



In response to the South African government's delays to remove mud schools in the Eastern Cape Province, the Legal Resources Centre (LRC) took the government to court in August 2010. Budget analysis by CSOs was a core component of the legal strategy. In January 2011 the Eastern Cape Department of Education signed an agreement with LRC that stipulated that the province would receive increased funds to address infrastructure backlogs, and the provincial government would provide for provisional educational facilities. Progress in implementing the agreement has been slow, but the LRC continues to apply pressure and monitor progress. Photo courtesy of Legal Resources Centre

The following case study illustrates how budget analysis strengthened litigation for better educational infrastructure in South Africa. This is a summary of a more in-depth study prepared by Alison Tshangana as part of the Learning Program of the IBP's Partnership Initiative. The PI Learning Program seeks to assess and document the impact of civil society engagement in public budgeting.

Download a PDF of the complete case study at <http://internationalbudget.org/wp-content/uploads/LP-case-study-LRC.pdf>.

SOUTH AFRICA: USING LITIGATION TO ELIMINATE THE 'MUD SCHOOLS'

South Africa's first multiracial elections in 1994 brought an end to apartheid and ushered in majority rule, but democracy has not erased the legacy of inequality left behind. And nowhere are these inequalities more apparent than in the rural province of the Eastern Cape, where the so-called mud schools have become emblematic of unresolved problems left by decades of discrimination.

A "mud school" specifically refers to a school that is held in a mud-walled hut, but the term has become a symbol of a wider challenge of dangerous or make-shift school buildings across the country. Still, because of the scale of the problem there, Eastern Cape has been the focal point of the discussion, with an estimated 572 mud-structure schools located in the province from 2004 to 2005.

Since 2009, three main court cases have leveraged more than \$1 billion from the South African government to change the situation. Though these were not part of a coordinated strategy, the three cases have been loosely coordinated by a core group of organizations. This case study looks at those cases, the role of budgetary analysis within them, and their impacts upon government spending and accountability in the educational sector.

THE ISSUE: CLOSING THE GAP IN SOUTH AFRICA'S NEGLECTED EDUCATIONAL SECTOR

According to the South African Constitution, education is a shared responsibility of national and provincial government. Whilst national government is responsible for policy development, monitoring and evaluation, support to provinces, and administration of grants to provinces, the provincial education departments are responsible for actual delivery. The largest single share of provincial budgets goes to education, and the great majority of provincial education department budgets are funded by conditional grants from the national department.

Education policy has been designed expressly to close the massive gap between former white schools and schools in historically black and disadvantaged areas, which were deliberately under-resourced during South Africa's notorious policy of racial segregation. While great strides have been made in access to education since the end of apartheid, quality remains the most serious issue. Essentially outcomes are not commensurate with public investment. Literacy and

numeracy levels lag behind those of countries at similar income levels – despite expenditure of five percent of South Africa's gross domestic product (GDP) in the education sector – and educational outcomes remain skewed along lines of geography and race.

Critics point to problems with inputs, such as inadequate teacher training and development, inconsistent quality in school management and leadership, inadequate access to textbooks and other educational materials, and major backlogs in school infrastructure. In addition, learner outcomes are impacted negatively by social issues, especially poverty in rural areas and the conditions in urban informal settlements. Poor test scores and high drop-out rates persist in secondary schools.

The Eastern Cape – one of the poorer, more rural provinces of South Africa – has consistently been amongst the worst performers in educational outcomes. Its provincial government has historically been plagued with inefficiency and maladministration. Having inherited corrupt and bureaucratic government structures from the apartheid era, it remains bloated with personnel spending. Similar to other provinces, the Eastern Cape spends 45 percent of its total provincial budget on education, but of the Education Department's total budget of R26.2 billion for 2012/2013, R81 billion is allocated for personnel, leaving few resources for desperately needed investments.

For 2004/2005 the Department calculated that there were 572 mud structure schools in the province. In 2009 the Education Department stated that R23 billion would be required to eradicate unsafe and mud structures, as compared to a total education infrastructure budget for that year of R981 million.

Since 1994 there have been multiple political promises to eradicate these backlogs, but targets declared by both national and provincial politicians have been repeatedly missed. In 2004 President Thabo Mbeki told parliament that by March of the following year there would be no pupil "learning under a tree, mud school or any dangerous position." During his 2008/2009 Budget Speech the Eastern Cape Education Minister said, "All mud schools have been declared unsafe and are required to be replaced in 2008/2009."

Most disheartening for the teachers and learners affected, as well as the CSOs involved in the issue, is that despite the urgency of the issue and the acknowledgement of its importance as evidenced in politician's promises, the Education Department's infrastructure spending record is poor and significant portions of allocated funds remain unspent.

The issue of mud schools, and other types of unsafe and inadequate school infrastructure, is therefore a well-known problem in the Eastern Cape. And for CSOs involved in social justice issues in the region, it constitutes a seemingly straightforward service delivery problem requiring a basic remedy of bricks and mortar – and political will.

TWO LEGAL SUITS

Amasango Case

Founded in 1995 to cater for marginalized, abused and poor children, the Amasango School first operated from two shipping containers and then moved into abandoned railway buildings in Grahamstown. Amasango was registered as a special school by the Education Department and in 2006 was placed on the departmental priority list for planned school construction projects.

Desperate for a new school building for Amasango, the school governing body (SGB), its principle and other staff lobbied the Education Department for years in repeated meetings, letters and phone calls, but with no result. With frustration mounting the SGB set up a task team to address the issue, including police, labor union representatives, municipal officials and politicians, members of the school management team, and parents. In 2008 the Task Team took a bold decision to pursue legal action against the Education Department and brought the decision to the SGB, which gave it unanimous endorsement. As Jane Bradshaw, founder and principal of the school explained, "We had nothing to lose."

By chance Bradshaw had a long-standing friendship with Sarah Sephton, the regional director of the Legal Resource Centre (LRC), a human rights organization that does public interest litigation. LRC had previously been involved in education-related cases and was familiar with the issue of poor school infrastructure. Indeed LRC had identified poor educational infrastructure as an issue they wished to act upon, but had always been unable to find a school willing to take the Education Department to court. So when Bradshaw contacted Sephton looking for legal assistance, it did not take much convincing.

The initial complaint, lodged by two members of the SGB in October 2009, argued that the failure to provide adequate facilities for Amasango was a violation of the constitutional requirement for the government to provide appropriate and adequate education for all children.

In early March, the Eastern Cape Finance Minister announced that the province had arranged R2.5 billion (\$US 281 million) in resources 'outside the budget.' Later that month the Education Department, which had initially indicated that it would oppose the case, offered a settlement. The Education Department would provide six prefabricated classrooms, build four toilets, and provide a library by 1 October 2010. Furthermore, the Education Department vowed to file an affidavit by 25 March 2011 that would set out their plan for the construction of a new school, with building to commence by May 2011. The agreement was made an Order of the Court on 11 March 2010.

A month later, however, the Department had the clause in the Court Order referring to the building of a new school removed, forcing the SGB to renew its legal suit. In the Education Department's answering affidavit, it argued that Amasango was already on the list of priority schools, and that because resources were insufficient to address all needs simultaneously, the province was within its right to make education "progressively available and accessible to everyone... through reasonable measures," citing Section 29 of the Constitution.

In response, LRC enlisted the support of the Public Service Accountability Monitor (PSAM). A CSO engaged in social accountability monitoring since 1999, PSAM had done its own work on education and school infrastructure in the province, including an in-depth analysis of the backlog in school infrastructure in 2005.

PSAM's research helped to reject the Education Department's argument in two key ways. First, PSAM demonstrated that Amasango had indeed been placed on the priority list, but then removed inexplicably only to be placed back on the list a year later, after the court case had been filed. Second, PSAM helped to combat the claim that financial constraints were relevant. PSAM used its experience with budgetary analysis to demonstrate that the Education Department had been underspending its infrastructure budget, and that as part of the provincial budget process, underspent budget lines are routinely adjusted downwards. In other words, if sufficient funds were not available, this was partly the result of the Department's own failure to spend the resources.

The court later ruled that the Eastern Cape Education Department's failure to provide appropriate and adequate school facilities at Amasango is "unconstitutional, unlawful and invalid," and ordered the Department to develop and implement a plan for improving the school's facilities and to report back to the Court every three months on progress.

Still, the court has been unable to assure compliance. To date and in contravention of the court ruling, only temporary structures for Amasango School have been put in place, and a new school has not been built.

The Seven Schools Case

Unlike the Amasango Case, which was brought forward to address the challenges of a single school, the so-called Seven Schools Case was spearheaded by the LRC (Legal Resource Centre) as a deliberate activist strategy. The LRC identified 25 mud schools in the Eastern Cape: all with poor buildings, a lack of access to water, and shortages of desks and chairs, among other deficiencies. It then supported each one to build a case. The process resulted in a list of seven schools that were willing to legally confront the Education Department in spite of the perceived threat from the Provincial Head Office. To mitigate the risk, each school established an Infrastructure Crisis Committee (composed of parents, students and community members) to act as the plaintiff in the case, shielding staff and school board members from repercussions. The LRC also selected larger schools to preempt the possibility that the Education Department might simply shut down the schools and transfer the children as part of an economies-of-scale argument.

LRC also approached the Centre for Child Law (CCL) at the University of Pretoria to serve as co-applicant with the seven schools. There was a mutual interest for doing so. The CCL

had undertaken previous cases related to broader impediments to education such as admissions policies and social grants; the Seven Schools Case fit well within those goals. And having a national, institutional applicant for the case served to lift the case beyond its regional implications.

The complaint, filed against the Eastern Cape Province and the national government, made three points. First, it cited the constitutional right to education and numerous government policies and legislation at the national and provincial level that aimed to eradicate mud schools. Second, the complaint detailed the efforts made by each of the schools to communicate their needs, including petitions and correspondence. Finally it stressed the lack of transparency by the Eastern Cape Education Department in designing its plans for improving educational infrastructure.

In October, the province gave notification that it would oppose the lawsuit. The core of the counter-argument was that it is the unique mandate and responsibility of the government to plan on a priority basis, within limited resources, evoking the concept of "progressive realization," the gradual fulfillment of the rights of citizens. By framing the argument in this manner, the government sought to shift the issue from the absolute question of the need in these seven schools to the relative need of these schools in relation to other schools.

The Answering Affidavit also provided details of the Education Department's prioritization method for allocating the annual infrastructure budget for the eradication of all inappropriate school infrastructure. The Education Department stated that it had already devised a plan specifically for the eradication of inappropriate schools, including mud structures, whereby R436 million (\$US 49 million) would be made available by the National Treasury as a conditional grant for the Eastern Cape. The affidavit also mentioned a larger sum of R4.48 billion (about \$512 million) to be made available (presumably nationally, although the court document is unclear) for the eradication of mud schools, again as a conditional grant from the National Treasury (as part of a November 2010 decision made at national level).

But before LRC could submit its response to the Affidavit, it received a letter from the provincial Education Department essentially conceding to the applicants' requests. In February 2011, a memorandum of understanding was signed by all parties indicated that R8.2 billion (\$US 1 billion) had been committed by the Government of South Africa to replace inadequate educational structures nationally over the following three years. Allocations for each of the seven schools were included in the document. For their part, the Provincial Education Department was instructed to put in place temporary measures for the seven schools within two months. Temporary structures were indeed put in place, and some of the seven schools have since been rebuilt, though the construction of some of the schools has been delayed due to difficulties with tenders and contractors.



TACTICS FOR LITIGATING SOUTH AFRICA'S FAILED PROMISES TO PROVIDE ADEQUATE SCHOOLS

- Referring to constitutional and national commitments to provide adequate school facilities;
- Demonstrating efforts by the schools to communicate their needs;
- Taking measures to protect schools against backlash from the government;
- Using budget analysis tools to challenge the 'limited resources' and 'progressive realization' arguments.
- Working in a coalition to raise the relevance of a case to the national level; and
- Monitoring progress on legal commitments and exerting political pressure, or initiating new legal processes, when these are unmet.

CHANGES DUE TO THE CAMPAIGN

The achievements of the court cases have been attributed to a few factors. In the Amasango Case, it was the unusual willingness of school leadership to take legal action that enabled the process – and the lessons that later strengthened the Seven Schools Case.

A second key factor was the effective use of PSAM's research and analysis to refute government arguments related to 'limited resources' and 'progressive realization.'



OUTCOMES OF LITIGATION IMPROVE SOUTH AFRICAN EDUCATIONAL INFRASTRUCTURE

- Setting a legal precedent that precluded the Government of South Africa from citing a lack of resources as defense for the failure to provide adequate school facilities;
- Obtaining specific budget allocations and work plans for addressing poor infrastructure in schools;
- Winning a legal commitment of \$1 billion for addressing inadequate structures across the country;
- Prompting the establishment of the Accelerate Schools Infrastructure Delivery Initiative;
- Establishing new legal mechanisms for holding the national and provincial governments to account;
- Improvement of conditions at a few of the schools represented in the cases; and
- Providing important strategic lessons that are being taken up by other CSOs.

Furthermore the use of budget analysis and tools helped to ensure that court orders contained specific budget commitments.

Externally the media played a significant role. Newspaper coverage in particular brought the attention of the National Education Department and National Treasury, which may have significantly altered the outcomes. Interviews conducted for this case study found that pressure and involvement from the national government likely contributed to the settlements in both cases.

Whilst neither case has yet resulted in the full and timely implementation of the actions delineated in the final agreements, they have had broader implications for the education sector – and perhaps beyond it – in South Africa.

In the press and among experts in the education field, the Seven Schools case has been credited for prompting the establishment of the Accelerated Schools Infrastructure Delivery Initiative (ASIDI) for the National Department of Education in 2011. The ASIDI was funded by two conditional grants from the National Department of Basic Education, which provided two major dedicated funding streams for the eradication of mud schools: the Education Infrastructure Grant (EIG) and the School Infrastructure Backlogs Grant (SIBG). Both were introduced in the 2011/12 budget, which was tabled by the national Minister in the same month that the Seven Schools MOA was signed. Although the MOA in the Seven Schools Case did not specifically name the SIBG as the funding sources for the R8.2 billion committed by the Government of South Africa from 2011/12 to 2013/14, the numbers of the SIBG line up with the commitments agreed to in the MOA. The timing of the turning points in the evolution of both court cases suggests the National Education Department exerted a hand in prompting the Eastern Cape provincial education department's conciliatory agreement and supplying the additional funds required to meet the funding gap.

The court cases have also brought a closer partnership between PSAM, LRC and CCL – a trio that plans to sustain pressure on the national and provincial governments to ensure that the new promises are better kept.

Finally, the cases have inspired new action. Equal Education (EE), a community and membership-based education NGO that played a role in the community mobilization and education aspects of the Seven Schools Case, is taking over where the Seven Schools Case left off. EE is currently pursuing a case against the national Education Minister that cites the examples of two specific schools that require emergency structures. But in a deliberate effort to challenge the systemic issues plaguing the education system, EE is asking the court to require the Minister to set minimum norms and standards for school infrastructure which would apply country-wide. Shortly before the publication of this case study the Minister conceded to this demand.

CONCLUSIONS

A key lesson from this case study is that strategic litigation of this nature can be an effective tool to force governments to

comply with their commitments. Court orders, the threat of a legal precedent, and media attention all serve to build a critical mass of pressure on government officials to take action.

But litigation alone is often insufficient. A comprehensive campaign that includes grassroots mobilization and community ownership, a plan for obtaining high level political support, and a deliberate strategy to harness the media is often necessary to convert court victories into meaningful policy changes. Furthermore it is the work in these other areas that often prepares CSOs for successful litigation.

The Amasango and Seven School cases developed as a result of committed CSOs being prepared to respond to legal opportunities as they appeared. And that poise and preparation was a consequence of their previous efforts in the field of educational justice, efforts that had included – for PSAM – budget monitoring and evaluation.

As efforts on all these fronts continue simultaneously in South Africa, there remains hope that historic injustices may one day be resolved.

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