

OPERA IN PRACTICE: STRENGTHENING IMPLEMENTATION OF STRATEGIC LITIGATION IN SOUTH AFRICA

This case study reflects on a joint project between the Center for Economic and Social Rights (CESR) and the Legal Resources Centre (LRC) piloting the use of CESR's OPERA framework to strengthen implementation in a right to education case brought by the LRC. It is part of a series of case studies produced by CESR to share insights and learning from the use of OPERA in a variety of contexts and settings.

ECONOMIC AND SOCIAL RIGHTS MONITORING

There has been a significant growth in socio-economic rights litigation in South Africa over the past 20 years.¹ South African Courts have been increasingly willing to order innovative remedies that declare a right has been infringed, but allow the responsible government agency varying degrees of discretion to choose the means of rectifying that non-compliance (rather than the court itself developing or dictating a solution). When such remedies are accompanied by a supervisory order, the government is typically expected to submit a plan that identifies a clear timeframe by which specific milestones have to be reached and periodically report to the court on its progress.² This approach, which some commentators term “dialogic,” responds to concerns about judicial “policymaking” contrary to the separation of powers doctrine.³ Nevertheless, government agencies have frequently failed to implement these types of court orders, which limits the transformative potential of public interest litigation on economic and social rights.

As has been discussed by numerous commentators, proper follow-up after litigation is one, if not the, critical factor in ensuring that public interest litigation achieves social change, by ultimately translating legal success into material benefits for a large number of people on the ground, including those not directly involved in the litigation.⁴ It is also acknowledged that “in follow-up, as in litigation, a combination of strategies is likely to be most successful”.⁵ Nevertheless, much of the discussion related to follow-up focuses specifically on social mobilization,⁶ with comparatively little attention paid to other strategies.

Economic and social rights are critical to addressing the persistent concerns of poor and marginalized South Africans. To strengthen the effectiveness of strategic litigation on these rights, it is important to better understand the factors that will influence the effectiveness, or otherwise, of different follow-up strategies. In this context, the Center for Economic and Social Rights (CESR) and the Legal Resources Centre (LRC) began a collaborative project in August



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2015 exploring how civil society monitoring and other social accountability strategies might support implementation of dialogic remedies ordered by courts on economic and social rights.

The LRC identified the implementation of judgments and settlements as a major challenge in their work and were interested in exploring the role that “OPERA”—a four step analytical framework developed by CESR—could play in meeting this challenge. OPERA, which stands for Outcomes, Policy Efforts, Resources and Assessment, aims to support human rights advocates to use innovative methods and techniques for collecting, analyzing and presenting evidence of non-compliance with economic and social rights standards.

CESR and the LRC worked together to pilot OPERA to monitor *Madzodzo v Department of Basic Education*, a case about chronic school furniture shortages that was brought by the LRC on behalf of the Centre for Child Law and a number of applicant schools. *Madzodzo* is the first time that OPERA has been used to track progress in implementing a court order. The project explores its potential value-add in identifying indicators to track progress in implementation and gathering information on them. This, in turn, can support both follow-up legal proceedings and more constructive, evidence-based dialogue with the education departments more broadly—in order to strengthen social accountability and sustain political pressure for implementation.

This paper reflects on activities undertaken from the commencement of the pilot in August 2015, up until April 2017, incorporating the lead up to and the period covered in the fourth order made in the case. It describes how we used OPERA, what it helped reveal, and how our strategies in the case evolved in response. It also offers a number of lessons learned – specifically about OPERA and generally about monitoring implementation in strategic litigation.

WHAT IS THE CASE ABOUT?

Eastern Cape schools have suffered from a chronic shortage of furniture, which means many thousands of learners (students) spend their days sitting on the classroom floor, or squeezed together at desks that are broken, not designed for their age or are otherwise unsuitable. In *Madzodzo*, the South African High Court declared that the government’s failure to address this problem was a violation of Section 29(1)(a) of the Constitution, which protects the right to a basic education.

The first settlement in the case was made in November 2012. As well as committing to supplying furniture to the three applicant schools, the Department of Basic Education (DBE) undertook to complete a full audit of furniture needs across the province; to develop a comprehensive plan to address the shortage; and to deliver furniture to all schools by June 2013. Non-compliance with this agreement resulted in a second round of litigation, involving additional applicant schools, in August 2013. Another consent order was made in September 2013, with further promises of an independent audit and a comprehensive plan. A third round of litigation, heard in February 2014, resulted in a judgment by the Eastern Cape High Court. The judgment provides a clear account of the nature and content of the right to education and

demonstrates how to translate the right into appropriate remedies; specifically, the DBE was ordered to deliver sufficient desks and chairs to all Eastern Cape schools by 31 May 2014.

At the time that CESR and the LRC began collaborating, the case was in its fourth round of litigation and the DBE was requesting a further extension (the deadline had already been extended to 30 June 2015). The LRC was requesting that any additional extension be overseen by a Special Master (an independent person appointed by, and who reports to, the court) and that a reporting obligation be included that would require the DBE to periodically update the court on its progress.

WHAT IS OPERA?

OPERA is an analytical framework made up of four steps: Outcomes, Policy Efforts, Resources and Assessment. Each step provides a broad checklist of questions to be answered when analyzing the fulfilment of economic and social rights. Importantly, each question reflects a relevant human rights norm. When combined, the four steps enable a more comprehensive assessment of a government's efforts to honor its obligations, tracing the links between policies on paper and their impact on the ground. Another significant feature of OPERA is that, as well as identifying *what* questions need to be answered to measure relevant norms, it also suggests tools and techniques for *how* to answer them:

- Step one suggests ways to identify socio-economic outcome indicators that measure well-being (e.g. mortality rates, literacy rates, employment rates) and can be analyzed through a human rights lens to assess levels of human rights enjoyment in practice, as well as to show disparities and changes in the situation of particular social groups over time, etc.
- Step two identifies the human rights commitments the government has made and evaluates how well these commitments have been reflected in law and policy. Often, it is in the implementation of laws and policies where challenges arise. So, step two also suggests analyzing administrative statistics, survey data and personal testimony to evaluate whether policies translate into infrastructure, goods and services on the ground that meet human rights criteria of accessibility, affordability, quality etc.
- Funding-related issues are a common reason for the poor implementation of laws and policies. So, step three looks at resources at a “macro” level. It suggests ways to use tax and budget analysis techniques to evaluate whether money is being generated, allocated and spent in line with the obligation to dedicate the maximum of available resources to fulfil economic, social and cultural rights progressively.
- Step four draws together the findings from the first three steps to make an overall assessment. However, before doing so, it considers broader factors, suggesting ways to use contextual and political economy analysis techniques to ask: Why haven't efforts been more successful, and which duty bearers are responsible?

HOW DID WE APPLY OPERA IN MADZODZO?

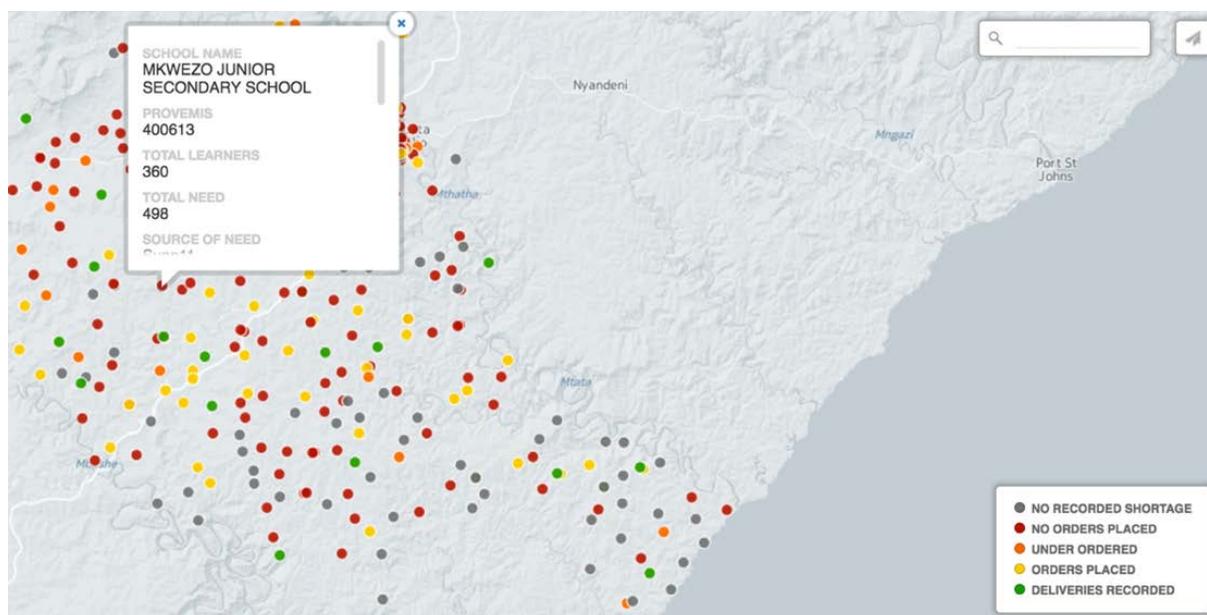
Research initially focused on sorting through and making sense of the masses of information that had been provided by DBE in various rounds of litigation. As shown in the table below, we first mapped out the issues in the case using the four steps of OPERA. Doing so allowed us to separate out these issues into more manageable pieces.

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|-----------------------|---|
| OUTCOMES | <i>The outcomes in this case are clearly defined and, in theory, quite measurable: the furniture deficit in each school. The focus of this step is therefore to find a way to more accurately estimate this deficit and track it over time.</i> |
| POLICY EFFORTS | <i>The court orders specify action needed to facilitate the provision of furniture, namely to conduct an audit and deliver the furniture to those schools that need it. The focus of this step is therefore to develop benchmarks against which to judge the adequacy of the actions taken by the government.</i> |
| RESOURCES | <i>A grossly inadequate budget allocation has been a major factor in the government's failure to provide furniture needed. The focus of this step is therefore to analyze budgetary data, to determine how resources are allocated and spent.</i> |
| ASSESSMENT | <i>A particularly relevant contextual factor is the role of the private sector in the procurement of furniture. For example, at least one company contracted to construct furniture has attempted to pull out, claiming that its quote was too low. Lack of political will appears to be another factor hindering provision of furniture, as does lack of clarity in the division of responsibilities between the national and provincial governments. The focus of this step is therefore to better understand these dynamics.</i> |

We prepared a briefing note on the status of the case—based on OPERA and drawing on the documents submitted to court, supplemented by additional desk research and interviews with schools and department officials. That helped to clarify where the biggest gaps and challenges in implementation lay. In addition, we also consolidated the data submitted by the education departments on enrollment numbers, most recent shortages recorded, orders placed and deliveries made in two districts in the province—Maluti and Mthata—and classified schools according to the following groups:

- No recorded shortage (grey)
- Shortage recorded, but no orders placed (red)
- Orders placed, but for less than 75% of the shortage recorded (orange)
- Orders placed, but no record of delivery (yellow)
- Delivery of at least 75% of orders recorded (green)

We mapped out this data as a way to visualize the level of progress in implementing the court order. However, as discussed further in the following section, the starkest takeaway from this analysis was the complete unreliability of the education departments' data on furniture stock.



WHAT ISSUES DID OPERA HELP TO UNCOVER?

In relation to **outcomes**, a fundamental challenge in the case has been how to determine the severity of the problem and how widespread it was. This could be done using the indicators “percent of learners without adequate furniture” and “percent of schools without adequate furniture.” In their founding affidavit, the applicants referenced an audit of furniture needs conducted in May 2011, which showed that out of 5,700 schools in the Eastern Cape, nearly 1,300—just under a quarter—needed furniture (affecting 605,163 learners). However, information submitted during the course of the litigation suggests that the figure may be more like 40-50%. For example, a “list of needs” submitted by the Eastern Cape Department of Education (ECDOE) in 2014 lists 2,277 schools in the province as needing 597,721 units of furniture. No orders had been recorded for 1,164 of the schools listed—over half—for which a shortage of 303,606 units of furniture is recorded. On the basis of this information, it appeared that at least a fifth of all schools in the district would continue to face furniture shortages in the short to medium term. Nevertheless, without a reliable baseline it was impossible to tell whether the furniture shortage in the province had gotten better, stayed the same or gotten worse.

In relation to **policy efforts**, there were five attempts to record schools’ furniture needs in the province (four by ECDOE and one by the Independent Development Trust). However, each attempt was plagued with methodological problems that meant the data produced was flawed. The consolidated data on schools in Mthatha illustrated these problems. For example, the first list, from March 2013, was just a “top priority” list and records shortages of desks only. The second list, from May 2013 indicated that the number of desks required was the same as the number of learners enrolled, for many schools. The figures in the third list, the result of the audit conducted in early 2014, were identical to the second list, which makes it very doubtful that the recorded shortages were ever independently verified. Again, the figures in the fourth list were

identical to the audit. The figures were much higher in the fifth list, compiled by district directors, with a number of additional schools included and the number of units of furniture requested increasing significantly. This final list also indicated the “reasonableness” of schools’ furniture needs, listing some schools as having “over ordered.” However, no criteria for judging the reasonableness of the needs was given.

Meanwhile, a number of procurement processes had been undertaken since 2013 and, on the face of it, it appeared that a significant amount of furniture had been ordered. Information submitted to the court indicated that:

- more than 60,000 units of existing furniture stock was ordered under tender DM/2013;
- approximately 108,000 units of new furniture stock and an unknown amount of existing furniture stock was ordered under tender SCMU6-13/14-0004;
- more than 77,000 units of new furniture stock was ordered under tender RT1-2014;
- the Department of Environmental Affairs (DEA) was tasked with providing at least 80,000 desks; and
- DBE was providing approximately 138,000 additional desks.

However, the procurement processes undertaken were characterized by irregularities, lengthy delays and poor management—and we did not have adequate information about the process through which orders were placed. In particular, there are a number of cases where the furniture units ordered for particular schools bore little resemblance to their identified needs—yet no explanation was given for this difference. At the learner level, it was impossible to know how well these orders met required need, without knowing specifically what units had been ordered.

Further, much of what had been ordered had still not been delivered. There were significant gaps in the information available about deliveries, making it difficult to appraise the adequacy of progress made. Nevertheless, the most recent information submitted to the court indicated that as of June 2015, only one of the three providers under SCMU6-13/14-0004 had completed their deliveries; the others had delivered less than half their order.

In relation to **resources**, approximately R290 million was allocated to school furniture in the Eastern Cape between 2013 and 2015, according to information submitted to the court. However, it was difficult to verify these figures without knowing which programmatic or economic classification furniture falls under and whether the allocations came from the province’s equitable share or from a conditional grant from the national treasury. Further, and more problematically, it was not clear how much of the money allocated was actually spent. Order records and memos from the ECDOE supply chain management unit shed some light on spending. However, a considerable amount of additional information would be needed to track expenditure on furniture for the past three years—in particular, purchase orders, invoices, payment batches, and delivery slips related to all three orders as well as for all orders placed with the DEA.

In relation to **assessment**, the province's furniture problem continues because actions taken offered only band-aid solutions, instead of trying to tackle the root causes of chronic poor furniture management. A consequence of this ad hoc approach was that the education departments were essentially chasing a "moving target." School furniture has a limited lifespan—it wears out, it breaks, it gets lost or stolen. Further, the schools' needs change over time as enrollments fluctuate. Root causes identified in our analysis related to information systems, strategic planning, leadership and the conduct of third parties.

Interviews with school administrators revealed that information management systems in place at the school, district, provincial and national levels did not adequately capture information about what furniture schools have. At the school level, asset registers are often not accurate due to low administrative capacity and the lack of a standardized, electronic system for maintaining them. More significantly, information recorded by schools is not properly channeled up to the district level. Asset registers are not reconciled with enrollment numbers, or aggregated in any sort of centralized database, nor cross referenced when schools request furniture. Furniture stock is not captured in any of the DBE's databases.

Furniture shortages are barely mentioned in any long-term planning strategies, including the national development plan and sector plan for education; the five-year plans at the national and district levels; and annual performance plans at the national and district levels. Nor is it clear whether furniture is considered to be part of infrastructure, part of learning and teaching support materials, or part of a separate category. Consequently, there are no strategic goals, objectives, performance indicators and targets related to school furniture and, as a result, no discussion of the resource considerations related to its provision.

The almost total lack of attention to furniture in the ECDOE's strategic planning raises questions about how seriously it is committed to this issue—reflective of entrenched weaknesses in the department's leadership, including:

- the DBE's takeover of the running of the ECDOE as per Section 100(1)(b) of the Constitution in 2012;
- the suspension of the department's superintendent-general, pending investigations into allegations of mismanagement of the school furniture tender in July 2014;
- the Special Investigating Unit (SIU) authorized to investigate ECDOE as per the proclamation signed by President Zuma in June 2015.

The conduct of third parties was also a factor delaying the timely delivery of furniture. In particular, two rounds of litigation resulted in the department being interdicted from continuing with the award of two of its tenders. In its affidavits, the ECDOE also pointed to additional factors affecting the delivery of furniture beyond its control, such as load shedding (rolling electricity cuts) and non-availability of materials. However, it did not provide supporting evidence for these claims.

WHAT MONITORING STRATEGIES DID WE EXPLORE AS A RESULT?

Applying OPERA prompted us to think more comprehensively about the type of data needed for monitoring implementation of *Madzodzo* and more creatively about the tools and approaches that could be used to gather said data. Following our analysis of the documents submitted in the case, our subsequent strategy focused, in large part, on getting better data. We pursued this strategy in a number of ways:

- by providing detailed recommendations to the education departments on how to conduct an effective furniture audit, as well as on improving its information management systems;
- by requesting access to relevant databases maintained by the DBE and ECDOE; and
- by experimenting with technology-based platforms for communicating with gathering information from schools directly.

First, having a fuller picture of the issues uncovered by OPERA gave the LRC a strong basis to argue for heightened oversight of the department's compliance with its obligations in the case. The analysis based on OPERA also underpinned the constructive, evidence-based recommendations the LRC offered to the department about the steps and resources needed to do so. In February 2016, an order was made by agreement requiring that the Minister of Basic Education set up a "furniture task team" for Eastern Cape schools. The order was significant for the detailed obligations it set out for the education departments. Specifically, it required that:

- The furniture task team prepare a consolidated list with details about the furniture needs of all public schools in the Eastern Cape by May 2016.
- This list be verified by August 2016 and the Minister ensure that those schools needing furniture receive age and grade appropriate furniture by 1 April 2017.
- The Minister report to the court every 90 days, providing updated data about current shortages; describing steps taken to procure furniture, including budget allocated and orders placed; and supplying evidence of deliveries made and a timetable for deliveries scheduled.

Throughout the agreement period, the LRC met regularly with the task team and made recommendations on carrying out their mandated tasks. This included providing comments and feedback on the proposed data collection methods for verifying furniture needs (which the task team decided to do through another audit process), based on tools we developed and piloted in consultation with schools; suggesting improvements in information management, such as recording school furniture stock electronically in "SA-SAMS" (South African Schools Administration and Management System); identifying the repair of damaged furniture (which we observed large stocks of in our school visits) as a cost-effective alternative to procuring new furniture; and proposing draft text for a school furniture policy.

According to the first affidavit filed under the order in May 2016, the Minister appointed a "national coordinator" for the task team, who had previously served as legal counsel in the case.

A national head was also appointed, who had overall responsibility for the work of the task team, including managing the audit. A task team lead at the provincial level was appointed, as well. Ten officials from DBE and 23 officials from ECDOE also augmented the task team. A further 128 unemployed graduates were trained by ECDOE to conduct the audit and visit every public school in the province.

The consolidated list was filed in May, as required, based on “information provided under oath by provincial district directors.” However, no information was provided on the methodology the task team used to determine what was the “most accurate information available,” to use the language of the court order. The audit was completed in early October 2016. Data for the audit was collected and reconciled manually by 154 auditors who visited schools across the province. It was then reviewed, digitized, and checked by 25 quality assurers employed by DBE. The task team reported it had various challenges in “designing, planning and executing” the audit. The second affidavit filed under the order, in August 2016, referenced logistical challenges, grievances from auditors, illness of the lead audit official, and local government elections as reasons for the audit’s slow progress.

The audit findings published on the ECDOE website reported a shortage of 222,332 desks and 289,870 chairs; 3,611 schools, two thirds overall, recorded shortages of tables or chairs. Based on the enrollments figures cited in the audit, this leaves almost one in three children across the province without a desk or chair. Nevertheless, the reliability of the data that came out of the audit is questionable. After the audit, the LRC identified 200 of the schools with the greatest furniture need, 50 were contacted and it turned out 25 of the schools were indeed in dire need. However, phone calls to the schools also revealed that incorrect audit figures at just eight schools amounted to 2,020 unneeded double combination desks being recorded. The task team, too, recognizes that the reliability of the audit data is uncertain. Without a reliable baseline of data, major questions remain about whether and by when the task team’s interventions will be able to meet the demand for furniture across the province.

In addition to these various efforts to engage with the task team, we also sought access to departmental databases, such as:

- the Education Facilities Management System (EFMS), which contains all data from the National Education Infrastructure Management System (NEIMS), and
- the Education Management Information System (EMIS), which contains data from the Tenth School Day Headcount Survey (SNAP); Annual Survey of Ordinary Schools (ASS); and South African Schools Administration and Management System (SA-SAMS).

Access to the data recorded in these databases would allow for independent analysis, which could uncover important patterns and trends in school infrastructure. Despite there being a protocol for providing access to these databases to researchers, our requests have been unsuccessful. It may be necessary to make a request under the Promotion of Access to Information Act for this purpose.

Finally, we also experimented with a number of options for setting up a mobile messaging platform that the LRC could use to communicate directly with principals and other stakeholders to gather primary data related to their infrastructure and resource needs.

As a preliminary step, we consulted with a number of principals and, on the basis of that feedback, approached potential tech partners. An existing app called Juggle (formerly Bambisa) provided functions that principals had expressed interest in (users of the app become members of a “group” and can message each other while the LRC can also send informational messages, polls, short surveys etc.). We piloted Juggle with principals in three circuits in the Eastern Cape (encompassing approximately 80 schools) to assess the usage rates and observe user behavior etc. However, there was little to no uptake of the app, despite general enthusiasm about the idea from the schools we met with. Some of the issues we came across in school visits include principals not having data on their phone; no network coverage at the school; and, in a couple of instances, glitches with the app.

In response, we undertook a second round of consultations with principals and school administrators to explore alternative platforms. This time we narrowed our focus to two groups from circuits in Mthata District. We undertook a brainstorming exercise with each of the groups to map out what they considered the most important characteristics of a potential technology solution. Both groups felt strongly that both group communication and two-way communication between individual users and the LRC were vital. Although these exercises revealed a number of other different (and sometimes contradictory) views, downloading a new app was seen as a significant barrier to user uptake. This meant adapting to existing platforms used, such as SMS or WhatsApp.

We set up two WhatsApp groups with the principals and school administrators we had met with in Mthata. The LRC sent some initial messages to the groups but neither built up momentum. An important lesson learned from this pilot exercise was the need for critical reflection when estimating the organizational capacity that is necessary to ensure the sustainability of a new tech-based approach. As discussed further below, experimenting with mobile messaging also highlighted the value of leveraging existing networks and channels for communication and coordination among school administrators.

WHAT HAVE WE LEARNED?

The clearest takeaway from the pilot project has been the determination that the four steps of OPERA can align neatly with the various components of a judicial decision.

First, in finding a breach of a right that must be remedied, the court is, in effect, identifying an outcome that must be achieved. In some cases, such a finding may elaborate the normative content of the right and, by extension, clarify the outcome expected. In *Madzodzo*, Judge Goosen stressed that the right to a basic education “requires the provision of a range of educational resources.”⁷ This includes “adequate, *age and grade appropriate* furniture which will enable each child to have his or her *own reading and writing space*.”⁸

Second, in granting relief the court will, with varying degrees of detail and specificity, set out remedial actions that must be taken; this broadly corresponds to the concept of policy efforts. Judge Goosen's order was not heavily prescriptive in the actions it set out. Nevertheless, it did require that the Education Department complete an audit of furniture needs and ensure that all needs identified in the audit were met within 90 days.

Third, resources are often a major consideration in determining what remedies will be appropriate in a particular case, even if not an explicit one. South African courts have typically been hesitant about going too far in interrogating the government's budgetary decisions. The Constitutional Court has emphasized, for example, that while its orders have budgetary implications, they are "not in themselves directed at rearranging budgets."⁹ Nevertheless, there are some signs this may be starting to change. In *Madzodzo*, Judge Goosen emphasized that mere assertions of budgetary incapacity cannot justify watering down remedies, citing the Constitutional Court's judgment in *Blue Moonlight*.¹⁰ Although his order did not explicitly address the resources required to deliver necessary furniture, he did consider the time involved in securing an appropriate budget allocation and undertaking the procurement process in determining a reasonable time period for the order.¹¹

Fourth, broader factors also play a role in shaping remedies, although, again, that role may often be implicit. In *Madzodzo*, Judge Goosen acknowledged the possibility that broader factors may lead to "legitimate delays" inhibiting the Education Department's compliance with the court order, which would make it appropriate to extend the order's time period, subject to full disclosure as to the reasons for non-compliance.¹²

Organizing the various components of the court order according to the four steps of OPERA provided a number of benefits in the pilot. In particular, it gave us a system for categorizing, systematizing and, importantly, identifying gaps in the information that has been submitted. The court has been flooded with an overwhelming amount of information in the affidavits and annexes submitted by the education departments over the course of various rounds of litigation. Nevertheless, this information has been extremely fragmented and therefore difficult to verify and cross check. Identifying the gaps in it helped us to determine where to prioritize our energy when engaging with the education departments. As discussed above, we focused on exploring ways to improve information management systems for recording furniture stock and on trying to get additional information about resources as a result.

The order made by agreement in February 2016 reflects the impact that OPERA had in the way we approached our engagement with the education departments regarding the case. By requiring that a "furniture task team" be appointed; setting out a detailed process for the task team to verify schools' furniture needs and requiring that their findings be publically available; obligating the Minister to report to the court every 90 days; and addressing the question of resources *explicitly*, by requiring that the implementation reports include information about budget allocations, the order set out significantly more detailed obligations than previous ones, in terms of remedial actions to be taken.

An interesting question prompted by using OPERA to monitor implementation in *Madzodzo* is what impact it could have in shaping remedies, if incorporated earlier in the litigation process. As Kent Roach and Geoff Budlender have discussed, governmental non-compliance with human rights obligations can be the result of different causes, including incompetence, inattentiveness and intransigence; the appropriate remedy for each will differ. They recommend, very broadly speaking, general declarations with possible reporting to the public for inattentive governments; mandatory relief with reporting to the court for incompetent governments; and detailed mandatory interdicts enforced by contempt proceedings for intransigent governments.¹³ In *Madzodzo*, the settlement agreements became more and more detailed as we pushed for more systematic improvements in the way the education departments operated. The research we undertook using OPERA contributed to this, by giving a fuller picture of their competency gaps, in this case as they relate to the provision of school furniture. This type of information could provide compelling evidence of the need for more detailed mandatory relief. Nevertheless, the LRC's experience in other cases suggests that judicial responsiveness to such prescriptive remedies early on in the litigation process, even with compelling evidence, might be limited.

Beyond the use of OPERA, the pilot has also provided a number of broader insights about the factors that impact the effectiveness of different strategies and tactics in monitoring implementation.

To start with, the pilot emphasized the **importance of data as a tool in measuring implementation**. The lack of useful data was a major limitation in our ability to assess progress on addressing furniture shortages across the province. While improving the production and accessibility of data saw some success, the quality of data in the periodic reports has remained quite limited. Nevertheless, we need to use the data we do have more effectively, beyond our engagement with the education departments, a more challenging task. To generate more positive outcomes from strategic litigation, the Open Society Justice Initiative suggests data could be better used in follow-up litigation, to encourage media coverage, or as a direct spur to judicial action.¹⁴ All of these suggestions could be applied to support monitoring implementation in *Madzodzo*.

The pilot also highlighted the **tension between the necessarily more adversarial approach of litigation and the need for collaboration in monitoring implementation**. At times, this dynamic needed to be navigated delicately. For example, we made numerous recommendations to the task team about the methodology for the audit, stressing that the data it produced needed to be integrated into a proper information management system so it could be periodically updated. There was limited receptiveness to these recommendations. This is in line with the Open Society Justice Initiative's observation that:

In South Africa, strategic litigation has led to increased dialogue through settlement talks generated by the litigation. These have at least led to a better understanding of the difficulties that the government faces in delivering services, although their fundamentally

adversarial nature means that, while space has been created for increased dialogue, that dialogue is not always constructive.¹⁵

That said, the education departments do appear to be taking onboard our feedback in a piecemeal fashion. For example, ECDOE eventually committed to recording furniture needs on SA-SAMS, making the Eastern Cape the first province to do so. They also put out tenders for the collection and redistribution of excess furniture and for the repair of damaged furniture that can be fixed—potentially a much more efficient approach than procuring new furniture. Nevertheless, the possibility of going back to court did appear to make the education departments somewhat more circumspect when discussing their challenges in implementing the court order.

Finally, the pilot illustrated some of the **challenges associated with using monitoring as an entry point for organizing in order to increase political pressure** for implementation. Steven Budlender argues that “while the use of innovative and wide ranging remedial powers by the courts is important in terms of achieving social impact, it is arguably less important than the capacity and willingness of the organizations involved to properly follow up and enforce whatever order is granted.”¹⁶ As discussed above, we had limited success in utilizing technology as a tool for ongoing engagement with schools across the province. A major factor influencing uptake of the WhatsApp groups was the level of organizing among school principals and administrators. This highlighted the need for complementary efforts to identify and support “champions” for the issue and to facilitate opportunities for “offline” cooperation and alliance building. One suggestion from principals was to hold regular indabas (community meetings), for example.

We did observe some **tensions in thinking through how narrowly or broadly to tackle deprivations** of the right to education, which may impact alliance-building efforts. On the one hand, breaking down the right into more specific components (e.g. textbooks, infrastructure, sanitation, teacher salaries, and, in our case, furniture) has proven to be an effective strategy in litigation and has resulted in judgments that provide concrete interpretations of the substance of the right. On the other hand, the day-to-day reality is that schools are struggling to provide multiple components of the right to education. Furniture shortages were not the biggest concern for many of the schools we engaged with and, as a result, it was not always a topic that motivated principals and administrators. This experience suggests that, strategically, it may be necessary to fit the more narrowly focused topic of furniture into a framework that addresses a broader range of needs—one that better prioritizes urgencies among schools across the province and allows for a more agile response.

WHERE ARE WE CURRENTLY AND WHAT COMES NEXT?

As described above, the task team undertook a number of the steps required by the court order. However, the education departments had not complied fully with it by 1 April 2017. They applied to vary the court order, extending its deadline until 30 November 2017, and an order to that effect was eventually made by agreement. The June and October 2017 quarterly reports cited a

number of promising developments, including the planned integration of the furniture database into SA-SAMS; advertised tenders for the redistribution of surplus furniture; the placement of orders for 220,438 school chairs; the preparation of bid documents for a tender to repair damaged furniture; and the drafting of guidelines for furniture management in schools.

Despite this, the likelihood that the education departments will meet the order's current deadline still appears low. Tracking furniture needs—a prerequisite for effective planning, budgeting, procurement, ordering, and delivery—continues to be a problem. As noted above, the education departments have acknowledged that the audit conducted in October 2016 is inaccurate and is already becoming outdated. ECDOE is again taking order forms for furniture directly from schools, after they have been verified by circuit and district officials, instead of relying on the database. They had reportedly received over 1,400 by the end of August. These orders are being recorded by district in Excel spreadsheets but it remains to be seen whether this system will be any more effective and whether the spreadsheets will be updated regularly. Further, “unexpected” delays have slowed down both the awarding of new tenders and the delivery of orders made under existing tenders.

More than five years of engagement with the department to resolve the furniture crisis has shown that while litigation might be necessary to make any engagement possible, and to resuscitate engagement when it stalled, it is when litigation helps identify energetic, dedicated officials to engage with that real systemic progress is possible. One official seconded from national office has finally made engagement meaningful, and it was necessary to continue knocking on doors until an effective administrator (not a lawyer) was found. This experience speaks to the **important “enabling impact” of litigation**. As Jackie Dugard and Malcolm Langford outline, litigation leads to changes in “socio-political assets” that can provide greater leverage in civil society’s engagement with the state.¹⁷ In *Madzodzo*, such assets included greater visibility of the problem; the increase in publicly accessible information about it; and the deeper awareness of the structural causes behind it.

Understanding the political and structural limitations which the department operates within has also been important. Even the most sensible plans will find **little traction if there is no political will or administrative capacity** to implement them. For example, ensuring that accurate baseline data is captured and updated has proven very difficult when schools themselves were experiencing “reporting fatigue” after years of reporting furniture needs with little effect. Trying to ensure that clear lines of responsibility were established when schools’ furniture needs were reported up the administration chain is a real challenge when many circuits and districts are completely dysfunctional, often due to political infighting. It was only through ongoing engagement, facilitated through increasingly detailed settlement agreements, that we were able to understand these limitations and assist with suggestions to circumvent them.

If the education departments fail to comply with the court order by 30 November 2017, and there are still large numbers of children without adequate furniture, the next step, of course, will be to decide how to respond. That decision, in turn, will need to be based on instructions from clients, taking into account an overall assessment of the adequacy of efforts taken to date. We will rely

on OPERA to inform such an assessment. In so doing, our aim is to continue to improve the mechanisms that will increase the likelihood of full and ongoing compliance.

ENDNOTES

¹ Budlender, S., Marcus, G. and Ferreira, N. (2014) “Public interest litigation and social change in South Africa: Strategies, tactics and lessons,” *Atlantic Philanthropies*, at 8.

² Liebenberg, S. (2008), “South Africa” in *Social Rights Jurisprudence*, Langford, M. (ed.), at 98.

³ See e.g. O’Connell, P. (2012) *Vindicating Socio-Economic Rights*.

⁴ See e.g. Budlender et al, n 1, at 122.

⁵ *Id.*, at 123.

⁶ Dugard, J. and Langford, M. (2011) “Art or Science - Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism” in *South African Journal on Human Rights* 27(1), at 56.

⁷ *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMHC 5, at para. 20.

⁸ *Id.*, at para. 41 (emphasis added).

⁹ *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15, at para. 38.

¹⁰ *Madzodzo*, at paras. 34 – 35.

¹¹ *Id.*, at para. 40.

¹² *Ibid.*

¹³ Roach, K. and Budlender, G. (2005) “Mandatory Relief and Supervisory Jurisdiction: when is it appropriate, just and equitable?”, *South African Law Journal* 122(2).

¹⁴ Open Society Justice Initiative (2017) “Strategic Litigation Impacts: Equal Access to Quality Education,” at 63.

¹⁵ *Id.*, at 73.

¹⁶ Budlender et al, n 1, at 125.

¹⁷ Dugard and Langford, n 6, at 56.

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