IN THE CONSTITUTIONAL COURT

CASE NO: _____
ECHC Case no.: 3317/18

In the matter between:

CENTRE FOR CHILD LAW	First Applicant
37 CHILDREN	Second to Twenty-Fifth 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

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FOUNDING AFFIDAVIT

I, the undersigned,

ANJULI MAISTRY

do hereby make oath and say that –

1 I am an adult admitted attorney of the High Court, practising as such at the Centre for Child Law ("the Centre"). I am duly authorised to depose to this affidavit on behalf of the Centre.

2 The facts contained in this affidavit are, to the best of my knowledge and belief, true and correct and are within my personal knowledge, unless the context indicates otherwise.

THE PARTIES

3 The first applicant is the Centre. The Centre is accredited and certified as a law clinic in terms of the Legal Practice Act 28 of 2014, and is based in the Law Faculty at the University of Pretoria. Its offices are situated at Room 4-31, Law Faculty, Ring Road, University of Pretoria, Lynnwood Road, Hatfield. The Centre's interest in this matter stems from its main objective: to contribute within its means to establish and promote the best interests of children in South Africa, and more particularly to use the law as an instrument to advance such interests. The CCL has been authorised by the University of Pretoria to bring this application.

4 The second to twenty-fifth applicants are children or parents, caregivers or co-caregivers on behalf of children, who are excluded from public schools because they do not have birth certificates. Their details are set out in **annexure FA 1** to this affidavit. I pray that its contents be read as expressly incorporated herein. They have authorised the Centre to assist them in bringing this application on their behalf.

4.1 Twenty-three of the 37 children are South African citizens. Despite being South African citizens, they are unable to obtain birth certificates for reasons explained below.

4.2 Fourteen of the 37 children are not South African citizens, but are non-nationals who are present in South Africa because their parents or caregivers are here. They have also been excluded from public schools on the ground that they do not have birth certificates.

5 The first respondent is the Minister of Basic Education ("the Minister") cited herein in her official capacity as the political head of the national Department of Basic Education ("the DBE") and the person responsible for the acts and omissions of officials within the national department. The Minister's offices are situated at 222 Struben Street, Pretoria; however for purposes of service, her address is c/o Whitesides Attorneys, 53 African Road, Makhanda.

6 The second respondent is the Member of the Executive Council, Department of Education, Eastern Cape Province ("the MEC"). The second respondent is cited as the nominal respondent on behalf of the ECDOE and as the bearer of the constitutional and statutory powers and duties of the Member of the Executive Council of Education in the Eastern Cape. For purposes of service, his address is c/o Whitesides Attorneys, 53 African Road, Makhanda.

7 The third respondent is the Superintendent-General of the Eastern Cape Department of Education. The Superintendent-General is cited as the administrative head of the ECDOE and the accounting officer of the ECDOE under section 36 of the Public Finances Management Act 1 of 1999. For purposes of service, his address is c/o Whitesides Attorneys, 53 African Road, Makhanda.

AN OVERVIEW OF THIS APPLICATION

8 This is an urgent application for direct leave to appeal to this Court, against a decision of the Eastern Cape High Court, Grahamstown, handed down by the Honourable Mr Acting Justice Mtshabe on 10 December 2018. Mtshabe AJ gave reasons for his order on 3 January 2019, and refused an urgent application for leave to appeal on 22 January 2019.

9 The case concerns 37 children from Aliwal North, who have been excluded from public schools because they do not have birth certificates. Twenty-three of the children are South African citizens. Fourteen are non-nationals.

10 The children are desperate to be educated. But instead of joining their peers on the first school day of 2019, the children stayed home, because of a combination of:

10.1 the DBE's refusal to educate any child that does not have a birth certificate, whether that child is a South African citizen or not; and

10.2 the refusal of the Grahamstown High Court to grant them interim relief on an urgent basis pending a challenge to the relevant legislation and policy that denies them access to schools.

11 The children have been out of school for an extended period of time. Some have never attended school at all. Unless this urgent application succeeds, these children – who are all from disadvantaged backgrounds and are amongst the most vulnerable people in our country – will remain out of school

for at least the next two years, with the result that they will continue to suffer the irreparable educational and developmental harms that follow from the ongoing denial of the right to a basic education.

12 The applicants have challenged the constitutionality of the underlying policy and legislation in terms of which the children are being denied access to schools. Pending the determination of that challenge, they asked the High Court to order the respondents to admit them into schools on an interim basis from the beginning of the 2019 school year.

13 The High Court refused to grant interim relief. The High Court's key reasoning was that there are, at present, policies and legislation in force which prevent undocumented children from attending school. While those policies and legislation are still in force, the Court held, the 37 children "*have [no] right to basic education*" (judgment at para 39). Though the Court recognised that section 29 of the Constitution guarantees the right to education to all in South Africa, it went on to hold: "*Does that mean undocumented children can simply demand and be given education without abiding to the national policies and laws? I do not think so.*" (judgment at para 13). The High Court also refused leave to appeal without giving reasons for its refusal.

14 This is an urgent application for direct leave to appeal to this Court, against that decision.

15 The High Court's order and judgment are attached as **annexures FA 2** and **annexure FA 3** respectively. A copy of the order refusing leave to appeal is attached as **annexure FA 4**.

16 In what follows in this affidavit, I deal with the following issues in turn:

16.1 the relevant factual background;

16.2 the High Court's decision;

16.3 the effect of the High Court's decision;

16.4 why a direct appeal is necessary;

16.5 the prospects of success: why the applicants are entitled to the interim relief; and

16.6 urgency.

FACTUAL BACKGROUND

17 The second to twenty-fifth applicants litigate on behalf of 37 children who have been unable to obtain birth certificates because of insurmountable practical difficulties their parents and caregivers have faced in attempting to register their births.

18 I emphasise that 23 of the children are South African citizens. This is so because one or more of their parents is or was a South African citizen. In terms of section 2(1) of the South African Citizenship Act 88 of 1995, any person who has a parent who is a South African

citizen by birth. Despite being South African citizens, and despite their parents' or guardians' best efforts, they are unable to obtain a birth certificate. The 14 non-national children are also unable to obtain birth certificates for various reasons.

19 These difficulties include the following:

19.1 Most of the children have a mother from Lesotho and a father who is South African. In many cases, the child's mother is undocumented. When the mother attempts to register the child's birth, the mother is required to provide her own documentation – which, as mentioned, most of the mothers do not have. They are, as a result, unable to register their children.

19.2 Neither is it possible for the child's father to register the child's birth. This is because fathers who are not married to the mother of the child are barred from registering their children's births in terms of section 10 of the Births and Deaths Registration Act 51 of 1992 ("BDRA") read with regulation 12 of the Regulations on the Registration of Births and Deaths ("BDRA Regulations").

19.3 South African mothers also face difficulties complying with legislative requirements to register their child's birth. For instance, regulation 3(3) of the BDRA Regulations requires "*proof of birth*" to be provided to the Department of Home Affairs ("DHA"). Many mothers did not give birth in hospitals and did not see doctors after they gave birth. Because they did not give birth in hospitals, or see a doctor after

giving birth, they were not issued with "*proof of birth"* making this requirement impossible to meet.

19.4 Some of the children's parents have passed away or have abandoned them, leaving them in the care of their grandparents or other caregivers. Caregivers face legislative hurdles in registering the births of the children they care for. For instance, they must formally be appointed as guardians in order to register the birth of the child, and provide copies of both parents' death certificates. None of the caregivers in this matter have the means to bring a guardianship application in the High Court. Further, they are often unable to secure copies of the parents' death certificates.

20 Despite the very real practical difficulties that their parents and caregivers have faced in trying to get birth certificates for them, the 37 children have been excluded from schools because they do not have birth certificates.

21 The children have been excluded from schools in the following ways:

21.1 Ten of the children were in school and were removed before the school year had concluded, because they do not have birth certificates.[1]

[1] These children's details are contained in Annexure A to the Notice of Motion, at numbers 2, 4, 18, 20, 22, 24, 26, 35, 36 and 37 in the table.

21.2 Two children were allowed to complete the 2015 school year but were refused readmission to school in 2016 because they do not have birth certificates.[2]

21.3 Eleven of the children attempted to apply at various different primary schools but were refused admission because they do not have birth certificates.[3]

21.4 Fourteen of the children did not apply at any school at all because they do not have birth certificates and know that many other children were being removed from school or refused admission for this reason.[4]

22 A table that sets out the above information in greater detail has been attached to the notice of motion as annexure A. The Centre has obtained additional affidavits setting out the specific accounts of the children, their parents, their caregivers, their co-caregivers and their older siblings. I attach two of these affidavits, to illustrate these issues: one for Esona Sigo (**annexure FA 5**), and one for Nontlantla Jolingana (**annexure FA 6**).

23 The children face ongoing harmful consequences: they are out of school and unable to access any of the essential benefits associated with an education that will allow them to participate meaningfully in society. They languish in

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[2] These children's details are contained in annexure A to the Notice of Motion, at numbers 1 and 3 in the table.

[3] These children's details are contained in annexure A to the Notice of Motion, specifically they are numbers 5, 6, 8, 13, 14, 15, 16, 27, 32, 33 and 34 in the table.

[4] These children's details are contained in annexure A to the Notice of Motion, at numbers 9, 10, 11, 12, 17, 19, 20, 21, 23, 25, 28, 29, 30 and 31 in the table.

extreme poverty with little hope or possibility of lifting themselves out of their circumstances. Some of the older children have attempted to find employment; however, their prospects of employment are directly affected by their level of education. Accordingly, they have not been able to find work, are idle, and feel ashamed.

24 The children's exclusions from school are the result of the DBE's interpretation of the Admission Policy for Ordinary Public Schools (GN 2432 of 1998) ("Admission Policy"). On the DBE's interpretation of section 15 of the Admission Policy, a birth certificate is required in order for a child to be admitted to a public school.

25 On 26 May 2017, the Centre, along with the School Governing Body of Phakamisa High School, instituted proceedings in the High Court under case number 2480/17 seeking, *inter alia*, an order directing that no learner may be excluded from a public school on the basis that he or she does not have an identity number, permit or passport ("the Phakamisa application"). A copy of the notice of motion in that application is attached as **annexure FA 7**.

26 A matter such as the Phakamisa application, involving complex questions, including the constitutional interpretation of policy, can take up to two years to determine finally, including all likely appeals. In the meantime, it came to the Centre's attention that there were 37 children in Aliwal North, who had been, and who continued to be, denied access to public schools as a result of the Admission Policy.

27 Cognisant of the fact that final relief in the Phakamisa application would likely come too late to prevent irreparable harm to these children, and anxious to ensure that the children were admitted to school when the 2019 school year began, the applicants approached the High Court, seeking urgent, interim relief to protect rights of the 37 children to education, pending the final determination of the Phakamisa application.

28 After launching the application for interim relief, the children applied for leave to intervene as co-applicants in the Phakamisa application. As part of that intervention application, the children seek additional, related relief to that sought by the existing applicants in the main application, including various declarations of constitutional invalidity.

29 Before the children's intervention, the Phakamisa applicants had sought a constitutional interpretation of section 15 of the Admission Policy, coupled with a declarator that no learner may be excluded from a public school on the basis that he or she does not have an identity number, permit or passport. In addition to this relief, the children seek orders declaring the following provisions constitutionally invalid:

29.1 section 15 of the Admission Policy;

29.2 section 21 of the Admission Policy, which requires learners who are classified as *"illegal foreigners*" in terms of the Immigration Act 13 of 2002 ("Immigration Act") to show evidence that they have applied to legalise their stay in the country when applying for admission to a public school; and

29.3 sections 39(1) and 42 of the Immigration Act, which prohibit schools from providing basic education to children who are considered "*illegal foreigners*".

30 A copy of the notice of motion in the intervention application is attached as **annexure FA 8**.

31 The application for leave to intervene in the Phakamisa application had not been launched at the time the urgent application for interim relief was heard in the High Court. The papers had been drafted, and the applicants notified the High Court of their intention to launch it, and to seek the additional relief outlined above. The application was ultimately launched on 13 December 2018.

32 The High Court therefore had before it an urgent application for interim relief, directing that the 37 children be admitted to school, pending the determination of an application challenging the provisions of the Admission Policy and Immigration Act that denied them access to schools.

THE PROCEEDINGS IN THE HIGH COURT

33 In the High Court, the applicants sought orders to the following effect:

33.1 directing that the 37 children be admitted into a public school pending the final determination of the Phakamisa application; and

33.2 directing the respondents to take all necessary steps in admitting the 37 children into public schools and placing them at appropriate schools.

34 In opposing the application for interim relief, the respondents did not take issue with the facts raised in the applicants' founding papers. It was thus common cause that –

34.1 the 37 children face insurmountable practical difficulties in obtaining a birth certificate;

34.2 the respondents require a birth certificate in order for a child to be admitted to a school;

34.3 a number of the children who were in schools were removed because they did not have (and were unable to obtain) birth certificates; and

34.4 a number of the children applied to be admitted to school but were refused admission because they did not have (and could not obtain) birth certificates; and

34.5 those children who had applied to schools and who did not have birth certificates, could not (and cannot) be admitted into school.

35 Given these factual concessions, the approach the respondents took to defending the matter was surprising. Rather than engaging constructively, creatively and proactively with the applicants to ensure that the 37 children are not denied their right to a basic education pending the final determination

of the Phakamisa application, they blamed the children's parents and guardians for failing to obtain birth certificates, and treated the applicants as adversaries, taking every imaginable technical point against them.

36 State litigants have a duty not to litigate as though they are at war with their citizens. This Court has recognised that, particularly where the rights at issue are those of a child to receive a basic education, there is a duty on all stakeholders to engage in good faith. This duty of good-faith engagement on matters relating to education must also extend, I submit, to the conduct of litigation where a breach of education rights is alleged.

37 The respondents' approach to the litigation reflects a troubling approach to their constitutional obligation to provide education. The respondents relied on an affidavit in support of the admission of the DHA as an *amicus curiae* in the Phakamisa application, in which Mr Apleni, the Director-General of the DHA, refers to children without birth certificates as "*fraudulent learners*" and lauds the savings occasioned by their expulsion. He says:

> *"The respondents have set out in great detail the fraudulent learners or those otherwise attending schools in irregular circumstances within the Eastern Cape province during the period April to November 2016 alone.*
>
> *Some 85 000 learners were weeded out from the system as not being properly registered and a saving of R1 460 139 250 was achieved by implementing the circular."*

38 Despite an averred commitment to the right to education, it appears that the respondents' key aim is to "*weed out*" as many children from the system as possible, so as to save money. In the Eastern Cape alone, 85 000 children have been expelled from public schools on this basis.

39 The points *in limine* raised by the respondents included the following:

39.1 That the application for urgent interim relief is *lis pendens*, because of the Phakamisa application.

39.2 That the Minister of Home Affairs ought to have been joined as a party to the application for urgent interim relief.

39.3 That the applicants ought to have filed a notice in terms of Rule 16A before bringing their urgent application for interim relief.

39.4 That the relief sought was not interim in nature, because it does not preserve the status quo.

39.5 That the applicants have not exhausted internal remedies under the South African Schools Act 84 of 1996 ("Schools Act").

39.6 That the interim relief sought is not competent until the legislation that the respondents consider to require them to refuse or remove the children has been set aside.

40 Though the High Court held that the matter was urgent, it refused to grant the interim relief sought. Its core reasons were as follows:

40.1 There is currently policy and legislation in place which prevents children from accessing public schools unless they have a birth certificate and, in the case of foreign children, a valid study permit. Children must comply with the applicable legislation and policies in order to "*access*" their right to a basic education.

40.2 Until the relevant laws and policies preventing access to public schools for undocumented learners are reviewed and set aside, the 37 children have no right to a basic education.

40.3 In the absence of a constitutional challenge to the validity of the relevant policies or legislation, interim relief admitting the children to schools cannot be granted.

40.4 Relief is only interim in nature if it seeks to preserve the status quo. Because the status quo is that the children are out of school, the High Court held that it could not grant interim relief admitting them to school.

40.5 The matter is *lis pendens* because it concerns the same issues as those raised in the Phakamisa application.

40.6 The Minister of Home Affairs ought to have been joined, as the Minister responsible for issuing birth certificates and study permits, "*which are the documents entitling a person to realize the right to basic education*" (judgment at para 64).

THE EFFECT OF THE HIGH COURT'S JUDGMENT

41 The effect of the High Court's judgment is that the 37 children are out of school, and will remain out of school, until the Phakamisa application is finally determined.

42 It is difficult to predict when this might be. The Phakamisa matter is not yet ripe, and a hearing date has not yet been set. In addition, there is no way of knowing when a final determination will be made on the Phakamisa application. It is likely that judgment will be handed down handed down between three and six months after the hearing. It is also likely that whoever wins the main application, there will be an appeal. This can take up to 18 months to conclude. It may therefore be as long as two years before the Phakamisa application is finally determined.

43 And for all this time – two more school years – the 37 children must, in terms of the High Court's decision, remain out of school.

44 Two school years is an enormously significant amount of time in the educational life of a child. Two school years marks the difference between a child with a grade 1 education and a grade 3; no education and a grade two; a grade 10 and a matric. If the Phakamisa application ultimately succeeds, and the 37 children are admitted to school once it has been decided, they will have suffered enormous developmental harm, and be so far behind their peers it may be impossible for them to catch up.

45 Ultimately, every day the children are out of school causes ongoing, irreparable harm to their development and education. Weighed against the severe harm that the children will suffer, the DBE put up no evidence of prejudice – budgetary or otherwise – it would suffer in the event of the interim relief being granted.

46 I emphasise that the children affected have no power to obtain the required documents themselves. The position of the respondents is that it is constitutionally permissible to punish the children by excluding them from school in order to give their parents and guardians an incentive to register their births.

WHY A DIRECT APPEAL IS NECESSARY

47 I respectfully submit that, in the present matter, direct leave to appeal is warranted. For this reason, although the applicants have for the sake of caution also applied to the Supreme Court of Appeal ("SCA") for leave, we have made expressly clear in that application that it is conditional on this Court refusing direct leave to appeal.

48 I am aware that, in general, this Court declines to entertain appeals directly from the High Court, because to do so results in the bypassing of the SCA. However, this Court has repeatedly made clear that each case must be considered on its merits in this regard:

> *"Leave to appeal directly to this Court will be granted if it is in the interests of justice to do so. Each case is considered on its own merits. The factors relevant to a decision whether to grant an application for direct appeal have been listed as including whether there are only constitutional issues involved, the importance of the constitutional issues, the saving in time and costs, the urgency, if any, in having a final determination of the matters in issue and the prospects of success. These must be balanced against the disadvantages to the management of the Court's roll and to the ultimate decision of the case if the Supreme Court of Appeal (SCA) is bypassed."*[5]

[5] *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) at para 21.

49 In what follows, I explain why on the facts of this case, direct leave to appeal is indeed warranted.

50 First, this appeal involves only constitutional issues.

50.1 It concerns the question of what is to happen to the 37 children, while they wait for the Phakamisa application to be decided: are they entitled to attend public schools, or must they continue to languish at home, uneducated? This is a purely constitutional question.

50.2 There are no material disputes of fact in the matter.

50.3 This Court will be asked to determine whether the children's constitutional right to a basic education, in terms of section 29(1)(a) of the Constitution, and their right to have their best interests considered paramount, in terms of section 28(2) of the Constitution, give rise to a *prima facie* right to the relief sought: to be admitted to public schools pending the determination of the *Phakamisa* application.

50.4 The Admission Policy, by making admission to public schools conditional on providing a birth certificate, limits the right to a basic education. This Court is not asked, at this stage, to determine whether that limitation is justifiable. That will be the question before the High Court when the Phakamisa application is decided. This Court is, however, asked to determine whether the fact that the Admission Policy imposes this limitation means that not even interim relief can be granted, pending the determination of its constitutionality.

51 Second, the application raises critical issues of the utmost public and constitutional significance.

51.1 It concerns not only the right to a basic education (section 29(1)(a) of the Constitution), but also the right of every child to have their interests be of paramount importance in every matter concerning them (section 28(2) of the Constitution).

51.2 As explained above, parents and caregivers face very real difficulties in attempting to obtain birth certificates for children under their care. Those difficulties disproportionately affect some of the poorest and most marginalised people in the country. And the results of failing to obtain a birth certificate are catastrophic for the children affected: they are denied their right to a basic education entirely. Without an education, they can never hope to lift themselves out of poverty, and remain vulnerable and marginalised.

52 Third, it is urgent that the children obtain interim relief.

52.1 The High Court held that the matter was urgent. This finding has not been cross-appealed by the respondents.

52.2 With every day that the children remain out of school, there is ongoing harm to their development and education. Their prospects of becoming productive members of society is damaged, and they fall further behind their peers.

52.3 The application for interim relief was instituted with a view to ensuring the children's admission to schools prior to the commencement of the 2019 academic year. The 2019 academic year commenced on 9 January 2019. It is imperative that the children are able to attend school as soon as possible in order to alleviate the additional burden of trying to catch up missed work, which is particularly difficult given the length of time they have already been out of school.

52.4 The applicants' legal representatives are well aware of the considerable pressures of workload facing this Court and the fact that it has stated that it does not easily convene as a matter of urgency. However, the 37 children find themselves in a desperate situation. Unless this matter is heard by this Court on an urgent basis, the children will, in effect, lose yet another school year. This is because, even if special leave to appeal is granted by the SCA and the appeal is heard, it is likely that it will take some months for the matter to be heard and decided.

52.5 In addition, even if the SCA upholds the appeal, given the respondents' pugnacious attitude to the litigation so far, it seems inevitable that they would seek leave to appeal to this Court – further delaying the children's admission to school. These are lost months of school for children who have already suffered the detrimental effects of extended periods without education – and which the children simply cannot afford to lose.

53 Fourth, the application has strong prospects of success. As this affidavit explains, the approach adopted by Mtshabe AJ is not consistent with the judgments of this Court and the constitutional scheme.

54 Finally, although this Court will be deprived of the views of the SCA on this issue, it has the benefit of a full set of reasons from the High Court to consider.

55 Therefore, I respectfully submit that the present case constitutes such a palpable denial of the children's education rights, with such resultant irreparable harm, that this Court is both entitled to and should deal with the matter as a direct appeal, as urgently as possible.

PROSPECTS OF SUCCESS

56 I respectfully submit that the appeal bears reasonable prospects of success. In this regard, I do not set out each of the respects in which the applicants submit Mtshabe AJ erred. These are set out in more detail in the application for leave to appeal to the High Court which is attached as **annexure FA 9** and which I pray is read as incorporated herein.

57 Instead, in what follows, I focus on the key issues that fall to be determined by this Court. In this regard, I submit that the High Court ought to have held that:

57.1 The 37 children are bearers of the right to education.

57.2 The 37 children have a *prima facie* right to be admitted to school.

57.3 The 37 children are entitled to interim relief.

57.4 The points in *limine* are bad in law.

57.5 Interim relief is competent.

58 I deal with each of these grounds in turn.

The children are bearers of the right to education

59 The High Court held that children who do not have birth certificates are not bearers of the right to education; and that the exercise of the constitutional right to education is conditional on having a birth certificate. Though it does not expressly say so, the High Court must by implication have made the same finding concerning section 28(2) of the Constitution – specifically, that the exercise of the best interests principle is conditional on having a birth certificate.

60 This is a startling finding. It is unprecedented in our law, and no authority was cited in its support, either by the respondents, or in the High Court's judgment.

61 I submit that this approach is inconsistent with the constitutional framework.

61.1 There is no basis in the language of the Constitution in support of this proposition. On the contrary, section 29 expressly affords the right to "*everyone*".

61.2 Regarding the use of the word "*everyone*" in the rights contained in sections 12 and 35(2) of the Constitution, this Court has specifically

noted that "*everyone*" covers even persons who are not South African nationals (*Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at paras 26 – 27).

61.3 There is therefore no reason not to give "*everyone*" in section 29(1)(a) its ordinary meaning, including children who do not have birth certificates.

61.4 Similarly, section 28(2) of the Constitution requires that "*[a] child's best interests are of paramount importance in every matter concerning the child*." This applies to every child, not only those who are in possession of birth certificates.

62 Therefore, I submit that the High Court ought to have held that children who do not have birth certificates are nonetheless bearers of the right to education in terms of section 29 of the Constitution.

The children have a prima facie right to be admitted to school without a birth certificate

63 The High Court held that the applicants had failed to establish a *prima facie* right to the relief sought. I submit that, in this respect, the High Court erred. It ought to have held that the applicant children have a *prima facie* right to be admitted to public schools, without having to comply with any precondition (such as providing a birth certificate or permit).

64 This *prima facie* right is rooted in section 29(1)(a) of the Constitution, read with section 28(2). Section 29(1)(a) of the Constitution provides that

"[e]veryone has the right (a) to a basic education, including adult basic education". This right applies to "*everyone*" – not "*everyone, on condition that they provide a birth certificate*".

65 In particular, the constitutional right to a basic education extends to all persons within South Africa's borders, regardless of their nationality or immigration status. This must be so, because education is a fundamental component of human dignity, which is not qualified by nationality.

66 The importance of the right to basic education cannot be over-stated, and has been recognised by this Court. It is only through education that a child is able to develop his or her personality, talents and mental and physical abilities to his or her fullest potential.

67 Unlike other socio-economic rights, section 29(1)(a) does not have an internal limitation that requires that the right must be progressively realised within available resources. This Court has stated emphatically that the right in section 29(1)(a) is immediately realisable. As a result, the right to a basic education may only be limited in accordance with law of general application, in line with section 36 of the Constitution.

68 Denying admission to undocumented learners also implicates section 28(2) of the Constitution, which requires that "*[a] child's best interests are of paramount importance in every matter concerning the child*."

69 Again, section 28 of the Constitution protects "*every child*", not only children in possession of birth certificates. Our courts have held that that even children who are detained for the purpose of deportation as illegal foreigners are bearers of section 28 rights. Section 28(2) creates both a self-standing right, and strengthens other rights – such as the right to basic education.

70 Requiring children to produce a birth certificate or permit in order to be admitted, or remain at, public schools, renders the right to a basic education conditional. The right is not guaranteed to "*everyone*", as section 29(1)(a) requires, but rather a select group – those who can provide the required documents. For everyone else – including the 37 children – the right is severely limited – in fact they are entirely denied any access to basic education. This clearly limits children's rights to education, and to have their best interests considered paramount.

71 Whether the limitation is justifiable is to be decided in the Phakamisa application. However, the very least that can be said is that the applicant children, as persons in South Africa, and in particular as children, have a *prima facie* right to be admitted to public schools so as to obtain a basic education.

72 The High Court asked whether the right to a basic education means that "*undocumented children can simply demand and be given education"* without complying with the requirement of producing a birth certificate. I submit that, *prima facie*, this is precisely what the right to a basic education means. If the right to a basic education does not even give rise to a *prima facie* right to

"*demand and be given education*", it is difficult to imagine what else its effect can be.

73 Therefore, I submit that the High Court ought to have held that a *prima facie* right to the relief sought had been established.

The children have a right to be granted access to schools on an interim basis

74 Once it is accepted that the 37 children have a *prima facie* right to be admitted to public schools without providing a birth certificate, I submit that it follows that the interim relief ought to have been granted. This is because the remaining requirements for the granting of interim relief were clearly established in the High Court.

75 First, the balance of convenience is in favour of the application being granted.

75.1 The respondents do not suggest that they themselves will suffer any prejudice if the interim relief is granted and the Phakamisa application ultimately fails.

75.2 On the other hand, the 37 children will suffer significant harms if the interim relief is not granted but the Phakamisa application succeeds. They will be out of school until such time as the main application is finally determined – including any appeal processes. This could take a number of months, if not years.

76 Second, if the children are not admitted to school pending the determination of the Phakamisa application, they will suffer the irreparable educational and developmental harms that follow from the ongoing denial of basic education.

77 Finally, there are no other available remedies to protect the children's rights. Approaching this Court for urgent, interim relief is the only way to ensure that the children are admitted to school as soon as possible for the remainder of the 2019 school year, and that further harm can be avoided.

78 Therefore, I submit that the High Court ought to have held that a proper case was made out for the interim relief to be granted.

The points in limine are bad in law

79 The High Court upheld three points in *limine* –

79.1 failure to exhaust internal remedies;

79.2 *lis pendens*; and

79.3 non-joinder.

80 First, the High Court held the application is not competent because the applicants have not exhausted their domestic remedies as required by the Promotion of Administrative Justice Act 3 of 2000. However:

80.1 An appeal was submitted to the MEC in terms of section 5(9) the Schools Act on behalf of 24 of the children (those children who were

previously in school or who had applied to be admitted to schools). The MEC did not respond to the appeal.

80.2 In any event, the children's appeal to the MEC does not constitute an available, effective and adequate remedy, because any appeal to the MEC is doomed to fail. It is well established that an internal remedy is not an available remedy "*if it does not offer a prospect of success*".[6]

80.3 In the light of the respondents' stance regarding documentation requirements, the internal appeal could never have prospects of success because none of the children has a birth certificate. The respondents' answering affidavit makes it clear that the respondents consider themselves not to have the authority to grant the relief sought by the children. The respondents are of the view that they are bound by the Admission Policy's requirement that birth certificates must be provided within 3 months of admission.

80.4 An appeal to the MEC therefore cannot possibly provide the children with effective redress. Awaiting the MEC's inevitable dismissal of the appeals would be an exercise in futility.

81 Second, the High Court held that the application for interim relief was *lis pendens* because the Phakamisa application also relies on the right to basic education in section 29(1). However:

6 *Basson v Hugo and Others* 2018 (3) SA 46 (SCA) at para 22

81.1 A comparison of the notice of motion in this case and that of the applicant children in the Phakamisa application reveals this to be incorrect. In this application the children seek an interim order that they be admitted into public schools pending the final determination of the Phakamisa litigation and directing the respondents to take all necessary steps to admit them into public schools. In Phakamisa, different, final relief is sought. The relief sought in this matter is plainly not the same as that sought in the Phakamisa matter.

81.2 The mere fact that an application for interim relief relies on the same right that will be sought to be vindicated in Part B of the same application does not mean that the cause of action is the same or that the same issues are to be decided. The application for final relief relies on a final determination of the rights of the parties to the dispute while the application for interim relief does not.

81.3 Therefore, I submit that the High Court ought to have held that the matter was not *lis pendens*.

82 Third, the High Court held that the Minister of Home Affairs should have been joined as a respondent because the DHA is the entity that issues the birth certificates and study permits implicated or necessary to allow a person to "*access*" the right to basic education.

82.1 The test for a necessary joinder is whether the relief which is sought can be carried into effect without prejudicing the interests of the party which it is contended ought to be joined.

82.2 The Minister of Home Affairs must be joined as a respondent to the Phakamisa application (because he is responsible for the legislation being challenged in Phakamisa). This is why the children have sought an order joining him as a respondent to that application. But he has no direct and substantial interest in the interim relief being sought in this application. The interests of the DHA are in no way affected by the interim admission of 37 children into schools in the Eastern Cape.

82.3 The High Court does not provide any reason why the order that is sought in the interim application cannot be carried into effect without prejudicing the interests of the Department of Home Affairs. The mere fact that the Department of Home Affairs issues the relevant birth certificates does not mean that it is prejudiced if 37 children are admitted into schools on an interim basis.

82.4 I submit that the High Court ought to have held that joinder was not required.

Interim relief is competent in this matter

83 The High Court held that it could not competently grant the interim relief sought in this matter. In this, I submit, it erred.

84 First, the High Court held that any order which does not preserve the status quo is not competent as a form of interim relief. The Court found that the interim relief sought was therefore incompetent because the children are not presently in school. It held that if they were in school and they were seeking

an order that they must be allowed to continue with their education pending the outcome of the Phakamisa application, then that order would have been granted because this would constitute the restoration of the status quo.

85 I submit that this is incorrect:

85.1 The relief that the applicants seek is a mandatory interdict. This Court has characterised a mandatory interdict as involving the situation where "*positive conduct on the part of the alleged wrongdoer is required to terminate continuing wrongfulness.*"[7]

85.2 Because it requires positive conduct on the part of the wrongdoer to bring an end to continuing wrongfulness, a mandatory interdict necessarily has the effect of changing, rather than preserving, the status quo.

85.3 There are numerous examples of our courts granting mandatory interdicts (which have the effect of changing the status quo) on an interim basis.

86 That it is plainly competent for a court to grant a mandatory interdict which has the effect of changing the status quo in order to protect a constitutional right, was made clear by this Court in *President of the Republic of South Africa and others v United Democratic Movement* 2003 (1) SA 472 (CC) ("*UDM*") at para 32(b):

[7] *Democratic Alliance v African National Congress And Another* 2015 (2) SA 232 (CC) at para 159.

> *"A High Court has jurisdiction to grant interim relief designed to maintain the status quo or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or through action it is reasonably feared might cause irreparable harm of a serious nature." (Emphasis added)*

87 This was further confirmed by this Court in *South African Informal Traders Forum and Others v City of Johannesburg and Others* 2014 (4) SA 371 (CC), where the applicants were granted urgent interim relief, permitting them to trade at the locations from which they had been forcibly removed. This relief was sought pending a review of three decisions of the City of Johannesburg that had resulted in their removal. In turn, the traders' right to trade was protected in the interim, pending a final determination on the legality of the City's decisions.

88 In any event, section 172(1)(b) of the Constitution provides that "[*w]hen deciding a constitutional matter within its power, a court may make any order that is just and equitable*." Section 172 of the Constitution gives this Court and the High Court the broadest imaginable remedial power. It plainly includes the power to grant interim relief which has the effect of changing, rather than preserving, the status quo.

89 Second, the High Court held that –

89.1 children who do not have birth certificates are precluded from attending public schools by virtue of the existence of sections 15 and 21 of the Admission Policy and sections 39(1) and 42 of the Immigration Act 13 of 2002 ("Immigration Act"); and

89.2 any interim order requiring the admission of the children is incompetent in the absence of a challenge to the Admission Policy and the Immigration Act.

90 As a matter of law, it is not correct that a constitutional challenge must be brought against a policy before interim relief is sought. Interim relief may be granted pending the determination of a constitutional challenge, even where the constitutional challenge has not yet been launched at the time of the application for interim relief. This is the effect of this Court's judgment in *UDM*.

91 As a matter of fact, I submit that the High Court was incorrect to hold that no constitutional challenge had in fact been brought against the Admission Policy or the Immigration Act. Such challenge will be determined by the High Court when it hears the *Phakamisa* application.

91.1 It was clear on the papers before the High Court that the applicants would bring an application to intervene in the *Phakamisa* application within days of argument in the High Court application. The applicants clearly explained that they intended to seek additional relief challenging the constitutional validity of the Admission Policy and the Immigration Act. The application for leave to intervene was launched on 13 December 2018, a matter of days after the hearing of the urgent application.

91.2 In any event, even before the applicants sought leave to intervene in the *Phakamisa* application and sought the additional relief described

above, that application did challenge the constitutional validity of the Admission Policy. It sought relief directing that no learner may be excluded from a public school on the basis that he or she does not have an identity number, permit or passport. Though the Phakamisa applicants did not directly challenge the constitutional validity of the Admissions Policy, they sought to interpret the Admissions Policy in accordance with the Constitution, thereby challenging the interpretation adopted by the respondents.

91.3 Therefore, the High Court's finding that the constitutionality of the relevant policies and legislation is not challenged in the *Phakamisa* application was not correct. In any event, there is now a frontal challenge to the provisions of the Admissions Policy and the Immigration Act, which will be decided in the *Phakamisa* application.

URGENCY

92 The matter is, I submit, self-evidently urgent. The High Court acknowledged this. The relief sought remains urgent in that:

92.1 With every day that the children remain out of school, there is ongoing harm to their development and education. The 2019 academic year commenced on 9 January 2019. It is thus imperative that the children are admitted sooner rather than later.

92.2 The children will not be able to obtain substantial relief at a hearing in due course.

92.3 The fact that the children have already been out of school for long periods of time renders this matter more urgent, not less.

92.4 It will likely take up to two years for the Phakamisa application to be finally determined (including probable appeals). It is untenable for the 37 children to remain out of school for that time.

CONCLUSION

93 In all the circumstances, I submit that:

93.1 The envisaged appeal concerns significant constitutional issues and falls within the jurisdiction of this Court;

93.2 The envisaged appeal bears excellent prospects of success; and

93.3 In view of the various features of this case, it is in the interests of justice for leave to appeal to be granted directly to this Court.

94 I therefore pray for the relief set out in the Notice of Motion.

_____

ANJULI MAISTRY

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the _____day of JANUARY 2019, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

_____

COMMISSIONER OF OATHS