

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO: 2480/17

In the matter between:

CENTRE FOR CHILD LAW

First Applicant

**THE SCHOOL GOVERNING BODY OF
PHAKAMISA HIGH SCHOOL**

Second Applicant

37 CHILDREN

Third to Twenty Sixth Applicants

and

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

and

SECTION 27

First amicus curiae

**THE SOUTH AFRICAN HUMAN RIGHTS
COMMISSION**

Second amicus curiae

FIRST AMICUS CURIAE'S HEADS OF ARGUMENT

INTRODUCTION

1. This is a case about the systemic denial to a group of vulnerable children of their right to education. Through no fault of their own, the children on whose behalf the applicants have brought this application are barred from accessing what is recognised in South Africa and throughout most of the world as a fundamental right that is essential to empowerment, self-development and the achievement of equality.
2. The African Committee of Experts on the Rights and Welfare of the Child has made the following apt remarks on the rights concerned in this matter:

[A] year in the life of a child is almost six per cent of his or her childhood. It is in the spirit and purpose of the African Children's Charter, the African Call for Accelerated Action (Cairo Plus 5), the Millennium Development

Goals and other similar commitments, that States need to adopt a “children first” approach with some sense of urgency. This is one of the messages that the drafters of the African Children’s Charter wanted to communicate in its Preamble when they recognised that “the child occupies a unique and privileged position in the African society”. The implementation and realisation of children’s rights in Africa is not a matter to be relegated for tomorrow but an issue that is in need of proactive immediate attention and action.¹

3. The effect of the order the applicants seek in this case would be, inter alia, –

3.1. To enable undocumented children to gain admission to schools even if they are not in possession of an official birth certificate or other form of identity document, or satisfactory evidence that they have applied to regularise their presence in South Africa. This forms part of the relief sought² by the 37 children who were granted leave to intervene on 19 March 2019.³ This relief includes a constitutional challenge to various legislative and policy provisions that exclude undocumented children from accessing schools in South Africa:

3.1.1. Section 15 of the Admission Policy for Ordinary Public Schools (GN 2432 of 1998) (“Admissions Policy”). This provision states that a

¹ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Government in Kenya* (22 March 2011), decision no 002/Com/002/2009 para 33.

² Notice of motion in joinder application, bundle 1, pp 2 – 5.

³ Joinder application, bundle 2, p 320.

learner without an official birth certificate may only be conditionally registered at a public school, and that the necessary documents must be provided within three months of the conditional registration.

3.1.2. Section 21 of the Admissions Policy, which provides that “illegal aliens” seeking admission for themselves or their children to a public school must show evidence of their application to the Department of Home Affairs to legalise their stay in South Africa.

3.1.3. Sections 39(1) and 42 of the Immigration Act 13 of 2002 (“Immigration Act”), which prohibit, inter alia, the admission of illegal foreign children to public schools and the provision of training to illegal foreign children.

3.1.4. These will be referred to collectively in these heads of argument as “the impugned provisions”.

3.2. To compel the Eastern Cape Department of Education (“Provincial Education Department”) to include in its provisioning all learners actually enrolled in public schools in the Eastern Cape, regardless of whether they are in possession of a valid birth certificate or other form of identity document. This forms part of the relief sought by the Centre for Child Law and the School Governing Body of Phakamisa High School.⁴

⁴ Notice of motion in main application, bundle 1, pp 1 – 3.

4. SECTION27 was granted leave to intervene as amicus curiae in these proceedings on 16 July 2019. The purpose of its intervention is to make submissions to assist the Court in its adjudication of this matter on the following issues:

4.1. The scope and application of the right to basic education, to be applied in analysing the constitutional validity of the impugned provisions. In particular, these submissions address –

4.1.1. The content of the right to basic education in international law, and particularly the meaning of the “access” component of this right;

4.1.2. The South African government’s international law obligations in providing access to basic education for undocumented children;

4.1.3. The “access” component of the right to basic education in comparative law, including decisions of regional human rights fora and courts in foreign jurisdictions;

4.1.4. An application of these principles to the right to basic education as enshrined in section 29 of the Constitution of the Republic of South Africa 1996 (“Constitution”);

- 4.1.5. An analysis of whether the impugned provisions' limitation of the right to basic education is a reasonable and justifiable limitation in terms of section 36 of the Constitution; and
- 4.2. The obligations of the national Department of Basic Education ("DBE"), the Eastern Cape Department of Education ("Provincial Department") and the Department of Home Affairs ("DHA") arising from the principles of co-operative government and in relation to the facilitation of access to education for undocumented children.

INTERPRETATION OF THE RIGHT TO BASIC EDUCATION

5. The South African jurisprudence on the right to basic education has established several principles that assist this Court in adjudicating this matter:
 - 5.1. The right to basic education as enshrined in section 29 of the Constitution is an immediately-realizable right; unlike the other socio-economic rights in the Constitution, it is not subject to progressive realisation within the state's available resources;⁵
 - 5.2. There is an obligation on the state to ensure the provision of each component of the right to basic education, including educator and non-

⁵ See, for example, *Governing Body of the Juma Masjid Primary School and others v Essay NO and others* 2011 (8) BCLR 761 (CC) para 37.

educator staff,⁶ textbooks,⁷ safe and adequate infrastructure,⁸ furniture⁹ and transport;¹⁰ and

- 5.3. The right to basic education is an individual right. This means that for as long as there is one child that has not been provided with each component of the right to basic education, the state is in breach of its obligations.¹¹
6. The South African courts have not yet directly addressed the application of this right to basic education for undocumented children. This Court is therefore required to consider whether the right entrenched in section 29(1)(a) of the Constitution creates an obligation to provide basic education – including all the composite parts of that education – to children despite the fact that they do not possess the necessary official documentation.
7. Section 39(1) of the Constitution provides as follows:

When interpreting the Bill of Rights, a court, tribunal or forum –

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
- (b) must consider international law; and*
- (c) may consider foreign law.*

⁶ *Centre for Child Law and others v Minister of Basic Education and others* 2013 (3) SA 183 (ECG).

⁷ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

⁸ *Equal Education and another v Minister of Basic Education and others* 2019 (1) SA 421 (ECB).

⁹ *Madzodzo and others v Minister of Basic Education and others* 2014 (3) SA 441 (ECM).

¹⁰ *Tripartite Steering Committee and another v Minister of Basic Education and others* 2015 (5) SA 107 (ECG).

¹¹ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA).

8. In an effort to assist the Court in the discharge of this obligation, these submissions address the application of the right to basic education to undocumented children in international and comparative law.

Relevant international law principles

International human rights instruments

9. Section 39(1)(b) of the Constitution obliges courts, when interpreting a right in the Bill of Rights, to consider international law.
10. This duty of the courts has been described as a “special interpretive regime” which pays particular attention to international law where rights in the Bill of Rights are concerned.¹²
11. The Constitutional Court also discussed this duty in *S v Makwanyane*, in the context of section 35(1) of the Interim Constitution.¹³ The Court held as follows:

In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary

¹² J Dugard *SC International Law – a South African Perspective* (4th Ed) Juta (2011) at p 62.

¹³ Section 35(1) of the Constitution of the Republic of South Africa Act 200 of 1993 provides that “*In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.*”

*international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments . . . may provide guidance as to the correct interpretation of particular provisions in Chapter Three.*¹⁴

The International Covenant on Economic, Social and Cultural Rights (“ICESCR”)

12. The South African government signed the ICESCR in 1994 and ratified it in 2015.

13. The ICESCR regulates the right to education in two articles:

13.1. In terms of clause 13.1, *“The State Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.”* (emphasis added)

13.2. In terms of article 14, state parties that have not, at the time of signature of the ICESCR, secured universal free primary education must, within two years of becoming party to the ICESCR, adopt a detailed plan of action

¹⁴ *S v Makwanyane and another* 1995(3) SA 391 (CC) para 35, footnotes omitted.

for the provision of “*compulsory education free of charge for all.*”
(emphasis added)

14. It is important to note the language used in the ICESCR, which creates an obligation to provide education to everyone. On the face of it, the right is not restricted to those whose presence in the jurisdiction of a state party is supported by official documentation.
15. The United Nations Committee on Economic, Social and Cultural Rights (“CESCR”) issued General Comment 13 on the right to education (“General Comment 13”) on 8 December 1999. It sets out the rationale for the entrenchment of the right to education:

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able

*to wander freely and widely, is one of the joys and rewards of human existence.*¹⁵ (Emphasis added)

16. The CESCR has further provided an interpretation of the right in order to enable state parties to fulfil their obligations arising from it. Giving content to the education rights contained in the ICESCR, and adopting the work of the first UN Special Rapporteur on Education, Ms Katarina Tomaševski, the CESCR describes a framework of four features known as the “4-As” which the CESCR describe as “interrelated and essential” to the fulfilment of the right to education:¹⁶

16.1. Availability: this feature is one that ensures a sufficient number of functioning education institutions and programmes to meet the demand for education.

16.2. Accessibility: this requires that “*educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party.*”

16.3. Acceptability: this element applies to the form and substance of education. For example, curricula and teaching methods must be of an appropriate and acceptable standard.

¹⁵ General Comment 13, para 1.

¹⁶ General Comment 13, para 6.

- 16.4. Adaptability: this requires that education be flexible enough to adapt to the changing needs of societies.
17. The CESCR has noted that when considering the appropriate application of these often interrelated and overlapping features, the best interests of the learner is always a primary consideration.¹⁷
18. The element of accessibility includes three overlapping dimensions:
- 18.1. Non-discrimination, requiring that education be available to all, especially the most vulnerable groups, in law and in fact, without any discrimination on any of the prohibited grounds;¹⁸
- 18.2. Physical accessibility, requiring that education be within safe physical reach;¹⁹ and
- 18.3. Economic accessibility, requiring that education be affordable to all.²⁰
19. The prohibited grounds of discrimination are listed in article 2(2) of the ICESCR and include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

¹⁷ General Comment 13, para 7.

¹⁸ General Comment 13, para 6(b)(i).

¹⁹ General Comment 13, para 6(b)(ii).

²⁰ General Comment 13, para 6(b)(iii).

20. In elaborating on the non-discrimination aspect of accessibility, General Comment 13 states that *“The Committee takes note of article 2 on the Convention on the Rights of the Child and article 3(c) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.”*²¹

(Emphasis added)

21. Moreover, there is a positive duty on state parties to *“closely monitor education – including all relevant policies, institutions, programmes, spending patterns and other practices – so as to identify and take measures to redress any de facto discrimination.”*²²

22. The CESCR has recently made the following observations specific to South Africa:²³

22.1. It has noted its concern that 30% of undocumented child migrants, refugee and asylum-seeking children are not in formal education;²⁴ and

²¹ General Comment 13, para 34.

²² General Comment 13, para 37.

²³ UNCESCR: Concluding observations on the initial report of South Africa (12 October 2018) available at

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en.

²⁴ Id at para 72.

22.2. It has recommended that the South African government take steps to ensure that all migrant, refugee and asylum-seeking children have access to education regardless of their immigration status.²⁵

The Convention on the Rights of the Child (“CRC”)

23. The South African government signed the CRC in 1993 and ratified it in 1995.

24. Article 2(2) of the CRC describes the scope of this convention as follows:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.” (Emphasis added)

25. Article 28 of the CRC entrenches the right to education, and recognises the importance of equal opportunity in access to education. The measures to promote equal opportunity in education include making primary education “*compulsory and available free to all*”²⁶ and taking measures “*to encourage regular attendance at schools and the reduction of drop-out rates.*”²⁷

²⁵ Id at para 73(c).

²⁶ CRC article 28(1)(a); emphasis added.

²⁷ CRC article 28(1)(e).

26. Article 29 sets out the purpose for the entrenchment of the right to education. It states that a child's education should be directed to, inter alia, *"The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own."*²⁸

UNESCO Convention Against Discrimination in Education ("UNESCO Convention")

27. This Convention was ratified by the South African government on 9 March 2000.
28. The purpose of the UNESCO Convention is to eliminate and prevent discrimination, which is defined as –

any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education in particular:

(a) *Of depriving any person or group of persons of access to education of any type or at any level;*

(b) . . .

(c) . . .

²⁸ CRC article 29(1)(c).

- (d) *Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.*²⁹

29. Article 2 of the UNESCO Convention sets out a closed list of situations that do not, for the purpose of this Convention, include discrimination. These are the establishment or maintenance of single sex schools, religious schools, schools offering education in a specific language and private schools.
30. It follows that a distinction between learners on any other ground is prohibited in terms of the UNESCO Convention.
31. Against this general prohibition on discrimination, article 3 of the UNESCO Convention imposes the following obligations on state parties:

In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

- (a) *To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;*
- (b) *To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;*

²⁹ UNESCO Convention article 1.

- (c) *Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;*
- (d) *Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;*
- (e) *To give foreign nationals resident within their territory the same access to education as that given to their own nationals.*

International Convention on the Protection of Rights of All Migrant Workers and Members of their Families (“Convention on Protection of Migrants”)

32. Although the South African government has neither signed nor ratified this convention, it is still a relevant tool in the interpretation of the right to basic education. In this regard we reiterate the Constitutional Court’s statement in *Makwanyane* that courts ought to take into account both binding and non-binding law in interpreting the rights in the Bill of Rights.³⁰

33. Article 30 of the Convention on the Protection of Migrants provides that “*Each child of a migrant worker shall have the basic right of access to education on the*

³⁰ Above n 14.

basis of equality of treatment with nationals of the State concerned. Access to . . . schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.” (emphasis added)

34. In explicit terms, then, it is clear that the State may not interpret the right to basic education such that it does not apply to undocumented learners, irrespective of the reason that their documentation is absent.

South Africa's Regional human rights obligations

35. There are, in addition to the above international human rights law instruments, two key regional instruments that must, in terms of section 39(1)(b) of the Constitution, be considered in interpreting the scope of the right to basic education.

The African Charter on Human and People's Rights (“African Charter”):

36. South Africa signed the African Charter on 9 July 1996 and ratified it on the same date.
37. Article 2 of the African Charter makes clear that the rights and freedoms contained therein are to be enjoyed by “*every individual . . . without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.*”

38. Article 17(1) of the African Charter provides clearly that every individual shall have the right to education.
39. The African Commission on Human and People's Rights was called upon to pronounce on an alleged violation of Article 17 in *Free Legal Assistance Group v Zaire*.³¹ The claimants in that case contended that the State of Zaire (now the Democratic Republic of Congo) had violated several rights in the African Charter, including the right to education; in support of this contention they relied on the closure by the State of Zaire of universities and secondary schools for a period of two years.³²
40. The Commission confirmed that this closure of educational institutions was in breach of the right to education as enshrined in article 17(1). Unfortunately, the Commission did not engage in further discussion about the nature and scope of this right.

The African Charter on the Rights and Welfare of the Child ("African Children's Charter")

41. The South African government signed the African Children's Charter on 10 October 1997 and ratified it on 7 January 2000.

³¹ *Comm. No. 25/89, 47/90, 100/93.*

³² *Id* at para 48

42. Article 3 of the African Children's Charter provides that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the charter *"irrespective of the child's or his or her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status."*
43. Article 11 of the African Children's Charter provides as follows:
1. *Every child shall have the right to education.*
 2. *...*
 3. *State Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular:*
 - (a) *provide free and compulsory basic education*
 - (b) *...*
 - (c) *...*
 - (d) *take measures to encourage regular attendance at schools and the reduction of drop-out rates;*
 - (e) *take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.*
44. The African Committee of Experts on the Rights and Welfare of the Child considered these provisions in a complaint brought on behalf of children of

Nubian descent living in Kenya.³³ The complaint arose from the difficulty in registering these children's births, due to practical difficulties such as their parents not having their own valid identity documents. As a result, the complainant argued that the children had been denied the right to a nationality at birth, had suffered unlawful and unfair discrimination and had consequently had their rights of equal access to education and health care violated.³⁴

45. The Committee noted that statelessness "*is generally antithesis to the best interests of children*", and is "devastating" in the realisation of their socio-economic rights, including education.³⁵
46. The Committee agreed with the complainant that the children of Nubian descent had less access to educational facilities and that this could be attributed to their lack of confirmed status as nationals of the Republic of Kenya.³⁶
47. The Committee accordingly held that these children's right to education had not been effectively recognised and adequately provided for, even though there were resources available to provide them access to education.³⁷ As a result the Committee made the following recommendation:

³³ *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Government in Kenya* (22 March 2011), decision no 002/Com/002/2009.

³⁴ *Id* at paras 4 – 7.

³⁵ *Id* at para 46.

³⁶ *Id* at para 65.

³⁷ *Id* at para 65.

*that the Government of Kenya to adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.*³⁸

Summary of international human rights obligations in relation to the right to education

48. The theme that runs through these instruments is their emphasis on universal access to education, regardless of national, ethnic or social origin, birth or any other status. This is consistent with their emphasis on non-discrimination in the protection and enjoyment of all of the rights they create. It is also consistent with the duty to hold paramount the best interests of the child in all matters concerning them.
49. Given their inclusion in human rights instruments that bind the South African government, these principles must inform the interpretation of the right to basic education under the South African Constitution.

Comparative law on access to education for undocumented children

50. As stated above, section 39(1)(c) of the Constitution provides that South African courts may consider foreign law in interpreting the rights in the Bill of Rights.

³⁸ Id, Decision of the African Committee, para 69.

51. This section of these written submissions therefore addresses the treatment of the right of access to education by regional courts and domestic courts in comparative jurisdictions.

Decisions of regional courts in comparative jurisdictions

European Court of Human Rights (“European Court”)

52. Like the African Committee of Experts on the Rights and Welfare of the Child the European Court has emphasised the importance of the right to education and has upheld this right in relation to undocumented children.

53. In *Timishev v Russia*³⁹ the European Court considered a case brought by an ethnic Chechen, who had moved to Nalchik as a forced migrant after his property in the Chechen Republic was destroyed as part of a military operation. The local laws at the time prohibited all former residents of the Chechen Republic and the applicant’s application for permanent residence was therefore refused.⁴⁰

54. The applicant held a migrant’s card, confirming his residence in Nalchik as a result of his forced migration from Chechnya. However, two years after his migration he received compensation for the destruction of his property in Chechnya and had to surrender his migrant’s card.⁴¹

³⁹ App no 55762/00, App no 5974/00, ECHR 2005-XII, (2007) 44 EHRR 37, IHRL 3191 (ECHR 2005), 13 December 2005, European Court of Human Rights.

⁴⁰ *Id* at paras 10 – 11.

⁴¹ *Id* at para 23.

55. As a result of the applicant's lack of documentation, his two children were refused admission to a school in Nalchik. He reached an agreement with the principal of the school that the children would be admitted informally, but that they would be immediately suspended if this came to the attention of the authorities. The applicant's complaint was directed at the Nalchik Education and Science Department's policy of refusal of access to education for his children.⁴²
56. The applicant argued that the refusal to provide his children with access to education was in breach of Article 2 of Protocol No 1 to the European Convention on Human Rights ("European Convention"). Article 2 provides that "*No person shall be denied the right to education*".⁴³
57. The Government of Russia accepted during the proceedings that the right to education of the applicant's children had been unlawfully restricted. The domestic law in Russia prohibited the restriction of rights and freedoms on account of a person's registered place of residence.⁴⁴
58. In confirming that the denial of admission to school was indeed unlawful, the European Court held that Article 2 of Protocol No 1 imposed an obligation on state parties to provide anyone within their jurisdiction a right of access to educational institutions existing at a given time.⁴⁵ The European Court confirmed that in the circumstances the Government of Russia had breached this provision.

⁴² Id at para 24.

⁴³ Id at para 60.

⁴⁴ Id at para 62.

⁴⁵ Id at para 63.

59. In addition to reiterating the right of access to education without discrimination on any of the listed grounds, the European Court has emphasised that this right, like all other rights in the European Convention must be *“interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory.”*⁴⁶
60. In *Çam v Turkey*⁴⁷ the European Court adjudicated a complaint of unfair discrimination against a visually-impaired learner who was denied admission to the Turkish National Music Academy. Apart from her visual impairment, the learner had met all the entrance criteria for admission to the Academy, including passing the relevant practical assessment.⁴⁸ She argued that the refusal to admit her constituted unfair discrimination on the basis of her disability and violated her right to education.⁴⁹
61. In finding in the applicant’s favour, the European Court emphasised the fundamental principles of universality and non-discrimination in the exercise of the right to education. The European Court further highlighted that in appropriate circumstances, and in order to make the right to education practically accessible, it is incumbent upon the state to *“correct factual inequalities which are unjustified and therefore amount to discrimination.”*⁵⁰

⁴⁶ *Leyla Şahin v Turkey* Eur. Ct. of Human Rights, App. No. 44774/98, 44 Eur. H.R. Rep. 99 (2005) para 136.

⁴⁷ *Çam v Turkey* App no 51500/08, IHRL 3940 (ECHR 2016), 23 May 2016, European Court of Human Rights.

⁴⁸ *Id* at paras 6 – 15.

⁴⁹ *Id* at para 3.

⁵⁰ *Id* at paras 64 – 65.

62. In that case, the factual inequalities were to be corrected through reasonable accommodation of Ms Çam's visual impairment. In this matter, the factual inequalities take on a different nature as described fully by the applicants, but are equally unfairly discriminatory and warrant correction in line with the rights enshrined in the Constitution.

Inter-American Court of Human Rights ("Inter-American Court")

63. The inclusion of the right to education in the American Convention on Human Rights ("American Convention") differs from the framing of the right in the instruments discussed above. In the American Convention, the right is contained in a general guarantee of progressive development of *"the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organisation of American States"*.⁵¹
64. The right has also been read into Article 19 of the American Convention, which provides that *"Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the state."*
65. The Inter-American Court has used these provisions together to vindicate the right to education for undocumented children in the Dominican Republic. We note that article 13 of the Additional Protocol to the American Convention ("Protocol of San Salvador") expressly guarantees the right to education, however it has

⁵¹ Article 26 of the American Convention on Human Rights.

not been ratified by the government of the Dominican Republic and was therefore not relied on in the case discussed below.

66. In *Girls Yean and Bosico v Dominican Republic* the Court came to the assistance of two girls whose mothers were born in the Dominican Republic and whose fathers were of Haitian descent. Despite both girls having been born in the Dominican Republic, the Government refused to issue birth certificates to them.⁵²
67. Because they did not have birth certificates, the girls could not be admitted to school. One of the children, Violeta Bosico, had initially been admitted to her school without a birth certificate, but was refused continued enrolment when she reached grade four. She therefore completed grades 4 and 5 at an evening school for adults.⁵³
68. In addition to arguing a breach by the Government of the Dominican Republic of the rights of minors, the complainants argued that the Government had also breached the rights to nationality,⁵⁴ equality before the law,⁵⁵ recognition as a person before the law,⁵⁶ and a given name and the surnames of his or her parents.⁵⁷ The complainants also relied on article 1(1) of the American Convention, which states as follows:

⁵² *Girls Yean and Bosico v Dominican Republic* Inter-American Court of Human Rights (IACtHR), 8 September 2005.

⁵³ *Id* p 48.

⁵⁴ Article 20 of the American Convention.

⁵⁵ Article 24 of the American Convention.

⁵⁶ Article 3 of the American Convention.

⁵⁷ Article 18 of the American Convention.

The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

69. In assessing whether these rights had been breached, the Inter-American Court made the following apposite comments:

The determination of who has a right to be a national continues to fall within a State's domestic jurisdiction. However, its discretionary authority in this regard is gradually being restricted with the evolution of international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States. Thus, at the current stage of the development of international human rights law, the authority of the States is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness. . . . Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability.⁵⁸

⁵⁸ Id at paras 140 – 142.

70. The Court continued that *“the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person’s 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.”*⁵⁹
71. Applying these provisions together, the Inter-American Court held that, in the light of the special protection conferred on children under article 19 of the American Convention, the Government of the Dominican Republic was required to provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development.⁶⁰ This was so, irrespective of their origin or parentage.⁶¹
72. The manner in which the Inter-American Court applied these provisions highlights the importance of understanding the right to education – including an entitlement to access education – as a right centred on and fundamental in giving effect to a child’s best interests.

⁵⁹ Id at para 155.

⁶⁰ Id at paras 185 – 187.

⁶¹ Id at para 244.

Decisions of domestic courts in comparative jurisdictions

73. In our analysis of decisions in domestic comparative jurisdictions, two countries stand out in their protection and advancement of the right of access to education for undocumented learners.

United States of America

74. Although there is no specific provision in the United States Constitution that expressly protects the right to education, courts in the United States have located the right of equal access to education, including equal education provisioning, in the Equal Protection Clause of the Fourteenth Amendment.⁶²
75. In *Plyler v Doe*⁶³ the United States Supreme Court examined a statute passed in the state of Texas withholding from local school districts any state funds for the admission of children who were not “legally admitted” into the United States, and authorising the school districts to deny enrolment to these learners.
76. The Court began its analysis by confirming that the plaintiffs, despite their residence in the United States being unlawful, were entitled to the protection

⁶² Section 1 of the Fourteenth Amendment provides that “*All persons born naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*”

⁶³ 457 U.S. 202 (1982).

afforded by the Fourteenth Amendment by virtue of the fact of their presence within the jurisdiction of the United States and the state of Texas.⁶⁴

77. The Court emphasised that the children affected by the impugned statute were not responsible for their undocumented status and that they should therefore not bear the burden of circumstances over which they have no control. In other words, *“legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”*⁶⁵

78. This is particularly so given the important role that education plays in society. In this regard the Court held that –

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavoured group of education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, “education prepares individuals to be self-reliant and self-sufficient participants in society. Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that

⁶⁴ Id at p 215.

⁶⁵ Id at p 220.

*deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.*⁶⁶

79. The Supreme Court concluded that *“the opportunity [to access] education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”*⁶⁷
80. The United States Court of Appeals for the Eleventh Circuit followed a similar approach in *Hispanic Interest Coal. Of Alabama v Governor of Alabama*.⁶⁸ As with *Plyler*, the case involved a legislative provision in Alabama that had the effect of barring undocumented learners from accessing education. The impugned statute compelled public schools to seek proof of each child’s citizenship or immigration status and, if sufficient proof was not provided, created a presumption that the child was present in the United States unlawfully.⁶⁹
81. The Court held that this significantly interfered with the exercise of the right to education and this interference could not be justified by any of the goals of the provision articulated by the Governor of Alabama:⁷⁰

⁶⁶ Id at pp 221 – 222, references omitted.

⁶⁷ Id at p 223, emphasis added.

⁶⁸ 691 F.3d 1236 (11th Circ. 2012).

⁶⁹ Id at p 5.

⁷⁰ Id at p 7.

- 81.1. The first was the interest in preservation of the state's resources for lawful residents. The Court rejected this as "*a concise expression of an intention to discriminate*".
- 81.2. The second was the interest in deterring illegal immigration, which the Court held could be achieved far more effectively through other means.
- 81.3. Third, the court rejected the argument that undocumented children placed a significant burden on the provision of educational resources sufficient to justify their distinction from other groups of children.
- 81.4. Finally, the court rejected the argument put forward that there is a distinction to be drawn between the contributions that different groups would be able to make in the territorial boundaries of the state.
82. The court went on to consider an argument that the purpose of the provision was to collect data about the population of undocumented children and the state resources being spent on them so as to plan for the future. The Court rejected this, holding that "*we do not find these justifications, which fit into the general category of "because we want to know," substantial enough to justify the significant interference with the children's right to education under Plyler.*"⁷¹

⁷¹ Id at p 10.

83. The Court concluded that the impugned provisions violated the Equal Protection Clause.⁷² It follows from this that children’s citizenship or migration status in the United States is irrelevant to their right to access education.

Canada

84. The Supreme Court of Canada considered the importance of access to education in *Moore v British Columbia*.⁷³ This case involved the cancellation by a public school of its special education program, leaving a student with severe dyslexia without access to education in the public schooling system. The student’s parents challenged this decision on the basis that section 8 of the British Columbia Human Rights Code considered as discriminatory conduct that “*without a bona fide and reasonable justification, den[ies] a person or class of persons any accommodation, service or facility customarily available to the public.*”

Summary of comparative law on the right to education

85. These decisions from foreign jurisdictions are consistent with the international human rights law instruments discussed above, and provide a further basis for the interpretation of the right to basic education in accordance with a children-first approach, and in accordance with principles of universal access and non-discrimination

⁷² Id at p 10.

⁷³ [2012] 3 S.C.R.

The meaning of section 29(1)(a) of the Constitution as informed by international and comparative law

86. Based on what is set out above, it is submitted that the right to basic education as guaranteed by section 29(1)(a) of the Constitution must be interpreted through the following lenses:

86.1. Child-centred approach: the link between access to basic education and the best interests of the child is one of the central themes of the CRC. It also features in the African Committee's decision regarding the rights of children of Nubian descent to nationality and to the host of rights that accompany this right, including the right to access education, and in *Girls Yean*, emphasising that education is one of the special protections offered to minors. The importance of a child-centred approach in interpreting the right to education is further consistent with the jurisprudence of our own Constitutional Court.⁷⁴

86.2. Universal accessibility: the use of the terms "everyone" and "for all" is consistent throughout the international human rights law instruments discussed above. This language appears in the ICESCR (and in General Comment 13 in which these provisions are analysed), the CRC and the African Charter. We submit that the use of these terms is a deliberate

⁷⁴ See *Governing Body of the Juma Masjid Primary School and others v Essay N.O. and others* 2011 (8) BCLR 761 (CC) at paras 66 and 71.

adoption of universal accessibility as a guiding principle for the provision of basic education. This is further consistent with the decision of the Constitutional Court in *Khosa*,⁷⁵ in which the Court held that a right conferred on “everyone” – in that case, the right of access to social security – could not be construed as referring only to citizens.⁷⁶

86.3. Non-discrimination: linked to the principle of universal accessibility, the prohibition on unfair discrimination is an express provision that runs through all of the instruments and decisions discussed above. The principle of non-discrimination in education further forms the basis for the existence of the UNESCO Convention. According to international human rights scholars the principle of non-discrimination in the international instruments is perhaps the most readily accepted by states, because it is usually perceived as having a primarily negative obligation. Scholars note too that state practice of the principle of non-discrimination seems sufficiently broad to qualify this aspect of the right as customary international law.⁷⁷ Section 232 of the Constitution notes that “*Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.*”

⁷⁵ *Khosa and others v Minister of Social Development and others; Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC).

⁷⁶ See also *Lawyers for Human Rights and another v Minister of Home Affairs and another* 2004 (4) SA 125 (CC) para 41.

⁷⁷ Klaus Beiter, *The protection of the right to education by international law including a systematic analysis of Article 13 of the International Covenant on Economic, Social, and Cultural Rights* (Martinus Nijhoff Publishers 2006) 45.

86.4. The transformative and empowerment role of education: this is a major theme of General Comment 13, which gives content to the right to education contained in the ICESCR. It has been affirmed in several South African decisions on the right to education.⁷⁸ The United States Supreme Court clearly articulated the role of basic education in its decision of *Brown v Board of Education*:

Today, education is perhaps the most important function of state and local governments. 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 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, must be made available to all on equal terms.⁷⁹

86.5. The need for practical and effective access to education: there are several provisions in the human rights law instruments discussed above that

⁷⁸ See *Juma Masjid* above n 174 para 41; *Minister of Basic Education v Basic Education for All* above n 7 para 37.

⁷⁹ *Brown v Board of Education of Topeka* 347 U.S. 483 (1954) at 493.

support an interpretation of the right of access to education as one that includes obligations to remove barriers to access. These include article 3 of the UNESCO Convention, the ICESCR which provides that primary education should be free of charge, and the African Children's Charter, which, inter alia, requires special measures to be taken to facilitate access to education for particularly vulnerable groups.

87. These principles are consistent with the entrenchment and interpretation of the right to education in comparative law, thus lending further support to the proposed interpretation of section 29(1)(a) of the Constitution.
88. On an interpretation of the right to basic education in section 29 of the South African Constitution that is consistent with what is set out above, it is clear that the impugned provisions limit the right to basic education, and that they do so substantially. The undisputed evidence shows⁸⁰ that despite numerous unsuccessful attempts by their caregivers to secure the prescribed documents, children are excluded from accessing basic education on the basis of their social origin and nationality. The impugned provisions impose administrative hurdles that make the realisation of the right to basic education impossible for many.
89. Against this background we now consider the arguments made in an attempt to justify these provisions.

⁸⁰ See Joinder Application Bundle 1 and particularly the supporting affidavits of Puseletso Thumane (pp 115 – 120); Palesa Mahadika (pp 120 – 127); Nomsa Ndlovu (pp 128 – 136); Amos Sokoyi (PP 137 – 147); Majobo Mofama (pp 152 – 159); Martin Lehloenya (pp 160 – 164) and Nomvuyo Mntuwaphi (pp 183 – 181).

LIMITATION OF THE RIGHT TO BASIC EDUCATION

90. Section 36 of the Constitution provides as follows:

- (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.*

91. In *S v Mlungwana and others* the Constitutional Court held that this analysis “requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment.”⁸¹

92. These submissions have addressed in some detail the nature and purpose of the right to basic education as interpreted with reference to international and

⁸¹ 2019 (1) SACR 429 (CC) para 57.

comparative law. We emphasise that the purpose of the right to education is to allow children to unlock their full potential, and to participate meaningfully in the societies in which they live. Education is an empowerment right and one of the vehicles to achieve equality and dignity.⁸²

93. The respondents' justification for the systemic exclusion of undocumented learners from accessing schools through the impugned provisions is, in essence, a desire to drive out migrants and deter any future migrants from entering South Africa.⁸³ Indeed, the DHA spells this out in its assertion that its policies are developed on the basis of a denial of basic and necessary services to migrants so that South Africa becomes a less attractive option for them.⁸⁴

94. The affidavits of the respondents, and particularly the DHA,⁸⁵ betray undertones of discrimination against all foreign nationals, which discrimination informs the policies adopted by them. Indeed, the manner in which the DHA describes its justification is in itself an attack on the dignity of those whose rights are being stripped away. For example –

94.1. The DHA tries to paint a picture of a sustained unlawful flow of Lesotho nationals into South Africa. The evidence it relies on, however, is simply evidence of arrivals from and departures to Lesotho, with no evidence to

⁸² See *Minister of Basic Education v Basic Education for All* above n 11.

⁸³ Fourth and Fifth Respondents' Answering Affidavit, Joinder Application Bundle 3, pp 530 – 533, paras 41 – 44.

⁸⁴ Fourth and Fifth Respondents' Answering Affidavit, Joinder Application Bundle 3, p 523, paras 21 – 22.

⁸⁵ The first to third respondents make no attempt to justify the limitation of the right to education.

substantiate the assertion that “*the unlawful migration from Lesotho [is] a pandemic.*”⁸⁶

- 94.2. The DHA argues that allowing “illegal foreigners” to attend no-fee schools in South Africa freely would lead to increased “illegal immigration” as well as child abandonment and child-headed households.⁸⁷ This is a serious allegation that is not supported by evidence or informed by the complex socio-economic issues that drive migration.
95. While we acknowledge that there may be a legitimate government purpose in appropriate immigration control, the justifications put forward by the DHA make clear that its motivations are xenophobic. Indeed, apart from motivating for a denial of basic services to foreign nationals, the DHA provides no evidence that excluding undocumented children from school will have any impact on migration.
96. Moreover, the DHA has failed to address whether there are less restrictive means to achieve the purpose of lawful and appropriate immigration control. Where less restrictive means exist to achieve a legitimate government purpose, the more restrictive means will not pass a limitations analysis.⁸⁸
97. The respondents do not explain why the use of other forms of identification will be inappropriate for them to meet their objectives. These alternative means could

⁸⁶ Fourth and Fifth Respondents’ Answering Affidavit, Joinder Application Bundle 3, p 526, para 27.

⁸⁷ Fourth and Fifth Respondents’ Answering Affidavit, Joinder Application Bundle 3, p 533, para 44.4.

⁸⁸ See, for example, *Minister of Justice and Constitutional Development and others v Prince and others (Clarke and others intervening)*; *National Director of Public Prosecutions and others v Rubin*; *National Director of Public Prosecutions and others v Acton* 2018 (6) SA 393 (CC) at paras 33 – 35 and 94; *Mlungwana* above n 81 at paras 95 – 101.

include the acceptance of alternative forms of identification. The second *amicus curiae*, the South African Human Rights Commission, suggests that alternative forms of identification such as passports, children's placement orders and affidavits can be used to achieve the same purpose as a birth certificate or identity document.⁸⁹

98. Moreover, the 2017 White Paper on International Migration sets out clearly the less restrictive means readily available to the DHA to achieve immigration control without infringing on the right to basic education.⁹⁰ These include:

98.1. Effective management of admissions and departures for international migrants to and from South Africa;

98.2. Effective management of residency and naturalisation;

98.3. Effective management of asylum seekers and refugees;

98.4. Effective management of the integration process for international migrants; and

98.5. Effective management of enforcement.

⁸⁹ Draft position paper on Access to Basic Education for Undocumented Learners in South Africa, SAHRC application, p 60.

⁹⁰ White Paper on International Migration, 2017, Joinder Application Bundle 3, p 607.

99. In sum therefore, the impugned provisions constitute an absolute denial of all undocumented learners' rights to a basic education irrespective of efforts made to obtain documentation or eligibility for documentation in terms of the legislative framework. Moreover, while budgeting for education provisioning or appropriate immigration control may serve a legitimate government purpose, a blanket approach to push migrants out is inconsistent with South Africa's democratic values of equality and dignity. Finally, there exist far less restrictive means to achieve the legitimate purposes articulated by the DHA.

100. We submit that the DHA has accordingly failed to provide any reasonable justification for the systemic exclusion from schools of undocumented learners.

THE PRINCIPLES OF CO-OPERATIVE GOVERNMENT

101. The principles discussed above create an obligation on the state to remove barriers to access to education. The evidence before this Court makes clear that one such barrier arises from the difficulties faced in registering births and securing the other necessary documentation for the enrolment of learners at public schools. These barriers implicate at least three organs of state:

101.1. The DBE, being the organ of state responsible for the Admissions Policy;

101.2. The Provincial Department, being the organ of state responsible for the implementation the Admissions Policy and generally for the provision of basic education to children in the Eastern Cape. In terms of section 16A

of the South Africa Schools Act 84 of 1996, the principal of a school is a representative of the Provincial Department; and

- 101.3. The DHA, being the organ of state responsible for the registration of births and deaths as well as the administration of visas and permits for those residing in South Africa.
102. Given the roles of these three organs of state in promoting access and removing barriers to basic education, it is necessary to conduct an analysis of the co-operative government provisions that bind them, and the nature of the obligations arising from these provisions.
103. Section 41(1) of the Constitution provides as follows:

Principles of co-operative government and intergovernmental relations

- (1) *All spheres of government and all organs of state within each sphere must –*
- (a) *preserve the peace, national unity and indivisibility of the Republic;*
 - (b) *secure the well-being of the people of the Republic;*
 - (c) *provide effective, transparent, accountable and coherent government for the Republic as a whole;*
 - (d) *be loyal to the Constitution, the Republic and its people;*

- (e) *respect the constitutional status, institutions, powers and functions of government in other spheres;*
- (f) *not assume any power or function except those conferred on them in terms of the Constitution;*
- (g) *exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and*
- (h) *co-operate with one another in mutual trust and good faith by –*
 - (i) *fostering friendly relations;*
 - (ii) *assisting and supporting one another;*
 - (iii) *informing one another of, and consulting one another on, matters of common interest;*
 - (iv) *co-ordinating their actions and legislation with one another;*
 - (v) *adhering to agreed procedures; and*
 - (vi) *avoiding legal proceedings against one another.*

104. It is submitted, for the reasons set out below, that section 41(1) of the Constitution obliges the DBE, the Provincial Department and the DHA to work together to facilitate and assist with the registration of births and to assist learners and their families in securing any other necessary documentation. In this regard we submit that all three of these organs of state bear obligations arising from the right to basic education and that they are required to co-operate and co-ordinate with one another to discharge these obligations.

The rationale for the co-operative government provisions

105. In its *Certification* decision,⁹¹ the Constitutional Court highlighted two aspects of the obligations arising from the co-operative government provisions in the Constitution:

105.1. The express provision that “*all spheres of government must exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.*”⁹² These are referred to in these written submissions as “the negative co-operative government obligations.”

105.2. The set of obligations referred to in these written submissions as “the positive co-operative government obligations”, articulated by the Constitutional Court as follows: “*Inter-governmental cooperation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement of CP XX that national unity be recognised and promoted.*”⁹³

⁹¹ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC).

⁹² *Id* at para 289.

⁹³ *Id* at para 290.

106. The focus of jurisprudence on the principles of co-operative government to date has focused primarily on the negative co-operative government obligations and on the procedures and consequences for intergovernmental disputes.⁹⁴

107. In this case, however, the Court is not faced with an encroachment by one organ of state on the terrain of another. On the contrary, learners across schools in the Eastern Cape – and indeed in schools across South Africa – are being denied access to education as a result, inter alia, of the failure by any of the organs of state in this case to take steps to promote and fulfil these learners' rights. For example:

107.1. The principal of Nchafatso Primary School has declined to enrol Esona Sigo in his school because she does not have a birth certificate. The DHA has refused to issue a birth certificate for Esona without a paternity test proving her father's identity. Both the Principal and the DHA have adopted a passive stance, with the result that eleven-year-old Esona has never been to school.⁹⁵

107.2. Matabello Moeketsi, who is the caregiver of a distant relative's daughter Mpho, explains that Mpho was asked to leave Pelomosa Primary School because she did not have a birth certificate. Mr Moeketsi explained the situation to the school and advised them that it would not be possible for him to get a birth certificate or study permit for Mpho. The school has again

⁹⁴ See, for example, *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC); *Uthukela District Municipality and others v President of the Republic of South Africa and others* 2003 (1) SA 678 (CC).

⁹⁵ Affidavit of Bongani Sigo, Joinder Application Bundle 1, pp 93 – 98.

been passive and awaited Mpho's documentation. Mpho has not attended school since 2015. Mr Moeketsi has no other option but to send her back to Lesotho, where she was born, to attend school. She has no one to look after her in Lesotho.⁹⁶

108. These are two of a host of examples of children who are out of school because they do not have the prescribed documentation. The Provincial Department – including the schools at which the children's caregivers seek their enrolment – and the DHA remain in their silos, refusing and/or failing to provide assistance to them to ensure that the children concerned may exercise their rights.

109. Against this background we consider below the nature and scope of the positive co-operative government obligations. We submit that, given the barriers to the exercise of fundamental rights, the organs of state are required actively to co-operate and co-ordinate their efforts and to assist learners and their caregivers in removing the barriers to the children's education.

110. We submit that the existence of obligations of this nature is supported by the text of the Constitution, as well as being alluded to by our courts.

⁹⁶ Affidavit of Matabello Vilita Moeketsi, Joinder Application Bundle 1, pp 99 – 103.

The text of the Constitution and co-operative government provisions

111. The Constitution is clear in its creation of a single cohesive government comprising three spheres of government and several organs of state. This intention appears in several constitutional provisions:

111.1. The reference in section 1 of the Constitution to South Africa as “*one, sovereign, democratic state*”; and

111.2. The emphasis in the wording of section 41(1) of the Constitution on national unity,⁹⁷ indivisibility⁹⁸ and coherence.⁹⁹

112. In line with this conception of a coherent and cohesive government, section 7(2) of the Constitution provides that “*The state must respect, protect, promote and fulfil the rights in the Bill of Rights.*” (Emphasis added)

113. The obligations set out in the Bill of Rights are the obligations of the state as a whole. Although the spheres of government and organs of state are allocated different roles and responsibilities in respect of these obligations, they discharge their duties not on behalf of their particular sphere of government or organ of state but on behalf of the state.

⁹⁷ Section 41(1)(a) of the Constitution.

⁹⁸ Section 41(1)(a) of the Constitution.

⁹⁹ Section 41(1)(c) of the Constitution.

114. It is inevitable that there will be some overlap between functional areas of different organs of state, or that the performance by one organ of state of its duties depends on the discharge of duties by another organ of state. These situations are regulated by the Intergovernmental Relations Framework Act 13 of 2005 ("Framework Act").

115. The Preamble to the Framework Act includes the following recognitions:

115.1. That all spheres of government must provide effective, efficient, transparent, accountable and coherent government to secure the well-being of the people and to realise their constitutional rights;

115.2. That there is a pervasive need to redress poverty, underdevelopment, and marginalisation of people and communities;

115.3. That these challenges are best addressed through a concerted effort by government to work together and integrate their actions in the provision of services, the alleviation of poverty and the development of people and our country.

116. These principles are carried through to the objects of the Framework Act, which are the following:

The object of [the Framework] Act is to provide within the principle of co-operative government set out in Chapter 3 of the Constitution a framework

for the national government, provincial governments and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation, including –

- (a) coherent government;*
- (b) effective provision of services;*
- (c) monitoring implementation of policy and legislation; and*
- (d) realisation of national priorities.*

117. For the purpose of realising these objectives, the Framework Act provides for a series of mechanisms to facilitate co-operation and co-ordination between the spheres of government and the organs of state within each sphere.

118. It is therefore clear from the text of the Constitution and the Framework Act that the spheres of government and the organs of state within those spheres are not intended to operate in isolated silos. Their obligations are primarily to respect, protect, promote and fulfil the rights in the Bill of Rights and to work together to deliver services, promote development and eradicate poverty and marginalisation.

119. This approach is apparent in jurisprudence on the manner in which organs of state are required to work together.

Judicial support for positive co-operative government provisions

120. In its discussion of the positive duty to co-operate in the *Certification* case,¹⁰⁰ the Constitutional Court relied on its previous decision in the *Education Policy Bill* case.¹⁰¹ That case involved the interaction between the national and provincial spheres of government in formulating and implementing education policy. This is a functional area of concurrent national and provincial competence in terms of schedule 4 to the Constitution. One of the challenges the Court was asked to address was whether the power conferred on the national Minister of Basic Education to determine education policy after consultation with the provinces – and the concomitant duty on the provinces to align their legislation and policies with the national policy – was consistent with the principles of co-operative government.

121. The Court held that the legislatures in the national and provincial spheres of government are obliged to exercise their concurrent powers through co-operation. As such, the Court held *“It cannot therefore be said to be contrary to the Constitution for Parliament to enact legislation that is premised on the assumption that the necessary cooperation will be offered, and which requires a provincial administration to participate in cooperative structures and to provide information or formulate plans that are reasonably required by the Minister and are relevant to finding the best solution to an impasse that has arisen.”*¹⁰²

¹⁰⁰ Above n 91.

¹⁰¹ *In re: Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill No 83 of 1995* 1996 (3) SA 289 (CC).

¹⁰² *Id* at para 34.

122. The Minister of Basic Education's attempt to exempt herself from this obligation was among the challenges levelled against the Minimum Uniform Norms and Standards for Public School Infrastructure ("Norms and Standards").¹⁰³ Regulation 4(5)(a) of the Norms and Standards made their implementation subject to the resources and co-operation of other government agencies and entities responsible for infrastructure.

123. The Minister argued that section 41 of the Constitution and the Framework Act prevented her from taking decisions and developing plans and programmes that bound other organs of state;¹⁰⁴ the applicants and the amicus curiae, on the other hand, argued that these provisions read with section 29 of the Constitution compelled the Minister to provide safe and adequate school infrastructure and to take positive steps to secure the necessary co-operation from the relevant organs of state.

124. The Court rejected the Minister's contentions, confirming that the principle of interdependence in government empowered and required her to secure the necessary resources and co-operation from the other relevant organs of state in upholding the constitutional rights and values.¹⁰⁵

125. We submit therefore that the co-operative government provisions in the Constitution must be read in such a way as to impose positive obligations on all spheres of government and organs of state within those spheres to co-operate

¹⁰³ GNR 920 in GG 37081 29 November 2013. These challenges were addressed in *Equal Education and another v Minister of Basic Education and others* 2019 (1) SA 421 (ECB).

¹⁰⁴ Id at para 73.

¹⁰⁵ Id at para 199.

and co-ordinate their efforts with the shared objective of the delivery of services and the advancement and achievement of constitutional rights.

126. We set out in the next section the manner in which the DBE, Provincial Department and DHA have failed to meet these obligations.

The DBE, Provincial Department and DHA are in breach of the positive co-operative government provisions

127. We addressed above the passivity of both the Provincial Department and the DHA in interacting with learners who cannot access schools because they are not in possession of the relevant documentation. Not only do the provisions of the Constitution and the Framework Act support an interpretation that requires these organs of state to adopt active measures to remove these barriers to education, but their own Implementation Protocol imposes duties on them to adopt these measures.

128. Clause 4 of the Implementation Protocol¹⁰⁶ deals with the parties' roles and responsibilities and envisages the following:

128.1. A birth registration and identity documents campaign including visits to schools to register births. The Implementation Protocol notes that the target date for the registration of all births is 2011. The campaign is to be

¹⁰⁶ Annexure "AA8", Main Application Bundle 2, p 438.

led by the DHA, and the DBE has undertaken to assist, including through the identification of appropriate schools.

128.2. The provision by the DHA of a list of learners turning 6 and 7 years old each year, in order to allow the DBE to identify children who are of compulsory school-going age but who are not enrolled at school.

129. On its face, the Implementation Protocol is a commendable example of how organs of state ought to work together to achieve the realisation of rights. If implemented, it would provide for an effective and accessible process for registering births and obtaining identity documents, and would therefore be a significant measure to ensure that all children have access to schools.

130. The DBE refers to this Implementation Protocol as an example of its compliance with its co-operative government obligations.¹⁰⁷ The description of this Implementation Protocol by the DBE, however, suggests that its use is directed not at facilitating access to services and advancement of rights, but at strengthening the barriers to access to education. In his opposing affidavit, Mr Padayachee describes the purpose of the Implementation Protocol as follows:

The protocol desires to establish a working relationship, to cooperate with each other by sharing information and best practices, aimed at combating fraud by people and other elements, in the process of issuing birth certificates. The protocol further recognises that the Department of Home

¹⁰⁷ First to third respondents' opposing affidavit, Main Application Bundle 2, p 324, para 126.6

*Affairs is mandated, among others, to develop and maintain credible National Population Register.*¹⁰⁸

131. No mention is made of the rights of children to access education, nor is there any reference to the promotion and protection of constitutional rights and values, including the best interests of the child.

132. The affidavit deposed to on behalf of the DHA provides insight into why this is the case:

*As human beings in the twenty first century, people require basic services such as health care, water, electricity, sanitation, food and the like. Children require the above together with an education. This position does not change when persons are living in a country illegally. Recognising this, and as the 1999 White Paper points out “the best way to prevent further illegal immigration is to create in South Africa an environment which does not offer them the opportunities of employment and free available public services which they cannot find in their countries of origin.”*¹⁰⁹

133. It is clear, therefore, that to the extent that there is co-operation and co-ordination between the DBE, the Provincial Department and the DHA, this is directed at further restricting access to education for undocumented learners. In other

¹⁰⁸ First to third respondents' opposing affidavit, Main Application Bundle 2, p 295, para 62.

¹⁰⁹ Fourth and Fifth Respondents' answering affidavit, Joinder Application Bundle 3, p 523, para 22.

words, the DBE, the Provincial Department and the DHA are purporting to act to give effect to section 41 of the Constitution, but are in fact undermining it.

134. Not only is this in violation of the rights discussed above, but it is also in direct breach of the obligations imposed on these organs of state to work together to adopt positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights.

CONCLUSION

135. When interpreted in line with international law and with reference to comparative law, it is clear that the right to basic education enshrined in section 29(1)(a) of the Constitution is a right afforded to all children within South Africa, regardless of their migration or documentary status.

136. The respondents have failed to justify the limitation by the impugned provisions of this right. As such, we submit that the impugned provisions are to be set aside as inconsistent with the Constitution and invalid.

137. Moreover, the respondents have breached their obligations arising from the principles of co-operative government.

138. For these reasons we submit that the applicants should be granted the relief they seek.

NIKKI STEIN

Counsel for the first amicus curiae

Chambers, Sandton

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