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

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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 demonstrates the justiciability of the right to education, and shows that 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-2015 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.

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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 three 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, 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.

The fact that education is a human right is certainly not new. As a means of measuring compliance with the right, Katarina Tomasevski, the UN Special Rapporteur on the Right to Education from 1998 to 2004, developed what is commonly referred to as the “4 A” scheme, incorporating availability, accessibility, acceptability and adaptability. The UN Committee on Social, Economic and Cultural Rights adopted in their General Comment on the Right to Education (General Comment 13), issued in 1999. The scheme forms a useful benchmark against which to measure governments’ performance towards the realisation of the right to education, because it embodies international law principles (Beiter, 2006). This article proposes that litigation on children’s right to education, provided that it is followed by proper monitoring of outcomes, can be used to promote another important “A”-word: Accountability. In his report on the right to education submitted to the 68th session of the General Assembly, the Special Rapporteur, Kishore

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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.

Singh, recommended that “accountability should be a cornerstone of the post-2015 development agenda, with the emphasis on mechanisms to hold governments accountable to their commitments” (*Report of the Special Rapporteur, August 2013*, para 126).

Although ‘education for all’ is premised on human rights, mechanisms for making the right real have been insufficiently explored. The UN Special Rapporteur on the right to education, Kishore Singh, presented a report to the 23rd session of the Human Rights Council on 10 May 2013, entitled “Justiciability of the right to education”. The report identifies justiciability of the right to education as a key instrument for its realisation. In other words, government policies and provisions of education are subject to review and determination by judicial and quasi-judicial bodies. Adjudication of the right to education by such bodies ensures that the right to education is respected, protected and fulfilled (*Report of the Special Rapporteur, May 2013*, part III).

This case study on mud schools presents a South African example of how government has been held accountable for the failure to provide a proper educational environment for children. As will be demonstrated, the case leveraged funding to deal with infrastructure backlogs. The article also shows that litigation on its own may not be sufficient to ensure full accountability. Monitoring of expenditure following the out of court settlement indicates slow progress and further litigation may be necessary. The case study charts a role for civil society in the post 2015 development agenda. The Special Rapporteur has recommended that ‘rights-holders should have the ability to challenge governments to meet their international obligations when they are not be respected and fulfilled. Access to justice is of foremost importance for getting the rights enforced’ (*Report of the Special Rapporteur, August 2013*, para 129). He concludes that effective enforcement mechanisms linked to government accountability should be foreseen in the in the future agenda (para 130).

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 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 (*Department of Basic Education, 2013*). 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 (*Department of Basic Education, 2010*), 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 (*Parliamentary Monitoring Group, 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 (*2013b*). 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 (*Mason, 2013*). 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 (*Van den Berg, 2008*). 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 (*Spaull, 2013a*). Accountability is also identified as a crucial element of that Agenda (*High-Level Panel of Eminent Persons, 2013; Report of the Special Rapporteur, August 2013*).

4. Litigation to ensure accountability in relation to education

One way to achieve accountability is through public interest litigation. The special rapporteur, in his report on the justiciability of the right to education, sets out international examples of jurisprudence arising from education related court cases on equality of opportunity, protection of marginalised and vulnerable groups, quality, minority and language rights, girls rights, the financing of education and the regulation of private education provision (*Report of the Special Rapporteur, May 2013*, part VIII). Litigation of the right to education has a history in developed countries (*Welner, 2012*), but is relatively new in developing countries (*Byrne, 2013*).

South Africa has a history of public interest 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 (*Marcus and Budlender, 2008*). It has, however,

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