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, DEPARTMENT OF HOME AFFAIRS	Fifth Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Amicus Curiae
SECTION 27	Amicus Curiae

THIRD TO 26TH APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 This case is about 37 children, and hundreds of thousands like them, who have been (or who stand to be) excluded from public schools because they are undocumented.

2 The affected children fall into two main groups –

2.1 South African children who, for various reasons, have been unable to obtain birth certificates; and

2.2 non-national children, who do not have permits entitling them to reside in the country, and most of whom do not have birth certificates.

3 The affected children are excluded from schools in various ways. Some are initially admitted, and later expelled because they are unable to produce the required documents. Others have their admission refused at the outset. Others do not apply for admission at all, because they know they will be refused.

4 If the Department of Basic Education ("DBE") consistently enforced the impugned legislation and policies, almost one million children who are presently enrolled in public schools would face exclusion if they are unable to obtain birth certificates within a certain period of time. According to the DBE, there are 998 433 learners presently enrolled in public schools who are undocumented.[1] The majority of these children (880 968 or 82% of the total) are South African citizens.[2]

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1 DBE supplementary affidavit, intervention application, bundle 4, para 22.3, p899.

2 DBE supplementary affidavit, intervention application, bundle 4, para 24, p899.

5 It is common cause that the majority of the children who do not have birth certificates are black and poor, and that the policy to exclude these children from education "*will disproportionately affect those who were historically made extremely vulnerable by apartheid: poor, black South African children*."[3]

6 The two primary legal mechanisms through which these exclusions come about are the Admission Policy for Ordinary Public Schools (GN 2432 of 1998) ("Admission Policy"), and the Immigration Act 13 of 2002 ("Immigration Act").

6.1 In respect of both South African and non-national children, section 15 of the Admission Policy makes admission to a public school conditional on producing a birth certificate.

6.2 In respect of non-national children who are in the country irregularly, section 21 of the Admission Policy requires proof of an attempt to regularise their status, before the child may be admitted. Sections 39(1) and 42 of the Immigration Act take this further, making it a crime for learning institutions to teach these "*illegal foreign*" children.

7 The right to a basic education, guaranteed in section 29(1)(a) of the Constitution, applies to "*everyone*." Its sweep is broad and unconditional. The right is not limited to South African citizens; to people who have birth certificates; or to people who are in the country legally.

8 The right to basic education is so wide in scope because it is so important. It is only through education that a child's personality, talents and mental and

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[3] Affidavit of Katharine Hall, intervention application, bundle 2, p348, para 64; not denied by the DBE – DBE supplementary affidavit, intervention application, bundle 4, pp891 – 906.

physical abilities can be developed to their fullest potential. Apart from its importance in its own right, education is an empowerment right: the means through which other rights can be achieved.

9 Yet the effect of the impugned provisions of the Admission Policy and Immigration Act is to render the realisation of the right to basic education conditional – and to render it conditional on factors that the children whose rights are limited are powerless to control.

10 This is unconstitutional. Not only does it amount to an unjustifiable limitation of the right to basic education, but it violates the rights of children to have their best interests considered paramount, to dignity, and to equality. No child may be excluded from school on the basis that they do not have a birth certificate or study permit.

11 We deal with the following issues in turn:

11.1 The factual background;

11.2 Section 15 of the Admission Policy is unconstitutional;

11.3 Section 21 of the Admission Policy is unconstitutional;

11.4 Sections 15 and 21 of the Admission Policy are *ultra vires*;

11.5 Sections 15 and 21 of the Admission Policy are applied arbitrarily;

11.6 Sections 39(1) and 42 of the Immigration Act are unconstitutional;

11.7 Remedy; and

11.8 Conclusion.

FACTUAL BACKGROUND

12 The third to 26th applicants ("the applicant children") were granted leave to intervene in this matter on 19 March 2019.[4]

13 The applicant children support the relief sought by the first and second applicants.[5] They also seek additional relief.[6] This additional relief relates to the documentation requirements for learners to be admitted to public schools.[7]

14 The South African Schools Act 84 of 1996 ("Schools Act") regulates admissions to public schools. Though the Schools Act does not require learners to produce any specific documents in order to be admitted to a public school, the Admission Policy does:

14.1 In terms of section 15 of the Admission Policy, a birth certificate is required for a child to be admitted to a public school.

14.2 In terms of section 21 of the Admission Policy, learners who are classified as "*illegal foreigners"* in terms of the Immigration Act must, when they apply for admission to school, show evidence that they have applied to legalise their stay in the country.

15 In addition to the documentation requirements set out in the Admission Policy, sections 39(1) and 42 of the Immigration Act prohibit learning institutions from providing basic education to children who are considered "*illegal foreigners*".

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4 The court order appears at p320, intervention application, bundle 2.

5 FA, intervention application, bundle 1, para 12.1, p20.

6 FA, intervention application, bundle 1, para 12.2, p20.

7 NOM, intervention application, bundle 1, pp 2-5.

16 The third to 26th applicants are children or parents, caregivers or co-caregivers of children, who are excluded from public schools because they do not have the required documents.[8]

17 They seek orders, amongst others, declaring sections 15 and 21 of the Admission Policy and section 39(1) and 42 of the Immigration Act, unconstitutional; and directing that children must be admitted to public schools, regardless of whether they have a birth certificate or study permit.[9]

18 The applicant children fall into two broad groups: South African citizens who do not have birth certificates; and non-national children residing in South Africa, who do not have permits allowing them to reside or study in South Africa and who (for the most part) do not have birth certificates.[10]

19 Each group of children has faced considerable difficulties in obtaining the documentation the respondents consider necessary in order for them to be admitted to school. There are many reasons why a child's caregiver may find it practically impossible to do so. These difficulties are set out in detail in the founding affidavit. [11] They include the following:

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[8] FA, intervention application, bundle 1, para 4, p17; not denied at DBE AA, intervention application, bundle 2, para 58, p 377; not denied at DHA AA, intervention application, bundle 3, para 96, p31.

[9] NOM, intervention application, bundle 1, pp 2-5.

[10] FA, intervention application, bundle 1, para 16, p22; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. DHA AA intervention application, bundle 3, paras 104-106 pp549-550 denies that the citizenship of all of the South African children has been proved, but not that the children broadly fall into these two groups.

[11] FA, intervention application, bundle 1, paras 18-29, pp23-27; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. DHA AA, intervention application, bundle 3, paras 109-121, pp 550-553 denies that the caregivers face impossible circumstances and alleges that there are options available to all caregivers to register births. The legal solutions presented do not, however, address the practical difficulties set out in detail at FA paras 19-29.

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 the overwhelming majority of the mothers do not have. They are, as a result, unable to register their children.[12]

19.2 It is often impossible 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 can only register their children's births if they pay for and undergo a paternity test.[13] Most fathers are unable to undergo a paternity test as the cost and practical difficulties associated them are prohibitive. For instance, each blood test costs R700.00 (meaning that one paternity test costs at a minimum R1 400.00), and paternity tests for the purposes of confirmation of citizenship can only be done at approved government labs. The costs of travel and overnight accommodation to attend at the labs are significant. [14]

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

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[12] FA, intervention application, bundle 1, paras 20 and 20.1, pp23-24; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. DHA AA, intervention application, bundle 3, paras 109-110, pp 550-551 gives a bare denial.

[13] FA, intervention application, bundle 1, para 20.2, p24; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. DHA AA, intervention application, bundle 3, paras 109-110, pp 550-551 denies that fathers are prevented from registering births as they can do so once a paternity test has confirmed they are the father. This does not address the practical difficulties with obtaining proof of paternity.

[14] FA, intervention application, bundle 1, para 55.3.1, pp43-44; not denied at DBE AA, intervention application, bundle 2, para 60, p 378; not denied at DHA AA, intervention application, bundle 3, para 125, pp 553.

Department of Home Affairs. Many mothers did not give birth in hospitals and did not see doctors after they gave birth, making this requirement impossible to meet.[15]

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 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.[16]

20 Non-national children face additional difficulties in obtaining a birth certificate or study permit.[17] For instance:

20.1 Some were born in South Africa and were unable to register their births in Lesotho because their parents could not afford trips there.[18]

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[15] FA, intervention application, bundle 1, para 21, p24; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. DHA AA, intervention application, bundle 3, paras 111-112, p 551 denies this and says that the DHA also accepts documents such as clinic records and affidavits. This does not, however, address the fact that mothers face practical difficulties meeting this requirement.

[16] FA, intervention application, bundle 1, para 22, pp24-25; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. DHA AA, intervention application, bundle 3, paras 113-114, p551 denies this, and says that a child's birth may be registered as long as there is some proof of familial connection. This does not, however, address the fact that many caregivers face practical difficulties meeting the DHA's requirements, nor does it address the fact that some caregivers and children do not have a familial connection.

[17] These are set out at FA, intervention application, bundle 1, paras 25-28.2, pp25-27.

[18] FA, intervention application, bundle 1, para 26.1, p26; not denied at DBE AA, intervention application, bundle 2, para 60, p 378; not denied at DHA AA, intervention application, bundle 3, paras 199-120, p552.

20.2 For others, their parents migrated to South Africa before they had registered the birth of the child in question. When they got to South Africa, they tried to attend to their children's birth registration but realized that they were required to have done so in Lesotho. However, they could not afford to go back to Lesotho to do so.[19]

20.3 For some, their parents do not have their own births registered which left them unable to, in turn, register the births of their children.[20]

20.4 For some parents who were able to return to Lesotho, attempts were made to register their children's births, but the Lesotho Ministry of Home Affairs required documents which they were not in possession of, such as a "King's Letter" or copies of other family member's passports.[21]

20.5 As far as study permits are concerned, some parents have attempted but been unable to obtain one for their child, because they did not meet the requirements for the issuance of a study permit. These requirements include the child having a medical aid scheme and the parent or caregiver providing bank statements which prove that they can financially care for the child. None of the children's parents can

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[19] FA, intervention application, bundle 1, para 26.3, p26; not denied at DBE AA, intervention application, bundle 2, para 60, p 378; not denied at DHA AA, intervention application, bundle 3, paras 199-120, p552.

[20] FA, intervention application, bundle 1, para 26.2, p26; not denied at DBE AA, intervention application, bundle 2, para 60, p 378; not denied at DHA AA, intervention application, bundle 3, paras 199-120, p552.

[21] FA, intervention application, bundle 1, para 26.4, p26; not denied at DBE AA, intervention application, bundle 2, para 60, p 378; not denied at DHA AA, intervention application, bundle 3, paras 199-120, p552.

afford private medical schemes, and the overwhelming majority also do not have bank accounts.[22]

21 These practical difficulties mean that many children reach a dead end, where they are unable to obtain documents at all. Children whose parents or guardians are disinterested in their well-being or unable to assist them are in the most vulnerable position: they are unlikely ever to be able to obtain the relevant documentation.

22 Even for those who are ultimately successful in obtaining documents, the process can take years. The DHA concedes as much, noting in its answering affidavit that, where paternity testing or social worker involvement is required, the process of obtaining a birth certificate "can be lengthy".[23]

23 The applicant children were, as a result of their inability to obtain documentation, prevented from attending school. This occurred in a number of ways:[24]

23.1 Ten of the children were in school and were removed before the school year had concluded. The children were told that they were being removed because they do not have birth certificates.

23.2 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.

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[22] FA, intervention application, bundle 1, para 28.2, p27; not denied at DBE AA, intervention application, bundle 2, para 60, p 378; not denied at DHA AA, intervention application, bundle 3, paras 199-120, p552.

[23] DHA AA, intervention application, bundle 3, para 116, pp551-552.

[24] FA, intervention application, bundle 1, paras 30-31 pp27-28; not denied at DBE AA, intervention application, bundle 2, para 60, p 378.

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

23.4 Fourteen of the children did not apply at any school at all because so many other children were being removed from school or refused admission.

24 The applicant children have explained the impact that their exclusion from school has had on them. For example:

24.1 The parents of Esona Sigo (9 years old), Onwabe Sigo (4 years old) and Ayabongo Sigo (2 years old) earn R300 and R400 a week making bricks. They were unable to obtain documentation for their children because they were themselves undocumented; and because they could not afford the paternity tests that the Department of Home Affairs required. At the time when this litigation was launched, Esona had never attended school. Instead she spent her days at home doing household chores and feeding her siblings. She constantly asked when she would be allowed to go to school, and felt shame and embarrassment at being unable to read and write.[25]

24.2 Nine-year old Kamohelo Marake dreamed of being a police officer. According to his stepfather, everyone who knows Kamohelo knows this about him. He was out of school for two years. During that time, he

[25] AM3.1, Affidavit of Bongani Sigo, intervention application, bundle 1, pp 93-98.

asked his stepfather repeatedly whether he can still be a police officer without an education.[26] Kamohelo himself describes his feelings in his own words in his own affidavit:

> *"I enjoyed school a lot. I made friends there but since I don't go there anymore I feel hurt and left out.*
>
> *When I was at school my favourite subjects were maths, Sotho and Xhosa. I also liked reading…*
>
> *Sometimes I get sent by the adults to buy things in town like cabbage. I also help with cleaning their houses. I don't feel like I can say no to them because they are older than me…*
>
> *I will study hard when I go back to school and I will do a lot to catch up for the time I have been out of school.*
>
> *I will be very, very happy if I can go back to school."*[27]

24.3 Siyabonga Ndlovu is described by his mother as a bright child who had enjoyed school. He was removed after having been in school for two years. When he was out of school, he passed the time with much older friends, and became subject to peer pressure. A neighbour saw him smoking cigarettes, and he has been caught stealing. His mother also worries about his safety. They live near the bank of the Orange river, and he had started trying to swim in the river, though he cannot swim and risks drowning.[28]

24.4 Thirteen-year-old Andiswa Busumane found it especially hard when she would wake up early in the morning and see her friends going to school. The other children would laugh at her and tease her about not going to school, and tell her that she will grow old without an education.

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[26] AM 3.7, Affidavit of Amos Sokoyi, intervention application, bundle 1, pp 137-147.

[27] AM3.8, Affidavit of Kamohelo Marake, intervention application, bundle 1, pp148-151.

[28] AM3.6, Affidavit of Nomsa Ndlovu, intervention application, bundle 1, pp128-136.

Her grandmother worries that Andiswa does not know how to read and write and how that will one day affect her employment prospects.[29]

24.5 Nontlantla Jolingana, who had been out of school for two years at the time this litigation was launched, spent this time playing with a toddler in her road, and sitting outside the house watching the passers-by, watching television or drawing if the materials were available.[30]

25 Pursuant to an application for urgent interim relief, the applicant children have now been permitted to attend school on an interim basis, in terms of an order made by the Constitutional Court, pending the final determination of this matter.[31]

26 The DHA has since investigated the circumstances of the 37 applicant children.[32] However, the majority of them are no closer to obtaining the necessary documentation than they were before the DHA's investigation.[33] This serves to further highlight the practical difficulties that families face in attempting to obtain the necessary documentation for their children: even with the DHA's assistance, the process is slow, difficult to navigate, and fraught with practical difficulties.

27 The problem of exclusions for lack of documentation is widespread. Beyond the applicant children, an alarming number of children have been refused

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[29] AM 3.9, Affidavit of Majobo Mofama, intervention application, bundle 1, pp152-159.

[30] AM 3.3, Affidavit of Jim Jolingana, intervention application, bundle 1, pp104-114.

[31] Annexure RA1, intervention application, bundle 4, pp945-951.

[32] DHA AA, intervention application, bundle 3, paras 50-93, pp535-547.

[33] RA, intervention application, bundle 4, para 68, p941.

admission or removed from schools, on the basis that they are undocumented.[34] It is clear that, pursuant to the Admission Policy and the Immigration Act, schools are actively excluding learners who are undocumented, by requiring learners to provide birth certificates as a condition for admission.[35] At least two schools have threatened to call the police to arrest undocumented learners.[36]

28 On the DBE's version, almost 1 million children of school-going age lack the required documentation to be admitted to schools.[37] This means that close to 1 million children – the majority of whom are South African[38] – stand to be excluded from school by virtue of the impugned provisions.

29 The DBE, in its supplementary affidavit, says that undocumented children are not actually excluded from schools.[39] This is false.

29.1 First, it is undisputed, as a matter of fact, that the applicant children were excluded from schools because they lacked the necessary

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[34] FA, intervention application, bundle 1, para 45, p37; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. The systemic problem is detailed in the FA, intervention application, bundle 1, paras 47-68, pp37-46; not denied at DBE AA, intervention application, bundle 2, para 60, p 378.

[35] FA Annexures AM16.1 to AM16.8, intervention application, bundle 1, pp252 – 266.

[36] FA Annexure AM11, intervention application, bundle 1, p225; and Annexure AM13, intervention application, bundle 1, p232.

[37] DBE supplementary affidavit, intervention application, bundle 4, para 22.3, p899. The DBE states in this para that there are 998 433 learners on its system for whom no ID numbers have been recorded.

See also Hall expert affidavit, intervention application, bundle 2, para 56.4, p345, where Dr Hall estimates that 157 000 children of school-going age lack birth certificates; and para s 57-62, pp345-346, where Dr Hall notes that the DBE would be well-placed to provide more accurate figures. The DBE's estimate of 998 433 seems to have been provided in response to this invitation to provide accurate data.

[38] Hall expert affidavit, intervention application, bundle 2, para 32, p335. That the majority of children in South Africa without birth certificates are South African is confirmed at DBE supplementary affidavit, intervention application, bundle 4, para 24, p899.

[39] DBE supplementary affidavit, intervention application, bundle 4, paras 11, 26 and 32, pp 894, 900 and 901.

documents, and were only allowed in after an application for interim relief.[40]

29.2 Second, it was the DBE itself that sought to ensure that the applicant children remained excluded from schools, pending the outcome of this litigation. The DBE mounted fierce resistance to the applicant children's request to be permitted to attend school pending the final determination of this matter, and only agreed to allow these 37 children to access schools after the Constitutional Court issued directions.[41] It is not clear how the DBE can claim that children are not excluded from schools as a result of the Admission Policy, when it has itself sought to implement the policy against the 37 applicant children.

29.3 Third, no meaningful answer has been provided to the detailed explanation, set out in the founding affidavit, of other exclusions that have occurred throughout the country, of children who lack the necessary documents. It is common cause that these exclusions occurred.[42]

29.4 Fourth, even if the DBE is correct that some undocumented children appear on its system, and are still in school, all this means is that not all undocumented children have been excluded from schools as yet.[43]

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[40] FA, intervention application, bundle 1, paras 30-31 pp27-28; not denied at DBE AA, intervention application, bundle 2, para 60, p 378.

[41] RA, intervention application, bundle 4, para 16.1.2, p919; Annexure RA1 RA1, intervention application, bundle 4, pp945-951.

[42] The systemic problem is detailed in the FA, intervention application, bundle 1, paras 47-68, pp37-46; not denied at DBE AA, intervention application, bundle 2, para 60, p 378.

[43] RA, intervention application, bundle 4, para 39.2, p929

> The DBE says that these children have been conditionally admitted to schools in terms of section 15 of the Admission Policy, and their parents are required to apply to the DHA for a birth certificate with the DHA to regularise their situation.[44] Though the DBE does not say what is to happen to them after the lapse of the period of their conditional admission, the clear effect of the Admission Policy (confirmed in practice by the exclusions that have already occurred) is that the learner will be excluded from school if the time period lapses and no birth certificate has been provided.

30 The problem is therefore far broader than the applicant children. It is for this reason that the applicant children seek relief that would ensure that no child is excluded from school because he or she is undocumented.[45] This application was brought, not only in the interests of the applicant children,[46] but also in the interest of children who are affected and/or likely to be affected by the impugned provisions of the Admission Policy and the Immigration Act,[47] and in the broader public interest.[48]

31 The problem cannot be addressed by efforts to ensure that the undocumented children obtain documents, however laudable such efforts may be. At a practical level, the DHA is simply unable to assist all of those undocumented learners to become documented. The DHA says that:

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[44] DBE supplementary affidavit, intervention application, bundle 4, para 11, p 894.

[45] NOM, intervention application, bundle 1, pp2-3, paras 3.3 and 4.3.

[46] In terms of section 38(a) of the Constitution.

[47] In terms of section 38(c) of the Constitution.

[48] In terms of section 38(d) of the Constitution.

> *"The Department simply does not have the capacity and lacks both human and financial resources to enable it to assist all persons wanting to apply for late registrations of birth and/or requiring paternity tests. It cannot trace or locate such persons, ensure they submit themselves to completing documentation and undergoing tests, nor can it make individual arrangements to accommodate all these persons. Nor should this assistance be expected of the Department as, for reasons set out in the Department's prior affidavits, parents have a duty to ensure the registration of their child's birth takes place and, if not done so within 30 days of the birth, to take necessary steps to follow through with a late birth registration."*[49]

32 Even if the DHA were able to assist undocumented children, the enormous numbers of undocumented children would mean that it would take years to do so. During all that time, children would remain out of school and suffer irreparable harm as a result.

33 The DBE primarily opposes the relief in relation to sections 15 and 21 of the Admission Policy.[50] The DHA abides the relief in relation to the Admission Policy, but opposes the relief sought in relation to sections 39(1) and 42 of the Immigration Act.[51]

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[49] DHA AA, intervention application, bundle 3, p533-534 at para 47.

[50] DBE AA, intervention application, bundle 2, para 68, p384-385.

[51] DHA AA, intervention application, bundle 3, para 12, p520.

SECTION 15 OF THE ADMISSION POLICY IS UNCONSTITUTIONAL

34 Section 15 of the Admission Policy is unconstitutional, in that it unjustifiably limits the right to a basic education,[52] children's rights to have their best interests considered paramount,[53] the right to dignity[54] and the right to equality.[55]

35 In this section we address the following issues:

35.1 the scope and effect of section 15;

35.2 section 15 limits children's rights;

35.3 the limitations are not capable of justification under section 36 of the Constitution; and

35.4 the new circular does not save section 15 from unconstitutionality.

Scope and effect of section 15

36 Section 15 of the Admission Policy provides:

> *"When a parent applies for admission of a learner to an ordinary public school, the parent must present an official birth certificate of the learner to the principal of the public school. If the parent is unable to submit the birth certificate, the learner may be admitted conditionally until a copy of the birth certificate is obtained from the regional office of the Department of Home Affairs. The principal must advise parents that it is an offence to make a false statement about the age of a child. (See Births and Deaths Registration Act, 1992 (No. 51 of 1992).) The parent must ensure that the admission of the learner is finalised within three months of conditional admission." (emphasis added)*

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[52] Section 29(1)(a) of the Constitution.

[53] Section 28(2) of the Constitution.

[54] Section 10 of the Constitution.

[55] Section 9 of the Constitution.

37 The effect of section 15 of the Admission Policy is that a birth certificate is required in order to attend school:

37.1 A child's admission is conditional on providing a birth certificate. If a birth certificate is not provided within 3 months, the child's admission is not "*finalised*" and he or she stands to be excluded.

37.2 This requirement applies to all children – both South African citizens and non-national children.

38 A number of children have already been excluded from schools as a result of section 15 of the Admission Policy – including the 37 applicant children (before they were admitted on an interim basis, pending the outcome of this litigation, in terms of an order made by the Constitutional Court).[56]

38.1 According to the DBE, 998 4333 children in South Africa of school-going age who do not have the required documents.[57] All of these children stand to be excluded from schools if the Admission Policy is permitted to stand.[58]

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[56] Though the DBE now denies that undocumented children are excluded from schools (DBE supplementary affidavit, intervention application, bundle 4, paras 11, 26 and 32, pp 894, 900 and 901), this is false, as explained above and at RA, intervention application, bundle 4, paras 38-39, pp 938-939.

[57] DBE supplementary affidavit, intervention application, bundle 4, para 22.3, p899. The DBE states in this para that there are 998 433 learners on its system for whom no ID numbers have been recorded.

See also Hall expert affidavit, intervention application, bundle 2, para 56.4, p345, where Dr Hall estimates that 157 000 children of school-going age lack birth certificates; and para s 57-62, pp345-346, where Dr Hall notes that the DBE would be well-placed to provide more accurate figures. The DBE's estimate of 998 433 seems to have been provided in response to this invitation to provide accurate data.

[58] RA, intervention application, bundle 4, paras 36 and 40, pp927 and 929-930.

38.2 Though the DBE contends that undocumented children are not excluded from schools,[59] this statement is false, as we have explained above.[60]

39 Therefore, the effect of section 15 of the Admission Policy is that children without birth certificates are excluded, or stand to be excluded, from public schools.

Section 15 limits children's rights

Right to a basic education

40 Section 29(1)(a) of the Constitution provides that *"[e]veryone has the right to a basic education, including adult basic education"*.

41 This right applies to "*everyone*" – not "*everyone, on condition they provide a birth certificate*".

42 The importance of the right to basic education cannot be over-stated:

42.1 The importance of the right to education was recognised by the Constitutional Court in *Juma Musjid*:

> *"Indeed, basic education is an important socio-economic right directed, among other things, at promoting and developing a child's personality, talents and mental and physical abilities to his or her fullest potential. Basic education also provides a foundation for a child's lifetime learning and world opportunities. To this end, access to school — an important component of the right of basic education*

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[59] DBE supplementary affidavit, intervention application, bundle 4, paras 11, 26 and 32, pp 894, 900 and 901.

[60] This is also explained at RA, intervention application, bundle 4, paras 38-39, pp 938-939.

guaranteed to everyone by section 29(1)(a) of the Constitution — is a necessary condition for the achievement of this right."[61]

42.2 Basic education has also been recognised by the courts as a "*primary driver of transformation in South Africa*."[62]

42.3 Apart from its importance in its own right, education is an empowerment right. The Committee on Economic, Social and Cultural Rights ("the CESCR") in its General Comment on the Right to Education stated:

> *"Education is both a human right in itself and an indispensable means of realizing 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 exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized 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".*[63]

42.4 In *FEDSAS*, Moseneke DCJ noted that:

> *"All forms of human oppression and exclusion are premised, in varying degrees, on a denial of access to education and training. The uneven power relations that marked slavery, colonialism, the industrial age and the information economy are girded, in great part, by inadequate access to quality teaching and learning."*[64]

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[61] *Governing Body of the Juma Musjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC) ("*Juma Musjid*") at para 43.

[62] *Minister of Basic Education and Others v Basic Education for All and Others* 2016 (4) SA 63 (SCA) at para 40. See also *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC) at para 45, where the Constitutional Court recognised the importance of education in redressing the entrenched inequalities caused by apartheid and its significance in transforming our society.

[63] CESCR, General Comment 13 (The Right to Education) at para 1, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en

[64] *FEDSAS v MEC for Education, Gauteng* 2016 (4) SA 546 (CC) ("*FEDSAS*") at para 3.

43 The Constitutional Court has held that the exclusion of a child from school limits the right of access to basic education.[65]

44 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.

44.1 The right is not guaranteed for "*everyone*", as section 29(1)(a) requires, but rather a select group – those who can provide the required documents.

44.2 For everyone else – including the applicant children – the right is severely limited. They are entirely denied any access to basic education at all.

45 This limitation of the child's right to a basic education occurs as a result of factors over which the child him or herself has no control:

45.1 The child does not have the ability to ensure that a certificate is obtained; yet, it is the child's rights that are limited where registration does not occur.

45.2 Parents and caregivers face significant obstacles in attempting to obtain a birth certificate. [66] It is therefore not a situation that can be easily remedied by either the child or his or her parents.

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[65] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) ("*Welkom High School*") at para 134.

[66] FA, intervention application, bundle 1, paras 18-29, pp23-27; not denied at DBE AA, intervention application, bundle 2, para 60, p 378. DHA AA, intervention application, bundle 3, paras 109-121, pp 550-553 denies that the caregivers face impossible circumstances and alleges that there are options available to all caregivers to register births. The legal solutions presented do not, however, address the practical difficulties set out in detail at FA paras 19-29.

46 Despite having no control or choice, the negative consequences attached to their parent's choices or the state's failure to register their births are borne by the children. For undocumented children, who are first and foremost *children*, and who the state is under an obligation to protect, the limitations have far-reaching consequences, which influences the course that their life will take.

47 Therefore, section 15 constitutes a severe limitation of the right to a basic education.

Right of children to have their best interests considered paramount

48 Section 15 of the Admission Policy violates the constitutional principle that children's best interests are of paramount importance in all matters concerning children.

49 Section 28(2) of the Constitution provides:

> *"A child's best interests are of paramount importance in every matter concerning the child."*

50 The Constitutional Court has found that sections 28(1) and (2) have a wide ambit. They must be considered in all matters affecting children:

> *"The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights."*[67]

[67] *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) ("*S v M*") at para 15.

51 Section 28(2) both creates a self-standing right, and strengthens other rights – such as the right to basic education.[68] In a concurring judgment in *Welkom High School*, Froneman and Skweyiya JJ said:

> *"It is salutary to remember that although, formally, this case is a dispute between the school governing bodies and the [head of department], their respective functions are to serve the needs of children in education. Section 28(2) of the Constitution makes it clear that the best interests of children "are of paramount importance in every matter" concerning children. That applies to education too."*[69] *(emphasis added)*

52 Section 15 of the Admission Policy harms children, by preventing them from attending school. The harm is aggravated by the vulnerability of the children affected by section 15: children are, by their nature, vulnerable members of our society, and the affected children here are especially vulnerable in that they are children who lack documentation. Denying them the benefits associated with education makes them even more vulnerable.

53 As such, section 15 is a severe limitation of section 28(2) of the Constitution.

Right to dignity

54 Section 10 of the Constitution provides:

> *"Everyone has inherent dignity and the right to have their dignity respected and protected."*

55 The Constitutional Court has found that children's dignity is not dependent on that of their parents, nor should it be assessed in the light of the actions of their parents: each child has his or her own dignity, and is an individual with distinctive personality.[70]

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68 *Welkom High School* at para 129, concurring judgment.

69 *Welkom High School* at para 129, , concurring judgment.

70 *S v M* at para 18.

56 Denying children an education has a severe and far-reaching impact on their dignity.

56.1 The supporting affidavits that were attached to the founding affidavit chronicle the devastating impact that being denied access to school has had for the applicant children. The children report feeling shame and embarrassment when they are unable to perform tasks that other children their age can perform; they become depressed; or find themselves in dangerous situations as a result of being out of school.[71]

56.2 Section 15 of the Admission Policy denies the affected children the essential benefits associated with an education that will allow them to participate meaningfully in society. Without education, these children – and those similarly situated – cannot hope to lift themselves out of poverty.

56.3 These effects go to the heart of the right to dignity: they impact on children's self-esteem and self-worth, their potential for human fulfilment, their ability to act to improve their own position in life later on and their ability to participate meaningfully in society.

57 Therefore, section 15 of the Admission Policy limits children's right to dignity.

Right to equality

58 Section 9(3) of the Constitution provides:

> *"The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex,*

[71] The supporting affidavits are AM3.1 to AM3.12, intervention application, bundle 1, pp93-181.

> *pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*

59 In the schooling context in particular, section 5(1) of the Schools Act prohibits unfair discrimination in admissions processes.

60 Section 15 of the Admission Policy results in children being denied access to education on the basis of their documentation status. This constitutes unfair discrimination. We say so for the following reasons:

60.1 Section 15 differentiates between children on the ground of documentation status.

60.2 Documentation status is not a listed ground of discrimination in section 9(3) of the Constitution. However, differentiation will amount to discrimination where it is on a ground analogous to those listed in section 9(3).

60.3 The most important consideration in determining whether a ground of discrimination is analogous to the prohibited grounds is its impact on the dignity of those affected. The Constitutional Court in *Khosa* held that:

> *"To be considered an analogous ground of differentiation to those listed in s 9(3) the classification must, therefore, have an adverse effect on the dignity of the individual, or some other comparable effect."*[72]

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[72] *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC) ("*Khosa*") at para 70.

60.4 Grounds of differentiation that the Constitutional Court has considered, on this test, to be analogous to the grounds listed in section 9(3), include citizenship and refugee status.[73]

60.5 We submit that documentation status is a ground analogous to those listed in section 9(3). Like citizenship and refugee status, their documentation status is a factor over which the children have no control.[74] Basing the differential treatment of children on their documentation status impairs their fundamental dignity, and affects them in a similarly serious way as would differentiation based on any of the listed grounds.

60.6 Section 15 therefore discriminates between children who have birth certificates, and those who do not.

61 The next question is whether it is unfair. The determining factor in answering this question is the impact of the discrimination on the person discriminated against.[75]

62 In *Harksen*, the Constitutional Court set out the factors to be considered in determining whether discrimination is unfair as follows:

62.1 The position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;

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[73] *Khosa* (citizenship) and, in relation to refugee status, *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC).

[74] *Khosa* at para 71.

[75] *Khosa* at para 72.

62.2 The nature of the power and the purpose sought to be achieved by it;

62.3 The extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.[76]

63 All of these factors lead ineluctably to the conclusion that section 15 of the Admission Policy amounts to unfair discrimination:

63.1 The affected children are plainly vulnerable and marginalised persons in society, who suffer from systematic disadvantage and discrimination. In this regard, the Constitutional Court has held as follows:

> *"The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair."*[77]

63.2 It is common cause that the children who bear the brunt of the disadvantage that results from a lack of documentation are among the most vulnerable, namely poor, black South African children.[78]

63.3 In addition, the differentiation is based on attributes and characteristics that have the potential to impair human dignity.

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[76] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) ("*Harksen*") at para 52

[77] *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at para 112 (concurring judgment of O'Regan J)

[78] Affidavit of Katharine Hall, intervention application, bundle 2, p348, para 64; not denied by the DBE – DBE supplementary affidavit, intervention application, bundle 4, pp891 – 906.

64 Therefore, we submit that section 15 of the Admission Policy unfairly discriminates between children on the basis of their documentation status. It therefore limits their right to equality.

The limitations are not capable of justification

65 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.

65.1 The Constitutional Court has stated emphatically that the right in section 29(1)(a) is "*immediately realisable*".[79]

65.2 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.

66 The onus to establish that the limitation is justified rests on the DBE.[80]

67 There is no basis upon which the limitation of these rights can be justified under section 36 of the Constitution. This is for three principal reasons:

67.1 First, section 15 of the Admission Policy is not "law of general application" within the meaning of section 36 of the Constitution. Any rights limitations it occasions are, as a result, unjustifiable.

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[79] *Juma Musjid* at para 37.

[80] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre As Amicus Curiae)* 2001 (4) SA 491 (CC) ("*Moise*") at para 31; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) ("*NICRO*") at paras 33-37; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) ("*Phillips*") at para 20.

67.2 Second, even if section 15 did constitute law of general application, it fails the limitations test on at least two legs:

67.2.1 the limitations are not rationally related to the purposes sought to be achieved;

67.2.2 less restrictive means are available to achieve the same purposes; and

67.3 Third, section 15 effectively removes the right to education from undocumented children altogether, and as such can never be considered a reasonable and justifiable limitation of that right.

(a) No law of general application

68 The Minister of Education made the Admission Policy in terms of section 3(4) of the National Education Policy Act 27 of 1996. In *Minister of Education v Harris*, the Constitutional Court held that policy made in terms of this section is not law and does not create binding legal obligations:

> *"[T]he Minister's powers under s 3(4) are limited to making a policy determination and he has no power to issue an edict enforceable against schools and learners."*[81]

69 In terms of section 36 of the Constitution, the rights in the Bill of Rights may be limited only in terms of law of general application.

70 Section 15 of the Admission Policy is not law of general application. It is merely policy. It is accordingly incapable of authorising the limitation of a right in the Bill of Rights.

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[81] *Minister of Education v Harris* 2001 (4) SA 1297 (CC) ("*Harris*") at para 11.

70.1 In *Dladla*,[82] the Constitutional Court considered the constitutionality of lock-out rules at a shelter. The majority held that the rules were not "law of general application".[83] The rights limitations occasioned by those rules were unjustifiable, because only a law of general application could authorise a limitation of a right, and the rules were not a law of general application.[84]

70.2 In *Blue Moonlight*,[85] the Supreme Court of Appeal held that the City's housing policy was not a law of general application. As a result, it was not necessary to determine whether the policy in issue was a justifiable limitation of occupiers' rights to equality.[86]

71 The Admission Policy is created in terms of section 3(4) of the National Education Policy Act 27 of 1996.

71.1 Like the City's housing policy at issue in *Blue Moonlight*, just that: a policy. It is not binding law.[87]

71.2 Therefore, the Admission Policy is not law of general application. The rights limitations it causes are, as a result, unjustifiable.

71.3 Section 15 of the Admission Policy is therefore unconstitutional.

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82 *Dladla and Others v City of Johannesburg and Another* 2018 (2) SA 327 (CC) ("*Dladla*").

83 *Dladla* at para 52.

84 *Dladla* at paras 52 and 53.

85 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) ("*Blue Moonlight*").

86 *Blue Moonlight* at 358.

87 *Harris* at paras 10 and 11.

(b) The attempt at justification

72 Even if section 15 did amount to law of general application, the rights limitations it causes are not reasonable and justifiable on the basis of the test set out in section 36 of the Constitution.

73 Section 36 provides:

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

74 The right to education is a right of profound importance. 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.[88] Education is also an indispensable means of realising other rights.[89]

75 The rights limitations occasioned by section 15 of the Admissions Policy are extraordinarily severe.

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[88] *Juma Musjid* at para 43.

[89] CESCR, General Comment 13 (The Right to Education) at para 1, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en

75.1 They entail the wholesale denial of the right to a basic education to an already vulnerable group of children, in circumstances in which the children themselves are powerless to remedy the situation.

75.2 They deny the affected children the right to have their best interests considered paramount, and limits their rights to equality and dignity.

75.3 Not only is the extent of the limitation each child suffers severe, but the extent of the limitation is also far-reaching in terms of the sheer number of children affected – close to 1 million, on the DBE's own figures (and more when considering that number does not capture children who were never admitted to school at all).[90]

76 Limitations of rights of this importance, and to this extent, require strong justification. If they are to be justifiable, they must be rooted in a particularly compelling purpose. As the Constitutional Court has held, "*the more substantial the limitation of the fundamental right, the more compelling the grounds of justification must be*."[91]

77 It is not clear what the DBE's position is in relation to the justification of section 15. Though it initially sought to justify it as a reasonable limitation of rights,[92] the DBE's supplementary affidavit seems to concede that children cannot justifiably be excluded from schools because they lack a birth certificate.[93]

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[90] DBE supplementary affidavit, intervention application, bundle 4, para 22.3, p899. The DBE states in this para that there are 998 433 learners on its system for whom no ID numbers have been recorded.

[91] *Engelbrecht v Road Accident Fund and Another* 2007 (6) SA 96 (CC) at para 41.

[92] See DBE AA, intervention application, bundle 2, from p517.

[93] See DBE supplementary affidavit, intervention application, bundle 4, from p892.

77.1 To the extent that the DBE no longer seeks to justify the rights limitations caused by section 15 of the Admission Policy, we submit that section 15 ought to be declared unconstitutional. The section limits rights and, in the absence of any justification being advanced, it ought to be set aside.[94]

77.2 It is, however, not clear whether this is the DBE's stance. Therefore, for the sake of completeness, we deal below with the justifications initially put forward by the DBE in its answering affidavit.

78 According to the DBE, the purposes sought to be achieved by section 15 of the Admission Policy are as follows:

78.1 to give effect to the provisions of the NEPA and Schools Act by making sure that schools comply with the Admission Policy;[95]

78.2 to give effect to the Births and Deaths Registration Act;[96]

78.3 to ensure that the details of vulnerable children in the DBE sector are shared with the Department of Social Development ("DSD") in order for DSD to provide the learners with the required services;[97]

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94 *NICRO* at para 36.

95 DBE AA, intervention application, bundle 2, paras 47 and 50, p373-374, read with DBE AA, main application, bundle 2, para 67, p296.

96 DBE AA, intervention application, bundle 2, paras 47 and 50, p373-374, read with DBE AA, main application, bundle 2, para 68, p297.

97 DBE AA, intervention application, bundle 2, paras 47 and 50, p373-374, read with DBE AA, main application, bundle 2, para 68, p297.

78.4 to make sure that all undocumented learners in the system are identified and that DHA is engaged to address the matter;[98]

78.5 to prevent human trafficking, child prostitution, child labour, and all other related abuses that are directed towards minor children;[99]

78.6 to eliminate so-called "*ghost*" learners – learners who are recorded on the system but who do not actually attend the school – and ensure that funding is provided only for the correct number of learners;[100] and

78.7 to prevent a host of negative consequences that the DBE alleges would result from educating undocumented learners, such as rendering the DBE ineffective; chaos in the governing of the country; an unexplained impact for labour relations; an impact on the country's "*economy and budget*"; and an impact on "*the provisioning of services*", including health, social and educational services, as well as housing and infrastructure.[101]

79 None of these purposes justifies the rights limitations brought about by sections 15 and 21 of the Admission Policy. In each case –

79.1 there is no relation between the purpose sought to be achieved in section 15 of the Admission Policy, and the limitations it occasions; and

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[98] DBE AA, intervention application, bundle 2, paras 47 and 50, p373-374, read with DBE AA, main application, bundle 2, para 69, p297.

[99] DBE AA, intervention application, bundle 2, paras 47 and 50, p373-374, read with DBE AA, main application, bundle 2, para 79, p297.

[100] DBE AA, intervention application, bundle 2, paras 47 and 50, p373-374, read with DBE AA, main application, bundle 2, para 70, p297.

[101] DBE AA, intervention application, bundle 2, paras 52 and 65, pp 375 and 380-381.

79.2 there are less restrictive means available by which to give effect to these purposes.

80 We consider each purpose in turn.

81 To the extent that section 15 seeks to ensure compliance with the Admission Policy:

81.1 The purported rationale simply makes no sense. The purpose of the Admission Policy's limitation of children's rights cannot be to ensure that schools comply with the Admission Policy. This is a circular justification.

82 To the extent that the impugned provisions of the Admission Policy seek to incentivise parents and caregivers to register children's births:

82.1 First, this purpose is not rationally related to depriving undocumented children of their rights.

82.2 The limitation seeks to incentivise action on the part of parents by threatening the rights of their child. This is not a legitimate approach to the limitation of fundamental human rights – much less to the limitation of children's rights.

82.3 The effect of section 28(2) of the Constitution is that it is not generally permissible for children to be forced to suffer as a result of their parents' misdeeds, without proper regard for the children's interests. In *S v M* the Constitutional Court captured the principle as follows:

> *"Every child has or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not*

> *merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited upon their children."*[102] *(emphasis added)*

82.4 Therefore, children are to be treated by the law as individual rights-bearers rather than mere extensions of their parents.[103] In removing children's rights as a mechanism to incentivise action on the part of their parents, the Admission Policy does not treat children as individual rights bearers, worthy of consideration in their own right.

82.5 Second, the limitation of children's rights is an ineffective means to achieve this purpose.

82.6 Where parents have been unable to register their child's birth, this is most often due to real practical difficulties such as those set out in detail in the founding affidavit – not laziness or lack of care. These are parents who are already incentivised to register their child, but who are simply unable to do so. Denying rights to their children does not change their ability to ensure their registration.

82.7 None of the respondents has put up any evidence to show that the Admission Policy has had any effect whatsoever in incentivising birth registration.

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[102] *S v M* at para 18.

[103] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) ("*Teddy Bear Clinic*") at para 40. See also *Van der Burg and Another v National Director of Public Prosecutions and Another* 2012 (2) SACR 331 (CC) at para 63.

82.8 Where justification depends on factual material, the party contending for justification must establish the facts on which the justification depends.[104]

82.9 In matters concerning the limitation of children's rights, such as this one, it is particularly important that courts be furnished with information of the best quality that can reasonably be obtained. [105]

82.10 Here, the respondents ask the Court to accept that the Admission Policy justifiably limits children's rights in order to incentivise birth registration – without any evidence to the effect that it actually has this effect.

82.11 Third, less restrictive means are available to achieve the same purpose.

82.12 In *Teddy Bear Clinic*, the Constitutional Court summarised the applicable test as follows:

> *"A limitation will not be proportional if other, less restrictive means could have been used to achieve the same ends. And if it is disproportionate, it is unlikely that the limitation will meet the standard set by the Constitution, for s 36 'does not permit a sledgehammer to be used to crack a nut'. A provision which limits fundamental rights must, if it is to withstand constitutional scrutiny, be appropriately tailored and narrowly focused."*[106]

82.13 Incentivising birth registration may be achieved without the wholesale denial of the right to basic education of children who do not have birth certificates. A key intervention that could be made is removing the

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[104] *Moise* at para 19.

[105] *Teddy Bear Clinic* at para 96.

[106] *Teddy Bear Clinic* at para 95.

practical difficulties that parents and caregivers face in attempting to register their children.

83 To the extent that the impugned provisions of the Admission Policy seek to ensure that the details of vulnerable children are shared with DSD and DHA:

83.1 This purpose is not rationally related to depriving those children of their rights. There is simply no need to exclude children from school in order to share their details with DSD and DHA.

83.2 There are less restrictive means to achieve the same purpose: the details of undocumented children can still be shared with DSD and DHA, while the child attends school.

84 To the extent that the impugned provisions of the Admission Policy seek to protect undocumented children as a vulnerable class:

84.1 This purpose is not rationally related to depriving those children of their rights.

84.2 Section 15 has the effect of rendering these children even more vulnerable, by preventing them from accessing the education necessary to pull themselves out of poverty.

84.3 It also has the effect that these already vulnerable children are out of school and unattended during the day, placing them in an even more dangerous situation.

84.4 Less restrictive means are available to achieve the same purpose. Vulnerable undocumented children can be protected without excluding

them from school. It is not a necessary facet of their "*protection*" that they be denied education.

85 To the extent that the impugned provisions of the Admission Policy seek to ensure that learners' identities are verified:

85.1 This objective can be achieved in a less restrictive manner. A birth certificate is not required to verify a child's identity: alternative forms of proof such as an affidavit could equally fulfil this purpose. None of the respondents has offered any justification for the rigid insistence on a birth certificate as the only permissible form of verification of a child's identity.

86 To the extent that section 15 aims to prevent negative consequences such as "chaos in governing the republic":

86.1 The DBE's assertions regarding these negative consequences are vague. They are pleaded at a level of generality that makes it impossible to answer properly.

86.2 In addition, no evidence is provided to the effect that any of these consequences would actually result from requiring the DBE to educate undocumented learners.

86.2.1 Where justification depends on factual material, the party contending for justification must establish the facts on which the justification depends.[107] In matters concerning the limitation

[107] *Moise* at para 19.

of children's rights, such as this one, it is particularly important that courts be furnished with information of the best quality that can reasonably be obtained. [108]

86.2.2 The DBE was therefore required to set out evidence to the effect that the negative consequences it alleges would result from the relief sought, would actually occur. It has failed to do so.

86.2.3 No figures are provided as to the current budget; the projected impact that providing education to undocumented learners would have on the budget; and that the DBE would be unable to meet these additional costs.

86.2.4 In the circumstances, it is not possible to conclude that these negative consequences would result from the relief sought.

86.3 Given the DBE's later statement, in its supplementary affidavit, that it in fact does educate undocumented learners, it is even more implausible that these negative consequences would actually arise. The DBE cannot simultaneously seek to persuade the Court that educating undocumented learners would lead to chaos in governing the country, and that it is currently educating undocumented learners.

87 Therefore, none of the purposes underlying section 15 of the Admission Policy justify the rights limitations they bring about:

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[108] *Teddy Bear Clinic* at para 96.

87.1 the limitations occasioned by section 15 are not rationally related to the purposes sought to be achieved; and

87.2 less restrictive means are available to achieve the same purposes.

88 The limitations are therefore not justifiable in terms of section 36 of the Constitution.

(c) A limitation cannot negate the essential content of the right

89 A limitation of a fundamental right cannot have the effect of negating that right entirely.

89.1 The limitations clause in the Interim Constitution made this explicit. It provided, at section 33(1)(d), that a limitation "*shall not negate the essential content of the right in question*".

89.2 In *Makwanyane*, Chaskalson P explained this requirement as being rooted in the concern that, "*under the guise of limitation, rights should not be taken away altogether*."[109]

89.3 Though this precise wording is not contained in section 36 of the Constitution, we submit that its rationale continues to apply.

89.4 A limitation that removes a right entirely from a particular class of persons can never be reasonable and justifiable, as is required by section 36. This is because, if a limitation may justifiably negate the essential content of the right in question, it is as though that right never

[109] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) ("*Makwanyane*") at para 134.

existed. The right is not "limited": it is removed. A right cannot be removed under the guise of limitation.

90 Here, the effect of the limitation brought about by section 15 is that undocumented children are relieved entirely of their right to education – despite the fact that section 29(1)(a) of the Constitution guarantees this right to "everyone". The affected children might as well not have had the right to a basic education at all, because it is wholly erased by virtue of section 15 of the Admission Policy.

91 A limitation that erases rights cannot, we submit, be considered reasonable and justifiable.

92 We accordingly submit that section 15 of the Admission Policy unjustifiably limits the rights under section 9(1), section 10, section 28(2) and section 29(1)(a), and should be declared unconstitutional.

The new circular does not save section 15 from unconstitutionality

93 The DBE seems to be of the view that the new circular, dated 8 July 2019,[110] ameliorates the problems with section 15 of the Admissions Policy. This is not the case.

94 First, the existing Admission Policy remains in force until such time as it is replaced with a new policy. It cannot be amended by a circular.

95 Second, the new circular suffers from the same essential problems as section 15 of the Admission Policy.

[110] HM5, intervention application, bundle 4, pp907-912.

96 The primary difference between the circular and the present Admission Policy is the following:

96.1 While the Admission Policy requires parents to ensure that the admission of an undocumented learner is finalised within three months of the date of conditional admission, the circular extends this three-month period to a maximum of six months from the date of conditional admission.[111]

96.2 If the parent remains unable to provide the birth certificate after this six-month period, the principal must refer the matter to the Head of Department concerned.[112]

96.3 If, after the six-month period, the learner remains unable to obtain a birth certificate, the Head of Department must consider the reasons for the delay and "*may extend the period within which to obtain the required documentation up to a period of not more than twelve (12) months from the date on which the undocumented learner was conditionally admitted at school*."[113]

97 It is accordingly clear that the circular contemplates, permits, and indeed requires, that undocumented children be removed from schools. It merely extends the time period afforded to the parents and guardians to obtain

[111] HM5, intervention application, bundle 4, p909, para 2.4.4.

[112] HM5, intervention application, bundle 4, p910, para 2.4.5.

[113] HM5, intervention application, bundle 4, p911, para 2.4.9(c).

documents from a maximum of three months to a maximum of 12 months, in the discretion of the Head of Department. As a result:

97.1 Like section 15 of the Admission Policy, the admission contemplated by the circular remains conditional: the required documents must be provided, or the admission cannot be finalised.

97.2 Where the existing Admission Policy permits a three-month conditional admission, the new circular extends this time to six or twelve months, depending on the circumstances.[114]

97.3 This means that the circular still permits children being excluded from schools if they do not provide the required documents – just after a longer period of time than that currently provided for. This is unlawful and unconstitutional, for the reasons set out above.

98 For the reasons we have explained, there are children who, through no fault of their own, will be unable to obtain documents even after 12 months. In particular, children whose parents or guardians are disinterested in their well-being or unable to assist them are unlikely ever to be able to obtain the relevant documentation, or will only be able to do so after years of effort. We submit that it can never be constitutionally permissible to take away the right of basic education from such children, thereby condemning them to a life on the margins of society.

[114] HM5, intervention application, bundle 4, p909-911, para 2.4.4.

SECTION 21 OF THE ADMISSION POLICY IS UNCONSTITUTIONAL

99 Section 21 of the Admission Policy is unconstitutional, in that it unjustifiably limits the right to a basic education,[115] children's rights to have their best interests considered paramount,[116] the right to dignity[117] and the right to equality.[118]

100 In this section we address the following issues:

100.1 the scope and effect of section 21;

100.2 section 15 limits children's rights;

100.3 the limitations are not capable of justification under section 36 of the Constitution.

Scope and effect of section 21

101 Section 21 of the Admission Policy provides:

> *"Persons classified as illegal aliens must, when they apply for admission for their children or for themselves, show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Aliens Control Act, 1991 (No. 96 of 1991)."*[119]

102 The effect of section 21 is that learners who are classified as "*illegal foreigners*" must show evidence that they have applied to legalise their stay, in order to be admitted to public schools.

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[115] Section 29(1)(a) of the Constitution.

[116] Section 28(2) of the Constitution.

[117] Section 10 of the Constitution.

[118] Section 9 of the Constitution.

[119] "Illegal aliens" is the term used in the now repealed Aliens Control Act. Its equivalent under the Immigration Act is "illegal foreigners".

103 For a number of children, this is simply not possible. These are children who have been brought into the country irregularly, and who do not meet the requirements to be granted a residence or study permit. As a result, they cannot apply to legalise their stays

104 This, in turn, means that these non-national children are denied access to, or expelled from, public schools.

Section 21 limits children's rights

105 Section 21 of the Admission Policy limits children's rights in largely the same ways as section 15 does. Therefore, where our submissions on these two provisions overlap, we do not repeat them in this section, and instead refer to our submissions in relation to section 15.

Right to a basic education

106 Section 21 of the Admission Policy limits the rights of "illegal foreign" children to a basic education.

107 The constitutional right to a basic education extends to all persons within South Africa's borders, regardless of their nationality or immigration status.

107.1 Section 29(1)(a) of the Constitution provides that *"[e]veryone has the right… to a basic education, including adult basic education"*. This right applies to "*everyone*" – not "*everyone, provided they are in the country legally*".

107.2 Regarding the use of the word "*everyone*" in the rights contained in sections 12 and 35(2) of the Constitution, the Constitutional Court has specifically noted that "*everyone*" covers even persons who are not South African nationals.

> *"The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution.*
>
> *Once it is accepted, as it must be, that persons within our territorial boundaries have the protection of our courts, there is no reason why 'everyone' in ss 12(2) and 35(2) should not be given its ordinary meaning. When the Constitution intends to confine rights to citizens it says so. All people in this category are beneficiaries of s 12 and s 35(2). It is not necessary in this case to answer the question whether people who seek to enter South Africa by road at border posts are entitled to the rights under our Constitution if they are not allowed to enter the country."*[120]

107.3 The SCA has also recognised that education is a fundamental component of human dignity, which is not qualified by nationality.[121]

107.4 Because education is fundamental to human dignity, to deny this right to foreign nationals who are inside the country would be inimical to our constitutional order. There is therefore no reason not to give "*everyone*" in section 29(1) its ordinary meaning, to include the applicant children who are not South African nationals.

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[120] *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at paras 26 – 27.

[121] *Minister of Home Affairs v Watchenuka* [2004] 1 All SA 21 (SCA) at paras 25 and 36.

107.5 Construing section 29(1)(a) as conferring rights on non-national children who are in the country irregularly is consistent with the principle that courts should first give a broad construction to rights, and then determine whether a particular limitation is reasonable and justifiable. The Constitutional Court has held that this is preferable to construing rights narrowly, thereby depriving individuals of the full measure of the fundamental rights and freedoms conferred by the Constitution.[122]

108 International law also makes it clear that all children, including those in irregular immigration situations, are bearers of the right to education.

108.1 The CESCR, in its general comment on the right to education, states that educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the state party.[123] It also specifies 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.[124]

108.2 The Committee on the Protection of the Rights of All Migrant Workers and Members of their families, together with the Committee on the Rights of the Child, has issued two joint general comments on the

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[122] *Teddy Bear Clinic* at para 41.

[123] CESCR, General Comment 13 (The Right to Education) at para 34, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en

[124] CESCR, General Comment 13 (The Right to Education) at para 34, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en

principles regarding the rights of children in the context of international migration.[125] In terms of these joint general comments:

108.2.1 The non-discrimination principle in the Convention on the Rights of the Child obliges states parties to respect and ensure the rights set forth in the Convention to all children – including migrants in irregular situations.[126]

108.2.2 States should ensure that children in the context of international migration are treated first and foremost as children.[127]

108.2.3 All children in the context of international migration, irrespective of status, shall have full access to all levels and all aspects of education, on the basis of equality with nationals of the country where those children are living.[128] This obligation implies that states should ensure equal access to quality and inclusive education for all migrant children, irrespective of their migration status.[129]

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[125] Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (16 Nov 2017) ("JGC No. 3"), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f22&Lang=en and Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (16 Nov 2017) ("JGC No 4"), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f23&Lang=en

[126] JGC No. 3 at para 9.

[127] JGC No. 3 at para 11.

[128] JGC No. 4 at para 59.

[129] JGC No. 4 at para 59.

108.2.4 The Committees strongly urge states to expeditiously reform regulations and practices that prevent migrant children, in particular undocumented children, from registering at schools and educational institutions.[130]

108.3 The African Committee of Experts on the Rights and Welfare of the Child (established under the African Charter on the Rights and Welfare of the Child) has noted the following in respect of South Africa's approach to undocumented children:[131]

108.3.1 The Committee notes with great concern that migrant children and children of foreign parents in South Africa are discriminated against and face xenophobia from their peers, teachers and are sometimes barred from accessing schools and other basic services because of reported illegal entry or stay in the country.[132]

108.3.2 The Committee calls upon South African government to eliminate all forms of discrimination against these groups of children by avoiding *de facto* and *de jure* barriers hindering

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[130] JGC No. 4 at para 60.

[131] ACERWC: Concluding observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the government of the Republic of South Africa on its first Periodic report on the implementation of the African Charter on the Rights and Welfare of the Child (March 2019), ("ACERWC Concluding Observations") available at https://acerwc.africa/wp-content/uploads/2019/07/Concluding%20observation%20for%20South%20African%20Periodic%20State%20Party%20Report.pdf

[132] ACERWC Concluding Observations at para 9.

them from accessing basic services such as education, health care, birth registration, child protection services and so on.[133]

108.3.3 In particular, the Committee urges the Government of South Africa to take legislative and other necessary measures to ensure that asylum seekers, migrant, refugee and stateless children access basic services without requirement of presenting documents.[134]

109 Therefore, we submit that all children in South Africa – regardless of their documentation or migration status, and regardless of whether they are in the country legally – are bearers of the right to basic education.

110 Section 21 of the Admission Policy demands proof of an application to DHA to legalise the child's stay, as a condition for that child to access basic education.

110.1 Yet, many children are not able to meet this requirement. These are children who have been brought into the country irregularly, and who do not meet the requirements to be granted a residence or study permit. As a result, they cannot apply to legalise their stay.

110.2 The effect of section 21 of the Admission Policy is therefore to set a condition with which these children are unable to comply.

[133] ACERWC Concluding Observations at para 9.

[134] ACERWC Concluding Observations at para 9.

110.3 This, in turn, means that the non-national children are denied access to, or expelled from, public schools – thereby limiting their right to access a basic education.

111 These limitations cause severe harm to the affected children, as explained above in relation to section 15. When a child is denied access to a basic education, he or she suffers enormous harm. This is the case whether it is a South African child who is denied access to education, or a non-national child residing in the country.

112 This is a serious limitation on children's rights, and it occurs as a result of factors over which the children themselves have no control at all.

112.1 The affected children are brought to South Africa by their parents or caregivers: they have no choice in their migration to South Africa.

112.2 Despite having no control or choice, the negative consequences attached to their parent's choices are borne by them.

112.3 For the affected children, who are first and foremost *children*, and who the state is under an obligation to protect, the limitations have far-reaching consequences, which influences the course that their life will take.

<u>Right of children to have their best interests considered paramount</u>

113 Section 21 of the Admission Policy also limits non-national children's rights under section 28(2) to have their best interests considered as paramount.

113.1 Section 28 of the Constitution protects "*every child*", not only children who are South African citizens, children who are lawfully present in South, or children in possession of birth certificates.

113.2 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.[135]

114 Similar to section 15 of the Admission Policy, section 21 also harms children, by preventing them from attending school.

114.1 The harm is aggravated by the vulnerability of the children affected by section 21: children are by their nature vulnerable members of our society, and the affected children here are especially vulnerable in that they are children who lack documentation, and who are in situations of irregular migration – through no fault of their own. Denying them the benefits associated with education makes them even more vulnerable.

114.2 The fact that the children harmed are classified by law as "illegal foreigners" is immaterial. They are bearers of the right under section 28(2), and are entitled to have their best interests considered paramount in matters that concern them. That applies to their education too.[136]

115 As such, section 15 a severe limitation of section 28(2) of the Constitution.

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[135] *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T).

[136] *Welkom High School* at para 129, concurring judgment.

Right to dignity

116 Similar to section 15 of the Admission Policy, section 21 also limits children's rights to dignity. We say so for the same reasons as are set out at paragraphs 54 to 57 above, in relation to section 15.

Right to equality

117 Similar to section 15 of the Admission Policy, section 21 also limits children's rights to equality. We say so for the same reasons as are set out at paragraphs 58 to 64 above, in relation to section 15.

The limitations are not capable of justification

118 There is no basis upon which these limitations can successfully be justified under section 36 of the Constitution. This is for two principal reasons:

118.1 First, section 21 of the Admission Policy is not "law of general application" within the meaning of section 36 of the Constitution. Any rights limitations it occasions are, as a result, unjustifiable.

118.2 Second, even if section 21 did constitute law of general application, it fails the limitations test.

(a) No law of general application

119 We have submitted at paragraphs 68 to 71 above, in relation to section 15 of the Admission Policy, that the Admission Policy does not constitute "law of general application" for the purposes of section 36 of the Constitution. The

same applies to section 21 of the Admission Policy. Section 21 of the Admission Policy is therefore unconstitutional.

(b) The attempt at justification

120 Even if section 15 did amount to law of general application, the rights limitations it causes are not reasonable and justifiable on the basis of the test set out in section 36 of the Constitution.

121 As with section 15 of the Admission Policy, the limitations occasioned by section 21 are extraordinarily severe:

121.1 They entail the wholesale denial of the right to a basic education to an already vulnerable group of children, in circumstances in which the children themselves are powerless to remedy the situation.

121.2 The right to education is a right of profound importance. 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.[137] Education is also an indispensable means of realising other rights.[138]

121.3 Section 21 also denies the affected children the right to have their best interests considered paramount, and limits their rights to equality and dignity.

[137] *Juma Musjid* at para 43.

[138] CESCR, General Comment 13 (The Right to Education) at para 1, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en

122 Limitations of rights of this importance, and to this extent, require strong justification. If they are to be justifiable, they must be rooted in a particularly compelling purpose.

123 Though not entirely clear on the papers, the rationale underlying section 21 of the Admission Policy appears to be to ensure that immigration law is complied with. The DHA says that the South African government has adopted a policy of refusing access to basic services in an attempt to deter illegal immigration, "*so that South Africa was no longer regarded as a desirable place to migrate illegally to*".[139]

124 However, section 21 of the Admission Policy fails the limitations test under section 36 of the Constitution on at least three legs.

125 First, the purpose of ensuring compliance with immigration laws is not rationally related to the depriving children of their rights.

125.1 The limitation seeks to incentivise action on the part of parents by removing the rights of their child. As explained in relation to section 15 at paragraph 82 above, this is simply not a legitimate approach to the limitation of fundamental human rights – much less to the limitation of children's rights. The state cannot punish children – by denying them their fundamental human rights – in an effort to incentivise their parents to refrain from unlawful conduct. To do so is to ignore the child's status

[139] DHA AA, intervention application, bundle 3, p523, para 21

as an individual, separate from his or her parents, and deserving of concern in his or her own right.[140]

125.2 Although on its face section 21 requires only an application to the DHA to regularise their stay in South Africa, it will not ordinarily be within a child's power to make such an application. Only the child's parent or caregiver is able to do so. It is impermissible to remove a fundamental right from a child in order to incentivise the parent or caregiver to do or refrain from doing something.

125.3 The limitation of children's rights is also an ineffective means to achieve this purpose.

125.4 Where parents have been unable regularise their child's status in the country, this is most often due to real practical difficulties. Denying rights to their children does not change their ability to legalise their stay in the country.

125.5 Even where children are denied access to education, there is no evidence to the effect that this in any way disincentivises irregular immigration.

125.6 Where justification depends on factual material, the party contending for justification must establish the facts on which the justification depends.[141] In matters concerning the limitation of children's rights,

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[140] *S v M* at para 18; *Teddy Bear Clinic* at para 40.

[141] *Moise* at para 19.

such as this one, it is particularly important that courts be furnished with information of the best quality that can reasonably be obtained.[142]

125.7 Here, the respondents ask the Court to accept that the policy justifiably limits children's rights in order to incentivise compliance with immigration law – without any evidence to the effect that the policy actually has this effect.

126 Second, this purpose can be adequately achieved through less restrictive means that do not interfere with the children's fundamental rights.[143]

126.1 One way to achieve this, rather than a *total* denial of education to a child, would be to ensure that the processes related to the deportation of "*illegal foreigners*" are undertaken with the degree of diligence and efficiency which is required.

126.2 These measures can be taken while, in the intervening period, the child is afforded access to a basic education.

127 Third, a limitation of a fundamental right cannot have the effect of negating that right entirely. We have made this submission above, at paragraphs 89 to 91 in relation to section 15 of the Admissions Policy.

127.1 Here, the effect of the limitation brought about by section 21 is that non-national children who are present in the country irregularly are relieved entirely of their right to education – despite the fact that section 29(1)(a)

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[142] *Teddy Bear Clinic* at para 96.

[143] *Teddy Bear Clinic* at para 96.

of the Constitution guarantees this right to “everyone”. The affected children might as well not have had the right to a basic education at all, because it is wholly erased by virtue of section 21.

127.2 A limitation that erases rights cannot, we submit, be considered reasonable and justifiable.

128 The limitations are therefore not justifiable in terms of section 36 of the Constitution.

129 We accordingly submit that section 21 of the Admission Policy unjustifiably limits the rights under section 9(1), section 10, section 28(2) and section 29(1)(a), and should be declared unconstitutional.

SECTIONS 15 AND 21 OF THE ADMISSION POLICY ARE ULTRA VIRES

130 The Admission Policy is just that - policy. It therefore cannot conflict with legislation. As the SCA held in *Akani Garden Route (*approved by the Constitutional Court in *Harris*):

> *"Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between Legislature and Executive will disappear."*[144]

131 Sections 15 and 21 of the Admission Policy conflict with – and are *ultra vires* – both the Schools Act, and the National Education Policy Act 27 of 1996 ("the Policy Act"").

132 In relation to the Schools Act:

132.1 Section 3(1) of the Schools Act provides that it is compulsory for all children to attend school from the age of seven until 15, or on reaching grade 9, whichever comes sooner.

132.2 Yet sections 15 and 21 of the Admission Policy purport to impose additional requirements on children who seek admission to public schools, which are not contemplated by the Schools Act.

132.3 They have the effect of prohibiting children from attending school, despite being of compulsory school-going age, if they do not have a birth certificate.

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[144] *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) ("*Akani Garden Route*") at para 7, quoted with approval in *Harris* at para 10.

132.4 Though the Schools Act requires all children between seven and fifteen to be admitted, the Admission Policy precludes some of these children from admission.

132.5 Sections 15 and 21 of the Admission Policy are therefore ultra vires the Schools Act.

133 In relation to the Policy Act:

133.1 The Admissions Policy was issued in terms of section 3(4) of the Policy Act.

133.2 Section 3(4)(i) of the Policy Act empowers the Minister to make national policy for the admission of students to education institutions. Section 4 of the Policy Act provides that the Policy shall be directed toward specific objectives, including the advancement of the right "of every person to basic education", and facilitating access to educational institutions. [145]

133.3 Sections 15 and 21 of the Admissions Policy are inconsistent with these provisions. Far from enhancing the right to basic education and facilitating access to educational institutions, they have the effect of limiting rights and access by excluding learners who are unable to obtain birth certificates or identity documents from public schools.

133.4 The Policy Act contains no provision which contemplates or authorises the imposition of the requirement of providing a birth certificate or

[145] Section 4(a)(ii) of the Policy Act.

identity document as a necessary precondition for admission to a public school.

133.5 Sections 15 and 21 of the Admission Policy are therefore *ultra vires* the Policy Act.

134 Therefore, we submit that sections 15 and 21 of the Admission Policy are *ultra vires* the Schools Act and the Policy Act. They are accordingly unlawful, and should be set aside on that basis alone.

THE ADMISSION POLICY IS SELECTIVELY ENFORCED

135 On its own version, the DBE is enforcing sections 15 and 21 of the Admission Policy against some children, but not against others.

135.1 On the evidence provided by the applicants, a great number of children have been excluded from schools as a result of the Admission Policy.[146]

135.2 However, if the DBE's supplementary affidavit is believed, not all undocumented children have been subjected to the same treatment, and many remain in school.[147]

136 This is a form of selective enforcement and is unlawful.

137 In *Walker,*[148] the Constitutional Court had to decide whether a city's policy of selected enforcement of debt recovery against residents of primarily white suburbs, while electing not to pursue defaulters in predominantly black suburbs was constitutionally compliant with section 8 of the interim Constitution (the right to equality). The Court held that:

137.1 The policy of selective enforcement differentiated among residents on the basis of race.

137.2 The differentiation was related to a rational purpose, namely the need to "*provide continuity in the rendering of services by the council while*

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[146] The systemic problem is detailed in the FA, intervention application, bundle 1, paras 47-68, pp37-46; not denied at DBE AA, intervention application, bundle 2, para 60, p 378.

[147] DBE supplementary affidavit, intervention application, bundle 4, para 25, p900.

[148] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) ("*Walker*").

phasing in equality in terms of facilities and resources, during a difficult period of transition."[149] It was therefore not irrational.

137.3 However, the Court held that that was not the end of the matter, as the policy of selective enforcement adopted by the City Council constituted indirect discrimination on the basis of race.[150]

137.4 Because the discrimination was on a ground expressly prohibited by the Constitution, the City Council bore the onus of rebutting the presumption of unfair discrimination.[151]

137.5 The Constitutional Court held that the policy of selective enforcement constituted unfair discrimination:

> *"The effect of what was done was to take action against defaulters in old Pretoria but not in Mamelodi and Atteridgeville; to single out white defaulters for legal action while at the same time consciously adopting a benevolent approach which exempted black defaulters from being sued.*
>
> *No members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others who belong to other race groups.*
>
> *…*
>
> *The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity."*[152]

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[149] *Walker* at para 27.

[150] *Walker* at para 32.

[151] *Walker* at para 36.

[152] *Walker* at paras 80-81.

137.6 Since the policy of selective enforcement was conduct, it involved no law of general application as required by the limitations clause, and the discrimination could not be justified.[153]

138 In *Quick Drink,*[154] the North Gauteng High Court similarly held that selective enforcement was impermissible and unlawful.

139 We submit that the arbitrary enforcement of sections 15 and 21 is even more obviously unconstitutional than the one that was in issue in *Walker*.

139.1 This is because there can be no rational basis for distinguishing between different undocumented children to determine who should be permitted to attend school, and who not.

139.2 Accordingly, the differentiation is both irrational and constitutes unfair discrimination against the children who are excluded from school. It therefore breaches section 9 of the Constitution.

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[153] *Walker* at para 82.

[154] *Quick Drink Co (Pty) Ltd and Another v Medicines Control Council and Others* 2015 (5) SA 358 (GP).

SECTIONS 39(1) AND 42 OF THE IMMIGRATION ACT

140 To the extent that sections 39(1) and 42 of the Immigration prohibit schools from providing a basic education to learners, they are unconstitutional.

141 In this section, we address the following issues:

141.1 the scope and effect of the impugned provisions of the Immigration Act;

141.2 the correct interpretation of the impugned provisions;

141.3 the impugned provisions limit children's rights; and

141.4 the limitations are not justifiable.

Scope and effect of the impugned provisions

142 Sections 39(1) and 42 of the Immigration Act make it an offence for learning institutions to provide instruction to who are "*illegal foreigners*" at all.

143 Section 39 of the Immigration Act prohibits a "*learning institution*" from "*knowingly*" providing training or instruction to "*illegal foreigners*". It states:

> *"39. Learning Institutions*
>
> *(1) No learning institution shall knowingly provide training or instruction to—*
>
> *(a) an illegal foreigner;*
>
> *(b) a foreigner whose status does not authorise him or her to receive such training or instruction by such person; or*
>
> *(c) a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's status.*
>
> *(2) If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by, the person who has*

control over such premises, unless prima facie evidence to the contrary is adduced"

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

145 Stiff criminal penalties attached to breaches of sections 39 and 42(1). Section 49(6) of the Immigration Act states that *"[a]nyone failing to comply with the duties and obligations set out under sections 38 to 46, shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding five years"*.

The correct interpretation of the Immigration Act

146 We submit that this Court should accept the Human Rights Commission's ("HRC's") argument that, properly interpreted, these provisions do not apply to basic education.[155]

147 On this interpretation, in the Immigration Act:

147.1 The phrase "learning institution" does not include schools providing basic education; and

147.2 The phrase "instruction or training" does not include basic education.

148 While the 37 children support the HRC's approach, we leave it to the HRC to make the argument in full. We merely emphasise the following:

[155] HRC's application for intervention, pp17-20, paras 33-49

148.1 If this Court agrees, there is no need for it to determine the constitutional challenge to those sections. However, critically, it will then be necessary to grant relief which makes this clear, because it is common cause that:

148.1.1 The Department of Home Affairs has a different view, contending that the sections prohibit schools from admitting non-national children who are present in the country irregularly, and "*constitute a powerful tool in the hands of the Department and the country, of dissuading economic migrants, of illegally immigrating into the country….*".[156]

148.1.2 A number of schools understand these sections to apply to basic education and consider themselves obliged to expel non-national undocumented children from their schools as a result of the sections.[157]

148.2 For the sake of clarity, therefore, we submit that if the interpretation advanced by the HRC is endorsed, this Court should grant a declarator that, properly interpreted, sections 39(1) and 42 of the Immigration Act do not prohibit the admission of illegal foreign children into schools and do not prohibit the provision of basic education to illegal foreign children.

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[156] DHA AA, p530, para 40

[157] FA Annexures AM16.1 to AM16.8, intervention application, bundle 1, pp252 – 266; FA Annexure AM11, intervention application, bundle 1, p225; and Annexure AM13, intervention application, bundle 1, p232

149 In the remainder of this section, we demonstrate that, to the extent that these provisions are not capable of the interpretation set out above, and to the extent that they prohibit schools from providing instruction to non-national children who are in the country irregularly, they are unconstitutional.

The impugned provisions limit children's rights

150 If they prohibit the provision of basic education to foreign children who are irregularly present in the country, the impugned provisions limit a range of children's rights –

150.1 the right to a basic education (section 29(1)(a) of the Constitution);

150.2 children's right to have their best interests considered paramount (section 28(2) of the Constitution);

150.3 the right to dignity (section 10 of the Constitution); and

150.4 the right to equality (section 9 of the Constitution).

151 We have already dealt with the manner in which sections 15 and 21 of the Admission Policy limit these rights. The submissions in respect of the impugned provisions of the Immigration Act are the same as those made in relation to section 21 of the Admission Policy, and we do not repeat them here. We emphasise that:

151.1 Section 29(1)(a) of the Constitution is broadly worded. It affords the right to a basic education to "*everyone*" – not "*everyone, provided they are in the country legally*". There is no reason to read section 29(1)(a)

as excluding from its protection children who are in the country irregularly.

151.2 Similarly, even children classified as "*illegal foreigners*" are bearers of the rights to dignity (section 10), equality (section 9), and to have their best interests considered as paramount in every matter that concerns them (section 28(2)). In relation to section 28(2), 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.[158]

151.3 Therefore, sections 39(1) and 42 of the Immigration Act limit the rights of children to a basic education, to dignity, equality and to have their best interests considered paramount.

152 These rights limitations cause severe harm to the affected children, as already explained in the previous sections of these heads of argument. These rights limitations occur as a result of factors over which the children themselves – who are particularly vulnerable members of society – have no control at all.

The limitations are not capable of justification

153 The DHA states that it is necessary to deny a basic education to children who are in the country irregularly so as to deter "*illegal immigration*". The best way to combat "*illegal immigration*" is, the DHA alleges, to limit "*pull factors*" – such as fundamental human rights – and the right to a basic education in particular.[159]

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[158] *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T).

[159] DHA AA, intervention application, bundle 3, para 21, p523.

154 There is no basis upon which the limitation of these rights brought about by sections 39(1) and 42 of the Immigration Act can successfully be justified under section 36 of the Constitution.

155 This is for three principal reasons.

156 First, the purpose of ensuring compliance with immigration laws is not rationally related to the depriving children of their rights.

156.1 The limitation seeks to incentivise action on the part of parents by threatening the rights of their child. As explained in relation to sections 15 and 21 at paragraphs 82 and 125 respectively above, this is simply not a legitimate approach to the limitation of fundamental human rights – much less to the limitation of children's rights. The state cannot punish children by denying them their fundamental human rights in an effort to incentivise their parents to refrain from unlawful conduct. To do so is to ignore the child's status as an individual, separate from his or her parents, and deserving of concern in his or her own right.[160]

156.2 In addition, it is not the child – the person whose rights are limited – who makes the decision to enter the country irregularly. The child is powerless to alter the immigration decisions of his or her parents; yet it is the child who suffers the wholesale denial of his or her rights. This is irrational and unjustifiable.

156.3 In any event, the mechanism chosen to give effect to this purpose – denying children access to education – is ineffective to deter irregular

[160] *S v M* at para 18; *Teddy Bear Clinic* at para 40.

immigration. No evidence has been provided by DHA to support its allegation that denying education to the children of irregular immigrants reduces irregular immigration, despite the fact that the DHA's defence of the impugned provisions depends on their actually having a deterrent effect.

156.3.1 Where justification depends on factual material, the party contending for justification must establish the facts on which the justification depends.[161] In matters concerning the limitation of children's rights, such as this one, it is particularly important that courts be furnished with information of the best quality that can reasonably be obtained. [162]

156.3.2 Here, the DHA asks the Court to accept that the impugned provisions of the Immigration Act justifiably limit children's rights in order to incentivise compliance with immigration law – without any evidence to the effect that those provisions actually have this effect.

157 Second, this purpose can be adequately achieved through less restrictive means that do not interfere with the children's fundamental rights.[163]

157.1 One way to achieve this, rather than a *total* denial of education to a child, would be to ensure that the processes related to the deportation

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[161] *Moise* at para 19.

[162] *Teddy Bear Clinic* at para 96.

[163] *Teddy Bear Clinic* at para 95.

of "*illegal foreigners*" are undertaken with the degree of diligence and efficiency which is required.

157.2 These measures can be taken while, in the intervening period, the child is afforded access to a basic education.

158 Third, a limitation of a fundamental right cannot have the effect of negating that right entirely. We have made this submission in detail above in relation to section 15 and 21 of the Admissions Policy at paragraphs 82 and 125 respectively.

158.1 Here, the effect of the limitation brought about the impugned provisions of the Immigration Act is that "illegal foreign" children are relieved entirely of their right to education – despite the fact that section 29(1)(a) of the Constitution guarantees this right to "everyone". The affected children might as well not have had the right to a basic education at all, because it is wholly erased by virtue of the impugned provisions of the Immigration Act.

158.2 A limitation that erases rights cannot, we submit, be considered reasonable and justifiable.

159 Therefore, the DHA has failed to prove that the limitations are justifiable.

160 The impugned provisions are therefore unconstitutional.

REMEDY

161 This Court has a broad remedial jurisdiction under section 172 of the Constitution. In terms of section 172, a court deciding a constitutional matter within its power:

161.1 Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;[164] and

161.2 May make any order that is just and equitable.[165]

162 In relation to the impugned sections of the Admission Policy, we submit that:

162.1 Sections 15 and 21 of the Admission Policy are an unjustifiable infringement of children's rights to a basic education, dignity and equality, as well as their right to have their best interests considered as paramount in any matter that concerns them.

162.2 Sections 15 and 21 of the Admission Policy are *ultra vires* the Schools Act and NEPA. Accordingly, they stand to be set aside on that basis.

162.3 Sections 15 and 21 of the Admission Policy are enforced arbitrarily. The differentiation is both irrational and constitutes unfair discrimination against the children who are excluded from school. It therefore breaches section 9 of the Constitution.

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[164] Section 172(1)(a).

[165] Section 172(1)(b).

163 The just and equitable relief in relation to these sections of the Admission Policy is accordingly the following:

163.1 Declaring them to be invalid and setting them aside.[166]

163.2 In the alternative, declaring section 15 invalid to the extent that it prohibits the admission into public schools of children not in possession of official birth certificates or identity documents; and declaring section 21 invalid to the extent that it requires evidence of an application to the Department of Home Affairs in terms of the Immigration Act for admission to a public school.[167]

163.3 Directing that all children not in possession of official birth certificates and any child to whom section 21 applies must be admitted into public schools; and directing that where a learner cannot provide a birth certificate or proof of an application to the DHA, an alternative proof of identity, such as an affidavit, must be accepted.[168] These prayers apply to any child to whom the provisions apply, and not only to the 37 applicant children.

163.4 Directing that children who did not enter the country on a study permit cannot be required to provide a study permit for purposes of admission to a public school.[169]

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[166] NOM, intervention application, bundle 1, pp2-3, paras 3.1 and 4.1.

[167] NOM, intervention application, bundle 1, pp2-3, paras 3.2 and 4.2.

[168] NOM, intervention application, bundle 1, p2, paras 3.3.

[169] NOM, intervention application, bundle 1, p3 para 5.

164 In relation to the impugned provisions of the Immigration Act, sections 39(1) and 42 of the Immigration Act constitute an unjustifiable infringement of children's rights to a basic education, dignity and equality, as well as their right to have their best interests considered as paramount in any matter that concerns them.

165 The just and equitable relief in relation to the Immigration Act (in the event that the Court finds that they cannot be interpreted so that they do not apply to basic education) is the following:

165.1 Declaring section 39(1) invalid to the extent that it prohibits foreign children from admission into public schools.[170]

165.2 Declaring section 42 invalid to the extent that it prohibits the provision of basic education to illegal foreign children.[171]

165.3 Suspending the declarations of invalidity for 18 months to allow Parliament to correct the defects.[172]

165.4 Providing interim reading-in orders pending any amendment.[173] We submit that any just and equitable reading-in order must allow undocumented children to be admitted to schools pending the amendments.

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[170] NOM, intervention application, bundle 1, p3 para 6.1.

[171] NOM, intervention application, bundle 1, p4 para 6.2.

[172] NOM, intervention application, bundle 1, p4 para 6.3.

[173] NOM, intervention application, bundle 1, p4 para 6.4.

166 The 37 children must also be admitted into public schools despite their lack of documentation, and may not be removed from school on the ground that they lack documentation.[174]

167 With regard to the usual principles regarding costs in constitutional matters of this sort, if the applicants succeed, they are entitled to an order for costs, including the costs of two counsel.[175]

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28 August 2019

[174] NOM, intervention application, bundle 1, pp4-5 para 7.

[175] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paras 21 – 25.