**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**CASE NO: 2840/2017**

**REPORTABLE**

In the matter between:

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| **CENTRE FOR CHILD LAW** | First Applicant |
| **THE SCHOOL GOVERNING BODY OF PHAKAMISA HIGH SCHOOL** | Second Applicant |
| **37 CHILDREN** | Third to Thirty-ninth Applicants |

**and**

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| **MINISTER OF BASIC EDUCATION** | First Respondent |
| **MEC FOR EDUCATION, EASTERN CAPE** | Second Respondent |
| **SUPERINTENDENT GENERAL OF THE EASTERN CAPE DEPARTMENT OF EDUCATION** | Third Respondent |
| **MINISTER OF HOME AFFAIRS** | Fourth Respondent |
| **DIRECTOR-GENERAL OF HOME AFFAIRS** | Fifth Respondent |
| **SECTION 27** | First *Amicus Curiae* |
| **THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION** | Second *Amicus Curiae* |

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**JUDGMENT**

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**MBENENGE JP**

*Introduction*

[1] Central to this application is the right to basic education enshrined, without any qualification, in section 29 of the Constitution. The application concerns children who have been precluded from unconditionally continuing to attend public schools unless they or their parents/guardians identify themselves by means of, *inter alia*, passports, identity documents, birth certificates or permits.[1] Justification for the requirements set by the Department of Basic Education[2] is to improve the administration within the Department and, at another level, to manage and ameliorate challenges associated with the control of immigration.

In ordinary parlance, learners lacking the requisite documents have become known and are referred to in this judgment as "*undocumented children.*"

[2] Before delving into the substance of the application, it is as well to reflect on the significance of education, about which one writer has said:

> "Every person must face the practical realities of life– its opportunities, its responsibilities, its defeats and its successes. How he is to meet these experiences, whether he is to become master or victim of circumstances depends largely upon his preparation to cope with them- his education."[3]

[3] Education is a mighty tool in the hands of the possessor. Its efficacy depends largely on the bulwark that surrounds it– the right to education. In *Juma Musjid*[4] the Constitutional Court, recognising the importance of the right to basic education, said:

> "Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and work opportunities. To this end, access to school– an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right."[5]

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[1] These means of identification are hereinafter otherwise collectively referred to as identification documents.
[2] The Department of Basic Education (DBE).
[3] Ellen G. White, *Education*, foreword at page 7.
[4] *Governing Body of the Juma Musjid Primary School and Others v Essay N.O. and Others (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) (*Juma Musjid*).
[5] Id at para 43; also see *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at para 3, where Moseneke DCJ noted:

[4] In our constitutional dispensation basic education is a pivot of transformation, serving as it does to "*redress the entrenched inequalities caused by apartheid*."[6] On the transformative and empowerment role of education one finds the following remarks articulated by the United States Supreme Court quite edifying:

> "Today, education is perhaps the most important function of State and local government. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in him helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."[7]

*Factual Background*

[5] Prior to the year 2016, the Department of Education of the Eastern Cape Provincial Government[8] provided teaching staff and funding to all learners at schools in the Eastern Cape regardless of whether the learners possessed identification documents. Funding was provided to schools based on the actual number of learners in the school, and not on the number of learners whose identification document particulars were entered into the South African Schools Administration and Management System.[9] This system ensured that all learners in the Province gained access to basic education and the concomitant nutrition provided by the National

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> ". . . . All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning. . . ."

[6] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 45.

[7] *Brown v Board of Education of Topeka* 347 U.S.483 (1954) at 493.

[8] The Provincial Department.

[9] Otherwise referred to as SASAMS, an electronic database of all the learners who attend public schools in South Africa and contains the personal and educational details of the learners. It is utilized to determine the learner numbers of a school for purposes of any Norms and Standards, Post Provisioning allocation, and the provision of funding for the schools' National School Nutrition program, which is an important program that contributes to the realisation of learners' rights to education and food and nutrition as it assures that learners are provided with one meal per school day to enable them to concentrate on their school activities and receive the necessary nutrition for their proper development.

School Nutrition Program,[10] with the result that learners without identification documents were not excluded from attending school.

[6] It came to pass that the then Acting Superintendent-General of the Provincial Department issued a Circular dated 17 March 2016[11] for "*SCHOOLS TO UPDATE SASAMS WITH IDENTITY OR PASSPORT NUMBERS OF LEARNERS*". In part, the Circular provides:

> "1. PURPOSE
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> The purpose of the circular is to inform school governing bodies and management of the responsibility of updating the South African Schools Administration & Management System (SASAMS) Database with the correct National Identity ("ID") or Passport numbers for all learners…
>
> This circular provides that any Norms and Standards, Post Provisioning allocation and Nutrition transfers to schools will be based only on the learner numbers where valid ID passport numbers have been captured on the SASAMS system.
>
> …
>
> 2. APPLICATION
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> The circular applies to all Public Ordinary, subsidized Independent and Special Schools within the Eastern Cape province as provided for in The Schools Act, Act 84 of 1996 ("SASA").
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> 3. …
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> 4. IMPLEMENTATION
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> 4.1 …
>
> 4.2 …
>
> 4.3 … These amounts to be transferred will be based only on validated learner ID and passport numbers.[12] In cases where learners do not have ID or passport numbers the Department will not transfer the budget for such learners until such time as the valid ID or passport numbers have been provided. As per the Schools Admission Policy, schools have two weeks after a learner has been admitted to get the ID or passport number of the learner…"

[7] Circular 06 of 2016 was followed by a further circular issued by the Acting Superintendent-General on 06 June 2016 advising that funding for learners with no identity numbers or with invalid numbers would be withheld until corrected,

[10] National School Nutrition Program (NSNP).
[11] Circular 06 of 2016.
[12] It is not in dispute that "*ID and passports*" includes identification documents, or any other permit issued by the Department of Home Affairs to regularize a learner's stay in the country.

failing which, by 17 June 2016, the affected learners would be regarded as no longer in existence and thereupon removed from enrolment at the affected schools.

[8] Efforts by the first and second applicants to urge the Provincial Department not to give effect to Circular 06 of 2016[13] yielded naught. In practical terms, the consequences of the decision to stop funding undocumented children resulted in their exclusion from school and the exclusion of learners from being funded if they remained at school. It is common cause that in the case of Phakamisa High School, a no-fee school located at Zwide Township, Port Elizabeth, on whose behalf the second applicant launched the application, there were, at the time of the launch of the application, 37 learners without valid identity numbers. This number constitutes a decrease from the 2016 academic year when there were 99 such learners.

*Chronological litigation history*

[9] This application was launched on 26 May 2017 by the first and second applicants, against the first, second and third respondents, seeking, in the main, an order declaring Circular 06 of 2016 "*communicated on 17 March 2017 that any Norms and Standards, Post Provisioning allocation and National School Nutrition [P]rogram … transfers to schools in the Eastern Cape Province will be based only on the learner numbers where valid identity, permit or passport numbers have been captured in the SASAMS … is inconsistent with the Constitution and/or the South African Schools Act and unlawful.*"

[10] The first and second applicants also seek consequential relief which, in effect, requires the first to third respondents to take steps to address the post establishment, paper budget, NSNP funding and furthermore requires these respondents to report to the court and the first and second applicants' attorneys regarding the steps taken to comply with the order. The remainder of the relief seeks to address the Admission Policy for Ordinary Public Schools.[14] It is a quest for, *inter alia*, an order

[13] These having been, *inter alia*, a demand letter on 21 October 2016; a meeting with departmental officials on 28 October 2016 and another demand letter on 11 November 2016.

[14] Published in Government Gazette 19377 under Government Notice No. 2432 of 1998, issued in terms of section 3(4)(i) of the National Education Policy Act of 1996 (hereinafter conveniently referred to as the Admission Policy). In this judgment, "*Circular 06 of 2016*"is used interchangeably with "*Admission Policy*".

"[d]*irecting that the three month period for the finalisation of the admission of a learner without an identity document or passport or permit in section 15 of the National Education Policy Act 27 of 1998- Admission Policy for Ordinary Public Schools is not mandatory and that where a learner cannot comply with this requirement he or she must remain conditionally registered at the school and the principal is directed to accept alternative proof in place of birth certificates, passports or permits*" and that "*no learner may be excluded from a public school on the basis that he/ she does not have an identity number, permit or passport.*"

[11] After the delivery of the replying affidavit, the first and second applicants approached the court, by way of urgency under case number 3317/18, seeking, mainly, an order that named learners of the Phakamisa High School, 37 in number, be admitted into a public school pending the final determination of this application. The court (*per* Mtshabe AJ) refused the applicants the interim relief they sought,[15] having been of the view that no proper case therefor had been made out.[16]

[12] Following this turn of events, on 13 December 2018, the 37 children sought leave to intervene in this application. The majority of these children are born of South African parents,[17] but have, for a variety of reasons,[18] been unable to obtain birth

[15] *Centre for Child Law and Others v Minister of Basic Education and Others* (3317/2018) (ECG) unreported (10 December 2018).

[16] The court in paras 53-5 reasoned as follows:

> "In terms of the Admission Policy, in my view, it is a pre-requisite that before a child can be admitted or can accesses (sic) the basic right to education the parent must provide and produce a birth certificate and in the event of it not being available the parent must produce proof that he or she has applied for it from the Department of Home Affairs. In the case before me it is clear that the children do not have birth certificates and there is no evidence that the parents or care-givers or guardians have applied for birth certificates from the Department of Home Affairs. To me Applicants and or children cannot access the basic right to education without complying with the Admission Policy.
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> I agree with Mr Quinn SC that the relief sought by the applicants is incomplete, because unless they make an application to declare certain provisions of the statutes which I have refer (sic) to above in particular Admission Policy invalid and inconsistent with the Constitution, the right to basic education is limited or cannot be accessed.
>
> In the pending application (Case No: 2480/17), I could not find any prayer whereat the first applicant seeks a relief that the Admission Policy must be declared unconstitutional and invalid. Further there is no prayer in the pending application that the provisions of statutes I have referred to above, which according to the first applicant violate the right to basic education should be declared unconstitutional and be set aside."

[17] By virtue of section 2(1)(b) of the South African Citizenship Act 88 of 1995, they are South African citizens because one of their parents are, at the time of their birth, South African citizens.

[18] These reasons are, *inter alia*—

(a) only one of the parents is a South African citizen, usually the father and the mother is undocumented and can therefore not register the birth of the child;

certificates.[19] The others are foreign children residing in South Africa without the necessary documentation allowing them to reside or study in South Africa.[20]

[13] Meanwhile, on 15 February 2019, the Constitutional Court set aside the order granted by Mtshabe AJ, dated 10 December 2018, and directed, *inter alia*, as follows:

> " . . .
> 4. The respondents are directed to admit and enrol the learners listed in annexure "A" to this order into appropriate adult basic education and training centres (ABET centres), pending the final determination of the litigation instituted in the High Court under case number: 2480/17.
> 5. The respondents are directed to admit and enrol the learners listed in annexure "B" to this order into ordinary public schools, pending the final determination of the litigation instituted in the High Court under case number: 2480/17.
> 6. The admission and enrolment referred to in paragraphs 4 and 5 above will not be conditional upon the learners complying with the admission criteria set out in sections 15, 20 or 21 of the Admission Policy for Ordinary Public Schools (GN 2432 of 1998).
> . . ."[21]

[14] The 37 children were granted leave to intervene as further applicants (third to thirty-ninth[22] applicants) in March 2019.[23] At the same time, the Minister of Home Affairs and the Superintendent-General of the Department of Home Affairs were joined as the fourth and fifth respondents, respectively. The 37 children thereupon embarked on a challenge to clauses[24] 15[25] and 21[26] of the

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(b) the South African father is barred from registering the child in terms of section 10 of the Births and Deaths Registration Act read with regulation 12 of the Regulations on the Registration of Births and Deaths, 2014;
(c) some of the mothers are South African but are unable to register the births of their children because they do not meet certain requirements of the Births and Deaths Registration Act such as the "*proof of birth*" to be provided to the Department of Home Affairs; and
(d) some of the children's parents have passed away or have abandoned them leaving them in the care of a care-giver who is unable to provide the required documentation to register the children.

[19] Some of the affected children have birth certificates issued in their country of origin, whilst most do not.

[20] These children do not have birth certificates because they are born of Lesotho nationals with no claim to South African nationality and whilst some of the children possess Lesotho birth certificates, they do not possess study permits or proof of application for study permits.

[21] Constitutional Court order dated 15 February 2019 (CCT 19/19).

[22] Reference in the process heading to "*third to twenty-sixth applicants*" must have come about through inadvertence, for a proper computation of the total number of applicants gives us 39 in all, hence the process heading in this judgment has been amended to reflect the correct position (I have yet to check this thoroughly).

[23] Court order dated 19 March 2019.

[24] The Circular itself makes mention of and is divided into "*paragraphs*". The parties argued the matter on the basis that the Circular embodies "*sections*". Purely for the sake of convenience "*clause*" and "*clauses*" will be used in this judgment.

[25] Clause 15 of the Admission Policy requires a parent applying for admission of a learner to an ordinary public school to provide an official birth certificate to the principal of the school, failing which the learner may only be admitted to the school conditionally until a copy of the birth certificate is obtained for the finalisation of the admission within three months of the conditional admission.

Admission Policy, and sections 39[27] and 42[28] of the Immigration Act 13 of 2002, relied on by the first to the third respondents in opposition to this application.

[15] The fourth and fifth respondents delivered their opposing affidavit on 21 June 2019.

[16] The South African Human Rights Commission[29] was admitted as *amicus curiae* in these proceedings on 02 July 2019 in order primarily to make submissions on the proper interpretation of the Immigration Act.

[17] By order dated 16 July 2019 Section 27[30] was also admitted as *amicus curiae*. Section 27 seeks to assist the court on the access component of the right to basic education including its protection under international human rights law instruments and its interpretation in regional fora and comparative jurisdictions. Secondly, Section 27 relies on the constitutional and legislative provisions that empower and oblige organs of State to co-operate and co-ordinate their efforts to advance the realisation of constitutional rights.

[18] On 17 July 2019 the first to third respondents delivered their supplementary opposing affidavit. In that affidavit, they make reference to Circular 1 of 2019.[31]

[19] Circular 01 of 2019 accommodates undocumented children at schools, whilst their parents or care-givers take steps to secure the requisite documents. The Circular stipulates a maximum period within which such steps must be taken, and, in part, does so in the following terms:

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[26] Clause 21 of the Admission Policy obliges illegal foreigners to provide evidence that they have applied for their stay in the country to be legalised when applying for admission for their children or for themselves to any ordinary public school.
[27] Section 39(1) of the Immigration Act prohibits a learning institution from knowingly providing training or instruction to illegal foreigners.
[28] Section 42(1) of the Immigration Act makes it an offence for any person to aid, abet, assist, enable or in any manner help an illegal foreigner or a foreigner in any manner that violates their status, including by providing instruction or training to him or her, or allowing him or her to receive instruction or training.
[29] The South African Human Rights Commission hereinafter otherwise conveniently referred to as the SAHRC.
[30] Section 27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance, *inter alia*, constitutional rights, including the right to basic education as set out in section 29 of the Constitution.
[31] Circular 1 of 2019 dated 05 July 2019 (Circular 01 of 2019).

> "The Head of the Department when considering the reasons for the delay in obtaining the birth certificates or any other relevant documentation required for admission must treat each case on its own merits and may extend the period within which to obtain the required documentation up to a period of not more than twelve (12) months from the date on which the undocumented learner was conditionally admitted at school. However the Head of the Department must continue liaising with the nearest office of Department of Home Affairs or the Foreign Embassy of the country of origin of a learner, as the case may be, to ensure that the required documentation are obtained before the end of the year in which the learner was admitted conditionally."[32]

[20] Shortly before the hearing of this matter, on 18 September 2019, the first to third respondents sought leave to file a further supplementary affidavit which seeks to verify that all learners, including undocumented children, are being funded during the current year. The affidavit also introduces Circular 06 of 2019, the content of which reiterates and confirms the terms of Circular 01 of 2019.[33]

*The bases of the respective parties' cases*

[21] The first and second applicants have founded their case on the contentions that (a) the right enshrined in section 29(1)(a) read with section 28(2)(a) of the Constitution accords "*everyone*" a basic right to education, and not a right subjected to a condition that they provide identification documents; (b) the impugned decision infringes section 28(2) of the Constitution which provides that "[a] *child's best interests are of paramount importance in every matter concerning the child*"; (c) the decision is also discriminatory within the meaning and contemplation of the equality clause[34] and section 5 of the South African Schools Act 84 of 1996[35] which states that "*a public school must admit learners and serve their educational requirements without unfairly discriminating in any way*"; and (d) the right to dignity under section 10 of the Constitution.

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[32] Paragraph 2.4.9(c) of Circular 01 of 2019.

[33] The relevant portion reads:

> "7. …, that the department took a decision to transfer funds to all learners registered in the system ("the SA-SAMS and LURITS") with effect from April 2019.
>
> 8. The circular further indicates that the verification process of the existing learners will ensue after the transfer of funds to the schools in the first tranche. The first tranche of payment was made in April of the current year.
>
> 9. The circular further made provision that in the event that the E[astern] C[ape] D[epartment] o[f] E[ducation] transfers funds to a school using the criteria reported in the circular and subsequently discovers that the information provided by the school is invalid, the department will hold the school's principal liable.
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> 10. …, the request is made that schools affected by having learners without ID numbers are urged to cooperate in the process."

[34] Section 9(1) of the Constitution.

[35] The South African Schools Act (the Schools Act).

[22] Because this application was launched long after the expiry of the 180 days period referred to in section 7(1) of the Promotion of Administrative Justice Act 3 of 2000[36], the first and second applicants seek condonation in terms of section 9 of PAJA. They proffer an explanation of how the delay came about.

[23] At the heart of the first to third respondents' opposition to the relief sought by the first and second applicants is the Admission Policy.

[24] The bases of opposition as otherwise adumbrated in the affidavit delivered in answer to that of the first and second applicants, are as follows:

(a) the Births and Deaths Registration Act stipulates that every birth to a child by South African citizens must be registered within thirty days;

(b) undocumented minors are most vulnerable to human trafficking, child prostitution, child labour and all other related abuses affecting minor children;

(c) the Admission Policy—

(i) minimizes over-reporting and eliminates ghost learners for the preservation of State resources;

(ii) promotes accountability in terms of financial management and funding allocation and serves to provide social services to a group within the citizenship of South Africa that is really vulnerable and in need of the social services;

(iii) in the context of accountability and financial management, protects the relevant department from providing a social right to people who are in the Republic illegally and are not documented; and

[36] Promotion of Administrative Justice Act (PAJA).

(iv) upholds of the Constitution, the Children's Act, the Immigration Act, the Births and Deaths Registration Act and the Rule of Law.

[25] The first to third respondents proffered no response to the allegations made in support of the application for condonation of the late launch of this application.

[26] In the supporting/confirmatory affidavits filed on behalf of the 37 children, details of the challenges that their parents or care-givers face are set out. These affidavits make it clear that generally the attempts to obtain the necessary documents are rendered futile.

[27] In their further answering affidavit delivered in response to that of the 37 children, the first to third respondents, *inter alia*, allude to the need to amend the Admission Policy as a result of legislative and policy developments since the current Admission Policy was adopted. In a supplementary affidavit of the first to third respondents subsequently delivered,[37] the point is made that, whilst the Admission Policy is being amended, undocumented children are being admitted to public schools and receiving basic education, albeit conditionally.

[28] The fourth and fifth respondents seek to justify the impugned provisions of the Immigration Act and make out a case for the limitation brought about by these provisions in terms of section 36 of the Constitution, regardless of the outcome of the application on the Admission Policy. The nub of their case is captured in their opposing affidavit of which the salient part reads:

> "…there is no reason why illegal foreigners ought to receive free education by establishing, as of right, children of this status to attend '*no fee*' schools, which are entirely subsidized by taxpayers. This is likely to lead to increased illegal immigration, as well as potential child abandonment or child-headed households, especially from neighbouring countries, once it is ordered that all children in South Africa must obtain a free education. I understand that the same privilege is not afforded by all our neighbouring countries, and certainly not all of them in Africa, from where many of the illegal immigrants to this country originate."

[29] It is essential that measures prohibiting free access to public education as well as those contained in the Immigration Act, contend the fourth and fifth respondents,

[37] The affidavit is deposed to by the Acting Director-General of the Department of Basic Education, Mr Shunmugam Govidasamy Padayachee.

are in place to prevent or at the very least dissuade, persons who are not citizens or otherwise legally entitled to free government services from burdening the country's constrained financial resources. In denying that persons illegally in the country are entitled to basic education, the fourth and fifth respondents further contend that undocumented children ought to claim whatever rights they may have regarding basic education from their country of citizenship, lest South Africa becomes a destination for persons requiring or desiring free education.

*The stance of the amici curiae*

[30] The stance of Section 27 is that—

(a) when interpreted in line with international law and with reference to comparative law, the right to education enshrined in section 29(1)(a) is afforded to all children within South Africa, regardless of their migration or documentation status;

(b) (i) Clauses 15 and 21 of the Admission Policy; and

(ii) Sections 39(1) and 42 of the Immigration Act,

are unconstitutional; and

(c) the respondents have not justified the limitations imposed by the provisions referred to in paragraph (b) above in terms of section 36 of the Constitution.

[31] The SAHRC, on the other hand, seeks to demonstrate that a declaration of invalidity of sections 39(1) and 42 is not the appropriate relief because, upon a proper interpretation, the Immigration Act does not prohibit the provision of basic education to children who are illegally present in the country. This stance has the support of the 37 children as well, save that they persist in a declaration of unconstitutionality in the event of the court not being persuaded that the SAHRC's interpretation is correct.

*Issues for determination*

[32] At the commencement of the hearing of this matter Ms *Sephton*, on behalf of the first and second applicants, informed the court that Circular 06 of 2016 has been withdrawn and Circular 01 of 2019 issued. Resulting from this, she submitted, all learners, including the undocumented ones, are being funded at schools in terms of Circular 01 of 2019. In Ms *Sephton's* view, the relief that the first and second applicants seek has become moot. She handed up a draft order for consideration by the court.[38] The court was informed that the draft order had been drawn with input from the first to third respondents' counsel, Mr *Erasmus* (appearing together with Ms *Baloyi-Mere*). Mr *Erasmus* contended that he could not argue contrary to the draft order[39] because it adequately addresses the *de facto* position on the ground. More about the draft order, later.

[33] The stance that the challenge to the Admission Policy as embodied in Circular 06 of 2016 has become moot has the support of all the respondents, and not the third to thirty-ninth applicants and the two *amici curiae*. The remaining applicants persisted in all relief effectively barring the DBE and the Provincial Department from allowing undocumented children to be enrolled at public schools subject to the resolutive condition that their parents eventually produce identification documents. The prayers seeking to attack certain provisions of the Admission Policy and those of the Immigration Act also remain extant.

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[38] The draft order reads:

"1. Eastern Cape Department of Education Circular 6 of 2016 has been withdrawn, is no longer in force and has been replaced by Circular No. 6 of 2019, signed by the Superintendent-General of the Eastern Cape Department of Education dated 26 February 2019.

2. Undocumented learners who are admitted to schools under Circular 1 of 2019 are registered on SASAMS, irrespective of their ability to provide an identity number, permit, or passport number.

3. The first, second and third respondents shall, within 20 days from the date of this order, issued a notice to all South African Schools and School Governing Bodies advising them of 1 and 2 above.

4. The first, second and third respondents shall, within 30 day of the date of this order provide the first and second applicant's attorneys with a copy of this notice.

5. The first to third respondents will include all learners registered on SASAMS for the purpose of calculating the educator post-establishment of all schools with effect from the educator post establishment for 2020.

6. The first to third respondents will include all learners registered on SASAMS for the purpose of setting the paper budgets for all schools AND for the purpose of allocating NSNP (National School Nutrition Program) funding to qualifying schools with effect from October 2019 to December 2019, subject to the payment of the adjusted budget.

7. The first to third respondents will include all learners registered on SAMSAMS for the purpose of setting the paper budgets for all schools AND for the purpose of allocating NSNP (National School Nutrition Program) funding to qualifying schools with effect from January 2020.

8. The first to third respondents shall pay the first and second applicants' costs, including the costs consequent upon the employment of two counsel where utilized."

[39] Mr *Erasmus* could not pitch it to the level of saying the order was by consent.

[34] The Court was also informed, during argument by Mr *Erasmus* that the contention raised in the first to third respondents' heads of argument that the applicants should be non-suited for having inordinately delayed before approaching the court has not been abandoned.

[35] Therefore, the issues that this court has been called upon to determine are—

(a) whether there was an unreasonable delay in launching the application and, if so, whether such should be condoned in terms of section 9 of PAJA;

(b) whether the issue on the constitutionality of the Admission Policy embodied in Circular 06 of 2016 has become moot;

(c) the constitutionality of clauses 15 and 21 of the Admission Policy;

(d) whether sections 39(1) and 42 of the Immigration Act should be interpreted as prohibiting the provision of basic education to children whose presence in the country is illegal; and

(e) what order the court should grant.

[36] These issues are dealt with *seriatim*, within the context of the relevant regulatory framework applicable to each one of the subjects referred to above.

*Was there an unreasonable delay in bringing the application?*

[37] The contention persisted in by Mr *Erasmus* (in the heads of argument only) is that the "[a]*pplicants approached this court seeking an order declaring section*[s] *15 and 21 of the Admission Policy as unconstitutional*" and that the applicants "*failed to give an explanation on why it is only now that they are challenging the provisions of a policy … or even a circular issued … on … 16 November 2016*."

[38] The contention is not directed at the relief sought by the 37 children. The first and second applicants have, in their papers, sought condonation in relation to the decision communicated to the second applicant on 17 April 2016.

[39] The first and second applicants have predicated their cause of action on section 6(1) of PAJA[40]. Proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date "… *on which the person concerned was informed of the administrative action…*"[41]

[40] The present application was launched just over a year after the impugned decision was communicated to the second applicant.

[41] In *Opposition to Urban Tolling Alliance*[42] it was held that section 7 creates a presumption that a delay of longer than 180 days is "*per se unreasonable*." There is thus no further enquiry to engage in regarding the reasonableness or otherwise of the delay.

[42] Having found that the launch of this application is beset by unreasonable delay, I move to the next stage of the enquiry.

*Should the delay be condoned?*

[43] The period of 180 days referred to in section 7(1)(b) of PAJA may be extended by a court on application by the person concerned.[43] When the delay is longer than 180 days a court is required to enquire into whether the interests of justice require condonation of the unreasonable delay.

[44] "*Interests of justice*" features prominently and generally in condonation applications. In *Brummer*[44] laying the standard that applies to the granting of both condonation and leave, the Constitutional Court said:

> "The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other

[40] In their founding affidavit they say the impugned decision is inconsistent with the Constitution and unlawful and reviewable under sub-sections 6(2)(i); 6(2)(a)(i); 6(2)(c); 6(2)(f)(ii) and 6(2)(h) of PAJA.
[41] Section 7(1)(b) of PAJA.
[42] *Opposition to Urban Tolling Alliance and others v The South African National Roads Agency Ltd and others* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (*Opposition to Urban Tolling Alliance*); also see *Buffalo City Metropolitan Municipality v Asla Constructions (Pty) Limited* [2019] ZACC 15; 2019 (6) BCLR 661 (CC); 2019 (4) SA 331 (CC).
[43] Section 9(1) of PAJA.
[44] *Brummer v Gorfil Brothers Investments (Pty) Ltd and others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3 (*Brummer*); also see *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC); 2014 (3) SA 240 (CC).

defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."

[45] In *Oudekraal Estates*[45] Navsa JA stated the following in relation to the delay rule:

> "In reviewing and considering whether to set aside an administrative decision, courts are imbued with a discretion in the exercise of which relief may be withheld on the basis of an undue and unreasonable delay causing prejudice to other parties, notwithstanding substantive grounds present for the setting aside of the decision. The application of the delay rule would in a sense '*validate*' a nullity. This rule evolved because, prior to the Promotion of Administrative Justice Act 3 of 2000 (PAJA), no statutorily prescribed time limits existed within which review proceedings had to be brought. The rational was an acknowledgment of prejudice to interested parties that might flow from an unreasonable delay as well as the public interest in the finality of administrative decisions and acts."

[46] "[I]*nterests of justice*" in the context of section 9(2) of PAJA was considered in *Camps Bay Ratepayers*[46] where it was held:

> "[T]he question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.
>
> That, in my view, plainly contemplates the exercise of a discretion in the '*loose*' sense."[47]

[47] The discretion to be exercised in considering applications for condonation generally is a judicial one and, in essence, the question is that of fairness to both sides. In *United Plant Hire*[48] the Court held:

> "In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation [therefor], the prospects of success …, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.
>
> These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not so strong."[49]

[48] The advent of the constitutional dispensation has introduced a further dimension to the enquiry. For instance, in *Ntamo*[50] the Court was persuaded to

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[45] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2009] ZASCA 85; 2010 (1) SA 333 (SCA) at para 33 (*Oudekraal Estates*).
[46] *Camps Bay Ratepayers and Residents Association and another v Harrison and another* [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) at para 54.
[47] Also see *Beweging vir Christelik- Volkseie Onderwys v Minister of Education* [2012] ZASCA 45; [2012] 2 All SA 462 (SCA).
[48] *United Plant Hire (Pty) Ltd v Hills and others* 1976 (1) SA 717 (A) (*United Plant Hire*).
[49] Id at page 720 F - G.

condone the delay mainly because the case involved the alleged infringement of a constitutionally entrenched right, which in that instance had been the right to vote, which was regarded as weighing heavily in favour of a ventilation of the merits of the matter despite the delay in launching the application. The Court further considered the fact that the respondents therein had placed no facts or circumstances warranting the conclusion that they had been prejudiced, and the prospects of success.

[49] The Constitutional Court has held that, even within the context of PAJA, there has to be a consideration of the merits of the impugned decision in order to determine whether the interests of justice dictate that the delay should be condoned,[51] laying to rest the view previously held that in considering whether there had been undue delay the court did not have to consider the merits.[52]

[50] It is common cause, or at least not in dispute, that the second applicant became aware of the role played by their attorneys of record and the possibility that the first applicant could champion the second applicant's cause some 5 months after becoming aware of the impugned Circular, in October 2016. Negotiations subsequently embarked upon by the attorneys yielded no concrete results; there were limited resources which resulted in a struggle to secure the services of senior counsel willing to work for a reduced fee; and for some time the applicants harboured a mistaken belief that the matter could be resolved outside of court.

[51] Even though this application was launched way beyond the 180 days period stipulated in PAJA, in my view, the explanation tendered for the delay passes muster. The second applicant did not rest on its laurels after the disputed decision had been communicated to it. The papers make it demonstrably clear that at the instance of the applicants there was constructive engagement with the powers that be in the hope that the parties' differences in relation to the impugned Admission Policy might be

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[50] *Ntamo and another v African National Congress Regional Executive Committee, O R Tambo Region and others* [2017] ZAECMHC 49 (24 November 2017).
[51] *Khumalo and another v Member of the Executive Council for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC); also see above n 42 *Buffalo City Metropolitan Municipality* at paras 55- 8.
[52] *Cf Asla Construction (Pty) Limited v Buffalo City Metropolitan Municipality and another* [2017] ZASCA 23; [2017] 2 All SA 677 (SCA); 2017 (6) SA 360 (SCA).

resolved without the need to litigate. The respondent did not argue that there are no prospects of success on the merits.

[52] There is no doubt that this case, raising as it does a novel constitutional issue, is of national importance. Upholding the delay contention would still leave the *lis* between the 37 children and the respondents extant. The fact that this case involves constitutional rights, especially of children would, in my view, on its own warrant the grant of condonation of the unreasonable delay and adjudication of the merits of the matter.

[53] It is also not without significance that, in their affidavits, the first to third respondents adopted a supine attitude towards undue delay, mum in relation to whether they had suffered any prejudice. Moreover and in any event, the stance of these respondents in relation to the content of the draft order handed up on behalf of the first and second applicants wards off any suggestion that these respondents would be prejudiced were the merits of the case to be adjudicated on.

[54] I therefore conclude that a good case has been made out for condoning the delay occasioned in launching this application.

*Has the relief sought by the applicants become moot?*

[55] The first to third respondents argued that the relief sought by the applicants has become moot, because—

(a) the third respondent has withdrawn Circular 06 of 2016 and replaced it with Circular 01 of 2019, rendering the 2016 Circular not operative;

(b) a multitude of undocumented children have, in terms of Circular 01 of 2019, been admitted to schools and are thus being funded; and

(c) in any event, the DBE has, since the launch of the application, set in motion a process of amending its Admission Policy during which the

members of the public and the applicants will be given an opportunity to make their input.

[56] To advance their argument, the first to third respondents primarily rely on *J T Publishing*[53], where Didcott J refused to issue a declaratory order, having been of the view that the issue of inconsistency of the provisions of the Publications Act of 42 of 1974 with the Interim Constitution raised in that matter had become abstract, academic or hypothetical in nature.[54]

[57] Mr *Cassim*, who, together with Ms *Freese* appeared for the fourth and fifth respondents, sought to add a further bow to the arrow. He contended that by virtue of the "*order of court*" resulting from an agreement about which he only heard for the first time on the morning of the hearing, the "*remaining issues have become moot*."

[58] It is trite law that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.[55] The enquiry is whether the claim has been mooted only because the respondent has voluntarily, but not necessarily permanently, acquiesced. For [s]*o long as the person mounting the legal challenge confronts continuing harm, collateral harmful consequences that continue to endure, or a significant prospect of future harm, the case cannot be deemed moot*."[56]

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[53] *J T Publishing (Pty) Ltd and another v Minister of Safety and Security and others* [1996] ZACC 23; 1996 (12) BCLR 1599; 1997 (3) SA 514 (CC) (*J T Publishing*).
[54] Id at para 15.
[55] *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 21; also see *Koko v Eskom Holdings SOC Limited* [2018] ZALCJHB76 (21 February 2018) at para 21, where it was held that:

> ". . . . A case would be moot if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision. It is moot, if it no longer presents an existing or live controversy or the prejudice or threat of prejudice, which to an applicant, no longer exists."

[56] *Afriforum NPC and others v Eskom Holdings SOC Limited and others* [2017] ZAGPPHC 199; [2017] 3 All SA 663 (GP) at para 110, relying on *Southern Pacific Terminal Co v Interstate Commerce Commission* 219 US 498, 514 - 515 (1911).

[59] It should also be borne in mind that mootness does not constitute an absolute bar, and involves the exercise of a discretion. In *Langeberg Municipality*[57] it was held:

> "A prerequisite for the exercise of the discretion is that any order which this court may make will have some practical effect either on the parties or on others."[58]

[60] Can it be said that in this matter there is no longer an existing or live controversy or prejudice or threat of prejudice to the applicants? The starting point must needs be a consideration of the relief that the applicants are seeking.

[61] In the present matter, the legal challenge is mounted mainly on clauses 15 and 21 of Circular 06 of 2016, and not on Circular 01 of 2019. Consequential to that, is the quest, *inter alia*, for a *mandamus* directing that no learner may be excluded from a public school on the basis that he or she does not have an identity number, permit or passport.

[62] Clause 15 of Circular 06 of 2016 in effect denies access to education on the basis that children lack identification documents. Clause 21, on the other hand, provides that learners who are classified as illegal foreigners in terms of the Immigration Act must, when applying for admission to school, show evidence that they have applied to legalise their stay in the country. Both impugned clauses, it is argued, limit the children's right to education, yet the right to education extends to all.

[63] Let me now turn to consider whether the impugned Circular has in fact been withdrawn and/or substituted, or not. Nothing from a reading of Circular 01 of 2019 points to even a purported withdrawal of Circular 06 of 2016. Instead, the purpose of this Circular is stated as being "*to provide schools and school related structures with guidance as to how to deal with* [problems encountered by schools when dealing with admission of learners with no documentation irrespective of their citizenship status] *in the meantime until the finalisation of revised Admission Policy.*" Not even

[57] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) (*Langeberg Municipality*).
[58] Id at para 11.

Circular 06 of 2019, the effect of which is to confirm the contents of Circular 01 of 2019, purports to withdraw Circular 06 of 2016.

[64] Upon a proper interpretation, Circular 01 of 2019 seeks to give guidance to schools when implementing the policy embodied in Circular 06 of 2016, pending a revision process that is still underway. Much as Circular 01 of 2019 makes for the funding of and accommodates even undocumented children, it effectively extends the period within which the requisite documentation should be secured from 3 months to 12 months. After 12 months, and absent the requisite documentation, the affected children must leave school until they secure the required documents. This, according to the 37 children, is unfair, as it should never be permissible to expel a child from school on the basis that they are unable or have failed to obtain identification documents. The respondents see it differently. In those circumstances, it cannot be said there is no live issue or controversy between the parties.

[65] The papers make it plain that besides the 37 children, there are over a million children who, even on the respondents' showing,[59] have been admitted subject to the condition that they will be excluded should they not produce the requisite documents at the expiry of 12 months. It is further clear that due to the personal circumstances of some of the children's care-givers and parents, there is no end in sight to the children concerned securing these documents. Also, examples of other parlous experiences of how impossible it has been to obtain the necessary documents are narrated. These experiences concern parents who have abandoned their children, leaving them in the care of relatives or other care-givers, and rendering it impossible for the children (invariably born at home or residing in other inaccessible areas due to geographical remoteness) to obtain birth certificates. Attempts to register some of the children, absent their biological parents whose whereabouts are unknown, have proved futile. Resulting from this, the children are stuck in limbo and there are no prospects of them obtaining the birth certificates which are a prerequisite to obtaining identification documents. Besides facing the danger of being stateless, the children are beset by two

[59] The respondents say 1 190 434 undocumented learners, 830 698 which are of South African origin and 167 734 of foreign origin.

problems: first, being abandoned by their parents and, second, being denied the right to basic education on the basis that they lack a piece of paper identifying who they are and lack the means, themselves, to acquire identification documents. In any event, the application is not brought only in the interest of the 37 children but also on behalf of a class and in the public interest, in terms of section 38 of the Constitution.

[66] The facts in the *J T Publishing* case[60] relied on by the first to third respondents are distinguishable from those in the present one. First, in *J T Publishing* there had been no staunch effort made before the Constitutional Court to defend the parts of the Publications Act that had come under fire; by the time argument was concluded it had become clear that in some important respects the impugned statute could not survive constitutional scrutiny, the issue remaining in dispute having been whether the consequent invalidation should ensue immediately or be suspended whilst the legislature repaired the defects. In the meantime, Parliament had enacted the Films and Publications Act 65 of 1996 which was to come in operation soon. The Court was of the view that neither of the applicants nor for that matter anyone else stood to gain from an order dealing with futureless provisions, and concluded:

> "In all those circumstances there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historical one, than those on which our ruling is wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that."[61]

[67] Unlike in *J T Publishing* we have here staunch opposition to the challenge of the constitutionality of a provision that requires learners to produce identification documents within a stated time on pain of being excluded from school. The issues are not academic or hypothetical, but very much alive. If the impugned Admission Policy were not to stand constitutional muster, multitudes of children would be saved from the guillotine effect of clauses 15 and 21 of the Admission Policy. These children, who have not applied for admission to school because they will not end up being documented, would do so knowing full well that they would not face exclusion at the expiry of 12 months. There is a multitude of other children who have an interest in the relief being sought by the 37 children.

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[60] *J T Publishing* above n 53.
[61] Id at para 17.

[68] The above conclusion puts paid even to the contention raised on behalf of the fourth to fifth respondents that the handing up of the draft order favourable to the first and second applicants has rendered the relief sought in relation to the Admission Policy moot. Nor can the content of the draft order be interpreted to lend legitimacy to the guillotine effect of the Policy read together with Circular 01 of 2019. To begin with, the draft order was not necessarily consented to and has yet to pass muster as an order of court. And, as pointed out by Mr *Ferreira*, who together with Ms *Botha* appeared for the 37 children, none of the parties has asked that the terms of Circular 01 of 2019 be made an order of court.

[69] Paragraph 2 of the draft order stipulates that "[un]*documented learners who are admitted to schools under Circular 01 of 2019 are registered on SASAMS irrespective of their ability to provide an identity number, permit or passport number*." Paragraph 2.4.7 of Circular 01 of 2019 is clearly worded- it gives the Head of Department the power to extend the period within which a parent or guardian of the learner must obtain documentation up to no longer than 12 months from the date of conditional admission. Paragraph 2.4.7 also provides that after such exclusion, the Head of the Department must continue liaising with the nearest office of the Department of Home Affairs to assist the child to obtain the requisite documentation. This by no means suggests that at the expiry of 12 months an undocumented child cannot be excluded.

[70] For all these reasons, the relief sought is not hit by the mootness principle, with the result that the merits of the application ought to be considered.

*Are Clauses 15 and 21 of the Admission Policy unconstitutional?*

[71] In terms of section 29(1)(a) of the Constitution "[e]*veryone has the right to basic education, including adult basic education*." The section is unqualified, unconditional and applies to everyone, not even "*everyone upon the production of a birth certificate*" or "*provided they are in the country legally*." It is in that context that clauses 15 and 21 must be subjected to scrutiny.

[72] Even though the impugned clauses speak to one theme, they apply to different situations. Clause 15 applies mainly to nationals, whilst clause 21 applies to illegal aliens.[62] It is therefore convenient to deal with these clauses, one after the other.

*Clause 15*

[73] Clause 15 reads:

> "When a parent applies for admission of a learner to an ordinary public school, the parent must present an official birth certificate of the learner to the principal of the public school. If the parent is unable to submit the birth certificate, the learner may be admitted conditionally until a copy of the birth certificate is obtained from the regional office of the Department of Home Affairs. . . . The parent must ensure that the admission of the learner is finalised within three months of conditional admission."

[74] The clause makes the admission of national children to public schools conditional upon the production of a birth certificate within 3 months, failing which the child of the defaulting parent will be excluded from enrolment.

[75] Clause 15 constitutes a severe limitation to other rights enshrined in the Constitution for the protection of children namely, the right of children to have their best interests considered paramount;[63] the right to dignity;[64] and the right to equality.[65] These associated rights, in turn, warrant separate treatment.

*Best interests of children*

[76] Section 28 of the Constitution does not permit of a restrictive interpretation; it must be given a wider interpretation so as to encompass "*every child,*" and not only children who are South African citizens, children who are lawfully present in the country, or children in possession of birth certificates. Little wonder that the courts

[62] "*Illegal aliens*" is used in the now repealed Aliens Control Act 96 of 1991, the equivalent of which is "*illegal foreigners*" in the Immigration Act. For the sake of convenience these terms are used interchangeably.
[63] Section 28(2) of the Constitution which provides that "[a] *child's best interests are of paramount importance in every matter concerning the child*."
[64] Section 10 of the Constitution provides that "[e]*veryone has inherent dignity and the right to have their dignity respected and protected*."
[65] In terms of section 9(3) of the Constitution the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, . . . ethnic or social origin, colour, . . . language and birth.

have held that even children who have been detained for purposes of deportation as illegal foreigners are bearers of the right enshrined in section 28.[66]

[77] Section 28(2) does not only create a stand-alone right, but strengthens the right to basic education as well.[67] In seeking to uphold the best interests of children in "*every matter*" it also serves to augment the right to education.[68]

[78] The South African government has agreed through its signature and ratification of several instruments, including the Convention on the Rights of the Child[69] and the African Charter on the Rights and Welfare of the Child[70] to give primary consideration *inter alia* to children's interests at all times. These Conventions recognise the importance of holding paramount the best interests of the child in all matters concerning them.

*Right to dignity*

[79] Children have their own dignity and are individuals with distinctive personalities not dependent on or assessed in the light of the actions of their parents.[71] This was aptly stated by Sachs J as follows:

> "Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children."[72]

[66] *Centre for Child Law and another v Minister of Home Affairs and others* 2005 (6) SA 50 (T).
[67] *Head of Department, Department of Education, Free State Province v Welkom High School and others* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC) at para 134.
[68] Id, concurring judgment by Froneman and Skweyiya JJ at para 129, where it was held:

> "It is salutary to remember that although, formerly, this case is a dispute between the school governing bodies and the HOD [Head of Department], their respective functions are to serve the needs of children in education. Section 28(2) of the Constitution makes it clear that the best interests of children '*are of paramount importance in every matter*' concerning children. *That applies to education too*." (Emphasis added).

[69] Convention on the Rights of the Child was signed in 1993 and ratified in 1995.
[70] African Charter on the Rights and Welfare of the Child was signed on 10 October 1997 and ratified on 07 January 2000.
[71] *S v M* [2007] ZACC 18; 2007 (12) BCLR 1312 (CC); 2008 (3) SA 232 (CC).
[72] Id at para 18.

[80] The affidavits filed by some of the affected children unleash a horrifying picture and make it demonstrably clear that being denied access to school[73] has had devastating consequences. Some children have expressed feelings of shame and embarrassment at being unable to perform tasks that other children of their age can perform, becoming depressed, or finding themselves in dangerous situations resulting from being out of school.

[81] These disadvantaged children end up without the hope of being able to rid themselves of poverty or being allowed to participate meaningfully in the societies of which they are a part; they are denuded of their self-esteem and self-worth, and the potential for human fulfilment. Due to being idle, some of the children end up involved in criminal activity and thus become a menace to the social fabric.

*Right to equality*

[82] Section 9(3) of the Constitution proscribes unfair discrimination. Section 5(1) of the Schools Act makes it incumbent on a public school to admit learners and serve their educational requirements without unfairly discriminating in any way.

[83] Clause 15 of the Admission Policy effectively denies children access to education on the basis of their documentation status, which constitutes unfair discrimination.

[84] Even though the documentation required for enrolment in public schools is not a listed ground of discrimination in terms of section 9(3), the differentiation will amount to discrimination where it is on a ground analogous to those listed in the section. To be considered an analogous ground of differentiation to those listed in section 9(3), the classification must have an adverse effect on the dignity of the individual, or some other comparable effect.[74]

[73] Within the context of this case primarily for not being able to produce identification documents after 12 months of being conditionally allowed to attend school or not even starting, because of lack of prospects of ever obtaining the requisite documents.

[74] *Khosa and others v Minister of Social Development and others*; *Mahlaule and another v Minister of Social Development and others* [2004] ZACC 11; 2004 (6) BCLR 596 (CC); 2004 (6) SA 505 (CC); at para 70.

[85] The 37 children's submission is that documentation status is a ground analogous to those listed in section 9(3). This submission has merit. Indeed, one thing cuts across all these factors- the children have no control over them. Also, differentiating the children on their documentation status impairs their fundamental right to dignity, thus placing such differentiation on *par* with the expressly listed ones.

[86] It is an undeniable fact that the children affected by the impugned Circular are disadvantaged by their lack of documentation and emanate from the vulnerable, poor black community. If one adds to this the fact that this differentiation is based on attributes that have the potential to impair human dignity, the inescapable conclusion is that clause 15 limits the right to equality as discriminating between children on the basis of their documentation status, as well. If, as enjoined by *Harksen*,[75] one must have regard *inter alia* to the position of children in society and whether they have been disadvantaged in part and the extent to which their fundamental right to dignity has been impaired, one is led to the ineluctable conclusion that clause 15 of the Admission Policy is unfair.

[87] Each of the international human rights instruments that the South African government has signed and ratified expressly prohibits discrimination in the enjoyment of the rights that they entrench. The Convention on the Rights of the Child[76] is applicable to each child within a state party's jurisdiction without discrimination of any kind, irrespective of *inter alia* the child's or his or her parent's or legal guardian's national ethnic, social origin, birth or other status.[77]

*Clause 21*

[88] I next consider clause 21 of the Admission Policy, which reads:

> "Persons classified as illegal aliens must, when they apply for admission for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991 …"

[75] *Harksen v Lane N.O and others* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) at para 52 (*Harksen*).
[76] The Convention on the Rights of the Child above n 69.
[77] Id Article 2(2).

[89] Clause 21 requires of learners classified as "*illegal aliens*" to prove that they have applied to legalise their stay before they can be admitted to public schools, which is well-nigh impossible, if one has regard to the fact that the children were brought into South Africa illegally and, therefore, cannot meet the requirements of a residence or study permit. They can thus not apply to legalise their stay. They have no choice in their being brought to the country, but end up bearing the negative consequences attached to their parents' choices.

[90] The right to education extends to "*everyone*" within the boundaries of South Africa; the nationality or immigration status is immaterial. Emphasising the ambit of "*everyone*" contained in sections 12 and 35(2) of the Constitution in *Lawyers for Human Rights*[78] the Constitutional Court held:

> ". . . . The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. . . .
>
> Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why '*everyone*' in sections 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of section 12 and section 35(2). It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country."[79]

[91] The 37 applicants and the *amici curiae* to whom the court is indebted have benevolently made reference to a wealth of material in international law which makes

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[78] *Lawyers for Human Rights and another v Minister of Home Affairs and another* [2004] ZACC 12; 2004 (7) BCLR 775 (CC); 2004 (4) SA 125 (CC); at paras 26 -7 (*Lawyers for Human Rights*).

[79] *Cf Minister of Home Affairs and others v Watchenuka and another* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) at paras 25 and 36, wherein the Supreme Court of Appeal recognised that education is a fundamental component of human dignity, not qualified by nationality, in the following terms:

> "[25] Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s[ection] 10 of the Bill of Rights…
>
> [36] In my view the Standing Committee's general prohibition against study is also unlawful. The freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s[ection] 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education. . . . "

it plain that children, including those with irregular status, are bearers of the right to education.

[92] There can be no doubt that clause 21, too, constitutes a severe limitation to other rights which protect children.[80]

[93] I am accordingly satisfied that clauses 15 and 21 of the Admission Policy are unconstitutional.

*Is the limitation imposed by clauses 15 and 21 of the Admission Policy justified under section 36 of the Constitution?*

[94] Section 29 of the Constitution which protects the right to basic education is an immediately realisable right that stands on a higher pedestal. In *Juma Musjid*[81] the Constitutional Court said:

> "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.*"[82]

[95] Therefore, the right to basic education may only be limited in accordance with law of general application in accordance with section 36 of the Constitution. The first to third respondents bear the onus to establish that the limitation is justified.[83]

[96] Section 36 of the Constitution provides:

> "(1) The rights in the Bill of Rights *may be limited only in terms of law of general application* to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights." (Emphasis added).

[80] These rights have been discussed in paragraphs [77] – [92] above.
[81] *Juma Musjid* above n 4.
[82] Id at para 37.
[83] *Moise v Greater Germiston Transitional Local Council* [2001] ZACC 21; 2001 (8) BCLR 765 (CC); 2001 (4) SA 491 (CC) at para 31; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and others* [2004] ZACC 10;; 2004 (5) BCLR 445 (CC); 2005 (3) SA 280 (CC) at paras 33 - 7; *Phillips and another v Director of Public Prosecutions, Witwatersrand Local Division, and others* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 20.

[97] Both clauses 15 and 21 of the Admission Policy are not a law of general application, but merely a policy which is incapable of authorising the limitation of a right in the Bill of Rights.[84]

[98] At the hearing of this matter counsel for the first to third respondents, quite correctly in my view, conceded that the Admission Policy is not a law of general application, thus jettisoning the stance adopted in the opposing affidavits regarding the reasonableness and justifiability of clauses 15 and 21. A faint suggestion was, however, made that the Admission Policy accords well with the "*laws of the land*", principal of which are sections 39 and 42 of the Immigration Act, whose purported legitimate purpose is to advance the interest of the citizens of South Africa and put measures in place to discourage illegal foreigners from coming here in order to receive free basic education. With the greatest respect, this argument need only be stated in order to be rejected. It sounds disingenuous of the first to third respondents to offer admission to children of illegal foreigners albeit conditionally for 12 months whilst, on their own showing, doing so is to commit an offence in terms of sections 39 and 42 of the Immigration Act. The test for a proper invocation of section 36 of the Constitution is not that a policy or law subject to scrutiny must accord well with the laws of the land, for some of those laws may very well come short of constitutional muster.

[99] In any event, it remains to be seen whether sections 39(1) and 42 of the Immigration Act can, upon a proper interpretation, permit the exclusion of learners who are not able to produce identification documents for their continued unconditional enrolment at public schools. There is not an iota of evidence to support the submission that illegal foreigners come to this country in order to "*receive free basic education.*" All indications are that immigrants come to South Africa primarily to seek employment. Besides putting in place proper immigration controls, the responsibility remains with government to enforce compliance with labour laws,

[84] See *Dladla and another v City of Johannesburg and others* [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC) at para 52; and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC).

including imposing appropriate sanctions for the hiring of illegal foreigners without compliance with the law. All this could and should be achieved without the invasion of the fundamental rights of children. Moreover, a policy cannot pass constitutional muster purely because the framers thereof had good intentions. It has to comply with constitutional precepts.[85]

[100] The concession made that the Admission Policy is not a law of general application puts paid to the issue of whether the limitation imposed by clauses 15 and 21 are reasonable and justifiable on the basis of the test set out in section 36.

[101] In all these circumstances it must be concluded that clauses 15 and 21 of the Admission Policy unjustifiably limit the rights under sections 9(1), 10, 28(2) and 29(1)(a) of the Constitution and fall to be declared unconstitutional. The impugned Admission Policy (Circular 06 of 2016, as amended by Circular 01 of 2019) does not save clauses 15 and 21 from unconstitutionality. Circular 06 of 2016, which embodies policy, has not been withdrawn. It remains operative. A policy can hardly be amended by a circular. In any event, and as already pointed out, the 2019 Circular merely extends the period afforded to parents to obtain documents from 3 to 12 months. The requirement for learners to furnish identification documents has not been abrogated.

[102] There is a further factor that bedevils the Admission Policy. The Policy is issued by the Minister of Education in terms of section 3(4) of the National Education Policy Act.[86] In *Harris*[87] the Constitutional Court held that the Minister's powers under section 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners.

[85] *South African Restructuring and Insolvency Practitioners Association v Minister of Justice and Constitutional Development and others, In Re: Concerned Insolvency Practitioners Association NPC and others v Minister of Justice and Constitutional Development and others* [2015] ZAWCHC 1; [2015] 1 All SA 589 (WCC); 2015 (2) SA 430 (WCC); 2015 (4) BCLR 447 (WCC); [2015] 4 BLLR 329 (WCC) at 499E.
[86] National Education Policy Act 27 of 1996 (NEPA).
[87] *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) at para 11 (*Harris*).

[103] Moreover and in any event, contrary to the assertion made by Mr *Erasmus*, the Admission Policy is in conflict with legislation. In *Akani*[88] it was held:

> "Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and the executive will disappear."[89]

[104] Whilst section 3(1) of the Schools Act provides that it is compulsory for all children to attend school from the age of 7 until 15, or on reaching grade 9, or whichever comes sooner, clauses 15 and 21 of the Admission Policy purport to impose additional requirements on children who seek admission to public schools. That is not contemplated by the Schools Act. On the one hand, section 3(4)(i) of NEPA empowers the Minister to make national policy for the admission of students to education institutions and section 4 of NEPA provides that the policy shall be directed towards specific objectives, including the advancement of the right "*of every person to basic education*". Contrary to that objective, clauses 15 and 21 of the Admission Policy have the effect of limiting rights and access by excluding learners from public schools who are unable to obtain birth certificates or identification documents.

[105] NEPA contains no provision either expressly or impliedly authorising the imposition of the requirement of providing a birth certificate or identification document as a necessary precondition for admission to a public school.

[106] Therefore, clauses 15 and 21 of the Admission Policy are also liable to be set aside on the basis that they are *ultra vires* the Schools Act and NEPA.

*Proper interpretation of sections 39 and 42 of the Immigration Act*

[107] According to the Department of Home Affairs (fourth and fifth respondents) with the support of the DBE, sections 39 and 42 of the Immigration Act prohibit schools from providing basic education to children who are illegal foreigners.

[108] Section 39 provides:

> "(1) No learning institution shall knowingly provide training of instruction to—

[88] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* [2001] ZASCA 59; 2001 (4) SA 501 (SCA) (*Akani*).
[89] Id at para 7.

(a) an illegal foreigner;
(b) a foreigner whose status does not authorise him or her to receive such training or instruction by such person; or
(c) a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's status.

(2) If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such premises, unless *prima facie* evidence to the contrary is adduced."

[109] Section 42(1) makes it an offence for any person to aid, abet, assist, enable or in any manner help an illegal foreigner or a foreigner in a manner that violates their status, including by providing instruction or training to him or her, or allowing him or her to receive the instruction or training.

[110] Anyone failing to comply with the duties and obligations set out, *inter alia,* under sections 39 and 42 shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding five years.[90]

[111] What, then, is the proper interpretation to be given to sections 39 and 42? The SAHRC, appositely so in my view, argued that the interpretation hinges on an invocation of—

(a) the requirement in section 39(2) of the Constitution which requires that all legislation be interpreted to promote the spirit, purport and objects of the Bill of Rights;

(b) the principle enunciated in section 233 of the Constitution requiring that legislation be interpreted in conformity with international law; and

(c) the presumption that legislation does not intend to change the law more than is necessary, and that Parliament knows the existing law when it legislates.

*Bill of Rights interpretation*

[90] Section 49(6) of the Immigration Act.

[112] Sections 39 and 42 of the Immigration Act ought to be interpreted so as not to be in conflict with section 29(1)(a) of the Constitution. For that reason, and contrary to the stance adopted by Section 27 referred to in paragraph 30 (b) (ii) above, I will opt for an interpretation that saves the impugned sections from constitutional invalidity. This view finds support from the following remarks by Goliath AJ in *Rahube*[91]:

> "When faced with a challenge to the constitutional validity of a provision in an Act, the Court examining the challenge should ascertain whether it is reasonably possible to interpret the section in a manner that conforms with the Constitution. . . ."[92]

[113] Section 39(2) of the Constitution enjoins courts, "[w]*hen interpreting any legislation*" … "[to] *promote the spirit, purport and objects of the Bill of Rights*". In *Hyundai Motor Distributors*[93] it was held that all statutes must be interpreted through the prism of the Bill of Rights.[94] The Court went on to say:

> "The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.
>
> "… Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[95]

[114] The rights under the Bill of Rights that are of relevance when interpreting sections 39 and 42 of the Immigration Act are the right to basic education, the right that seeks to uphold the best interests of the child, the right to equality, and the right to dignity. These rights have been dealt with extensively herein above when clauses 15 and 21 of the Admission Policy were being discussed. It would unduly overburden

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[91] *Rahube v Rahube and others* [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (*Rahube*).
[92] Id at para 34; also see *Govender v Minister of Safety and Security* [2001] ZASCA 80; 2001 (4) SA 273 (SCA); 2001 (2) SACR 197; 2001 (11) BCLR 1197 at para 11.
[93] *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: In Re Hyundai Motor Distributors (Pty) Ltd and others v Smit N.O. and others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) (*Hyundai Motor Distributors*).
[94] Ibid at para 21.
[95] Id at paras 22 and 23; *Cf Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 8; 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 (CC), where Madlanga J at para 34 held that interpreting "*legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights . . . does not mean that legislation must be interpreted so as not to be in conflict with any part of the Constitution*."

this judgment were one to once again deal with those points. It suffices to reiterate that children, including those who are undocumented and whose presence in the country may be illegal, are entitled to the right under section 29(1) of the Constitution.

[115] In so far as section 39(1)(c) of the Constitution enjoins a court to consider foreign law when interpreting a provision of the Bill of Rights, one finds, as was argued by the SAHRC, the *amicus curiae*, that the interpretation of section 29(1) of the Constitution accords well with foreign law.

[116] In *Plyler v Doe*[96] the US Supreme Court had occasion to consider whether it was lawful for the State of Texas to deny enrolment and withhold State funds from local schools for the education of children who were not "*legally admitted*" into the United States. What had happened is that in 1975, the Texas Legislature revised its education laws to deny enrollment in their public schools to, and withhold any state funds for the education of children who were not "*legally admitted*" to the country. A class action was filed on behalf of certain school-age children of Mexican origin residing in Texas who could not establish that they had been legally admitted into the United States. The District Court for the Eastern District of Texas[97] was approached to prevent the defendants from denying a free public education to members of the class.

[117] In deciding the matter, the District Court found that neither the revised law nor its implementation had "*either the purpose or effect of keeping illegal aliens out of the State of Texas*." The Court also found that the increase in enrollment in Texas public schools was primarily attributable to the admission of children who were legal residents; while barring undocumented children would save money, it would not necessarily improve the quality of the education. The Court then concluded that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment and that the Texas legislation violated it. The matter thereafter served as an appeal before the Court of Appeals which upheld the decision of the District Court.

[96] *Plyler v Doe* 457 US 202 (1982).
[97] The equivalent of the High Court in South Africa.

[118] When the matter eventually came before the Supreme Court, Brennan J, writing for the majority, said:

> "The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to deportation. But the children of those illegal entrants are not comparably situated. Their 'parent have the ability to conform their conduct to societal norms,' and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status.' *Trimble v. Gordon*, 430 U.S. 762, 770 (1977). Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.[98]
>
> …
>
> It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States . . .

[119] In confirming the judgment of the Court of Appeals, Brennan J concluded thus:

> "If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its border, that denial must be justified by a showing that it furthers some substantial state interest. No such showing is made here. Accordingly, the judgment of the Court of Appeals in each of these cases is [*a*]*ffirmed*."

[120] A similar approach was adopted in *Girls Yean and Bosico v Dominican Republic*[99] wherein the court was approached to come to the rescue of two girls whose mothers were born in the Dominican Republic and whose fathers were of Haitian descent. The girls were refused birth certificates by the government even though they had been born in the Dominican Republic. Their lack of birth certificates resulted in them being not admitted to school, and the one girl who had initially been admitted refused continued enrolment when she reached grade 4. The Court came to the assistance of the girls opining that "*the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person's*

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[98] See also *Webber vs Ietna Casuality and Surety Co* 406 US 164, 175 where it was held:

> "[V]isiting… condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the… child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual- as well as unjust- way of deterring the parent."

[99] *Girls Yean and Bosico v Dominican Republic Inter-American Court of Human Rights (IACrtHR),* 8 September 2005.

*migratory status in a State. In other words, States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause*."

*Interpretation in conformity with international law*

[121] Section 233 of the Constitution also enjoins courts when interpreting legislation to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is not.

[122] Reference has already been made herein above to conventions signed and ratified by South Africa to which the courts are bound to give effect to.

[123] These conventions have, on previous occasions, been the source from which the Constitutional Court drew whilst interpreting the provisions in the Bill of Rights.[100]

*Interpretation in conformity with earlier legislation*

[124] There is a longstanding presumption that the legislature does not intend to alter the existing law more than is necessary.[101] The legislature is also presumed to know the existing laws.[102] The Schools Act was promulgated before the enactment of the Immigration Act. The preamble to the Schools Act recognises that the country requires a new national system of schools that will provide education to "*all learners*". Learners are defined in the Schools Act as "*any person receiving an education or obliged to receive education in terms of the Act*." This definition does not draw any distinction between learners that are legally present in the country and those that are not. Instead, section 3(1) places an obligation on every parent to cause every learner

[100] *S v M* above n 71; see also *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC), where it was held at para 75 that "*international and regional instruments are relevant considerations because section 39(1)(b) of the Constitution requires us to 'consider international law' when interpreting a provision in the Bill of Rights, such as section 28(2)*."

[101] *Joseph and others v City of Johannesburg and others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at para 67.

[102] *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and others* [2016] ZASCA 80; [2016] 3 All SA 441 (SCA); 2016 (6) SA 121 (SCA) at para 11.

for whom he or she is responsible to attend a school from the first school day of the year in which the learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of 15 years or the ninth grade. Section 3(6)(b) provides that any person who, without just cause, prevents a learner who is subject to compulsory attendance from attending school is guilty of an offence and section 5 places an obligation on public schools to admit learners to their schools and to serve their educational needs without unfairly discriminating in any way.

[125] In light of the aforegoing, and in the absence of an express indication that the Immigration Act intended to repeal or amend the Schools Act, the Immigration Act must be interpreted not to detract from the right recognised under the Schools Act for all learners to receive education.

[126] The Immigration Act makes no reference to "*school*", "*education*" or "*basic education*". The significance of this is that, the Act was promulgated at a time when the Constitution already referred to a right to "*basic education*" in section 29; the international law that bound South Africa referred to the right of the child to "*education*"; and the Schools Act referred to "*school*", and "*education*" when it conferred rights on learners. Accordingly, in light of these provisions, it is appropriate to interpret the Immigration Act's reference to "*learning institution*" and "*training or instructions*" as not referring to the basic education that schools provide to children. Had it been the intention of Parliament to do so,[103] it would have had to be explicit in using these terms. It did not. Instead, it referred to "*learning institutions*" and to "*training and instruction*". These terms ought to be interpreted to refer not to the rights of the children who receive basic education, but adults attending "*learning institutions*" to obtain something over and above "*basic education*" and are thereby trained or instructed in furtherance of their pursuits. Were the Immigration Act to be interpreted in this way, none of the rights protected in the Constitution, international law, and the Schools Act would thereby be trumped.

[127] Therefore, sections 39 and 42 of the Immigration Act fall to be interpreted in a way that does not prohibit children from receiving basic education from schools. This

[103] To curtail the rights afforded to all children to receive basic education.

interpretation is consistent with the right to basic education as enshrined in section 29; every child's rights under section 28(2) to have their best interests taken into account in matters concerning them; international conventions' emphasis on providing education to all children irrespective of their status and the existing obligation in the Schools Act placed on parents; and Schools to ensure that all learners receive basic education.

[128] Having found that, interpreted through the prism of the Bill of Rights, sections 39 and 42 of the Immigration Act do not prohibit schools from providing basic education to children who are illegal foreigners, it has become unnecessary for this court to enquire into the constitutionality of the sections; justification for the limitation imposed by these sections in terms of section 36 of the Constitution similarly does not arise.

[129] Nothing, in my view, militates against the grant of an order that gives clear direction to all concerned, including the respondents, to conduct themselves within the bounds of their constitutional obligation to provide access to the right to basic education, which is in line with the approach contended for by the SAHRC. I am not persuaded that this interpretation is inconsistent with that enjoining courts to look at the plain language of a statutory provision being subjected to scrutiny. That requirement is indeed a means to an end, and not the end of the interpretative process. In *South African Police Service*[104], Sachs J said:

> "Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, I examine the context in which the word "may" is used. The importance of context in statutory interpretation was underlined by Schreiner JA in *Jaga v Dönges, N.O. and Another* as follows:
>
> > 'Certainly no less important that the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of

[104] *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC).

> interpreting may be along either of two lines. Either one may split the enquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.'"[105] (Footnotes omitted)

[130] I also find nothing strained with this interpretation which appeals to logic and common sense. In my view, the interpretation given can be reasonably ascribed to sections 39 and 42.

*Conclusion*

[131] In sum, therefore, the DBE and the Provincial Department are acting unconstitutionally in not permitting children to continue receiving education in public schools purely by reason of the fact that they lack identification documents.

[132] The draft order handed up on behalf of the first and second applicants at the commencement of the hearing of this matter is, by and large, predicated on the notion that the impugned Circular has been withdrawn, whereas it has not. In terms of section 172(1)(a) of the Constitution I am obliged to conclude that clauses 15 and 21 of the Admission Policy are inconsistent with the Constitution and to declare them invalid. There seems good reason not to declare sections 39(1) and 42 of the Immigration Act unconstitutional but rather to declare these provisions liable to be interpreted in a manner that does not trump constitutional precepts. Paragraphs 5 to 7 of the draft order seek to address specific issues which, in my view, are sufficiently covered by the order granted and set out hereunder.

[133] It bears mentioning that the assistance given to this Court by the *amici curiae*, for which the Court is grateful, was invaluable. The input of the *amici curiae* has gone a long way in assisting the court to arrive at the conclusion it did.

[134] The applicants have been successful. There is no reason why costs should not follow the *Biowatch*[106] principle and be awarded in favour of the applicants. The

[105] Ibid at para 17.
[106] *Biowatch Trust v Registrar, Genetic Resources and others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 23.

matter is sufficiently complex, and indeed novel. The engagement of two counsel by each one of the legal teams was justified.

*Order*

[135] The following order is made:

1. The unreasonable delay in the launch of this application is condoned in terms of section 9(1) of the Promotion of Administrative Justice Act 3 of 2000.

2. Clauses 15 and 21 of the Admission Policy for Ordinary Public Schools published in Government Gazette 19377 (19 October 1998) under Government Notice 2432 are declared to be inconsistent with the Constitution and, therefore, invalid.

3. Circular 06 of 2016, dated 17 March 2016, the contents of which were communicated to School Governing Bodies and Principals of public schools that any Norms and Standards, Post Provisioning allocation and National School Nutrition Program transfers to schools in the Eastern Cape Province will be based only on the learner numbers where valid identity, permit or passport numbers have been captured in the South African Schools Administration and Management System is declared inconsistent with the South African Schools Act 84 of 1996 and the Constitution and, therefore, invalid, and is set aside.

4. The first to third respondents are directed to admit all children not in possession of an official birth certificate into public schools in the Eastern Cape Province (the schools), and where a learner cannot provide a birth certificate, the Principal of the relevant school is directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, care-giver or guardian of the learner wherein the learner is fully identified.

5. Sections 39 and 42 of the Immigration Act 13 of 2002 do not prohibit the admission of illegal foreign children into schools and do not prohibit the provision of basic education to illegal foreign children.

6. The first, second and third respondents are interdicted and restrained from, in any manner whatsoever, removing or excluding from schools, children, including illegal foreign children, already admitted purely by reason of the fact that the children have no identity document number, permit or passport, or have not produced any identification documents.

7. The first to fifth respondents shall pay the costs of the application, including the costs consequent upon the employment of two counsel where utilised, jointly and severally, the one paying the other to be absolved.

_____

**S M MBENENGE**

**JUDGE PRESIDENT OF THE HIGH COURT**

**I agree:**

**_____**

**I SCHOEMAN**

**JUDGE OF THE HIGH COURT**

**I agree:**

**_____**

**S M MFENYANA**

**ACTING JUDGE OF THE HIGH COURT**

| | |
|---|---|
| For the first and second applicants | : *S A Sephton* |
| Instructed by | : Legal Resources Centre |
| | Grahamstown |

| | |
|---|---|
| For the third to thirty-ninth applicants | : *N Ferreira* (together with *I Cloete*) |
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| For the first to third respondents : | *M C Erasmus SC* (together with *E M Baloyi-Mere*) |
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| Instructed by | : Cliffe Dekker Hofmeyr |
| | c/o Wheeldon, Rushmere & Cole Incorporated |

Grahamstown

Date application heard : 18 September 2019

Date judgment delivered : 12 December 2019