Eradicating “Mud Schools” in South Africa

INTRODUCTION

The South African Constitution grants children a right to basic education.¹ The Constitutional Court of South Africa² has declared that this education right is accorded a higher position than other socio-economic rights. Specifically, the Court affirmed that the right is “immediately realisable,” as opposed to other socio-economic rights, which must be “progressively realised” within “available resources” subject to “reasonable legislative measures.”³

Despite this declaration, there are still students in South Africa who must study in unsafe structures known as “mud schools.” Mud schools are constructed using “traditional methods,” with “mud bricks and a wooden frame, plastered with mud mixed with cow dung. Some are plastered with cement.”⁴ According to South African practitioner Ann Skelton:

“[M]ud 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 simp-

². The Constitutional Court of South Africa is the highest appellate court in South Africa and generally only hears constitutional matters. S. Afr. Const., 1996, Section 167.
³. Governing Body of the Juma Musjid Primary School & Others v. Essay N.O. and Others 2011 (8) BCLR 761 (CC) at para. 37 (S. Afr.) (announcing that the right to education is “immediately realisable”). These terms of art will be explained in further detail below.
ly cannot attend school. Mud schools also lack electricity, running water and sanitation, and most have old and insufficient classroom furniture.”

These “mud schools” are the “left overs of a deliberate strategy during the apartheid years not to invest in schools for black children.” These schools are sometimes funded and built by the surrounding impoverished communities.

After a brief discussion of the right to education in South Africa, this Case Note will detail the successes and challenges the Legal Resources Centre (LRC) has faced in using litigation to eradicate mud schools and replace these structures with stable and safe buildings. The analysis will lead to two conclusions: first, despite great strides made in Centre for Child Law and Others v. Minister of Basic Education and others (“The Mud Schools case”), the complete enforcement of court orders remains a serious problem. Second, despite these challenges, there have been remarkable successes as a result of this case and lessons learned may allow the LRC to move forward and improve the effectiveness of education rights litigation.


6. Id. at 2 (explaining that while the Apartheid regime’s plan to ensure that all black South Africans belonged to their ‘own areas’ failed, its “legacy of impoverishment and under-development in the former ‘homelands’ lives on”).

7. McConnachie, supra note 4, at 558 (discussing the example of Nomandla Senior Primary School, which was built using funds from the community. In the community, “nearly 80 per cent of local households earn less than R 1000 per month.”).

8. The Legal Resources Centre is one among a number of public interest litigation firms in South Africa that focus on the realization of socio-economic rights in the Constitution. It was established in 1979 with the aim of “[encouraging] belief in the value of law as an instrument of justice and to give practical effect to this goal by providing legal and educational services in the public interest.” See Wallace Mgoqi, The Work of the Legal Resources Centre in South Africa in the Area of Human Rights Promotion and Protection, 36 J. AFR. L. 1, 1 (1992).
I. THE RIGHT TO BASIC EDUCATION IN SOUTH AFRICA

The South African Constitution provides for the right to basic education in Section 29.9 The Constitutional Court first defined the boundaries of the right to basic education in Gauteng Provincial Legislature In re: Gauteng School Education Bill of 1995. The Court held that “[the right to basic education] creates a positive right that basic education be provided for every person and not merely a negative right that such person should not be obstructed in pursuing his or her basic education.”10 A declaration that the right to education is a “positive right” means that the state is not only prohibited from impairing access to the right to education, but is also obligated to take positive steps to ensure this right is fulfilled.11

The Governing Body of Juma Musjid Primary School & Others v. Essay N.O. and Others (“Juma Musjid”), decided on April 11, 2012, went further, proclaiming the right to basic education as “immediately realisable.”12 The Court held that “unlike some of the other socio-economic rights, [the right to basic education] is immediately realisable” and may only be limited by what is “reasonable and justifiable” in South Africa’s democratic society.13

By implication, a right accorded

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9. S. Afr., Const., 1996, Section 29(a) (“Everyone has the right – (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”). Defining the term “basic education” is an important, but difficult, endeavor. See Chiedza Simbo, Defining the term basic education in the South African Constitution: An international law approach, 16 L. Democracy & Dev. 162, 181 (2012) (“The major recommendation is that there is need for a Basic Education Act in South Africa. Such Act should define the term basic education and its objectives.”). See also Chiedza Simbo, 16 L. Democracy & Dev. at 165 (“[B]asic education provided by section 29(1)(a) points to the quality of education that learners must receive and not the number of years a learner attends school.”).


12. Governing Body of the Juma Musjid Primary School, (8) BCLR 761 (CC) at para. 37 (S. Afr.). There was brief mention of the term “progressively realisable” in relation to education, but “references to practicability and historical redress suggested that the court’s reference to progressive availability and accessibility related to education in the language of the learner’s choice, and not to the right to a basic education in general.” Ann Skelton, The role of the courts in ensuring the right to a basic education in a democratic South Africa: a critical evaluation of recent education case law, De Jure 1 (2013) at 4.

13. Governing Body of the Juma Musjid Primary School, (8) BCLR 761 (CC) at para. 37 (S. Afr.). This line is also a reference to the Constitution’s proportionality language, a term commonly studied in comparative constitutional law scholarship. See generally Sandra
the status of “immediately realisable” cannot be left unfulfilled as a result of budgetary constraints that the government might face. However, *Juma Musjid* was limited in its impact because it avoided defining the substantive content of the right to education.14

Since *Juma Musjid*, litigation on the right to basic education has continued, spanning a range of specific issues. These cases have been brought in parallel with each other, often by public interest legal organizations such as the Legal Resources Centre,15 Equal Education,16 or Section 27,17 among others.18 Practitioners advocating for public school reform have characterized this type of litigation as “strategic litigation,”19 as these judgments often build upon one another in a piecemeal fashion to develop a working definition of the substantive content of the right to education.20

Despite the many successes of this type of impact litigation, the right to basic education has not been realized for many students in

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15. David J. McQuoid-Mason, *The Delivery of Civil Legal Aid Services in South Africa*, 24 Fordham Int’l L.J. 111 (2000) (“The LRC is the most successful specialist law firm in South Africa that provides legal aid services in civil cases for the poor and marginalized in the country.”). See also Mgoqi, supra note 8, at 1 (The Legal Resources Centre was established with the aims to “encourage belief in the value of law as an instrument of justice and to give practical effect to this goal by providing legal and educational services in the public interest.”).


18. Public interest litigation firms are not the only method of delivering civil legal aid. See McQuoid-Mason, supra note 15, at 111 (“South Africa has tried a wide variety of mechanisms for delivering civil aid services: These services include the following: (i) uncompensated private counsel (pro bono); (ii) state-compensated private counsel (judicare); (iii) state-funded candidate attorneys in rural law firms; (iv) state-funded law clinics; (v) state-funded justice centers (one stop legal aid shops); (vi) private, specialist law firms; (vii) independent university law clinics; (viii) paralegal advice offices; and (ix) legal insurance schemes”).


20. STEVEN BUNDLENDER ET AL., PUBLIC INTEREST LITIGATION AND SOCIAL CHANGE IN SOUTH AFRICA, STRATEGIES, TACTICS AND LESSONS, 94 (2014) (“[A]lthough the right to basic education is immediately realisable, civil society organisations have opted to take an incremental approach to litigation... the approach has been to give content to the right to basic education by gradually building it up from the absolute minimum.”). See also BUNDLENDER at 116 (“Earlier cases thus act as vital building blocks for more complex and difficult later cases.”).
South Africa. As of 2013, “only half of South Africa’s schools had water and sanitation, 93% of its schools did not maintain proper school libraries, and 95% did not have science facilities.” Other problems remain after protracted litigation. Nearly 19,000 teacher posts are vacant throughout South Africa, many in the Eastern Cape Province. Many South African schools also have a shortage of desks and chairs for students, forcing many students to sit on the floor and preventing some teachers from handing out written assignments. Furthermore, many schools lack an adequate number of classrooms as well as electricity, water, sports facilities, internet and computer facilities, and perimeter security. The public school system fails to provide for the educational needs of mentally disabled children in the Eastern Cape Province, which is further complicated by discrimination on the basis of refugee status and language differences. Some girls are prevented from attending school due to pregnancies. Matric pass rates are low. Finally, many students lack safe, reliable, and affordable transportation to schools, and there is a large resource gap between the richest and poorest schools in the country.

21. Id. at 2 (“Some of the impediments relate to non delivery of essential ingredients such as schools, stationery, textbooks, teachers and transport. Other challenges relate to disputed powers of school governing bodies and schools versus those of the provincial head of departments, members of the provincial executive councils (MECs) and, with regard to policy, the national Minister of Basic Education.”).

22. Id.

23. PRASCHMA, supra note 19, at 3.

24. Id.

25. Id.

26. Id. at 4.

27. Id.


29. “Matric” refers to both the final year of high school as well as the minimum high school “exit” exam qualification needed for university entrance. Doron Isaacs, Interpreting, Litigating and Realising the Right to Education in South Africa: Lessons from America, Winning Essay: Solly Kessler Memorial Prize, University of Cape Town (2007) at 7 (“Nationally, the number of learners enrolled in grade 12 is half that enrolled in grade 1, meaning that nearly half the children who enrol in school do not arrive in matric . . . In the Eastern Cape and Limpopo this figure falls to 59% and 56% respectively. . . In 2005, there were 31 schools in the country where not a single student passed matric.”). See also Simbo, supra note 9, at 164 (“[T]he numeracy and literacy tests which were completed around 2008 concluded that of the 45 developing countries that took part in the survey South Africa took the 45th position which shows that the South African education system is producing a large number of graduates who are illiterate and innumerate.”).

30. PRASCHMA, supra note 19, at 3.

31. Id. at 6.
II. The Mud Schools Case

South African legal practitioners such as Cameron McConnachie and Chris McConnachie have argued that Section 29(1)(a) of the South African Constitution includes an unqualified right to adequate school facilities.\(^32\) Much of their argument is given context by the thousands of students in the Eastern Cape that attend school in unsafe, dilapidated “mud schools.”\(^33\)

The Legal Resources Centre brought a founding application on behalf of seven schools\(^34\) in 2010 against various governmental bodies (notably, the provincial and national Departments of Education), alleging that the dilapidated and inappropriate school structures and lack of sanitation, water, and furniture for the students attending the schools constituted a breach of their constitutional right to basic education.\(^35\) At the time, there were approximately 400 “mud schools” in the Eastern Cape.\(^36\)

The matter was settled in a “memorandum of understanding” signed in February 2011,\(^37\) in which the government pledged a total of R8.2 billion between April 1, 2011 and March 1, 2014 to eradicate all mud schools in the country, with over R6 billion to be spent in the Eastern Cape.\(^38\) The settlement included an undertaking to build permanent structures for the seven plaintiff schools, and to provide these schools with temporary prefabricated classrooms, sanitation, and other furniture.\(^39\) Soon after, the temporary structures and resources were

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32. McConnachie, \textit{supra} note 4, at 556.
33. See generally McConnachie, \textit{supra} note 4.
34. A “founding application” is the equivalent of a “complaint” in South African civil procedure. This number was later reduced to five schools, when it became clear in 2014 that two of the schools were no longer mud schools. \textit{Mud Schools}, LEGAL RESOURCES CENTRE, http://www.lrc.org.za/resources/mud-schools (last visited Apr. 14, 2015).
38. \textit{Id.} ¶ 3.
delivered, and construction of the permanent buildings was completed at those schools.40

By November 2014, it appeared that the settlement was a success. Seventy more mud schools in the Eastern Cape had been completely replaced, 78 were at the design stage for replacement, and nearly 50 more had “framework agreements” in place.41 Furthermore, following the settlement, the Department of Basic Education created the “Accelerated Schools Infrastructure Delivery Initiative” (ASIDI) to implement the settlement terms. This original ASIDI set out a list of 496 schools requiring infrastructure improvements, and the updated list in April 2010 increased this number to 510 schools.42 The government had also increased the budget for this project.43

Despite these initial successes, the ASIDI project has failed to spend the budget allocated to it under the settlement agreement.44 Conditions at schools on the list and updates to the LRC show that there is still slow progress on spending and building, planning for new buildings, and managing issues with defaulting contractors.45

In January 2014, the Legal Resources Centre returned to court because the Department had not fulfilled its obligations under either the settlement agreement or the ASIDI plans, and it was unlikely that the plans would be completed by the March 1, 2014 deadline.46

At that point, over 200 schools did not know if or when they would have replaced facilities, and the lack of planning was leading to

41. These numbers were obtained directly from the LRC lawyer on the case, Cameron McConnachie. See LRC Staff: Grahanstown, LEGAL RESOURCES CENTRE, http://www.lrc.org.za/about-us/lrc-trustees-staff (last visited Apr. 15, 2015).
42. See supra note 39.
43. It is now a R13 billion “conditional grant.” See The Budgetary Review and Recommendation Report of the Portfolio Committee on Basic Education on the performance of the Department of Basic Education for the 2013/14 financial year, dated 22 October 2014, PORTFOLIO COMMITTEE ON BASIC EDUCATION, Report BRRR (2014) at 12.
44. Centre for Child Law & Others v. Government of the Eastern Cape Providence & others 2010 (ECB) case no 504/10 (S. Afr.) (Founding Affidavit at para. 32) (on file with author).
45. Id. at 33. See also Julian Rademeyer, Schools promised by Zuma have not been built, AFRICA CHECK (2013), http://africacheck.org/reports/schools-promised-by-zuma-have-not-been-built/.
46. See generally Centre for Child Law & Others v. Government of the Eastern Cape Providence & others 2010 (ECB) case no 504/10 (S. Afr.) (Notice of Motion) (on file with author).
underspending of the budget. Furthermore, many schools were excluded from the ASIDI list that should have been included, and some schools with emergency needs were not provided with new buildings, even though they were on the ASIDI list. The building of new schools had stalled significantly, and worst of all, South African leaders did not appear to be taking the project seriously.

On August 21, 2014, the Grahamstown High Court ordered that the government respondents publish an updated and complete ASIDI list of public schools in the Eastern Cape with inappropriate structures (including detailed criteria), develop a comprehensive plan to upgrade or rebuild the school structures on the ASIDI list, and provide emergency relief to the co-applicant schools.

Once again, the government did not comply with this order. Today, while the co-applicant schools finally have their permanent structures and the plans for those schools already “allocated” for replacement have been produced, the updated ASIDI list and comprehensive plans for approximately 200 more schools have yet to be released. The November 20, 2014 deadline to do so has passed, and the LRC sought a contempt order in early April 2015 to enforce compliance.

Some have calculated that it will take 9 more years for the government to make the required infrastructure changes, although the

47. See Centre for Child Law & Others v. Government of the Eastern Cape Providence & others 2010 (ECB) case no 504/10 (S. Afr.) (Founding Affidavit at para. 36) (on file with author).
48. Id. ¶58.
49. Edmund van Vuuren, South Africa: President Zuma’s Comments On Mud Schools an Insult to Children, ALLAFRICA (2014) http://allafrica.com/stories/201401190212.html (“We want to eradicate all mud schools . . . We are not in a hurry because no one is going to rule but the ANC.”).
51. See Centre for Child Law & Others v. Government of the Eastern Cape Providence & others 2010 (ECB) case no 504/10 (S. Afr.) (Founding Affidavit at para. 111.2) (on file with author).
52. Id. ¶110.1.
Department has vehemently denied the accuracy of that timeline. The public has harshly criticized the government on this matter, which may galvanize the government to hasten its compliance process.

III. MOVING FORWARD: CHALLENGES TO OVERCOME IN THE MUD SCHOOLS CASE

Enforcement is the main challenge for these right to education cases, as the government often does not comply with the initial high court order. It is vital to investigate the reasons behind the barrier to enforcement if such cases are to be effective in the long run. Problems with enforcement are especially significant when injunctive relief is sought. In particular, the level of poverty in the Eastern Cape makes it all the more difficult to bring socio-economic rights litigation to seek and enforce injunctions.

Unfortunately, it is unclear whether the enforcement problems are due to a lack of funding, poor efficiency, poor organization, in-


57. Yana van Leeve, Mobilising the right to a basic education in South Africa: What has the law achieved so far? 2 (2014) (unpublished manuscript), available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/van-Leeve1.pdf (“However, more often than not, litigation yields symbolic victories which are difficult to implement and which ultimately require sustained political pressure to ensure that the demands of the poor to safe school buildings are given effect.”).

58. See Sandra Liebenberg, Forging New Tools for Vindicating the Rights of the Poor in the Crucible of the Eastern Cape, 3 (Sept. 3, 2014) (submitted to SPECULUM JURIS) (on file with author) (“Litigating socio-economic rights in the context of the Eastern Cape is exponentially harder due to the deep levels of poverty, administrative dysfunction, and the barriers to community organisation and public interest lawyering created by dispersed, largely rural communities and poor infrastructure.”).

59. It may also be useful to separate out the “liability” and “remedy” stages of litigation when considering the impact of poverty on socio-economic rights litigation. For instance, it is conceivable that extreme poverty may make it easier to show that the government has not provided certain right, but that it also may make the remedy or enforcement of a court order significantly more challenging. As an example, the provision of new “pre-fabricated structures” to serve as classrooms for children has been extremely difficult in the poor, rural, and mountainous former Transkei region, where the lack of quality maps, paved roads, and signs often prevents the delivery of classroom building materials to these remote schools.
competence, corruption, a lack of respect for the courts, a lack of accountability, or a combination of these factors. The National Development Plan Vision 2030 lists the primary cause for the failing school system as “weak capacity throughout the civil service – teachers, principals and system-level officials,” which is exacerbated by “nepotism and the appointment of unsuitable personnel.” While the NDP seems to suggest that the lack of government expertise and capacity in the civil service sector is the main problem, non-profit legal organizations sometimes disagree, citing lack of governmental accountability as the main issue.

An additional future challenge is that the Constitutional Court has not always sided with implementing socio-economic rights, especially when the essence of that right has not been defined. For instance, in Mazibuko v. City of Johannesburg, applicants were unsuccessful in establishing that the City of Johannesburg did not provide residents “sufficient water” as required by Section 27 of the Constitution. Specifically, the Court concluded that it is not appropriate for a court to give a quantified content to what constitutes “sufficient water” because this is a matter to be addressed by legislators. The Constitutional Court seems to be more comfortable enforcing positive constitutional duties that have been given greater content through statutes and


61. Equal Education Law Centre would add a fifth “A,” “Accountability,” to the 4 “A’s” in the international standard to education. See EQUAL EDUCATION, http://www.eelawcentre.org.za/focus_area (last visited Jan 13, 2015). See also Skelton, supra note 12, at 23 (“Litigation on children’s rights to a basic education has been used to promote another important ‘A’-word: Accountability. In this regard the courts have played a significant role in shaping the contours of governance, as well as providing access to services.”). See also ACTION PLAN TO 2014: TOWARD THE REALISATION OF SCHOOLING 2025, Department of Basic Education (Oct. 2011) (“The current plan will help the sector to plan in a manner that is more disciplined, professional and accountable.”).

62. Cases in which the court was more willing to intervene in sensitive political decisions include Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC) (S. Afr.), Glenister v. President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) (S. Afr.), and Democratic Alliance v. President of South Africa and Others 2014 (4) SA 402 (WCC) (S. Afr.). Cases in which the court adopted a more deferential approach to the legislature for socio-economic rights include Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC) (S. Afr.) and National Treasury & Others v. Opposition to Urban Tolling Alliance and Others 2012 ZACC 18 (CC) (S. Afr.).

63. Mazibuko & Others v. City of Johannesburg & Others 2010 (4) SA1 (CC) (S. Afr.).

64. Id. ¶60 (“[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.”).
regulations, rather than defining the contours of certain socio-

economic rights. 65

Mazibuko can be distinguished from right to education cases,
because “right to sufficient water” is a “progressively realisable” right,
whereas the right to basic education is “immediately realisable.” 66

However, as discussed above, the Constitutional Court has not yet de-

fined the substance of the right to basic education either. 67 There is a

care concern that the Court will be hesitant to side with certain educational

claims that may appear to be more concerned with education policy,

but it is too early to tell at this point. It is even harder to predict what

the Court’s stance will be with regards to class actions seeking educa-

tion reform, as this is an entirely new area of law.

IV. CONCLUSION

Despite challenges to strategic litigation, there have been tre-

e mendous successes through The Mud Schools case. Of the 510

schools that were deemed “mud schools” in the beginning of the litigation

process, around 200 have either been replaced by proper building

structures, or are in the process of being replaced. 68

South African practitioners in this area often explain that their

work is part of the project of “constitutional transformation” or “trans-

formative constitutionalism,” because the cases that they work to

build have the aspirational purpose of changing society through con-

stitutional litigation. In this context, the work of organizations like the

Legal Resources Centre has forced the government to comply with its

constitutional and statutory obligations, and serves as the “overseer”

65. This is the “minimum core debate” among comparative constitutional law scholars.
See generally Katharine G. Young, The Minimum Core of Economic and Social Rights: A
Concept in Search of Content, 33 Yale J. of Int’l L. 113 (2008). Mazibuko, supra note 62,
stands as a case example of courts not wanting to define the minimum core.
66. Supra Introduction.
67. Supra note 14.
68. The exact number is not clear because it is difficult to do an inventory of which
schools have been replaced. These schools are located in the mountainous Transkei region,
have little access to post and email, and are often tens of miles apart. Furthermore, the defini-
tion of “mud school” is not standardized so teachers and principals may not be aware that their
infrastructure is much worse than that of other schools in the Eastern Cape.
69. Transformative constitutionalism is defined by Karl Klare as “a long-term project of
constitutional enactment, interpretation, and enforcement committed . . . to transforming a
country’s political and social institutions and power relationships in a democratic, participatory,
and egalitarian direction. Karl Klare, Legal Cultural and Transformative Constitutionalism, 14
that monitors the successes of court judgments and settlements. The LRC also aids in asking the court to interpret those obligations when the government’s interpretation is deficient or mistaken.

Ideally, the work of a case is completed once the court hands down an order and the government promptly complies. However, the breadth of the relief sought in these class actions and public interest matters, coupled with an intransigent Department of Education, means that enforcing judgments becomes the most significant challenge and the most time-consuming stage of the litigation and post-litigation process. For organizations such as the LRC, the work truly begins after the case has succeeded in court. This has been true of many of LRC’s cases, as illustrated by The Mud Schools Case.

The end goal of transformation is to break with the past and create a society based on the ideals set forth in the Constitution. The reality is that such a goal will require not only deeper engagement with the courts and innovative litigation strategies, but also mobilizing non-litigation based strategies to improve the effectiveness of each case. It is also important to recognize that litigation is just one tool to be used in assisting the process of transformation, and there are deeper institutional, political, and economic problems to be resolved.70 The Legal Resources Centre is working through this process, issue by issue.

Qingliu (Mary) Yang*

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70. Richard Calland, Chimera or real - how robust is South Africa’s post-1994 Constitutional order? 3 (2014) (unpublished manuscript), available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Calland.pdf (2014) (cautioning those involved in transformation discussions to not be “constitutional fetishists’ who would have people believe that the Constitution can either magically resolve all the weaknesses in South Africa’s politics and government, or else no less magically ‘transform’ its society, notwithstanding the brutal and unforgiving political economy and entrenched structural faultlines of its economy.”).

*J.D. Candidate, Columbia Law School, 2016. I would like to thank Sarah Sephton, Cameron McConnachie, Professor Jamal Greene of Columbia Law School, and Professor Sandra Liebenberg of Stellenbosch University for their advice and guidance during the writing process.