforcement of socio-economic rights and government obligations in respect of socio-economic rights. Finally, section 3 3 examines judicial remedies and attitudes towards expropriation.

#### **3 1 Nature and content of the right to basic education**

Section 29(1)(a) of the Constitution provides that everyone has the right to a basic education. Basic education refers to both primary and secondary education (Grades R-12).<sup>40</sup> In *Juma Masjid*,<sup>41</sup> the Constitutional Court held that unlike many of the other socio-economic rights, including the right to further education in section 29(1)(b), the right to basic education is "immediately realisable".

There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures".<sup>42</sup> The right to basic education may only be limited in terms of section 36 of the Constitution.<sup>43</sup> The

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<sup>40</sup> Department of Basic Education website "About Us" <<http://www.education.gov.za/AboutUs/AboutDBE.aspx>> (accessed 04-05-2017).

Note: school is compulsory for learners between 7 and 15 years or until the learner reaches grade 9, whichever occurs first, as per section 3(1) of the Schools Act.

<sup>41</sup> *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 8 BCLR 761 (CC).

<sup>42</sup> *Governing Body of the Juma Masjid Primary School and Others* para 37.

<sup>43</sup> C Simbo "The right to basic education, the South African constitution and the *Juma Masjid* case: An unqualified human right and a minimum core standard" (2013) 17 *Law Democracy & Development* 486.

court also recognised the inextricable link between the right to basic education and section 28(2) of the Constitution, which requires the best interests of the child to be taken into account in all matters concerning the child.

While the Constitutional Court has emphasised the importance of the right to basic education for the transformation of society,<sup>44</sup> for promoting constitutional values,<sup>45</sup> and for addressing inequalities created during apartheid,<sup>46</sup> it has not yet fully accounted for the precise meaning and content of the right.

The Department of Basic Education (DBE) gives meaning to the right to basic education in its National Policy documents that provide for minimum norms and standards, and objectives.<sup>47</sup> The courts examine the content of the right on an incremental basis. So far, they have held that the right to basic education encompasses the right of a learner to a textbook at the start of the academic year for each subject,<sup>48</sup> “adequate age and grade appropriate” desks and chairs,<sup>49</sup> and a direct entitlement to be provided with transport to and from school.<sup>50</sup>

The issue of whether security of tenure is a component of the right to basic education has not yet come before a court. However, if the issue arose before a court, it would likely hold that it is a component of the right. Textbooks, desks, and transport are all facilities at a school that the courts considered essential to the functioning of a school and the bear minimum of a working school. Security of tenure is an even more fundamental aspect of a functioning school than textbooks, desks, and transport, without a (safe) physical space to conduct learning, education is impossible.

Furthermore, SA ratified<sup>51</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>52</sup> in 2015, which requires education to be both “available”

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<sup>44</sup> *Governing Body of the Juma Masjid Primary School* para 38.

<sup>45</sup> *Minister of Basic Education and Others v Basic Education for All and Others* 2016 4 SA 63 (SCA) para 2.

<sup>46</sup> Para 37.

<sup>47</sup> Schools Act Regulations *Regulations Relating to Minimum Uniform Norms and Standards for Public School Infrastructure* GN R920 in GG 37081 of 29 November 2013; and Department of Basic Education *Action Plan to 2019: Towards the Realisation of Schooling 2030* (2015).

<sup>48</sup> *Minister of Basic Education and Others v Basic Education for All and Others*

<sup>49</sup> *Madzodzo v Minister for Basic Education* 2014 3 SA 441 (ECM); [2014] ZAECHC.

<sup>50</sup> *Tripartite Steering Committee and Another v Minister of Basic Education and Others* 2015 5 SA 107 (ECG); [2015] ZAECHC 67.

<sup>51</sup> South Africa ratified the ICESCR subject to the qualification that it would only take progressive steps to realise the right to education within its available resources. This is arguably inconsistent with section 29(1)(a) of the Constitution. See ESCR-Net “The Government of South Africa ratifies the ICESCR” (20-01-2015) <<https://www.escr-net.org/news/2015/government-south-africa-ratifies-icescr>> (accessed 05-05-2017).

<sup>52</sup> United Nations General Assembly *International Covenant on Economic, Social and Cultural Rights* 16 December 1996.

and “accessible”.<sup>53</sup> “Availability” entails that institutions “require buildings or protection from the other elements”.<sup>54</sup> “Other elements” would include instances where the farm owner unilaterally shuts down a functioning school, or takes pupils as farm labourers.<sup>55</sup> While “accessibility” includes “physical accessibility”.<sup>56</sup>

### 3 2 General enforcement of socio-economic rights

Socio-economic rights under the South African Constitution are justiciable. Section 8(1) of the Constitution binds the state to the Bill of Rights. And section 7(2) requires the state to “respect, protect, promote and fulfil the rights in the Bill of Rights”. The question is “how to enforce them [socio-economic rights] in a given case?”<sup>57</sup>

Socio-economic rights cases are polycentric, involving policy issues that have budgetary and resource implications. The primary responsibility to establish and implement such policies lies with the executive branch of government. Consequently, if the judiciary steps in to enforce socio-economic rights, there are potentially ramifications for the separation of powers doctrine, which requires the courts to refrain from usurping the core functions of the executive who are better placed to deal with policy decisions.<sup>58</sup> Judicial enforcement of socio-economic rights is influenced by this reality.

Yet the separation of powers doctrine is not absolute.<sup>59</sup> Various factors influence whether in a particular case the courts will enforce socio-economic rights.<sup>60</sup> First, successful enforcement depends on whether the case is framed as a breach of the positive or negative duty/right.<sup>61</sup> Positive duties require the state<sup>62</sup> to act or take proactive measures to “promote” and “fulfil” rights, while negative duties require the state (and private parties)<sup>63</sup> to refrain from interfering with peoples’ existing enjoyment of the right to “respect and “protect” rights.<sup>64</sup> Courts use “reasonableness review” when

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<sup>53</sup> Article 13(2). See General Comment on Article 13(2)(a) & (b) <[http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d\)GeneralCommentNo13The righttoeducation\(article13\)\(1999\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralCommentNo13The righttoeducation(article13)(1999).aspx)>.

<sup>54</sup> General Comment ICESCR.

<sup>55</sup> *Kobot Besigheid Trust* paras 11-12.

<sup>56</sup> General Comment ICESCR.

<sup>57</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), para 20.

<sup>58</sup> P De Vos & W Freedman *South African Constitutional Law in Context* (2014) 63.

<sup>59</sup> 63.

<sup>60</sup> 690.

<sup>61</sup> 693.

<sup>62</sup> The CC is starting to recognise that private parties also have positive obligations in respect of socio-economic rights. See *Daniels v Scribante and Another* 2017 ZACC 13 para 49.

<sup>63</sup> *Governing Body of the Juma Masjid Primary School* para 58.

<sup>64</sup> De Vos & Freedman *Constitutional Law* 673.

assessing compliance with positive duties,<sup>65</sup> and “proportionality review” as required by section 36 of the Constitution when assessing compliance with negative duties. If the case is framed as a breach of a negative obligation, the courts are more inclined to intervene despite budgetary considerations.<sup>66</sup> Notably, many commentators suggest that the distinction between positive and negative duties is a misnomer, a claim unfortunately beyond the scope of this submission.<sup>67</sup> Additionally, courts are more inclined to enforce socio-economic rights where a duty is articulated in a specific policy or legislation,<sup>68</sup> and where the right is connected to other fundamental rights.<sup>69</sup>

### 3 3 Judicial remedies and expropriation

Courts have wide remedial powers to enforce constitutional rights.<sup>70</sup> Although the courts innovatively and creatively craft remedies for realisation of socio-economic rights, they remain constrained by the separation of powers doctrine.<sup>71</sup> Relief for a finding that the state failed to fulfil a duty or that it interfered with existing enjoyment of a right, will inevitably affect policy.<sup>72</sup> In socio-economic rights cases, the types of remedies that the Constitutional Court grants are: a declaration of rights, structural interdicts,<sup>73</sup> meaningful engagement,<sup>74</sup> and constitutional damages.<sup>75</sup>

The court will award constitutional damages where it is necessary to protect and enforce chapter 3 rights.<sup>76</sup> In *Modderklip Boerdery*, the Constitutional Court awarded constitutional damages as compensation to the owner of illegally occupied property. Compensation was determined with reference to section 12 of the Expropriation Act.

In the SCA the basis for compensation was unjustified breach of the state’s obligations in relation to the owner’s property rights (section 25) and the duty owed to

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<sup>65</sup> 708.

<sup>66</sup> 59.

<sup>67</sup> 708.

<sup>68</sup> *Minister of Basic Education and Others v Basic Education for All and Others*

<sup>69</sup> *Khosa v Minister of Social Development and Others* 2004 6 SA 505 (CC): See education case examples in section 4 7.

<sup>70</sup> Ss 38 and 172 of the Constitution.

<sup>71</sup> *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

<sup>72</sup> De Vos & Freedman *Constitutional Law* 721.

<sup>73</sup> 406.

<sup>74</sup> 413; The meaningful engagement jurisprudence of the court has also been extended to educational rights contexts: *Head of Department of Education, Free State Province v Welkom High School* 2013 9 BCLR 989 (CC); *MEC for Education v Governing Body of the Rivonia Primary School* 2013 6 SA 582 (CC).

<sup>69</sup>.

<sup>75</sup> De Vos & Freedman *Constitutional Law* 409; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 8 BCLR 786 (CC).

<sup>76</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); 1997 7 BCLR 851 (CC) para 60.

the unlawful occupiers to provide access to housing (section 26).<sup>77</sup> However, in the Constitutional Court, the basis for compensation was unjustified breach of the duty in section 34 to provide suitable and effective enforcement procedures and to assist in implementing them when necessary.<sup>78</sup>

The Constitutional Court found it unnecessary to decide whether a court could order the expropriation of property. Nonetheless, it expressed support for the view that ordering the state to expropriate land from Modderklip would amount to the court “not only ordering the state to fulfil its obligations but also telling it how to do so” – an impermissible breach of the separation of powers.<sup>79</sup> Yet the court also stated that should the state decide to expropriate, the compensation (constitutional damages) would be set off against compensation given for the expropriation.

In summary, although the courts are willing to enforce socio-economic rights, they are constrained by the separation of powers doctrine. The socio-economic rights jurisprudence demonstrates that courts do intervene where fundamental rights or obligations are breached. However, they attempt to create relief that is sensitive to the separation of powers. At this stage, the Constitutional Court has expressed the view that it is not their role to facilitate expropriations (although debatably this is the effect of the Constitutional Court’s judgment in *Modderklip*). Consequently, the current position suggests that it is the executive’s primary responsibility to use expropriation as a tool to realise socio-economic rights.

#### **4 Expropriation as a tool to realise the right to basic education: What factors should guide the MEC’s discretion to expropriate for basic education?**

This section proposes various factors that should be considered to determine when it is appropriate for expropriation to be used as a tool to realise the right to basic education (as per section 58 of the Schools Act). The factors are extracted from judicial insights in section 3 regarding the nature and content of the right to basic education, socio-economic rights enforcement and state obligations, and judicial remedies. The factors in sections 4 1 to 4 11 are developed specifically for where an MEC is considering whether to expropriate a PSOPP. However, many are also relevant to

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<sup>77</sup> Constitution of South Africa. See Van der Walt’s interpretation of the SCA and CC judgments in AJ Van der Walt “The State’s Duty to Protect Property Owners v The State’s Duty to Provide Housing: Thoughts on the *Modderklip* Case” (2005) 21 *SAJHR* 156 158.

<sup>78</sup> *Modderklip Boerdery* para 51.

<sup>79</sup> Paras 63-64.

general expropriations for education in a non-PSOPP context (as section 58 is not confined to the PSOPP-scenario). The factors are applied to the facts of a matter currently being litigated in the Western Cape High Court (referred to as the *Grootkraal* matter). Critical reflections of the present approaches of both the courts and MECs are included.

#### 4 1 Nature of the right to basic education

The fundamental nature of the right to basic education, which has been held by the courts as “immediately realisable”<sup>80</sup> and by government as “unqualified” and “limitless”,<sup>81</sup> must underlie the whole process. The content of the right, on which both the court and government have shed light, as well as the argument adduced in the previous section that insecurity of tenure would form part of the content of the right, are crucial. The nature of the right is thus the basis or starting point, which should trigger the MEC to consider the option of expropriation in section 58 of the SASA, and guide the MEC when exercising the discretion to expropriate.

#### 4 2 Positive and negative right infringed or the obligation not fulfilled

The right to basic education and its accompanying duties imposed on the state can be formulated in both the positive and negative. In terms of the positive, everyone has a right to basic education and the state must “promote” this right. If the MEC wishes to expropriate land or a real right in or over land to establish a new school, this would be in keeping with the state’s positive duties to “promote” and “fulfil” the right to basic education.<sup>82</sup>

In terms of the negative right, the right to basic education entails that neither the state nor a private party should unjustifiably impair or interfere with a person’s pre-existing enjoyment of the right. Essentially, everyone should “respect” an existing right to basic education. If the state unjustifiably interferes with an existing right to basic education, this will be considered a retrogressive measure.<sup>83</sup> An expropriation may be necessary or even required for the state to fulfil its negative obligations i.e. to protect infringement of an existing right to basic education.

Both obligations are crucial. But based on the current jurisprudence, whether government’s positive or negative duties are at stake might affect the necessity,

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<sup>80</sup> *Governing Body of the Juma Masjid Primary School* para 37.

<sup>81</sup> Minister of Basic Education, Ms Angie Motshekga Minister of Basic Education Budget speech & responses (10-05-2016) <<https://pmg.org.za/briefing/22501/>> (accessed 29-04-2017).

<sup>82</sup> Constitution section 7(2).

<sup>83</sup> *Tripartite Steering Committee* para 45.

immediacy or urgency of the expropriation. As demonstrated in section 3 2, if the negative duty is implicated, the past practice of the courts suggests that they are more willing to intervene despite budgetary considerations, perhaps suggesting that infringement to this aspect of the right is more serious. Thus, if the negative right is implicated combined with other factors such as lack of alternative options (section 4 6), this might suggest more of an urgency to expropriate to avoid retrogressive measures. This is the case in *Grootkraal* where the school already exists.

However, the distinction between positive and negative in the context of the right to basic education is trickier than other socio-economic rights because the positive obligation is not subject to any internal qualifiers. The right, both in terms of its positive and negative formulations may only be limited by section 36 of the Constitution. Consequently, government must expropriate to fulfil its positive obligations in respect of the right as well.

#### 4 3 Viability of the school

If the school is in existence, the viability of the school matters. This is analogous to the health and safety issues in the eviction jurisprudence.<sup>84</sup> If a school is not viable, either because it is unsafe or the quality of the facilities or teachers is so poor, it is perhaps a factor that will weigh against an expropriation.

Yet if the school is viable (like *Grootkraal*),<sup>85</sup> this would be a major factor in favour of expropriation, especially in the greater context of the state of South African education – it is difficult to justify the closure of functioning schools. The DBE must carefully assess the viability of schools. The assessment of *Grootkraal* demonstrates that the school is viable.

#### 4 4 Conduct of the parties, the conclusion of section 14 agreements, and meaningful engagement

In *Juma Masjid* the conduct of the parties throughout the process, especially in terms of their willingness to conclude a section 14 lease agreement, weighed heavily on the court's ultimate decision to grant the eviction.<sup>86</sup> In that case the court felt that the private landowners acted reasonably and in good faith throughout the process: they attempted to conclude a section 14 lease agreement with the relevant MEC, and

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<sup>84</sup> *City of JHB v Changing Tides* 2012 6 SA 294 (SCA); *Occupiers Olivia Road v City of JHB* 2008 3 SA 208 (CC).

<sup>85</sup> *Kobot Besigheid Trust* para 23.

<sup>86</sup> *Governing Body of the Juma Masjid Primary School* para 45-65.

they incurred various out-of-pocket expenses on behalf of the school to protect the children's' rights to basic education.<sup>87</sup>

Yet the MECs failed to “teach by example”. She neglected to take reasonable measures to conclude a section 14 agreement, and she failed to take adequate steps to make alternative arrangements for the learners. This led the court to the conclusion that the MEC failed to fulfil her constitutional obligation to “respect, protect, promote and fulfil” the learners’ right to basic education.<sup>88</sup> Additionally, the conduct of the parties is also evidenced in their willingness to meaningfully engage with each other and the relevant stakeholders.<sup>89</sup>

In *Grootkraal*, the private landowners did not intend to enter into a long-term lease agreement with the MEC on behalf of the school (as required by section 14) because they intended to build a game reserve on the land. Furthermore, the landowners were asking for “exorbitant” rental,<sup>90</sup> and for the dismissal of the school’s principal as a prerequisite for a section 14 agreement. From the MEC’s side, when the negotiations for the section 14 agreement failed, he resorted immediately to closing the school and relocating the learners to a different school. *Equal Education* alleges that the School Governing Body (SGB) and community were effectively excluded from the negotiations and process.<sup>91</sup>

#### 4 5 Countervailing rights of the property owner

The right to property is afforded constitutional protection in section 25 of the Constitution. That the right to property needs to be respected has been acknowledged by the CC as important especially in light of the blatant disregard manifested by the apartheid government for property rights. Bilchitz suggests that “individuals are generally extremely vulnerable and insecure in the absence of private property rights” based on the fear that the resources required for survival do not lie within their control. Moreover, he suggests that private property rights allow people to have control over their own lives by allowing for spaces of freedom to pursue projects and goals of their choosing.<sup>92</sup>

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<sup>87</sup> Para 63-64.

<sup>88</sup> Para 47-51.

<sup>89</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>90</sup> *Kobot Besigheid Trust* para 7-8.

<sup>91</sup> Para 44-46.

<sup>92</sup> Bilchitz *Poverty* 229-230.

Ownership and property rights are not absolute.<sup>93</sup> Many of the comments made by the Constitutional Court regarding the importance of property rights pertain specifically to a “home” which has sentimental value and is a “zone of personal intimacy and family security”.<sup>94</sup> In *Grootkraal*, it is important to bear in mind that the owners want to use the land where the school is located for commercial use (a game farm).<sup>95</sup> Additional ways to mitigate the effects on the owner’s property rights is to expropriate only a portion of the land or a use right in or over land.

#### 4 6 Alternative options, and the general tone and purpose of SASA

Considerations of alternative options or less restrictive means are important in the context of a section 36 limitations analysis, and the eviction jurisprudence. In this context, alternative options to expropriation that potentially protect the children’s rights to basic education include relocations<sup>96</sup> or mergers.<sup>97</sup> While these options appear less intrusive to the owner’s property rights, depending on the circumstances they may have detrimental consequences for learners’ rights to basic education. Relocation may involve commuting further distances to school, or relocation or separation of communities and families, which has detrimental effects on learners. Equal Education has noted these concerns as applicable to *Grootkraal* learners.<sup>98</sup> Mergers also come with their difficulties – many schools are already at maximum capacity and integrating learners from different schools can have complicated social implications (unsettling). Viability of an existing school is also important here because it will mitigate against relocation.

Presently, alternative options are given too much weight by MECs and courts. MECs (and even the courts),<sup>99</sup> are quick to close schools down before they consider expropriation as an option. In *Juma Masjid*, the Constitutional Court provisionally ordered the MEC to attempt to negotiate a section 14 lease agreement or alternative arrangements (specifically relocation). Once the MEC did this, the court granted the

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<sup>93</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 2 SA 104 (CC); 2011 ZACC 33 para 40.

<sup>94</sup> *Port Elizabeth Municipality* para 17.

<sup>95</sup> *Kobot Besigheid Trust*.

<sup>96</sup> There is no direct reference in the Schools Act to “relocations” but past practice suggests that MECs resort to this strategy when schools close as per section 33 of the Schools Act. See *Juma Masjid* as a case in point.

<sup>97</sup> S12A of the Schools Act (“Interpretation Act”).

<sup>98</sup> *Kobot Besigheid Trust* para 52.

<sup>99</sup> In *Juma Masjid*, the Constitutional Court ordered MEC to come up with alternative arrangements for school- when she did, the court granted the eviction.

eviction order.<sup>100</sup> Similarly in *Grootkraal*, the MEC quickly jumped to considering closure of the school once the section 14 agreement failed.

In *Modderklip*, the court stated that when determining appropriate relief, the general tone and purpose of legislation must be considered.<sup>101</sup> The present approach discussed above is contrary to the scheme and intention of the SASA and legislature, which contemplates that in the event of a failed section 14 agreement, expropriation will at least be considered as an option.<sup>102</sup> This option must be given sufficient weight when considering alternative options.

#### 4 7 Interconnectedness of the learners' other rights

The interconnectedness of other rights is a crucial factor that impacts the successful judicial enforcement of socio-economic rights and should consequently be a factor that guides the MEC's discretion. For example, in *Minister of Basic Education*, the SCA recognised that the failure to provide textbooks to learners in schools in Limpopo was an unjustifiable violation of the rights to basic education, equality, dignity, SASA and section 195 of the Constitution.<sup>103</sup> The interconnectedness of these rights was a crucial factor that led the court to enforce the right to basic education.

In *Grootkraal*, in addition to the rights to basic education and the best interests of the children being at stake, the learners' rights to property are at stake as well. As demonstrated in previous sections, the learners' security of tenure is in jeopardy. Section 25(6) of the Constitution provides that a community whose tenure of land is legally insecure as a result of previous racially discriminatory laws is entitled either to tenure which is legally secure or to a comparable redress. A relocation or even a section 14 agreement can potentially exacerbate this insecure position and expropriation has unique advantages in this regard (as discussed in section 2 1). Although the land would be registered in the state's name post-expropriation, the state would be holding the land on behalf of the school. This would strengthen the school's security of tenure when compared with the status quo.

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<sup>100</sup> *Governing Body of the Juma Masjid Primary School* para 2.

<sup>101</sup> *Modderklip Boerdery* para 55.

<sup>102</sup> *Kobot Besigheid Trust* para 35; Ministerial Committee on Rural Education Report *A New Vision for Rural Schooling* 52.

<sup>103</sup> *Minister of Basic Education and Others* para 46.

#### 4 8 Vulnerability of the parties

In both the evictions and housing jurisprudence, the vulnerability of the parties is an important consideration.<sup>104</sup> Vulnerability is also a relevant factor in persuading the MEC to exercise her/his discretion to expropriate. The more vulnerable the group benefitting from the expropriation is, the more necessary the expropriation. Most PSOPP are located in rural SA and are on farms (*Grootkraal* is such an example). The learners at these schools are mostly farm worker's children who are poor and are mostly (if not exclusively) black. Farm workers experienced some of the worst aspects of apartheid in terms of landlessness, insecure tenure and inequality.<sup>105</sup> As a result, children of farm workers form part of a vulnerable group in society. The MEC must take into account all of the intersecting identities of the learners and the community as a whole. The *Grootkraal* learners are a prime example of a vulnerable group described above that require government intervention in the form of an expropriation to secure their rights.

#### 4 9 Redistribution and land reform imperatives

These themes have been dealt with in more detail in section 2, but their importance should not be disregarded by the MEC when considering an expropriation. This is especially so in light of allegations that challenge the lack of success and meaningful transformation accomplished in the first two decades of democracy.<sup>106</sup>

#### 4 10 The state's international law obligations

The MEC must also keep in mind the state's international law obligations, as discussed in section 3 1. International law is crucial when interpreting the Bill of Rights.<sup>107</sup> The ICESCR requires education to be both "available" and "accessible" (see section 3 1) and imposes a duty on the state to take steps to achieve these measures.

#### 4 11 Other contextual factors

The length of time that the school has been on the property is an important factor as it may indicate attachment to land and that the community is settled. In *Grootkraal*, the school has been on the land for 80 years.<sup>108</sup> Additional relevant contextual factors include the number of children affected – in *Grootkraal* there are

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<sup>104</sup> *Kobot Besigheid Trust; Port Elizabeth Municipality*.

<sup>105</sup> Centre for Child Law expert affidavit for *Kobot Besigheid Trust v MEC* para 23.

<sup>106</sup> Musyoka "The state is sick" Mail & Guardian.

<sup>107</sup> Constitution section 39(1)(b).

<sup>108</sup> *Kobot Besigheid Trust v MEC* para 58.

currently 202 learners enrolled<sup>109</sup> – as well as the location of the school,<sup>110</sup> and historical context.

## 5 Conclusion

This submission has proposed a number of factors that suggest when the MEC should exercise his/her discretion to expropriate. It is suggested that when certain circumstances are present, the MEC has a duty to expropriate to realise his/her obligations or duties in respect of socio-economic rights. This is the case where the beneficiary of the expropriation's fundamental right to basic education is limited either due to a third party's interference and the state has failed to protect the right, or where the state has failed to take steps to promote the right. An expropriation is even more necessary where the beneficiary of the expropriation is vulnerable, other fundamental rights are implicated, and where a section 14 lease agreement has been attempted and failed.

In practice, there is major confusion at a provincial government level about the scheme of the SASA in relation to PSOPP. This submission has clarified this confusion. The dominant approach of closing viable and functioning schools in the context of an education crisis is retrogressive and unlawful. A suggestion was made that expropriation might exacerbate already existing tensions between farm workers and farm owners if a portion of his land is expropriated and further victimisation and harassment could result.<sup>111</sup> Although this is a valid concern, continuation of the status quo is not an option considering the marginalisation, victimisation and powerlessness that farm workers already face. Rather, if land is expropriated for educational purposes, the relevant MEC would have an ancillary duty to ensure that the school is secure and that farm owners understand the importance of restitutionary policies in post-apartheid SA.

The most vulnerable in our society should be put first in terms of land reform and redistribution policies.<sup>112</sup> Learners at *Grootkraal* are amongst members of society who are better placed to benefit from land restitution policies. This begs the question: if not these people, then who should be benefitting from land reform and expropriation policies in SA? The conversation is already shifting presently to discussions that start

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<sup>109</sup> *Kobot Besigheid Trust* para 12.

<sup>110</sup> *Minister of Basic Education and Others* para 50.

<sup>111</sup> Ministerial Committee Report for Rural Education 52.

<sup>112</sup> F Fanon *The Wretched of the Earth* (1963) 1- Fanon suggests that the "last shall be first".

with the premise that our existing legal framework is inimical to land restitution and consequently needs to be altered.<sup>113</sup> Yet this submission demonstrates that in the context of education, section 58 of the SASA has never been used or even attempted. It is peculiar to change a policy that has never been tried because it is perceived as flawed or unable to succeed. Moreover, it is impossible to make informed decisions about what future policies or legislation should look like if existing policies are beyond scrutiny.

The scope of this submission does not permit a consideration of the real reasons behind section 58's lack of implementation. But it is most likely due to the complicated politics that accompany expropriations.<sup>114</sup> In going forward, restitution and redistribution policies must put politics last and the "last" first."<sup>115</sup> The poor and vulnerable must be put at the centre of policies. Government must "lead by example."<sup>116</sup>

The factors proposed in this submission are relevant for general determinations of when it is appropriate for the MEC to expropriate for basic education, as per section 58 of the SASA (beyond the PSOPP context). These factors are also useful for considering when expropriation should be used as a tool to realise socio-economic rights more generally, such as the right to health care, housing, or further education.<sup>117</sup> However, the distinguishing formulation of the right to basic education in the Constitution and accompanying jurisprudence mitigates against this. The method adopted in this submission would need to be developed individually to other socio-economic rights on a case-by-case basis.

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<sup>113</sup> D Bendile "ANC plans 'constitutional revolution' on land" Mail & Guardian (03-02-2017) <<https://mg.co.za/article/2017-02-03-00-anc-hits-warp-speed-on-land>> (accessed 09-05-2017).

<sup>114</sup> D Bendile "Politics blocks land reform" Mail & Guardian (17-03-2017) <<https://mg.co.za/article/2017-03-17-00-politics-blocks-land-reform>> [accessed 09 May 2017].

<sup>115</sup> Fanon *The Wretched of the Earth* 1.

<sup>116</sup> *Governing Body of the Juma Masjid Primary School* para 50.

<sup>117</sup> Ss 27(1)(a), 26 and 29(1)(b) of the Constitution.