Leveraging funds for school infrastructure: The South African ‘mud schools’ case study

Abstract

In 2013 there are still thousands of children in South Africa attending dilapidated mud schools, schools lacking sanitation, and schools without electricity. The situation took a positive turn in 2009 when the government was taken to court about the severe infrastructure backlogs in the Eastern Cape province. The case settled out of court, and resulted in a memorandum of agreement which pledged R 8.2 billion over three years. However, the allocation of these and other funds has not immediately translated into tangible results on a broad scale. This is because large infrastructure projects require management capacity that is lacking in Department of Education in South Africa. This paper explores how litigation, implementation monitoring and budgetary analysis may be new tools to lever funds for education at the country level, and to hold government accountable for efficient spending. The significance of this to the post-2105 development context is that developing countries must find new methods for ensuring the provision and expenditure of funds from existing budgets within their own countries. In order to achieve this education activists must forge new alliances with partners who have knowledge in budgeting, budgetary analysis and where necessary, litigation.

Sub theme: Futures of development assistance (Southern perspectives)

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1. Introduction

Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others, is often referred to as the ‘Mud Schools’ case.¹ Seven schools (amongst others) had battled for almost a decade to get any attention from the provincial department about their severe infrastructure problems. The complaints included firstly, dilapidated mud buildings (in some cases roofs missing and classes being held in neighbourhood dwellings), secondly, no running water or sanitation and thirdly inadequate seats and desks for the number of learners attending the schools. The Legal Resources Centre, on behalf of the Applicants, launched an application in the Grahamstown High Court during 2010. The matter settled out of court, resulting in a far-reaching ‘memorandum of understanding’ signed on 4 February 2011 which pledged a total of R 8.2 billion over a 3 year period and specific amounts earmarked for the seven schools. The agreement included the development of a plan for infrastructure to be managed by the National Department of Basic Education,² undertakings about interim arrangements such as prefabricated buildings and the installation of water tanks. An important term of the agreement provides that if there should be a serious breach of the agreement, the parties can, giving two weeks’ notice, go back to court to force compliance.

2. What is a ‘mud’ school?

Mud schools are, quite literally, schools in which the buildings are made of mud. They may consist of clusters of round mud huts, or in some cases are rectangular classrooms. While mud may not be the worst form of building material, the problem is that the mud schools are old and dilapidated. The roofs, often constructed from corrugated iron, have holes that have rusted through, causing children and classroom equipment to get wet when it rains. Books cannot be left in the classrooms, and when it rains, children simply cannot attend school. Mud schools also lack electricity, running water and sanitation, and most have old

¹ Centre for Child Law and 7 others v Government of the Eastern Cape Province and others, Eastern Cape High Court, Bhisho, case no 504/10.
² The Department of Basic Education is listed in Part A of schedule 4 of the Constitution. This means that the provincial department is responsible to ensure the direct delivery of education while the national department is responsible for developing norms and standards, national plans and legal frameworks, as well as monitoring compliance of the provincial departments’ delivery on their mandate.
and insufficient classroom furniture. The government has indicated that there are 510 of these schools, the vast majority of which are in the Eastern Cape Province. These ‘inappropriate structures’ as the government refers to them, are the left overs of a deliberate strategy during the apartheid years not to invest in schools for black children.

It is not a coincidence that the Eastern Cape, which has the most acute school infrastructure backlog, was an area which, during the apartheid regime’s rule, contained two ‘homelands’ or ‘bantustans’. These were delineated by the apartheid powers as part of its separate development policy which aimed to ensure that all black South Africans belonged to their ‘own areas’ which, in the warped political imagination of apartheid’s architects, were not part of South Africa. In this manner, the government aimed to render white South Africans a majority in South Africa, while the far bigger population of black South Africans were deemed to live in other countries. The grand plan failed, but its legacy of impoverishment and under-development in the former ‘homelands’ lives on.

While this history is pertinent, a reasonable observer might expect that almost two decades after the end of apartheid the worst of the infrastructure deficits would have been eradicated. Indeed, the National Department of Education issued National Norms and Standards for School Funding in October 1998, which it committed itself to eliminating school backlogs. In his State of the Nation address in 2004, President Thabo Mbeki assured the country that, by the end of that year, no learner would still be learning under a tree or in a mud school. The National Department of Basic Education has a more recent policy that requires schools to be maintained in a condition that makes teaching and learning possible, and yet so many schools remain in a parlous condition. It is true that the problem is a daunting one. The National Department of Education has identified the following needs: There are 510 inappropriate structures, 2401 schools that have no water on site, 3544 that have no electricity, and 913 that have no ablution facilities.

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3 Department of Basic Education ASIDI Brief volume 1 (Feb 2013).
5 Parliamentary Monitoring Group Department of Basic Education Presentation (29 May 2012).
3. Does infrastructure matter?

Spaull has identified two binding constraints on quality outputs in South African basic education – namely teacher absenteeism and teacher content knowledge. These findings are in keeping with wide-ranging research which shows that the issues most closely related to teachers that have the greatest impact on learning outcomes. Thus it is theoretically possible for an excellent teacher to garner good results from learners in a mud school environment. However, it must be remembered that extremely poor infrastructure has an effect on teachers, as well as pupils. A school which has no toilets for learners will usually have no toilets for teachers either. If children get wet when the roof leaks, so might teachers. A second reason why good quality outputs are unlikely from mud schools is that children who learn in mud schools with no electricity, no running water and no toilets are likely to live in circumstances that are similarly bereft of services. These circumstances are generally significant in learner outcomes. Finally, this is also a socio-economic rights issue. If the Post-2015 Development Agenda requires that no one is left behind, the inequality between the learning environment offered by mud schools and other public schools in South Africa is simply unacceptable.

Accountability is also identified as a crucial element of that Agenda.

4. Litigation to ensure accountability in relation to education

One way to achieve accountability is through public interest litigation. South Africa has a history of such litigation in a range of human rights violations. This form of activism dates back to the Apartheid era during which organisations such as Legal Resources Centres and Lawyers for Human Rights brought cases before the courts, using rule of law arguments to chip away at the edifice of the apartheid legal system, particularly in relation civil and political rights. It has, however, also been a strategy used during the post-1994

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Constitutional era to hold the new government accountable on a range of rights issues, including socio economic rights.

The Special Rapporteur on Education has indicated that the right to education is justiciable. The Bill of Rights in the South African Constitution contains justiciable rights. This means that when government fails to deliver on the promises made in the Constitution, it can be taken to court. This includes socio-economic rights, such as education. South Africa is a constitutional democracy, with a separation of powers and an independent judiciary. Citizens living in countries that have such a constitutional and political order are well placed to undertake litigation as a means to enforce rights.

Section 29(1)(a) of the Bill of Rights states that everyone ‘has the right to a basic education’. The Constitutional Court has explained the significance of this wording in the recent case of *The Governing Body of the Juma Musjid Primary School and another v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)*:  

“It is important, for the purposes of this judgment, to understand the nature of the right to ‘a basic education’ under section 29(1)(a). Unlike some of the other socio-economic rights this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’ within ‘available resources’ subject to ‘reasonable legislative measures’. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. This right is therefore distinct from the right to ‘further education’ provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education ‘progressively available and accessible’.

This means, in essence, that the government must provide basic education to all children without delay. Lack of planning, inability to carry out plans and lack of resources are not, legally speaking, permissible defences to the violation of a child’s right to a basic education.

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12 A Skelton ‘How far will the courts go in ensuring the right to a basic education?’ 2012 (27) *Southern African Public Law* 392-408.
13 2011 7 BCLR 651 (CC), hereafter ‘Juma Musjid’.
14 Para 37.
Given this extraordinary promise it is surprising that it took rather a long time for public interest litigation that directly tackles the right to a basic education to emerge. The Constitutional Court first dealt with the right to a basic education in *Ex parte Gauteng Provincial Legislature: In re dispute concerning the constitutionality of certain provisions of the Gauteng School Education Bill of 1995.*\(^{15}\) The court held that the right was more than a negative right requiring government not to impede its fulfilment, it in fact created positive obligations on the state to ensure that the right can be achieved by all. This jurisprudence was expanded upon in the *Juma Muṣjid* case, which established that the right is immediately realisable, as, unlike other socio-economic rights, it is not subject to progressive realisation.

There has been a steadily increasing stream of cases concerning the right to a basic education. Several have dealt with infrastructure,\(^{16}\) some with the provision of learning materials\(^{17}\) and some with the availability of teachers and non-teaching personnel.\(^{18}\) Others have dealt with admissions policy\(^{19}\) and language policy,\(^{20}\) and access to education for children with special needs.\(^{21}\) Yet others concern children’s rights within education such as the right to be protected from corporal punishment,\(^{22}\) to express religious beliefs\(^{23}\) and fair pregnancy policy.\(^{24}\)

One of these cases, which did not get as far as to being argued in court, was the mud schools case. It began with a letter of demand from the Centre for Child Law on behalf of seven schools and all other schools similarly situated. The letter was ignored. The Legal Resources Centre, acting for the Centre and the seven schools, then served papers on the department. These included a lengthy affidavit which set out the miserable state of affairs in

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\(^{15}\) 1996 (3) SA 165 (CC).

\(^{16}\) Equal Education and others v Minister for Basic Education and others, Bhisho High Court.

\(^{17}\) Freedom Stationery (Pty) Ltd v MEC for Education Eastern Cape (Unreported (59/2011) [2011] ZAECBHC1 (2010-03-10)); Section 27 v Minister of Education 2013 (3) SA 40 (GNP).

\(^{18}\) Centre for Child Law v Minister of Basic Education Eastern Cape [2012] 4 All SA 35 (ECG).

\(^{19}\) Governing Body of Rivonia Primary School v MEC for Education: Gauteng Province [2012] 1 All SA 576 (GSJ); Governing Body, Rivonia Primary School v MEC for Education, Gauteng Province 2013 (1) SA 632 (SCA).

\(^{20}\) Mikro Primary School 2006 (1) SA 1 (SCA); Head of Department, Mpumulanga Department of Education v Hoerskool Ermelo 2012 (2) SA 415 (CC).

\(^{21}\) Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa 2011 (5) SA 87 (WCC).

\(^{22}\) Christian Education SA v Minister of Education 2000 (4) SA 757 (CC).

\(^{23}\) MEC for Education, Kwa Zulu Natal v Pillay 2008 (1) SA 474 (CC); Antonie v Governing Body, Settlers High School and Others 2002 (4) SA 738 (C).

the schools, and a notice of motion setting out the action that needed to be taken. The
Department initially filed an opposing affidavit, but later reconsidered and made an offer to
settle. Following the signing of the agreement, the national Department of Basic Education
issued the ‘Accelerated schools infrastructure delivery initiative’ (ASIDI), as its
implementation plan to deal with the infrastructure backlog. This set out the list of schools
requiring infrastructure upgrades, and identified 496 schools with inappropriate structures.
The Department has since revised this figure: in April 2013 it is recorded as 510 schools.25

While the mud schools case was hailed as a victory, the real test of this strategy rests on
whether the schools actually get built within the required time frames. Thus monitoring of
the processes of budgeting, spending, procurement and construction became the next
important phase in the eradication of mud schools.

5. Monitoring compliance

The litigation phase had been undertaken by lawyers, working together with ‘infrastructure
crisis committees’ of each of the seven schools, made up of parents and teachers. The
monitoring phase required new and different skills. The Legal Resource Centre employed a
consultant with construction experience to monitor progress in the construction of the first
seven schools.

The Centre for Child Law commissioned a study by Cornerstone Economic Research, to track
school infrastructure spending and delivery.26 The report reveals poor delivery in terms of
school infrastructure backlogs, with only 4 of the schools having been completed in the first
year (2011/12) ad 12 in the second year (2012/13). The researchers determine that a lack of
money is not the problem. Firstly, they point out that South Africa’s total public expenditure
on educational institutions and administration amounted to 5.9% of the GDP, which is
slightly above the OECD average of 5.4%.

Secondly, the original amount of 8.2 billion leveraged by the Mud Schools case has in fact
been added to by the government, and amounts to a total of 13 billion over the 2012
medium term expenditure framework of three years. This is also not the only money being
spent on infrastructure. The R 13 billion allocated for school infrastructure backlogs is a

25 Department of Basic Education ASIDI Brief vol 1 (February 2013).
26 C Abdoll and C Barbenton School infrastructure spending and delivery Cornerstone Economics ( May 2013).
conditional grant, which is held and administered at a national level. This is the money earmarked for the mud schools refurbishment. In addition, the provincial departments also have budgets for infrastructure which are being spent, on average, more efficiently that the monies held by the national department.27 Overall, however, the report finds that the availability of funds did not play a role in the poor rates of completion. The funds were available but were not spent.

The report states that due to the absence of norms and standards on infrastructure, as well as a lack of reliable information on existing infrastructure available in the public domain it is not possible to create a precise picture of the infrastructure backlog. Indeed, the Department of Basic Education itself appears to be unsure how many ‘inappropriate structures’ there are, as it has provided different numbers in different reports ranging from 39528 to the most recent figure of 510. This calls their strategic planning into question.

The report makes the concerning finding that the national Department of Basic Education has woefully underspent the School Infrastructure Backlog grant for two years running.29 In 2011/2012 spending was a little over 10% and only at 23 per cent in 2012/2013 at the end of the third quarter. The ASIDI target for the number of schools to be built in 2011/2012 and 2012/2013 was 49. However, only 10 had been completed by the end of the first year. The Department identifies the following reasons for their failure: Inclement weather, the rural nature of the sites and poor roads, recruitment of contractors has to be done according to rigid procurement procedures, problems with contractors, profiteering and shortages of building materials.30 Abdoll and Barberton find that the reason for the National Department’s underspending is poor capacity within the Department to plan and manage an infrastructure programme of this size.31

The researchers find that if the project were to continue at the current rate it would take until 2034 to complete the infrastructure backlog! Allowing for the fact that projects of this

27 In fact, according the Abdoll and Barberton, the government has plans to allocate R 140 billion to school infrastructure in the 2013/14 to 2015/16 medium term expenditure estimates.
28 Department of Basic Education Strategic Plan for 2011-2014.
29 Provincial departments are spending their infrastructure grants more efficiently than the National Department, with the exception of the Eastern Cape.
30 Department of Basic Education ASIDI Brief vol 1 (February 2013)
31 Abdoll and Barberton (2013) 42.
nature tend to be slow to start off but gain momentum as they develop, they place a realistic completion date to be 2018/2019. This will be grave disappointment to the many children in mud schools who have been waiting so long for decent classrooms and schools.

6. Conclusion

The post 2015 Agenda is premised on the reality that there will be less financial aid to developing countries in the future. The story of the mud schools paints a picture that may find resonance with a post-2015 approach.

If no children are to be left behind, then developing countries must find the means to provide equal opportunities for all children to learn in a decent environment. Parent bodies, education advocates and activists must seek new partners and learn new skills to hold governments accountable, and ensure that deliver on their obligations regarding the right to education. These new partners may include lawyers and economists, procurement experts, infrastructure planners and construction experts. Public private partnerships may need to be explored.

The mud schools case leveraged a large sum of money to clear the infrastructure backlogs. However, the allocation of funds has proved to be only one factor pertinent to the success of the endeavour. Large sums of money will not reach the poorest children in the poorest schools timeously unless the capacity to plan and manage large infrastructure projects is developed. A new approach must ensure a robust monitoring of planning, budgeting and spending. There must be a demand for adequate financial information to be placed in the public domain to allow for such scrutiny.

If we are to re-vision the post 2015 agenda, it should be done in a manner that encourages organisations, parent bodies and even learners themselves to hold governments accountable. This requires not only making demands on the public purse to ensure that more money is allocated to education, but also ensuring that, once allocated, it is efficiently spent.
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