Promoting Access to Education in South Africa: A Sequential Reflection on a specific case

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Abstract

The South African educational sector and the learners continues to witness restricted access due to deleterious conduct of school management personnel such as school principals and or teachers. This remains a pervasive problem despite the provisions of section 29 of the 1996 Constitution, which provides for the right to access education. Learners are still denied access to education and educational institutions and this problem escalate unabated by those entrusted with responsibilities to promote access and protect learners such as school principals and teachers. Looking into the case of Moko and other predecessor cases reviewed in this study, the paper argue that there is a need to promote access and improve awareness interventions in order to enlighten those entrusted with the responsibilities to combat any conduct aimed at devaluating access to education.

Keywords: Access, Education, Promotion, South Africa,

Introduction

Access to education is one of the social mechanisms that communities can use to defeat poverty and escape destitution. Linked to this are Tomasevski's remarks that "access to education plays a crucial role in the fulfilment of socio-economic rights because education enhances a person's prospects of securing good employment, which in turn secures access to food, housing and health care services"(Tomaševski, 2006; 47). Against this background, UNESCO considers access to education the path to sustainability, poverty alleviation, and better health (UNESCO, 2017; 1). According to UNESCO, a country can make no stronger, more longer-lasting investment than educating its citizens (UNESCO, 2012; 1). Dwane averred that, quality education if successfully accessed and attained could be used as a bridge to cross over from poverty to a better life, thus improve the living standard of the people (Dwane, 2012).

According to UNESCO, the concept of accessibility to education integrates three corresponding proportions. Primarily, for every person education must easily be within reach, without any form of unfair segregation. Moreover, education must be physically accessible to everyone, that is to say schools be within safe physical reach. Subsequently, schools and educational institutions must also be accessible to people with physical impairments, to exercise their right to access education. Thirdly, education must be economically accessible, that is, be within everyone's means or affordable to all (UNESCO, 2003; 9; South African Human Rights Commission (SAHRC), 2006; 10).

The purpose of this paper is to analytically construe the phrase "access to education" and to consider its implications drawing from the case of *Moko* (Moko v Acting Principal of Malusi Secondary School and Others, 2020). In doing so, the current paper start by reviewing case laws that were adjudicated upon before *Moko*'s case aimed at promoting access to education. In this paper, the factual question is whether or not the demeanour of the acting principal of *Malus*i Secondary School who denied *Moko* and other learners access to the school premises was constitutional. The analysis stems from the leaners' right to education looking into his right to rudimentary education as mandated by section 29(1)(a) including his right to further education as entrenched in section 29(1)(b) of the 1996 Constitution.

However, it is important to provide an analytical overview of predecessor cases that dealt with the definition, application of access to education and its implication on the South African educational sector. This will be done by firstly having a short discussion of contributions of the scholarly legal revisionists on the issue of accessibility. This will be followed by reviewing important case laws, which played a central role in promoting access to education in South Africa. Subsequent to that, the discussion of *Moko*'s case will then follow. As a point of departure, the paper will argue that the matter ought to have not reached the Constitutional court but should have been resolved at the High Court.

Accessibility of the Right to Education

Accessibility of the right to education has been defined in the case of *Centre for Child Law v Minister for Basic Education Eastern Cape* (Centre for Child Law v Minister for Basic Education Eastern Cape, 2012) to refer to "the child's ability to enrol and as a result attend school". Beiter is of the view that "accessibility means that educational institutions and programmes have to be accessible to every person and it encompasses three aspects, namely accessibility without discrimination, physical and economical accessibility" (Beiter, 2005). Woolman and Fleisch posits that in order to ensure that there exist an effective economically accessibly education it is required that those learners who are destitute and live in relative destitution must be helped and supported accordingly by the government in order to make sure that they access quality education (Woolman & Fleisch, 2009).

In 2011, in the case of *Adam Legoale v MEC for Education, North West,* (Adam Legoale v MEC for Education, North West, 2011) the applicants together with the Centre for Child Law, represented by the Legal Resources Centre brought an application to the North West Court in Mafikeng seeking the provision of a fee-free learners' transport to and from school. The said applicants were the parents and the caregivers of learners who were enrolled and attending school at *Rakoko* High School in *Mabeskraal*, North West Province. These applicant and their children were families living in *Siga,* a village situated about 25 kilometres from *Mabeskraal*. The learners were previously enrolled and attended a school (JC *Legoale* Commercial School) which was based within their vicinity

and they were just walking to and from the school until the school was closed down by state as part of rural reasoning process in 2009.

Due to the fact that transport was not provided for, some learners had to drop out of school as their families could not afford the bus fare whereas it was difficult for some families to pay out the transportation costs from their incomes because most of them depended on government grants and or pensions. In their application, the applicants sought the provision of a fee-free learners' transport to and from their school. The Centre for Child Law requested the strategies and programmes to provide for the transportation of learners to be produce and made known to enable learners and their parents or caregivers to be conscious of their constitutional rights. The parties reached an agreement, which was endorsed as a court order (Adam Legoale v MEC for Education, North West, 2011).

Some of the terms of the agreement were that the Department of Public Works and Transport must work hand in hand with the Department of Education in providing learners with transportation from *Siga* village to their schools at *Mabeskraal* as of 8 August 2011 for a period of 3 months or until lengthier term measures are employed, whichever occurred later. The transportation of learners was to be funded by the two departments jointly and arranged properly to cater for the needs of the learners. The agreement also permits the applicants to interact directly with the two departments to assess progress. In the event any of the parties feels that one of the departments failed or has not complied with the terms of the agreement that party was allowed to approach the High Court on an urgent basis (Skelton, 2013).

In 2013, the Constitutional Court also delivered a ruling in *MEC for Education in Gauteng v The Governing Body of Rivonia Primary School* (MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others, 2013). This case "involved the relative powers of school governing bodies and provincial Education Departments in determining a school's capacity to accommodate learners. In this case, the Head of the Gauteng Department of Education instructed the school governing body

of Rivonia Primary School to admit a learner, even though the school was full in terms of its own admissions policy". The school governing body (SGB) challenged this, arguing that "the provincial department did not have the power to issue such an instruction".

The Court ruled that the provincial Departments of Education are authorised to overrule the admission policies of their respective schools, however, they must do that in a procedurally fair manner and in line with the powers conferred by the South African Schools Act (SASA) and or any other relevant laws. The Court pronounced the "right to education" as a fundamental right that empowers persons to achieve their potential and improve their living personal circumstances, and relate this to the General Comment 13 (MEC for Education, Gauteng and Others v Governing Body of the Rivonia Primary School and Others, 2013; par 28). It also gave emphasis on "the prominence of meaningful engagement by and between all role-players in education to ensure that the best interests of learners are advanced at all times". This case was recorded the third on the subject of the co-operation between the provincial Departments of Education and SGBs in a set of Constitutional Court judgments.

In *Mutukane and Others v Laerskool Potgietersrus* (Mutukane and Others v Laerskool Potgietersrus, 1996) the applicants were parents and caregivers who wanted to enrol their children at an English-medium stream school of Laerskool Potgietersrus. These parents were unsuccessful in their applications to have their children admitted and enrolled as learners at Laerskool Potgietersrus. "The respondent was the member of an executive council of the then Northern Province responsible for Education, Arts, Sport and Culture, who joined the other applicants in his official capacity to represent the interest of parents who would like to send their children to the school and also in the public interest".

The applicants stressed that black learners were negated admittance to the school following the respondent school policy, which rejected their admission based on racial grounds. The first applicant, Mr. Matukane, a black occupant of the then Potgietersrus, (now Mokopane) who wanted his three children to be enrolled in the school approached

the principal enquiring on the likelihood of having his children enrolled. The principal then informed the first applicant to wait for some time to allow the school to determine if there could be any vacant space available to enrol the children. Not convinced that the delay in receiving the respond was necessary, the first applicant approached the Provincial Department of Education, which informed him that there is a vacant space at the school, and as such, his learners could be enrolled. Based on the information he received, he went to the school, completed the required application forms and subsequently purchased the school uniform for the children. When he arrived with the children at school the next day, he found a group of White parents blocking the school gate and then refused him access to the school premises. The next day, his children were again refused access to the school premises.

At the hearing, it was proven that about fifty-five black learners had been denied admission to the school in the same way and there had been no black child admitted in that school whereas there had been none appearing on the waiting list. Following the treatment given to Mr. Matukane a group of black parents and or caregivers approached the High Court and sought an order compelling Laerskool Potgietersrus to enrol their children. At the High Court, the school contended that it did not reject to admit the children based on racial grounds, but it did that because it had reached the maximum number of the new intakes and as such, it was unable to accommodate more children.

The school further argued that had it admitted the children it would have been over populated by English-speaking children and that would abolish the Afrikaans ethos, morals and belief of the school. In support of its argument, the school asserted further that “section 32(c) of the Interim Constitution promotes the right to establish, where possible, educational institutions founded on a common culture or language, provided that there shall be no discrimination on the ground of race”. It was also contended that “the school was eligible to implement admission requirements designed to preserve and promote the prevailing Afrikaans values and beliefs of the school”. Moreover, it was emphasised that “a Department of Education directive gave the school governing body

the power to regulate its admission criteria" (Mutukane and others v Laerskool Potgietersrus, 1996).

Spoelstra J held *inter alia* that:

> Discrimination on the grounds of race has been proved to the satisfaction of the court. This is so because there has never been any learner of colour admitted to the school regardless of the number of applications received by the respondent. The fact that there has never been any admission of black learner be it this year or the previous years is a clear and robust indication to that effect. The court held further that the respondent failed to prove that there was no unfair discrimination based on race against any learner of colour. In addition, even if their applications had been unsuccessful because they had elected to receive their education through English, it would still constitute unfair discrimination (Mutukane and others v Laerskool Potgietersrus 1996).

A further case that deals with accessibility was a matter regarding the exclusion of pregnant pupils from their respective schools. The case of *Welkom* High *School v Head, Department of Education, Free State Province* (Welkom High School v Head, Department of Education, Free State Province, 2011) involves two cases, which were brought independently to the Bloemfontein High Court, and were later combined due to their similarities. In these cases, the girls involved were pregnant and as such, they were told not to come to school due to their pregnancies. The decision to negate the two girls access to education was as a result of the "pregnant learner policy" which was adopted by the SBGs of each school. These policies were founded on a National Department of Basic Education policy of 2007 referred to as "measures for the prevention and management of learner pregnancies". In response to parents and or guardians' complains the Provincial Department of Education substituted the decision of the school and reinstated the pregnant learners relying on a 2010 Circular, which provides that "a pregnant learner should return to school as soon as possible".

The Human Rights Commission and the Centre for Child Law contended that the Court ought to decide on the correctness of the policy that exclude the pregnant learners, or order the departments and the schools to amend their policies to be in line with the Constitution. The Court refused doing so and emphasised that it could not find any legal

way to deal with the constitutionality of the policy. Not convinced by the High Court decision, the HoD of the Free State Provincial Department of Education appealed the decision. On appeal, the Court did not make any ruling or contribution in relation to the constitutionality or the lawfulness of the policy, but concentrated much on the exercise of administrative power and the principle of legality (Head, Department of Education, Free State Province v Welkom High School, 2012). It is worth noting Rampai J's remarks that "there are two groups of children adversely affected by these decisions, namely the teenage mothers and their babies". Rampai J further said that "perhaps the greatest gift that can be given to the two little babies of the two teenage mothers is to ensure that their mothers continue to learn, so that they can become better parents in the near future".

An Overview of *Moko's* Case

A topical case that dealt with accessibility of the right to education is the case of *Moko v Acting Principal of Malusi Secondary School and Others*. This case involve one Mr. *Moko*, who was a grade 12 learner at *Malusi* secondary school based in Marobjane Village, Avon, Senwabarwana, Limpopo Province. On or about the 25 November 2020, Mr. Moko (the applicant) arrived at his school for the purposes of sitting for the Business Studies Paper 2 as part of his matric examination. Ironically, the acting principal of *Malusi* secondary school Mr. Mokgonyana (the first respondent) met the applicant and other two fellow learners at the school gate and denied them access to the school premises because they had not been able to attend certain additional lessons prior the commencement of the exam. They were then told to return to their respective homes to call their parents and or guardians, allegedly for the purposes of deliberating on the matter of their inability to attend additional lessons (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 7).

The applicant left school for home as per the instruction of the first respondent; however, unlike his fellow learners, he could not bring the parents or guardian to school let alone to locate them and as a result, he returned to school alone. Upon arrival, the school gates were locked and the Business Studies Paper 2 examination was already in progress and as such, the first respondent refused to allow the applicant to sit for the examination. This conduct by the first respondent deprived the applicant an opportunity to write his

examination as per the schedule (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 7&8).

Subsequent to the missed examination, the applicant met with first respondent in an attempt to amicably resolve the matter. The first respondent informed the applicant that he would only be able to sit for supplementary examination, which is to take place in May 2021. Following dissatisfaction on the part of the applicant, the matter was then elevated to the Member of Executive Council Limpopo Department of Education (the second respondent) who then instructed the District Director to attend to the matter as urgently as possible. The District Director informed the applicant that a decision has been taken against the first respondent and further confirmed that the applicant would only be given an opportunity to write supplementary examination in May of 2021 (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 9).

In the High Court

The applicant having aggrieved by the decision of the first and second respondents, and the fact that he would only be able to complete his matric examinations mid-2021, he then approached the High Court of South Africa, Limpopo Division, Polokwane on urgent basis. He sought relief that he be granted the opportunity to sit for and write the missed examination as soon as possible (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 10). Based on the decision of the first and second respondents, the Court established that the applicant would be allowed to write the missed examination paper in May of 2021 and for that reason, the Court ruled that it was not necessary for the matter to be determined and be heard on an urgent basis. Therefore, the applicant‘s application was struck from the roll for lack of urgency (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 11).

In the Constitutional Court

Aggrieved by the decision of the High Court and the fact that its determination of the matter will not afford him urgent relief he seeks being to sit and write the missed examination imminently, he therefore approached the Constitutional Court directly on urgent basis. In this Court, the applicant sought an order directing the respondents to

allow him to write the examination of the missed subject before the release of the other result so that his results of the missed paper too could be released together with the results of the other matric examination (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 12). The applicant asserted that the conduct of the first respondent was unreasonable and also violated his right to basic education as mandated by section 29(1)(a) of the Constitution inclusive of his right to further education as entrenched in section 29(1)(b) and it must be declared inconsistent with section 29(1)(a) and (b) of the Constitution. This is because if the applicant was to write the missed paper in May of 2021, he will not be able to commence further education at any institution of higher learning at the beginning of 2021, which will constitute a delay on his part (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 7).

After realising that the applicant has initiated the litigation in the Constitutional Court, the respondents decided not to oppose the application and all filed notices to abide by the decision of the Court. Furthermore, the second and fourth respondents filed submissions in an effort to assist the Court, wherein they showed their enthusiasm to offer the applicant an opportunity to write the missed examination in January 2021(Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 22). However, the offer to afford the applicant an opportunity to write his missed examination came only after the litigation had been initiated in the Constitutional Court (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 45).

In deciding on this matter, the Court made reference to the case of *Madzodzo* (Madzodzo and others v Minister of Basic Education and Others, 2014; par 19) and *Juma Musjid* (Governing Body of the Juma Musjid Primary School & Others v Essay, 2011; par 43) and held that access to school is a prerequisite for the realisation of the right to education. The court emphasised that access to an examination, particularly the one that is necessary to complete schooling is also an indispensable component for the realisation of the right to education. The court held that denying the applicant access into the school premises and precluding him from writing his examination particularly when his lateness was duly instigated by the first respondent defiantly breached the applicant‘s right to education in terms of section 29(1) (a) of the Constitution (Moko v Acting Principal of

Malusi Secondary School and Others, 2020; par 35). The court emphasised that the applicant nearly lost the opportunity of pursuing further education at institution of higher learning as of February 2021 due to the conduct of the first respondent (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 37). The court declared this conduct to be in violation of the applicant's right to education as entrenched in section 29(1) of the Constitution. As a result, the second and fifth respondent were ordered to afford the applicant an opportunity to write the missed paper on the 15 January 2021(Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 48).

Argument

This paper argue that the matter should not have reached the Constitutional Court for determination. It is argued that the High Court (Polokwane) did not determine the harm that the applicant will suffer by completing his matric examinations mid-2021 and the adverse effect that the whole arrangement would have on the applicant's further education. What it did was to uphold the decision of the first and second respondents and ultimately dismissed the application after establishing that the respondents had afforded the applicant an opportunity to sit for the missed examination mid-2021. The High Court could have dealt with the matter and protected the applicant's right to education as enshrined in 29 of the Constitution rather than to struck the matter from the court roll for lack of urgency. In this regard, the paper further argue that contrary to the court's view, the matter was urgent as the applicant wanted a relief so that his matric result particularly for the missed paper will be released together with other matric examination results. The applicant argued that this would afford him an opportunity to have vast prospects of enrolling in further education in the beginning of 2021 and as such exercising his right as entrenched in section 29 (1) of the Constitution. This denotes that the High Court erred by removing the matter from the roll for luck of urgency and the matter should have adjudicated there and then.

The significance of *Moko's* Case

The decision of the Constitutional Court in this case was important for some reasons. In the first instance, the Court has developed a precedent to define the meaning and the content of the phenomenon "access to education" in South Africa. Simply put, this ruling

has created some form of standards of conduct against which school principals and or teachers must adhere to in as far as treating learners is concern. The court's ruling will also inculcate some form of accountability in school principals and or teachers who exploited learners and also to deter others from such conduct. On the other hand, this ruling signposts the significance of taking schools' principals and or teachers to task about their conduct and responsibilities in schools. For this reason, this paper argue that the *Moko* case is the topical judicial and the utmost innovation in the promotion of access to education in South Africa. This means that the judiciary has through its judgements and pronouncements now became essential guiding body to shape and explain the meaning of access to education as of right in South Africa.

Conclusion

In the case of *Moko*, the Constitutional Court intervened and gave the meaning and interpretation of accessibility in terms of section 29 of the Constitution. The Court ruled that access to an examination, predominantly the one that is necessary to complete schooling is a vital component to realize the right to education. The Court noted that negating the applicant access into the school premises and denying him an opportunity to sit for the scheduled examination breached the applicant's right to education (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 35). According to the Court, to rule otherwise would strain the ordinary meaning of access in section 29 of the Constitution. In its ruling, the Court emphasized that due to the conduct of the first respondent, the applicant almost lost his opportunity of pursuing further education (Moko v Acting Principal of Malusi Secondary School and Others, 2020; par 37). For this reason, the Court held that "the conduct of the first respondent violated the applicant's right to education". Consequently, the Court ordered the second and firth respondent to afford the applicant an opportunity to sit for missed paper on the 15 January 2021 so that his results will be released simultaneously with results for the other papers (Moko v Acting Principal of Malusi Secondary School and Others, 2020 par 48).

This analysis has strived to demonstrate the intrinsic role played by the Constitutional Court in promoting access to education. This means that the Constitutional Court had developed a precedent to determine the meaning of access as contained in section 29 of

the Constitution. Simply put, this has developed a benchmark of conduct against which school principals and or teachers' conduct in schools must be measured. Over and above, the paper argue that this ruling will deter school principal and or teachers to act unreasonably and to be accountable in schools. This means that this Constitutional Court ruling has somehow paved the way for learners to seek justice following unreasonable conduct on the part of their principals and or teachers.

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