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
SUPERINTENDANT GENERAL OF THE EASTERN CAPE DEPARTMENT OF EDUCATION	Third Respondent
MINISTER OF HOME AFFAIRS	Fourth Respondent
DIRECTOR-GENERAL OF HOME AFFAIRS	Fifth Respondent

SUMMARY NOTE[1]

16 September 2019

In 2016, the Eastern Cape Department of Basic Education (ECDBE) sent a circular to all their schools informing them that they will only be providing funding to ordinary public schools for learners who have South African Identity Documents or foreign passports and study permit numbers. This per learner funding is generally the only source of funding for schools in quintiles 1 - 3 and is required to cover most items that are important for the running of a school, for example, stationary, textbooks, furniture, & the school feeding scheme. These learner numbers are now also being used as the basis for allocating teachers to schools.

[1] Written by Tess Peacock and Paula Proudlock, Children's Institute, UCT. Reviewed for accuracy by Anjuli Maistry, Centre for Child Law, UP & Cecile van Schalkwyk, Legal Resources Centre

If a school has 1000 learners of which 100 are undocumented, they will receive funding and teacher allocations to cover only the needs of 900 learners. Faced with this situation, the school will either opt to spread the funding across all their learners, thereby reducing the quality of the education and nutrition provided; or exclude the 100 undocumented learners from the school and/or feeding scheme.

As a result of this change in the funding process, the Legal Resources Centre (LRC) and Centre for Child Law (CCL) started to receive referrals of cases of undocumented children (both South African and non-national) being denied admission or continued enrolment at schools in the Eastern Cape. They, and the school governing body of Phakamisa High School, therefore launched this litigation to set aside the decision of the ECDBE to protect these children's rights to access basic education, and their rights to dignity and equality.

While the 1998 Admissions Policy for Ordinary Public Schools ("Admission Policy") already specifies that these documents are required for admission to school, it allows for conditional registration without these documents. However, the Admission Policy does require that that documentation is to be obtained within three months in order for the conditional registration to be made permanent. Although silent on what a school is supposed to do after three months, the Admission Policy has not generally been used to exclude undocumented children. However, the more recent change in the funding process has resulted in schools fearing cuts in their funding or actually receiving less funding. In some schools, this can amount to between 5 and 10% of funding for their learners. This is now pressuring many schools to deny admission or to exclude undocumented children.

There are also provisions in the Immigration Act that according to the CCL and the Department of Home Affairs prohibit the provision of education to children suspected of being "illegal foreigners", one of the categories of undocumented learner affected by this case. The CCL, representing 37 children, are questioning the constitutionality of both the provisions in the Admission Policy and the Immigration Act. They argue that they have the effect of excluding any learner without documentation from accessing education. CCL argues that no child should be prejudiced by the status or decisions of their parents or caregivers. The South African Human Rights Commission (SAHRC) has applied to join the case as an *amicus curiae*[2] agreeing that no child should be excluded from accessing education. The SAHRC differs from the CCL, however, arguing that the correct interpretation of the Immigration Act is that the relevant provisions do not apply to schools and that therefore schools cannot be sanctioned for providing services to undocumented learners.

[2] Friend of the court.

SECTION27 has also requested to join the case as an *amicus curiae* and is seeking to make submissions on what "access" means in respect of the right to education including inputs on what is required under international human rights law as well as what is required from organs of states in respect of cooperation and coordination for the advancement of the realisation of rights. They are arguing that the memorandums of agreement between the different government departments concerned, are aimed at 'limiting' rights and not at advancing rights.

The CCL and LRC have filed evidence from the Children's Institute, UCT, which argues that there are close to 500 000 children aged 0 – 18 in South Africa who do not have birth certificates and most of these children, according to the data, are likely to be South African. Approximately 157 000 are of school going age (between 6 to 18 years). The DBE in their Supplementary Affidavit in response to this evidence, reveals that the extent of the problem may be much greater. According to their data collection system, almost 1 million children do not have identity numbers at school and cannot be accounted for by DHA. 83.2% are South African and 16.7% or 167 734 children are non-nationals.

The Children's Institute's analysis of the data reveals that children without birth certificates are mostly black (African) and poor and are more likely to also be excluded from other government services such as immunizations, heath monitoring, and the Child Support Grant. It is this most vulnerable class of children who stand to be excluded from school if the funding decision together with the Admissions Policy is enforced in all provinces.

This litigation was launched at the end of 2016 but it has taken time to secure a court date due to the complexity of the issues and the many parties involved. It will be heard on 18 & 19 September 2019 in the Grahamstown High Court. If any of the parties appeal the order granted by the Grahamstown High Court, it could take another two years before finality is reached.

After launching an urgent interim application on behalf of the 37 children, the CCL has successfully secured access to public education institutions for them on an interim basis and pending the outcome of the main case referred to above. The Constitutional Court of South Africa confirmed a consent order between CCL and the DBE to this effect. The CCL, concerned for all the other children who stand to be denied their right to education while the main matter is being heard and decided, was in the process of preparing a second urgent application to ask the Court to order that no child may be denied access to school for being undocumented, pending the finalisation of the main litigation. In response, the National DBE indicated its interest in issuing a circular regarding the admission of undocumented learners into school pending the outcome of the main litigation. After meetings between the CCL and the office of the Deputy Minister of Education, a circular has been issued. Prior to the finalisation of the circular, the CCL and others made extensive comments on the circular to

DBE, motivating for changes that would improve its effectiveness at a school level. However, in effect the only change it has introduced is to extend the three month conditional registration period to six months. The circular also does not affect the funding policy in any way and therefore even if it influences schools to admit and retain undocumented learners, it does not ensure that schools will receive funding for those learners.

The more detailed summary below captures the main arguments from all the parties in the case.

On 18 and 19 September, the Grahamstown Eastern Cape Division of the High Court ("High Court") will hear an application that concerns the following issues:

[1] first, whether the decision of the Eastern Cape Department of Basic Education (ECDBE) to base funding transfers to quintiles 1-3 schools on learner numbers where a valid South African Identity Number ("ID"); or passport number and permit number has been captured on SASAMS[3], was lawful (reviewable in terms of the Promotion of Administrative Justice Act)[4] and/or constitutionally permissible;

[2] secondly, whether the three- month period for the finalisation of the admission of a learner without a valid South African ID; passport number or permit number in terms of section 15 of the Admission Policy for Ordinary Public Schools[5] ("the Admission Policy") is mandatory or not;

[3] thirdly whether section 15 of the Admission Policy which requires a birth certificate in order for a child to be admitted to a public school is lawful and/or constitutionally permissible;

[4] fourthly, whether section 21 of the Admission Policy which requires that "illegal foreigners" in terms of the Immigration Act 13 of 2002 must, when they apply for admission to school, show evidence that they have applied to legalise their stay in the country is lawful and/or constitutionally permissible;

[5] lastly, whether sections 39(1) and 42 of the Immigration Act prohibits schools from providing basic education to children who are considered "illegal foreigners" and makes such provision and offence, and if so, whether those provisions are lawful and/or constitutionally permissible.

[3] SASAMS, introduced in 2012, is an electronic database of learners who attend a public school and requires that the data of a learner be inputted which includes a submission relating to documentation namely, a valid ID number, passport or a study permit.
[4] 3 of 2000.
[5] GN 2432 of 1998.

This case was initially brought as an application on behalf of the Centre for Child Law ("the First Applicant") and the School Governing Body of Phakamisa High School ("the Second Applicant"), represented by the Legal Resources Centre, to review and set aside the decision of the Eastern Cape Department of Education ("ECDOE"). They sought the prayers contained in 1 and 2 above. The decision was set out in a circular which provided that various financial transfers (Norms and Standards, Post Provisioning allocation and National School Nutrition Programme) would be based *only* on the learner numbers where valid identity, permit or passport numbers have been captured in the SASAMS system.

The case was initially embarked on because the decision of the ECDOE would have a significant impact on funding of learners at public schools and impede many learners' full enjoyment of their right to basic education,[6] including their rights to equality,[7] non-discrimination,[8] nutrition[9] and dignity.[10] It was not the purpose of the application to challenge any existing legislation. The First and Second Applicants sought first to have the decision of the ECDOE reviewed and set aside and secondly, for the High Court to direct that all funding and resourcing for schools must include all learners. Issues No 1. and 2. above pertain to this part of the application.

The First to Third Respondents (National and Eastern Cape DBE) oppose the relief sought in the application. They contend that the decision by the ECDOE was in fact a decision by the Council of Education Ministers[11] ("CEM") and that the impugned decision was made for the purposes of improving administrative efficiency within the DBE. They submit that the relief sought by the First and Second Applicants is wide-ranging and will render the DBE ineffective in respect of effective, efficient administrative control. They submit that the rationale for the decision is to—

a. ensure compliance with the Admission Policy which states that learners must produce their birth certificates at registration, as well as compliance with the Births and Deaths Registration Act (BDRA)[12] which requires that every birth is registered within 30 days;
b. ensure that the details of vulnerable children can be obtained and shared with the Department of Social Development so that they can be provided with services;
c. identify all undocumented learners in the system and engage with the Department of Home Affairs to address the matter; and

[6] Section 29 of the Constitution.
[7] Section 9 of the Constitution.
[8] Ibid.
[9] Section 28(1)(c) of the Constitution.
[10] Section 10 of the Constitution.
[11] The CEM is established in terms of section 9 of the National Education Policy Act 27 of 1996.
[12] 51 of 1992.

d. minimize over-reporting and eliminate "ghost" learners from the system thereby preventing wasteful expenditure.

They contend that there is no violation of the right to basic education because the ECDOE has made provision for learners who have failed to submit their relevant documentation where they will be provisionally admitted to educational institutions and thus they are being provided with an opportunity to rectify their failure to submit the relevant documentation (the process has been expounded in a recent DBE draft circular on the Admissions Policy which allows for an upper limit of 12 months of provisional access as well as support from the Head of Department. No mention, however, is made regarding funding). They also submit that the DBE does "everything in it power" to alleviate challenges to register children by entering into protocols with DHA and SASSA. The provision of these identity documents is, however, mandatory as per the Admission Policy and these requirements are not an unjustifiable infringement on the rights of children.

In addition, DBE argues that the decision is meant to curb human trafficking, child abduction, child prostitution and related abuses. In respect of "illegal immigrants" or non-national children, DBE argues that they cannot provide public education to people who are in the country illegally and not documented, that is that since they are in the country illegally, that they do not have a right to basic education. Further, section 39 of the Immigration Act makes it an offence for any learning institution to provide training or instruction to an "illegal foreigner". DBE contends that the decision of the CEM merely gives effect to a prevailing legal framework and that it is wrong of the Applicants to attack a decision that was taken in furtherance of existing legislation without attacking the legislation itself.

On 12 December 2018, thirty seven (37) children ("the Intervening Applicants") represented by the Centre for Child Law applied to intervene in the case as the third to twenty-sixth applicants, and to join the Minister of Home Affairs (now the "Fourth Respondent") and Director-General of Home Affairs (now the "Fifth Respondent") as respondents. The Intervening Applicants are children, or the parents, caregivers or co-caregivers of children, who were excluded from public schools because they do not have birth certificates or permits.

The 37 children attack the lawfulness of section 15 and 21 of the Admission Policy since they agree with the DBE that these provisions have the effect of barring children who do not have the requisite documentation from accessing education services. These provisions, the 37 children argue, are an infringement of the rights of children (both South African nationals and non-nationals) as it denies these children their right to access education, one of the most important rights for empowerment, development and self-actualisation. They agree with the

CCL and Phakamisa SGB, that such exclusion also impacts on the rights to dignity and equality.

They submit that the right to education is an unqualified right that applies to "everyone" and does not have an internal limitation. It can therefore only be limited in terms of section 36 of a law of general application. The 37 children contend that the Admission Policy is not a law of general application within the meaning of section 36 (as it is a policy). To the extent that the Admission Policy is a law of general application, they submit that the limitations on the children's rights is unjustifiable because there is no rational relationship between the purpose the Policy seeks to achieve and the limitations it results in. Insofar as the purpose is found to be legitimate, that it is overbroad and there are less restrictive means to achieve such objectives.

The 37 children further argue that the Admission Policy goes beyond the legal boundaries allowed for in terms of the Schools Act[13] and the National Education Policy Act.[14] The Schools Act makes it compulsory for all children to attend school between ages 7 and 15 (or on reaching Grade 9), yet the ability to comply with this peremptory requirement is curtailed by additional requirements being imposed at the policy level. This must therefore be unlawful. The National Education Policy Act makes it clear that policy must be enacted with the goals of advancing equity and access to the right to basic education. Again, the 37 children contend, that the Admissions Policy – through its requirements - instead curtails the advancement of these rights by creating and limiting access to basic education and is therefore unlawful.

The 37 children also seek to have Sections 39(1) and 42 of the Immigration Act declared unconstitutional arguing that these provisions unjustifiably limit non-national children's rights to right to education, dignity and equality and to have their interests considered as paramount which they submit "illegal foreigners" are also the bearers of. They reiterate that these children are here through no choice of their own and the state has an obligation to protect them. Insofar as these provisions are in place to ensure compliance with immigration law, the Intervening Applicants argue that the rights of children should not be curtailed to achieve this purpose and that rather, less restrictive measures should be engaged in such as deportation processes, provided they are lawfully undertaken.

The Minister of Home Affairs initially applied for admission to the court as *amicus curiae* but has since been joined to the proceedings as the Fourth Respondent on account of the constitutionality of sections 39(1) and 42 of the Immigration Act being in question. The Minister opposes the application to have these sections declared invalid and in so far as issues

[13] 84 of 1996.
[14] 27 of 1996.

relate to the Admission Policy the Minister has indicated that he will abide by the decision of the court. The Minister provides extensive background to the goals of the Department in respect of birth registration and an accurate population register and the strides and achievements they have made in pursuit of these goals. The Minister contends that there are no categories of person born in South Africa, whether the mother is here lawfully or unlawfully who is not catered for in the existing legal framework.

In respect of illegal immigration, the Minister agrees that the provisions prohibit schools from knowingly providing education to illegal foreigners, making it an offence. The Department explains that it is government's policy to limit "pull factors" to South Africa in an effort to stymie illegal immigration, which it describes as a "pandemic". This means that South Africa has decided not to allow illegal immigrants to access public services, including education. They argue that this is both an economically viable approach to address the issue of illegal immigration as well as a way to preserve the scare resources in the country. They submit that deportation and detention is not sustainable as it requires substantial funding. At the same time, the Minister acknowledges that South Africa must embrace the reality that there are many economic migrants from the SADC region and is in the process of updating the Immigration Act to allow for special permits for people from Zimbabwe and Lesotho as well as the establishment of a Border Management Authority (through the Border Management Authority Bill before Parliament). The Department submits that any limitation of rights is justified in terms of section 36 of the Constitution by the importance of the purpose of the Immigration Act.

Concerning the 37 children, the Department conducted interviews in relation to 33 of the children of which the Department concluded that the processes for late birth registration were not completed by the parent or caregivers and/or DHA was not approached at all. The Department concluded that 8 children appeared entitled to South African citizenship and they would be assisted. In a further 12 cases, the father was claimed to be South African and the Department has arranged for the necessary paternity tests at the Department's cost. One child is considered abandoned and the case has been referred to the Department of Social Development for investigation. A further 12 children are illegal foreigners and the Department will take steps to have them and their caregivers deported to Lesotho.

The National and Eastern Cape DBE oppose the relief sought by the 37 children submitting that the impugned policy and legislation is lawful and rational and necessary for the effective and efficient running of the DBE.

To ensure that the 37 children were immediately placed in schools pending the outcome of this litigation, the Intervening Application asked for urgent relief from the High Court. On 10

December 2018, the High Court granted them urgent access to the Court but dismissed their prayer that the children be admitted to public schools. An application for leave to appeal was also refused by the High Court on 22 January 2019. The Intervening Applicants then appealed this decision urgently to the Constitutional Court of South Africa, who on 15 February 2019, handed down an order by consent granting urgent access and directing that the 37 learners be admitted to public institutions pending the final determination of the main litigation as per the Department of Basic Education's own undertaking filed with that Court.

On 1 March 2019, CCL addressed a letter to the Minister of Basic Education and Home Affairs arguing that all similarly situated undocumented learners should be given access to ordinary public schools pending the outcome of the main litigation. In response, the DBE has issued a circular to all schools, and a copy of that circular has been provided to the Court by the DBE. They have also indicated that they have prepared a draft amended admission policy. Subsequently the Minister has also publicly committed, after pressure from the Africa Diaspora Forum, that the department will "ensure that no learner without proper documentation is refused admission to a public school" and that "all learners, irrespective of their citizenship status, should not be denied admission to any public school".[15]

SECTION27 has applied to be joined as an *amicus curiae* intending to make submissions on what "access" means in respect of the right to basic education including submissions on how international human rights law can shed light on what is encompassed by the right. In addition, they intend to make submissions as to what is required from organs of states in respect of cooperation and coordination for the advancement of the realisation of rights. They submit that the current implementation protocols intend coordination and cooperation for the *limitation* of rights rather than the facilitation thereof.

The South African Human Rights Commission has also sought to be admitted as an *amicus curiae* and seeks to make submissions on the interpretation of the Immigration Act, arguing that sections 39 and 42 do not apply to schools and therefore it is not an offence to provide basic education to children of illegal foreigners. This interpretative conclusion flows from section 29 of the Constitution – that "everyone" is entitled to basic education – as well as the requirements of the South African Schools Act which has a compulsory school going age and includes obligations on parents to facilitate school attendance. They also submit that issues of immigration control and the provision of basic education have to be separated.

[15] See Manos Antoninis 'Migrant children's education must be ensured' *Mail & Guardian* 3 May 2019, available at: https://mg.co.za/article/2019-05-03-00-migrant-childrens-education-must-be-ensured-not-promised

Who is affected by this case

All the Applicants are at pains to demonstrate that the processes that the Department of Home Affairs contend cater to all scenarios, do not achieve that purpose and that there will always be undocumented learners through no fault of their own.

There are broadly two categories of children that will be affected by this case. First, South African citizens ("the South African children") who do not have birth certificates. Most South African citizens have their births registered within 30 days of their birth. However, there are a significant number of children whose births are registered late (approximately 200 000 per year[16]) or who have not had their births registered at all due to:

a. their parents or guardians being unable to register the child due to barriers to obtaining the requisite documents for a successful birth registration (these are documents that stand as "proof of birth", for example, where the maternity certificate is required from the hospital where the child was born and the child and or mother is now in another province and cannot afford the travel costs to go fetch the certificate);
b. in the context where the mother has abandoned the child or the mother is foreign and does not have the requisite documentation, the unmarried father of the child cannot register the birth. This is because fathers who are not married to the mother of the child are barred from registering their children's birth in terms of section 10 of the BDRA read with regulation 12 of the Regulations on the Registration of Births and Deaths, 2014 ("BDRA Regulations").[17] In addition, the fathers are generally required to obtain a paternity test which is prohibitively expensive and the National Health Laboratory Service only conducts these tests at 6 laboratory sites in the country (which results in additional transportation costs)[18].

[16] See Expert Affidavit by K Hall of the Children's Institute, UCT

[17] The Legal Resources Centre (LRC) brought the case of *Naki and Others v Director General: Department of Home Affairs and Another (Case No 4996/2016)* on behalf of Mr Naki who is unmarried and has a child with an "illegal foreigner" and – despite being a South African citizen himself – was unable to register his child. The LRC challenged the regulations as being overly rigid and therefore constitutionally invalid. The Centre for Child Law (CCL) and Lawyers for Human Rights (LHR) intervened and joined the case representing about 40 instances where fathers had been unable to register a child's birth. They submitted that section 10 of the BDRA read with regulation 12 is unconstitutional. In June 2018, a single judge of the Grahamstown High Court found regulations 3(5), 4(5), 5(5) and 12 unconstitutional and but left section 10 of the Act intact. As a result, CCL and LHR appealed the order to a full bench. If successful, any order of invalidity will need to be confirmed by the Constitutional Court of South Africa. An appeal date is still to be allocated by the Grahamstown High Court and is expected to be in the first term of 2020.

[18] Authors' note: In some cases DHA has accepted a Children's Court order ito s26 of the Children's Act confirming the unmarried father's paternity, or a High Court order granting them guardianship. However, the Children's Court process is not a well-known option, while the High Court route for guardianship is prohibitively expensive for the majority of fathers, takes a long time to obtain, and generally requires legal assistance.

c. the parents having abandoned the child or passed away, leaving the child in the care of grandparents or other caregivers. DHA generally requires a Social Worker investigation and Children's Court order in these cases or a guardianship order from the High Court. Further copies of both parents' death certificates are often requested.[19] The majority of caregivers lack the means to bring a guardianship application in the High Court, obtaining death certificates for both parents is often very difficult and mostly impossible due to many fathers being unknown or absent, and social worker processes generally take from 6 months to 3 years to be completed.
d. their parents or guardians failing to take the necessary steps to register them.

Secondly, non-national children residing in South Africa ("the non-national children") who do not have permits allowing them to reside or study in South Africa. According to the Admission Policy and Immigration Act these children are required to have both birth certificates and the necessary permits under the Immigration Act or proof that they have applied to legalise their stay in South Africa. Most of the non-national applicant children (in the group of 37 children) do not have birth certificates because the parents cannot afford trips to the origin country or the parents do not have their own births registered which means they cannot register their children's birth or they have not been able to obtain the requisite documentation from their origin country. None of these non-national applicant children qualify for study permits and are considered "illegal foreigners" for the purposes of the Immigration Act. They nonetheless live here because they have been brought into the country by their parents or caregivers.

The effect of the relief, if successfully obtained, will also assist non-national children who are unlawfully being refused documents which they are lawfully entitled to by the DHA. - for example, separated asylum seeking children who are lawfully entitled to an asylum seeker permit which the DHA unlawfully refuses to issue to them.

The Children's Institute, UCT ("CI") prepared an Expert Affidavit, filed by the 37 children, on the impact of excluding children without birth certificates from education; the estimated

[19] Authors' note: The Births and Deaths Registration Act and its Regulations allow 'next-of-kin or legal guardian' to register the birth of a child if both parents are deceased [sec 9 (1) read with Reg 3(2)]. Because the Regulations say 'next-of-kin or legal guardian' it is clear that they are two different options. The law therefore should be interpreted by DHA to allow next-of kin of a double orphan to register the child's birth without requiring them to first obtain a guardianship order from the High Court. However, with regards to abandoned children or 'single' orphans (ie where only one parent has died), the Act and Regulations clearly require a social worker to apply for the child's birth registration. In abandonment cases, a next-of-kin therefore cannot apply for birth registration. DHA will only accept the birth registration notice from the social worker after the social worker has conducted an investigation, and obtained an order from the Children's Court ito s156 of the Children's Court confirming that the child is in need of care and protection due to being abandoned or orphaned [Section 12 read with Reg 9(1) of the BDRA]

number of children that will be affected by such a decision and the extent to which such children are South African citizens. Based on the available data, there are close to 500 000 children aged 0 – 18 in South Africa without a birth certificate. Of that, approximately 157 000 are aged between 6 to 18 years (i.e. of school-going age). Prior to the decision of the ECDOE, attendance rates at school were already lower among those who do not have birth certificates, compared to those who do. In addition, the evidence goes against the idea that children without birth certificates are mostly non-national children. In fact, the vast majority of children without birth certificates are likely to be South African. Lastly these children are mostly black (African) and poor, more likely, than children with birth certificates, to be excluded from a range of government services, and therefore of the most vulnerable class of children. The CI also makes the point that the administrative data of the DBE is a very important additional source of information for Statistics South Africa and demographic planning. If these children are excluded from school, they will become invisible on a data level.

In response the DBE have now elucidated from their data (proving the point of the CI) that the problem is much more expansive. According to their system 998 433 children (currently attending public school) do not have identity numbers and cannot be accounted for by DHA. DBE also reported that 83.2% of these children are South African and 16.7% are foreign nationals (167 734).

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