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Litigating the right to basic education for undocumented children in South Africa: The role of the courts in advancing access to schools

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Summary: *The right to basic education is enshrined in section 29(1) of the Constitution of the Republic of South Africa, 1996, which clearly states that basic education is extended to 'everyone'. In 2016 the Eastern Cape Department of Education took a decision to stop funding the education of learners without birth certificates, passports or permits. In 2019 the High Court in Makhanda declared this decision unconstitutional and found that all learners, irrespective of their documentary status or their nationality, are entitled to attend school in South Africa. This article considers the* Centre for Child Law & Others v Minister of Basic Education & Others *judgment and its role in advancing the right to basic education in South Africa. It maps the events leading up to the litigation, the strategy in bringing the matter and the findings of the*

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Court, and considers the challenges in implementing the judgment. It finds that while the findings of the Court have provided some clarity on the interpretation of section 29(1) of the Constitution and its application to undocumented learners, some ambiguity in the framing of the order and a lack of awareness of the judgment among schools and provincial education departments have hampered implementation. In addition, new legislative and policy developments may undo some of the strides occasioned by the judgment.

Key words: *education; undocumented; schools; section 29(1)*

1 Introduction

The right to basic education is enshrined in section 29(1) of the Constitution of the Republic of South Africa, 1996, which clearly states that basic education is extended to 'everyone'. However, in 2016 the Eastern Cape Provincial Department of Education (ECDOE) took a decision that education funding would only be provided to learners who are in possession of valid birth certificates, identity documents, passports or permits. This seriously compromised access to education for children who were undocumented as many schools began denying access to undocumented children – ultimately calling into question whether they are holders of the right to education.

ECDOE decided that going forward, education funding would only be provided for learners who were in possession of valid birth certificates, identity documents, passports or permits. Undocumented learners, on the other hand, would receive no education funding, until such time as they were in possession of valid documentation and their documentary information had been captured on the South African School Administration and Management System (SA-SAMS).[1] The decision set in motion litigation that would result in

1 The SA-SAMS is a national school management system that was introduced by the Department of Basic Education in 2008 to allow for the uploading of data onto provincial databases and to improve data management at the school level. It contains information on learners in each of the provinces and can be used to extract various data indicators to assist the national and provincial education departments with school management and planning. For more information, see K Maremi and others 'Scoping the aspects and capabilities of South African School Administration and Management Systems (SA-SAMS)' (2020) Conference on Information Communications Technology Society, https://www.researchgate.net/profile/Marlien-Herselman/publication/341077413_Scoping_the_aspects_and_capabilities_of_South_African_School_Administration_and_Management_Systems_SA-SAMS/links/5ec395af458515626cb4d65b/Scoping-the-aspects-and-capabilities-of-South-African-School-Administration-and-Management-Systems-SA-SAMS.pdf (accessed 23 August 2023).

the Makhanda High Court's landmark judgment in *Centre for Child Law & Others v Minister of Basic Education & Others,*[2] where the Court found that the right to education extended to everyone, irrespective of their documentary status.

This article reflects on the use of this litigation to ensure that the right to basic education in South Africa is available to all children, regardless of their documentation status.[3] The aim of the article is three-fold. First, it seeks to document the litigation and judgment and provide an overview of the findings of the Court. Second, it reflects on and evaluates the litigation strategies employed in the *Centre for Child Law* case, with a view to informing future litigation on the right to education and the rights of undocumented children. Lastly, it considers the implementation phase of the judgment and the actual and potential challenges that have impacted the success of the litigation.

The authors were the attorneys of record on behalf of the applicants in *Centre for Child Law*.[4] In this article we rely on the court papers filed in the case, as well as the inside knowledge we acquired during the litigation. We also draw on our experiences in attempting to ensure compliance with the judgment and order.

2 Undocumented children in South Africa

The *Centre for Child Law* case was borne out of a larger systemic challenge in South Africa related to the ineffectual issuing of documentation by the Department of Home Affairs, the department responsible for the issuing of birth certificates and other forms of documentation. Essentially, the existing laws and regulations on birth registration have not kept up with the complex realities of children's circumstances and do not provide for the many contingencies that families may face.[5] In these circumstances, parents or caregivers are often unable to comply with the strict legislative framework prescribed by the Births and Deaths Registration Act 51 of 1992 (BDRA) and the Regulations and cannot provide the prescribed documents required

2 *Centre for Child Law & Others v Minister of Basic Education & Others* 2020 (3) SA 141 (ECG) (12 December 2019) (*Centre for Child Law*).

3 Documentation status is a term that denotes whether the children are holders of identifying documentation such as birth certificates, or whether they are holders of documents entitling them to reside here, such as visas and permits.

4 Anjuli Maistry was employed as a senior attorney at the Centre for Child Law and Cecile van Schalkwyk was employed as an attorney at the Legal Resources Centre's Makhanda office.

5 See, eg, P Proudlock 'A closer look at birth certificates' in K Hall and others (eds) *South African child gauge 2018*: *Children, families and the state* (2018) 121.

for birth registration and the issuing of a birth certificate.[6] The inability of Home Affairs to amend its laws to reflect the lived realities of families often results in children being undocumented.

These barriers have resulted in large numbers of undocumented children in South Africa. Expert evidence submitted by Hall as part of the application in the *Centre for Child Law* case showed that according to the National Income Dynamics Study (NIDS) data, 431 000 children between six and 15 years old did not have birth certificates in 2019.[7] When this data is extended to include children under the age of 17 years, it revealed that in 2019 around 500 000 children of school-going age did not possess birth certificates. Most learners within this group are identified as black or African, making up 87 per cent of the learners.[8]

Further insights into the scale of the problem arose during the exchange of papers during the litigation.[9] The Department of Basic Education provided information on the number of undocumented learners that did not have identity numbers captured on the SA-SAMS system at school level. In 2019 there were 1 190 434 undocumented learners on the SA-SAMS system.[10] Of this number, 989 432 learners had no valid identity numbers that could be retrieved from Home Affairs.[11] These numbers were far higher than the data obtained by way of the NIDS and provided further credence to the fact that children face serious barriers to birth registration and the obtainment of migration documents in South Africa.

Cumulatively, the data also reveals that this is a problem that disproportionately impacts on black African learners in South Africa, as well as children who in fact are South African citizens, but whose births were not registered. Any decision to stop funding these learners for their education, therefore, would have a disproportionately negative impact on black South African children, most of whom live in impoverished areas and do not have access to the documents or resources to have their births registered.

6 Children's Institute 'Children's Institute's submission on the 2022 BELA Bill' 6.
7 K Hall 'Expert affidavit' in *Centre for Child Law & Others v Minister of Basic Education & Others* 2020 (3) SA 141 (ECG).
8 As above.
9 SG Padayachee 'First to third respondents' supplementary affidavit' in *Centre for Child Law* (8 July 2019) para 24.
10 As above.
11 Padayachee (n 9) para 21.

3 Legal framework governing school admissions in South Africa

Before discussing the litigation in *Centre for Child Law*, we will provide a brief overview of the legislative framework governing the admission of learners to schools in South Africa and, in particular, the legislative and policy provisions that were relevant to the legal challenge. As set out above, section 29(1) of the Constitution guarantees a basic education to everyone in South Africa. In addition to section 29(1), constitutional provisions related to the right to equality (section 9), human dignity (section 10), and the best interests of the child (section 28(2)) provide a clear constitutional framework to guide the formulation and constitutionality of legislation and policy related to education in South Africa.

There are two important pieces of legislation that have been enacted to give effect to these constitutional rights, namely, the National Education Policy Act 27 of 1996 (NEPA) and the South African Schools Act 84 of 1996 (Schools Act). Section 3(4)(i) of NEPA explicitly gives the Minister the power to determine a national policy for the admission of students to education institutions. The Admission Policy for Ordinary Public Schools (Admission Policy) was enacted on 19 October 1998, and deals with the admission of learners to ordinary public schools. It applies uniformly to all provincial education departments and all ordinary public schools.

Clauses 15 and 21 of the Admission Policy would become one of the focal points in the *Centre for Child Law* litigation. Clause 15 of the Admission Policy was entitled 'Documents required for admission of learner' and read

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

In effect, clause 15 made the admission of children who are citizens of South Africa conditional upon the production of a birth certificate within three months. While the provision does not explicitly state that a learner who cannot provide their birth certificate within three months should be excluded from enrolment, schools had adopted such an interpretation.

Clause 21 of the Admission Policy, on the other hand, dealt with the admission of 'illegal aliens'.[12] Clause 21, entitled 'Admission of non-citizens', stated that '[p]ersons 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)'. Clause 21 was often used by schools to prevent the admission of non-national learners who were undocumented and unable to provide permits or evidence that they had submitted applications for their documents to Home Affairs.

In addition to the Admission Policy, the Schools Act also provides for school admission. Section 5 states that schools must admit learners and serve their educational requirements without in any way unfairly discriminating against learners. Importantly, the Schools Act also makes it clear that all children have to attend school in the country from the age of seven years, and that parents, guardians, and caregivers have a duty to ensure that the children were attending schools.[13]

Because the Department of Home Affairs had demanded that certain schools in Pretoria remove their non-national learners on the basis of sections 39 and 42 of the Immigration Act 13 of 2002 (Immigration Act), these sections became relevant to the litigation. Section 39(1), under the title 'Learning Institutions', stated that

> [n]o learning institution shall knowingly provide training or instruction to an (a) 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.

Section 42 of the Immigration Act, entitled 'Aiding and abetting illegal foreigners', states that

> [s]ubject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help (a) an illegal foreigner; or (b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable,

12 The term 'illegal alien' appears to have been used in conformity with the Aliens Control Act 96 of 1991 and the Aliens Control Amendment Act 76 of 1995 that were later repealed by the Immigration Act 13 of 2002. In terms of these laws, an 'alien' meant a person who is not a South African citizen or a citizen of a state the territory of which formerly formed part of the Republic. Despite these Acts being repealed in 2002, the term endured in the Admission Policy and was never amended to reflect the changes in immigration legislation.

13 Sec 3 Schools Act.

including but not limited to (i) providing instruction or training to him or her, or allowing him or her to receive instruction or training.

The Department of Basic Education, Home Affairs and ECDOE took the stance during the litigation that these provisions of the Immigration Act made it unlawful for them to provide education to undocumented non-national children, arguing that providing these learners with education would effectively result in them breaking their own immigration laws.

In sum, the culmination of the provisions of the Admission Policy and the provisions of the Immigration Act ultimately gave rise to the refusal to admit undocumented learners as well as to exclude learners from schools they already attended.

4 Background to the litigation

4.1 Background to *Centre for Child Law*

The litigation in *Centre for Child Law* initially emanated from ECDOE's decision to issue Circular 6 of 2016[14] in March 2016. The circular informed school governing bodies and principals in the province that schools must update SA-SAMS with the identity or passport numbers of all learners. The circular also indicated that any norms and standards, post provisioning allocation, and nutrition transfers to school would only be given for the children whose identity or passport numbers were captured on SA-SAMS. In other words, ECDOE took a stance that it would not fund undocumented learners. This was a departure from ECDOE's practice of using the learner numbers from the snap survey in January of every school year to allocate funding. In terms of the previous system, the schools would submit the actual learner numbers in January of the school year to ECDOE, and all the learners, irrespective of their documentary status, would receive funding.

The impact of the decision was devastating for schools and learners. It meant a lack of teachers, school nutrition funding, as well as funding for critical education resources such as textbooks, stationery, municipal services, and the maintenance of the school

14 Eastern Cape Department of Education 'Circular 6 of 2016: Schools to update SASAMS with identity or passport numbers of learners' 17 March 2016, https://www.eccurriculum.co.za/Circulars/2016_Circulars/Circular%206%20of%202016%20ID%20Numbers.pdf (accessed 23 August 2023).

building.[15] This impacted all learners in school and not only those that were undocumented. As a result of the decision, many schools also began excluding undocumented learners as they could simply not afford to provide them with education.

On 26 May 2017 legal proceedings were instituted against ECDOE as well as the Minister of Basic Education to challenge Circular 6 of 2016. The initial application was almost entirely based on the circular itself. It sought to declare the circular inconsistent with the Constitution and the Schools Act. It also sought to compel the respondents to issue all schools with revised educator post-establishment, which considers all learners enrolled at the school, including those without valid identity, permit, or passport numbers. Similar relief was sought in respect of the Norms and Standards for School Funding budgets, and the National School Nutrition Programme budgets.

At the time of the institution of the proceedings and the crafting of the relief, the budget issue was the focus of the application. While anecdotally the Legal Resources Centre (LRC) was aware that learners were being excluded because of a lack of documents, the LRC had no individual clients to represent on this issue. In addition, prior to the issuing of Circular 6 of 2016, undocumented learners in general, though not always, were gaining access to schools and being funded. Accordingly, the LRC believed that if the circular were set aside, it would also cure any exclusion issues.

Accordingly, as far as admission was concerned, the Centre for Child Law and the school governing body of Phakamisa High School asked the Court to direct that the three-month period for the finalisation of the admission of a learner without an identity document, passport or permit in Clause 15 of the Admission Policy was not mandatory, that where a learner cannot comply with this requirement, they must remain conditionally registered at the school and that the principal is directed to accept alternative proof in place of birth certificates, passports or permits. Furthermore, the applicants asked the Court to direct that schools could not exclude a learner from a public school on the basis that they do not have an identity number, permit or passport. Lastly, they asked the Court to direct the respondents and all public schools to admit any learner who does not have a South African identity number, passport or permit and to accept a sworn statement or affidavit as alternative proof of identity.

15 RL Ozah 'Founding affidavit' in *Centre for Child Law* (26 May 2017) paras 49-60.

4.2 Background to the intervention of 37 children as applicants into the *Centre for Child Law* case

By 2018, in large part as a result of the circular, many undocumented learners were being excluded from school or were not admitted to school at all. In that year the Centre for Child Law received an email query regarding the exclusion of hundreds of learners from schools. The children were based in Aliwal North in the Eastern Cape. The Centre for Child Law consulted with the children. The consultations revealed that they were removed from school or not admitted at all because they did not have documents. Realising that the Admissions Policy and Immigration Act barred the children from making successful requests to be admitted or readmitted to school, the Centre for Child Law began preparing litigation focused solely on the constitutionality of the above-mentioned provisions of the Admissions Policy and Immigration Act.

Specifically, two important questions had to be addressed: first, whether Clauses 15 and 21 of the Admission Policy were unconstitutional to the extent that they made the right to education conditional on the possession of documents; and, second, whether sections 39(1) and 42 of the Immigration Act were unconstitutional for prohibiting the provision of basic education to children whose presence in the country is irregular.

Because relief regarding the constitutionality of the Admissions Policy and the Immigration Act overlapped to a degree with the relief being sought in the *Centre for Child Law* case – specifically the relief relating to the exclusion of undocumented learners from schools – the 37 affected undocumented children applied to join the *Centre for Child Law* application on 13 December 2018. Once the 37 children had successfully joined, two *amici curiae* applied to join the litigation – specifically Section27, another civil society organisation, and the South African Human Rights Commission (SAHRC), a national institution established in terms of the Constitution to support constitutional democracy.

The 37 children argued that the Constitution affords everyone the right to basic education and that a child's best interests are of paramount importance in every matter concerning the child. When both constitutional provisions are read together in the context of this case, the applicants contended that the rights of these children to education cannot be subject to a condition that they provide identification documents. They also argued that the decision not to fund the undocumented learners and to insist on documentation before admission infringed sections 10, 28(2) and

29(1) of the Constitution. It was also submitted that the decision was discriminatory within the meaning and contemplation of the equality clause in section 9 of the Constitution and section 5 of the Schools Act.

In opposition to the relief sought by the applicants, the respondents relied on the existing legislative and policy framework in support of their argument. They submitted that the BDRA stipulates that every birth to a child by South African citizens must be registered within 30 days, and that birth registration was an important government objective that was being advanced by the decision not to fund undocumented learners and the provisions of the Admissions Policy. They also argued that undocumented minors were most vulnerable to human trafficking, child prostitution, child labour, and all other related abuses affecting minor children, and that documents are an important part of attempting to protect learners against these practices.

In relation to the Admission Policy, they argued that it minimises over-reporting and eliminates 'ghost learners' for the preservation of state resources; that it promotes accountability in terms of financial management and funding allocation and protects the relevant department from providing a social right to people who are in the Republic irregularly and are not documented. They also argued that the decision not to fund undocumented learners, as well as the Admission Policy were necessary to uphold the Constitution, the Children's Act 38 of 2005, the Immigration Act, BDRA, and the rule of law. They further contended that it is essential that measures prohibiting free access to public education as well as those contained in the Immigration Act be in place to prevent or, at the very least, dissuade persons who are not citizens or otherwise legally entitled to free government services from burdening the country's constrained financial resources. They further argued that undocumented children ought to claim whatever rights they may have regarding basic education from their country of citizenship, lest South Africa becomes a destination for persons requiring or desiring free education.

5 Findings of the Court

Judgment was handed down on 12 December 2019. The Court effectively made three important findings that will be addressed separately. First, it found that Circular 6 of 2016 was unlawful and unconstitutional; second, it found Clauses 15 and 21 of the Admission Policy to be unlawful and unconstitutional; and, third, it found that sections 39 and 42 of the Immigration Act do not apply

to children receiving basic education in South Africa (and therefore do not prevent undocumented non-national children from receiving education in South Africa).

5.1 Constitutionality of Circular 6 of 2016

As set out above, the issuing of Circular 6 of 2016 was the catalyst for the institution of legal proceedings. Despite this, the Court did not substantively address the question of funding in the judgment. Part of the reason for this is that on the morning of the hearing, counsel for the respondents conceded that the respondents have a duty to provide funding for undocumented learners attending schools in the Eastern Cape, and attempted to settle this point by way of a draft order. As a result, no arguments were led in court on the constitutionality of the circular insofar as it related to the question of funding for undocumented learners. The respondents accepted that it had the duty to fund all learners in schools and that the circular was unconstitutional and unlawful in as much as it withheld funding from undocumented learners.

Nonetheless, the Court in its order made a definitive finding on the constitutionality of the circular. It declared Circular 6 of 2016 to be inconsistent with the Schools Act and the Constitution and set it aside to the extent that it based any Norms and Standards, post-provisioning allocation and National School Nutrition Programme transfers to schools in the Eastern Cape Province on only the learner numbers where valid identity, permit or passport numbers have been captured in the SA-SAMS system. As will be set out below, while the Court set the circular aside, the framing of the order and the lack of substantive engagement by the Court on the question of funding has resulted in some subsequent challenges regarding the implementation of the order.

5.2 Constitutionality of Clause 15 of the Admission Policy

The Court held that Clause 15 constituted a severe limitation to other rights enshrined in the Constitution for the protection of children, namely, the right of children to have their best interests considered paramount; the right to dignity; and the right to equality. The Court considered the impact that Clause 15 had on each of these rights. Mbenenge JP found that section 28 of the Constitution, which addresses the best interests of the child standard, did not

permit a restrictive interpretation.[16] Instead, section 28 must be given a wide interpretation, encompassing 'every child' and not only children who are South African citizens, lawfully present in the country, or in possession of birth certificates.[17] The Court also found that section 28(2) of the Constitution does not only create a stand-alone right, but instead strengthens the right to basic education, and in upholding the children's best interests in every matter, the right to education is augmented.[18]

In addition to the child's best interests, the Court also addressed the impact of Clause 15 on the dignity of the affected children. It reiterated Sachs J's dictum in *S v M* where he found that '[e]very child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them.'[19]

Mbenenge JP then considered the devastating consequences that the lack of access to schools had on the affected children. In affidavits filed by the 37 children, they expressed their feelings of shame and embarrassment at being unable to perform tasks that other children of their age can perform, of becoming depressed, or finding themselves in dangerous situations because they were not attending school.[20] The Court stated that the children were without hope of being able to rise above poverty or being allowed to participate meaningfully in the societies of which they are part.[21] This impacted their self-esteem and self-worth, and the potential for human fulfilment.[22] In addition, the Court held that some of the children could end up involved in criminal activities and become a menace to the social fabric.[23]

The Court also considered the impact of Clause 15 on the right to equality. It highlighted the prohibition against unfair discrimination in section 9(3) of the Constitution as well as section 5(1) of the Schools Act, which makes it incumbent on a public school to admit learners and serve their educational requirements without in any way unfairly discriminating against learners. Mbenenge JP found that

16 *Centre for Child Law* (n 2) para 76.
17 As above.
18 *Centre for Child Law* (n 2) para 77.
19 *S v M* 2007 (2) SACR 539 (CC) (26 September 2007) para 18.
20 *Centre for Child Law* (n 2) para 80.
21 *Centre for Child Law* para 81.
22 As above.
23 As above.

Clause 15 effectively denied children access to education based on their documentation status, which constitutes unfair discrimination.[24] While documentary status is not a listed ground of discrimination in terms of section 9(3) of the Constitution, the Court found that the differentiation between documented and undocumented learners amounted to discrimination on a ground analogous to those listed in section 9(3). For documentary status to be considered an analogous ground of differentiation to those listed in section 9(3), the Court had to consider whether the classification had an adverse effect on the dignity of the undocumented learners, or some other comparable effect.[25]

In applying this test, the Court found that the children's argument that their documentary status is a ground analogous to those listed in section 9(3) of the Constitution had merit. First, the children had no control over their documentary status, and differentiating them on their documentation status impaired their fundamental right to dignity, placing this differentiation on par with those expressly listed in section 9(3) of the Constitution. Mbenenge JP stated:[26]

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

The finding that documentary status is an analogous ground of discrimination to the listed grounds in section 9(3) of the Constitution is important, as it is the first time a South African court has pronounced on this question and is something that holds significance for future litigation for undocumented children, particularly in respect of access to education. The Court linked the differentiation experienced by the affected undocumented learners to the impairment of their dignity, and ultimately concluded that it amounted to discrimination. The Court found further support for this conclusion in international human rights instruments to which South Africa is a signatory and that expressly prohibit discrimination

24 *Centre for Child Law* para 83.
25 *Centre for Child Law* para 84.
26 *Centre for Child Law* para 86.

in the enjoyment of entrenched rights. In particular, the Court relied on the Convention on the Rights of the Child, 1989 (CRC), which is applicable to each child within a state party's jurisdiction without discrimination of any kind, irrespective of the child's or their parent's or legal guardian's national ethnic, social origin, birth or other status.[27]

5.3 Constitutionality of clause 21 of the Admission Policy

The Court proceeded to consider the constitutionality of Clause 21, which requires that learners classified as 'illegal aliens' must prove that they have applied to legalise their stay before they can be admitted to public schools.[28] This, the Court held, was impossible.[29] It found that if regard is had to the fact that the children were brought into South Africa illegally, then they cannot meet the requirements of a residence or study permit.[30] They can therefore not apply to legalise their stay. They have no choice in being brought to the country but end up bearing the negative consequences attached to their parents' choices.[31]

The Court then made an important finding as to the ambit of the right to basic education in section 29(1) of the Constitution. It finds that the right to education extends to 'everyone' within the boundaries of South Africa, and that their nationality or immigration status is immaterial. It relies on the Constitutional Court's finding in *Lawyers for Human Rights*[32] where the Court had to interpret the ambit of 'everyone' in sections 12 and 35(2) of the Constitution. The Constitutional Court found that these rights were integral to the values of human dignity, equality, and freedom that are fundamental to South Africa's constitutional order, and that denying these rights to human beings who are physically inside the country, merely because they have not entered South Africa formally, would negate the values underlying the Constitution. As a result, 'everyone' in sections 12(2) and 35(2) should be given its ordinary meaning. The Court found that where the Constitution intends to confine rights to citizens, it says so. Mbenenge JP found further support for this in international law, which makes it plain that children, including those with irregular status, are bearers of the right to education.[33]

27 *Centre for Child Law* para 87; art 2(2) Convention on the Rights of the Child.
28 *Centre for Child Law* para 89.
29 As above.
30 As above.
31 As above.
32 *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC) paras 26-27.
33 *Centre for Child Law* para 91.

It was conceded by counsel for the respondents that the Admission Policy is not a law of general application for purposes of section 36 of the Constitution and that, therefore, the policy is incapable of authorising a limitation of the rights in the Bill of Rights.[34] The Court therefore concluded that Clauses 15 and 21 unjustifiably limit the rights under sections 9(1), 10, 28(2) and 29(1)(a) of the Constitution. An attempt was made by counsel for the respondents to suggest that even though the policy was not subject to the justifiability analysis in section 36, it did accord well with the 'laws of the land', of which sections 39 and 42 of the Immigration Act were the most important.[35] It was argued by the respondents that sections 39 and 42 have the legitimate purpose of advancing the interests of South African citizens and of putting in place measures to discourage illegal foreigners from coming to the country to receive free basic education.

Before addressing the constitutionality of sections 39 and 42 of the Immigration Act, the Court dealt with this argument by the respondents. The Court stated that no evidence was presented to the Court to suggest that illegal foreigners[36] come to South Africa to receive free basic education. Rather, all indications were that immigrants come to South Africa to seek employment. The Court made it clear that it remained the responsibility of the government to enforce compliance with labour laws, put immigration controls in place, and impose appropriate sanctions for the hiring of illegal foreigners without compliance with the law. All this could be achieved without the invasion of the fundamental rights of children to access education.

In addition to this, the Court also pointed out that the Admission Policy was *ultra vires* the Schools Act, as well as NEPA. Section 3(4)(i) of NEPA empowers the Minister to make national policy for the admission of students to education institutions, and section 4 of NEPA provides that the policy shall be directed towards specific objectives, including the advancement of the right 'of every person to basic education'. Section 3(1) of the Schools Act provides that it is compulsory for all children to attend school from the age of seven 7 until the age of 15, or on reaching grade 9, or whichever comes sooner. The Court found that Clauses 15 and 21 of the Admission Policy purport to impose additional requirements on children who seek admission to public schools. That is not contemplated by the Schools

34 *Centre for Child Law* para 97.
35 *Centre for Child Law* para 98.
36 The authors prefer the term 'non-nationals' but use the term 'illegal foreigners' as it was used in the judgment.

Act. NEPA also contains no provision, either expressly or impliedly, authorising the imposition of the requirement of providing a birth certificate or identification document as a necessary precondition for admission to a public school. As a result, the Admission Policy was found to be *ultra vires* the Schools Act as well as NEPA in as much as it requires documents to be provided upon admission. The Court then proceeded to address the challenge to sections 39 and 42 of the Immigration Act.

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

The Court relied on the SAHRC's (second *amicus curiae*) submissions on how sections 39 and 42 of the Immigration Act should be interpreted. The SAHRC argued that the interpretation hinged on three invocations, namely, (i) section 39(2) of the Constitution which requires that all legislation be interpreted to promote the spirit, purport and objects of the Bill of Rights; (ii) the principle enunciated in section 233 of the Constitution requiring that legislation be interpreted in conformity with international law; and (iii) the presumption that legislation does not intend to change the law more than is necessary, and that Parliament knows the existing law when it legislates.

First, the Court reasoned that sections 39 and 42 ought to be interpreted so as not to conflict with section 29(1) of the Constitution. In doing so, the Court opted for an interpretative approach that would save sections 39 and 42 from constitutional invalidity. This, the Court stated, accords with section 39(2) of the Constitution which requires the courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights.

Second, the Court found that sections 39 and 42 of the Immigration Act had to be interpreted consistent with international law, as envisioned by section 233 of the Constitution. The Court, throughout the judgment, had referred to international law instruments that supported the provision of education to all children, irrespective of their documentary status. It therefore found that given that South Africa has signed and ratified these international law instruments, the courts were bound to give effect to them.[37]

Third, the Court reiterated the longstanding presumption that the legislature does not intend to alter the existing legislation more

37 *Centre for Child Law* para 122.

than is necessary, and that it is presumed that the legislature knows the law.[38] The Court stated that the Schools Act was promulgated before the Immigration Act and that it does not draw any distinction between learners who are legally present in the country and those that are not.[39] Instead, the Court found that section 3(1) of the Schools Act places an obligation on every parent to cause every learner for whom he or she is responsible to attend a school from the first school day of the year in which the learner reaches the age of seven years until the last school day of the year in which such learner reaches the age of 15 years or the ninth grade.[40]

Section 3(6)(b) provides that any person who, without just cause, prevents a learner who is subject to compulsory attendance from attending school is guilty of an offence, and section 5 places an obligation on public schools to admit learners to their schools and to serve their educational needs without in any way unfairly discriminating.[41] The Court found that in light of the absence of any express indication that the Immigration Act intended to amend the Schools Act, the Immigration Act must be interpreted not to detract from the rights recognised under the Schools Act for learners to receive education.[42]

The Court further pointed out that the Immigration Act makes no reference to 'school', 'education' or 'basic education'.[43] The significance of this, the Court elaborated, is that the Act was promulgated at a time when the Constitution already referred to a right to 'basic education' in section 29; the international law that bound South Africa referred to the right of the child to 'education'; and the Schools Act referred to 'school', and 'education' when it conferred rights on learners.[44] Accordingly, it is appropriate to interpret the Immigration Act's reference to 'learning institution' and 'training or instructions' as *not* referring to the basic education that schools provide to children.[45] The Court, therefore, held that sections 39 and 42 of the Immigration Act had to be interpreted in a way that does not prohibit children from receiving basic education from schools.[46] This approach saved the provisions from being declared unconstitutional in their entirety.

38 *Centre for Child Law* para 124.
39 As above.
40 As above.
41 As above.
42 *Centre for Child Law* para 125.
43 As above.
44 As above.
45 As above.
46 *Centre for Child Law* para 126.

The Court ultimately found that the Department of Basic Education and the Provincial Department acted unconstitutionally in not permitting children to continue receiving education in public schools purely by reason of the fact that they lack identification documents.[47] It also directed the respondents to admit all children not in possession of an official birth certificate into public schools in the Eastern Cape Province and that where a learner cannot provide a birth certificate, the principal of the relevant school was directed to accept alternative proof of identity, such as an affidavit or sworn statement deposed to by the parent, care giver or guardian of the learner wherein the learner is fully identified.[48] The respondents were also interdicted and restrained from removing or excluding from schools children, including illegal foreign children, already admitted, purely by reason of the fact that the children have no identity document number, permit or passport, or have not produced any identification documents.[49]

6 Reflections on litigation strategies

When reflecting on the litigation, several strategies were employed that assisted with the litigation. In this part we address some of these strategies.

6.1 Bringing the matter on behalf of 37 children

After consultations with the children were completed, the Centre for Child Law researched, strategised and discussed whether the matter, if launched, had prospects of success. Several factors were taken into account when it considered the potential for success – or whether bringing the litigation could in fact have a damaging effect. While it struck the Centre for Child Law that the challenge in respect of South African children had higher prospects of success, it acknowledged that the same was not true for the undocumented migrant children it represented. It accordingly required research and a significant degree of contemplation.

The first consideration was international and foreign law. Special regard was given to a 2017 Joint General Comment of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families the Committee on the Rights of the Child.[50] It stated

47 *Centre for Child Law* para 135.
48 As above.
49 As above.
50 ESCR Committee General Comment 13: The Right to Education (article 3).

that children, regardless of their documentation status and whether they were irregularly in a country, should be given access to education. Special regard was also given to the Committee on Economic, Social and Cultural Rights (ESCR Committee)'s General Comment on the right to education,[51] which expanded on the special nature of the right to education – particularly its status as an empowerment right. The General Comment notes that '[e]ducation 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 marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.'[52] The importance of the right to education is similarly recognised in the Constitution, where it is also given unique status – for instance, that it is immediately realisable.

In addition to international law, the Centre for Child Law carefully considered *Plyler v Doe*,[53] an American case, which held that 'undocumented immigrants' could attend school. An important dictum from the case that propelled the Centre for Child Law to move forward with litigation on behalf of the undocumented migrant children included the Court's statement that

> [t]he deprivation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage; the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement. In determining the rationality of the Texas statute, its costs to the Nation and to the innocent children may properly be considered.

While *Plyer* was certainly correct that excluding undocumented children from being able to access education damaged the social fabric, a more critical factor for the Centre for Child Law was the impact on migrant children themselves – in particular, that their rights were being limited in respect of something over which they had no control and over their parents' actions. With children being holders of their own rights, punishing adults through their children's deprivation was legally incorrect. The Centre for Child Law was not opposed to the Department of Home Affairs performing its function of immigration control – it only required that the Department of

51 Joint General Comment 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 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 para 59.
52 General Comment 13 (n 50).
53 *Plyler v Doe* 457 US 202 (1982).

Home Affairs do so in a lawful manner and not in a manner that punished children for their parent's actions.

6.2 Including children's voices

A strategy that proved invaluable was to place before the Court affidavits from the 37 children who joined the proceedings, setting out their stories and experiences with accessing education while undocumented. Once the Centre for Child Law felt confident that it was legally sound to proceed with the matter, a decision was taken to represent the children rather than their parents, where the child's maturity allowed for it. This also had the effect that affidavits were taken from many of the children even where the parents were representing them – ensuring that even the voices of younger children were heard. The experiences of the children, as told by them, played an important role in the Court's conclusion that their human dignity was impaired by the decision to stop funding them and their exclusion from school.

6.3 The use of an institutional client

There are three reasons why it can be strategic to include an institutional client in litigation of this nature. First, as in the *Centre for Child Law* case, it allows for an institution with expertise on the issue to represent the interests of children beyond the individual applicants. In this case, the Centre for Child Law acted in their own interest,[54] in the interests of those learners who attended Phakamisa High School and whose rights were materially and adversely affected by the decision,[55] on behalf of a class of learners consisting of all learners without identity numbers, permits, or passports,[56] and in the public interest.[57] This means that the relief sought would not only apply to the learners at the applicant school but would also extend to all other learners that are affected by the decision.

Second, it often happens that the state agrees to the demands of the individual applicants and provides them with the relief that they sought to try and settle litigation. However, where the law, policy, decision or action that is challenged is of a large-scale, systemic nature, the unlawful or unconstitutional conduct may persist beyond the point of settlement where the institutional client is mandated to

54 Sec 38(a) Constitution.
55 Sec 38(b) Constitution.
56 Sec 38(c) Constitution.
57 Sec 38(d) Constitution.

represent wider interests. It is then important to have an institutional client who cares about the larger systemic issues and will persist with relief that would result in systemic change, even in instances where the individual applicants are no longer affected by it.

Third, it can often add credence to the case of the individual applicants to have a reputable institutional client join their cause. This creates the impression that the applicants are not alone in their belief that a law or practice is unlawful or unconstitutional, but an institution with expertise on the issue also supports their application. The decision to approach the Centre for Child Law, therefore, was a strategic attempt to bolster the case of the individual school governing body and its learners, and to extend the relief to all the learners in the province.

6.4 The role of the *amici curiae*

As set out above, Section27 and the SAHRC joined the application as *amici curiae.* The admission of the *amici curiae* proved invaluable for the success of the litigation as, in the manner described above, it provided further credence to the applicants' case – particularly given the importance of the SAHRC as a Chapter 9 institution.

This was especially important in a case in which the applicants were asking for relief that could be considered controversial. It also reinforced the fact that this issue did not only affect the individual school and its learners but in fact was widespread. The fact that other civil society organisations and South Africa's constitutional rights watchdog supported the relief, therefore, was crucial.

Second, on a practical level, the submissions by the *amici curiae* helped to secure a successful outcome in the case. While international law was at the core of why the Centre for Child Law thought it was legally sound to bring the matter, and while it had intended to rely on international law in its heads of argument, Section27 provided the Court with an overview of international law at an in-depth and detailed level that the Centre for Child Law did not have the scope to do.[58]

There was debate regarding the SAHRC's intervention, as some civil society organisations took the view that a declaration of constitutional invalidity was preferable to a constitutional reading of the Immigration Act. This view stemmed from a fear that leaving the

58 *Centre for Child Law* paras 112-123.

provisions as they are in the statute book could lead to departmental officials continuing to misinterpret the law – lower-level officials who approach schools with demands that non-national learners must be removed might not have access to the Makhanda High Court's judgment that stated how to interpret the Immigration Act. This was especially true for the Centre for Child Law, whose experience in Pretoria and Johannesburg was of lower-level Department of Home Affairs officials attending at schools and removing children from school on the basis of sections 39 and 42. However, the SAHRC's approach was legally correct and was accepted by the Court. In many ways this was preferable, as the Court would have been more inclined to read the provisions of the Immigration Act constitutionally and less inclined to declare them unconstitutional.

7 Implementation of the judgment

Following the judgment in December 2019, the Department of Basic Education and the various provincial education departments had to implement the judgment and the order. This process has been challenging and, as will be set out below, some of the formal steps undertaken by the state to implement the order have not always resulted in practical changes for learners on ground level. It is difficult to determine with certainty how many children continue to be excluded because of the lack of documentation. Civil society organisations continue to report assisting learners with obtaining access,[59] mostly in instances where schools were unaware of the judgment and Circular 1 of 2020.

In June 2023 the Eastern Cape Department of Education indicated that it had 73 391 undocumented learners on SA-SAMS in the province.[60] This is an increase from the 43 534 learners that were on the system in 2019 at the time of the *Centre for Child Law* judgment.[61] This data illustrates an obvious increase in the number of learners attending school in the province without documentation, but it may be incorrect to simply deduce that it can entirely be attributed to the *Centre for Child Law* judgment. During the COVID-19 pandemic,

59 In 2021 Section27 reported assisting 75 learners to obtain admission to school, while the LRC reported assisting 21 learners to obtain access to school.

60 Eastern Cape Department of Education 'Eastern Cape learners without IDs' Presentation to the South African Human Rights Commission (28 June 2023), Mthatha.

61 This information was provided in a supplementary affidavit of Shunmugam Govindasamy Padayachee, the then acting Director-General of the Department of Basic Education that was filed as part of the litigation in *Centre for Child Law*. The information was extracted from the Department of Basic Education's Learner Unit Record Information and Tracking System (LURITS).

Home Affairs suspended some of its services, including applications for late birth registrations. As a result, the number of children whose births were not registered increased over this period, and Home Affairs faces a serious backlog in the processing of late birth registration applications.[62]

Thus, at least part of this increase in the number of undocumented children attending school in the Eastern Cape may be attributed to an overall increase in the number of undocumented children whose births have not been registered due to challenges at Home Affairs. As the number of undocumented learners increase overall, the prevalence of these learners in the school system will also increase. Despite this contributing factor, the data does show that undocumented learners are increasingly gaining access to schools in the province and retained in the schools once they are admitted. This is indicative of the fact that the Eastern Cape province has started to align its practices with the *Centre for Child Law* case.

However, challenges do remain, and we have identified three difficulties with the implementation of the judgment and the order that continue to limit undocumented children's access to schools: first, the framing of the order itself and the lack of oversight and follow-up by education authorities to ensure implementation of the order; second, the continued failure to fund undocumented learners in some provinces; and, third, proposed legislative and policy changes that have the potential to undo the legal precedent in *Centre for Child Law*.

7.1 Framing of the court order

Unfortunately, the court order created some ambiguity as to its scope, particularly in relation to its application across all provinces in South Africa. The Admission Policy applied nationally and to all provincial education departments. The declaration of unconstitutionality of Clauses 15 and 21 of the Admission Policy, therefore, was applicable at a national level and not confined to the Eastern Cape province. However, the Court only directed the respondents to admit all children not in possession of an official birth certificate into schools in the Eastern Cape, and where the learner cannot provide the birth certificate, the principal of the relevant school was directed to accept alternative proof of identity such as an affidavit deposed to by the

62 Department of Home Affairs National Assembly Question for Written Reply: Question No 1798, https://pmg.org.za/committee-question/22858/ (accessed 30 September 2023); the total backlog of late birth registrations was 57 267 by December 2022.

parents, care giver or guardian of the learner wherein the learner is fully identified.[63] This directive to accept alternative proof of identity is confined to the Eastern Cape province, and the same practice was not ordered at a national level.

Despite this, the directive to national education authorities preventing them from removing or excluding a child from school by reason of the fact that they do not have identity numbers, permits or passports or have not produced these identification documents,[64] appears to apply nationally. This has the potential to create confusion among the other provincial education departments, that may have difficulty in interpreting the order and its application in provinces other than the Eastern Cape. In response to the judgment, and to clarify the application of the judgment and order, the Department of Basic Education issued a circular to all heads of provincial education departments, school districts offices, school governing bodies, school principals, and all South African schools in January 2020.

Circular 1 of 2020[65] served to inform all schools and education authorities about the *Centre for Child Law* judgment and its implications for the admission of learners to public schools. In particular, the circular clarified that while the judgment related to matters that emanated in the Eastern Cape province, it 'set the tone of the appetite of courts on the learners' right to basic education throughout the country'.[66] The circular reiterated some of the Court's findings, including that the right to education extends to everyone within the boundaries of South Africa despite their nationality or immigration status.[67] It also informed schools and education authorities that amendments would be effected to clauses of the Admission Policy to align it with the judgment and order and that all schools are advised to follow the precedent set in the order of the High Court.[68]

Circular 1 of 2020, while a positive step by the department to ensure compliance with the order, did not sufficiently address the confusion that arose from the order. It simply advised schools to follow the precedent in the judgment and order, without providing guidelines on how this must be achieved. There are two challenges with respect to this approach. First, the circular expected schools,

63 *Centre for Child Law* para 4 of the order.
64 *Centre for Child Law* para 6 of the order.
65 Department of Basic Education 'Circular 1 of 2020: Admission of learners to public schools', https://section27.org.za/wp-content/uploads/2020/02/Circular-1-of-2020-Undocumented-Learners.pdf (accessed 30 September 2023).
66 Para 2.1 of Circular 1 of 2020.
67 Para 2.2 of Circular 1 of 2020.
68 Paras 2.3 and 2.4 of Circular 1 of 2020.

principals and school governing bodies, as well as other education authorities, to search for the order, interpret it, and then apply it in their schools. It required significant effort on the side of school governing bodies, principals and schools, and relied on the ability of lay people to correctly interpret and apply the law. Second, those who took the steps to read the order would still be confronted by the obvious ambiguous nature of the order.

Civil society organisations[69] reported that despite the issuing of the circular, they still encountered numerous cases of undocumented South African, migrant, stateless, asylum-seeking and refugee learners being denied access to basic education.[70] Schools remain ill-informed regarding the rights of migrant and undocumented children to access education and are often unaware of Circular 1 of 2020 or the *Centre for Child Law* judgment. Importantly, civil society noted that at times, when schools are aware of the judgment and the circular, they have argued that it is only advisory, and that the judgment applies only to schools in the Eastern Cape province.[71] Consequently, schools continue to insist on identity documentation being submitted to obtain admission to schools, or excluding learners who are not documented. This is aggravated by the fact that the judgment was handed down by an Eastern Cape High Court and not by a national court. The perception seems to exist that because of the jurisdictional purview of the Court, the judgment is not binding on other provinces.

Additionally, some of the provinces have shifted their admission processes to an online portal, where parents and caregivers no longer apply at the school directly, but rather on a centralised electronic system. The online portal to apply for admission at a public school in the Gauteng and Mpumalanga provinces requires learners, parents and caregivers to submit identity documentation.[72] There is no option to by-pass this requirement on the portal when a learner, parent or care giver does not have identity documentation, which means that many undocumented learners are simply unable to apply to attend school in these provinces.

69 Section27, Centre for Child Law, Children's Institute, Legal Resources Centre, Equal Education Law Centre, and Lawyers for Human Rights.

70 Section27 and others 'Joint submission to the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the review of the information received from South Africa on follow-up to the Concluding Observations on its initial report' (14 May 2021).

71 As above.

72 K Mutandiro '"I want to be in school ... but we have no papers": Undocumented children struggle to find schools' *Groundup* 13 January 2023, https://www.news24.com/news24/southafrica/news/i-want-to-be-in-school-but-we-have-no-papers-undocumented-children-struggle-to-find-schools-20230113 (accessed 30 September 2023).

In the authors' experience of assisting undocumented learners to obtain admission following the judgment, much of the problem remains at school and provincial level. The Department of Basic Education has generally been responsive when complaints of learner exclusion have been filed, and attempt to address the challenge with the individual school or provincial education department.

Upon the joint request of the LRC, the Centre for Child Law and the Children's Institute, the Department of Basic Education also recirculated Circular 1 of 2020 in June 2022, with a clear instruction to schools and provincial departments to admit undocumented learners and provide them with basic education. Despite this, instances of learner exclusion continue at school level, and learners remain confronted by the need to produce a birth certificate, passport or permit.

This phenomenon illustrates the limitations of the courts in advancing the rights of undocumented learners. While the *Centre for Child Law* judgment was meant to rectify the situation of undocumented learners being denied access to schools, its impact is limited by the state departments tasked with enforcing the order. Even though the Department of Basic Education has taken some steps to attempt to implement the order, it requires a much more concerted and continuous effort to ensure that all schools are aware of the judgment and are abiding by the order. It also requires an effort on the part of civil society to make sure that the orders are complied with, and that implementation is continuously monitored and evaluated.[73]

7.2 Continued failure of provincial education departments to fund undocumented learners

In addition to instances of learners not being admitted to the schools, civil society organisations have also found that some provinces in South Africa are still not funding their undocumented learners. During 2022 the LRC undertook field research across all provinces in South Africa with a view to establishing whether schools are receiving

73 Following the handing down of the judgment, the LRC, Centre for Child Law, Children's Institute and Section27 established the Phakamisa Monitoring Alliance. It is an informal grouping of organisations committed to ensuring the implementation of the order. This includes engaging with government where challenges arise, collating data on the implementation of the order, and making submissions to regional and international bodies on South Africa's attempts to provide education to undocumented learners.

funding for their undocumented learners.[74] As stated above, the *Centre for Child Law* case was launched because of ECDOE's decision to stop funding undocumented learners. Given the outcome of the judgment, it was important to determine whether all learners, particularly Eastern Cape learners, were being funded for their undocumented learners.

The research revealed that most provinces in the country were abiding by the judgment and including undocumented learners when allocating education funding. However, in KwaZulu-Natal, Limpopo and the North West provinces, schools reported that undocumented learners were not being funded.[75] The interviewed schools indicated that while they had never received formal communication from the provincial education departments in these provinces addressing the funding of undocumented learners, they were told informally by district and provincial education officials that undocumented learners were not included when funding was allocated to schools.[76] Despite this, they all admitted undocumented learners as they had been instructed to do so by the provincial education departments.[77]

It therefore appears from the research that while these three provincial education departments follow the *Centre for Child Law* judgment in respect of the admission of learners, it does not fund the schools accordingly. It should be noted that all three provincial education departments deny that they are not funding undocumented learners. In correspondence to the LRC, all three departments stated that they did fund undocumented learners, but provided no proof to this effect. This claim by the provincial departments also contradicted the experiences of the schools themselves. A joint research project by the LRC, the Centre for Child Law and the Children's Institute during 2023 and 2024 is aimed at investigating the prevalence of the lack of funding in these provinces.

The SAHRC embarked on a similar exercise in the Eastern Cape to determine whether schools are funded for undocumented learners.[78] They reported interviewing schools during 2023 that

74 C van Schalkwyk and others 'Pro-poor education funding in South Africa' (March 2023), available from authors upon request.
75 Research was only conducted at 10 schools in each province, so the sample is too small to represent a conclusive finding that none of the schools are receiving funding for their undocumented learners. The research, however, was conducted in three different education districts in each of the provinces, with schools in all the education districts reporting a lack of funding.
76 Van Schalkwyk and others (n 74).
77 As above.
78 SAHRC 'Stakeholder engagement on undocumented children and access to education' (28 June 2023), Mthatha.

were not receiving funding for their undocumented learners.[79] This contradicts the findings of the LRC of which the research indicated that schools were receiving funding for their undocumented learners in the Eastern Cape.[80] ECDOE also indicates that it does fund undocumented learners in accordance with the *Centre for Child Law* case.[81]

It is unclear from the SAHRC's research what the exact reason is for the lack of funding in the schools. It appears that some schools experience administrative challenges and are not able to enter the details of the learners onto SA-SAMS, resulting in some learners not being captured on the system at all.[82] While most of the schools can enter their learner details without the required documentation, others appear unable to navigate SA-SAMS, resulting in the lack of funding.[83] This requires an intervention by ECDOE to ensure that all its schools and administrators are adequately trained to enable them to enter learner details on SA-SAMS.

As mentioned above, one of the shortfalls of the *Centre for Child Law* case is the failure to adequately address the question of funding. The finding by the Court that Circular 6 of 2016 should be set aside was important in addressing the funding issue in the Eastern Cape. It removed the immediate impediment to funding for learners in the province, but the Court did not make a clear finding that all undocumented learners across all provinces are entitled to education funding. Since the judgment itself does not provide guidance on the funding question, it is left to provincial education departments to interpret the judgment as per Circular 1 of 2020. As mentioned above, the circular is no more enlightening than the judgment and order, but relies on the abilities of lay people to interpret the law.

Upon a proper interpretation of the *Centre for Child Law* judgment, the Constitution,[84] the Norms and Standards for School Funding[85] and the Schools Act[86] it is submitted that any decision

79 As above.
80 It should be noted that the SAHRC interviewed 40 schools, while the LRC only interviewed 10 schools. The SAHRC reported that 23 of the 40 schools complained about a lack of funding for the undocumented learners, while the remaining 17 schools were receiving funding.
81 Eastern Cape Department of Education (n 60).
82 SAHRC (n 78).
83 As above.
84 Secs 7(2), 9, 10, 28(2) & 29(1).
85 *Government Gazette* Notice 2362 of 1998.
86 Secs 34 and 35 of the South African Schools Act. Sec 34(1) states that '[t]he state must fund public schools from public revenue on an equitable basis in order to ensure the proper exercise of the rights of learners to education and the redress of past inequalities in education provision'.

by any provincial education department not to fund undocumented learners is unconstitutional and unlawful. An analysis of the legal framework supporting this argument is outside the scope of this article. However, it is submitted that where a court is confronted by a question around funding for undocumented learners, it should undertake a proper analysis of the legal framework and make a clear finding on this question. This will prevent any uncertainty or potential ambiguity that could provide provincial education departments with a reason not to fund undocumented learners.

7.3 New legislative and policy framework

Following the *Centre for Child Law* judgment, there have been two significant legal developments that could potentially undo some of the positive legal changes brought about by the judgment. First, on 11 February 2021 the Department of Basic Education published a new draft Admissions Policy for Ordinary Public Schools for public comment.[87] The policy was drafted in part as a reaction to the *Centre for Child* judgment and the unconstitutionality of clauses 15 and 21 of the Admission Policy. The draft policy creates three categories of learners, namely, South African citizens;[88] learners who are not South African citizens;[89] and undocumented learners.[90]

Clause 15 of the draft policy states that when a parent applies for the admission of a learner to an ordinary public school, the parent must present an official birth certificate (with an identity number) of the learner or a written affirmation or sworn written statement (in the form of an affidavit) about the age of the learner to the principal of the school. Clause 15.1 further states that if the parent is unable to submit the birth certificate or has only submitted a written affirmation or sworn written statement about the age of a learner, the learner must be admitted. These two clauses align with the findings in the *Centre for Child Law* judgment that makes provision for an affidavit or sworn statement to be provided in the absence of a birth certificate.

In addition, clause 15.3 of the draft policy states that

> [i]f the parent fails to submit the birth certificate of a learner, the principal must admit the learner and refer the matter to the Head of Department concerned. The Head of Department must hold the parents accountable to acquire birth certificates for their children. The Head

87 *Government Gazette* 44139, https://www.gov.za/sites/default/files/gcis_document/202102/44139gen39.pdf; public comments closed on 12 March 2021.
88 Clauses 14 & 15.
89 Clauses 20-22.
90 Clauses 23 & 24.

> of Department may liaise with the nearest office of the Department of Home Affairs for assistance relating to the matter. It remains the primary responsibility of parents to acquire birth certificates for their children.

This obligation on the head of department to hold the parents accountable is reiterated in clause 24 of the draft policy which addresses the issue of undocumented learners.

Clauses 20 to 22 of the draft policy address the issue of admission for children who are not South African citizens but are in possession of some documentation to regulate their status in South Africa. It makes provision for learners in possession of a permanent residence permit, a temporary residence visa, and an asylum-seeker visa or refugee visa. Clause 20 sets out the documents that are required for these categories of learners and lists a number of documents, such as the learners' birth certificates from their country of origin, their passports, study visas, permanent residency certificates, or asylum-seeker permits. This list of documents is incredibly burdensome for children who are not South African citizens. It places a much more strenuous obligation on non-national children than the now unconstitutional Clause 21 of the existing Admission Policy, in turn creating the potential for these learners to face exclusion from schools should they be unable to fulfil all the documentary obligations set out in the draft policy.

Clauses 23 and 24 make specific provision for learners who are undocumented. Clause 23 states that the right to education extends to everyone within the boundaries of South Africa, and that the nationality and immigrant status is immaterial. It further states that '[a]ll schools are *advised* to admit learners and serve their educational needs irrespective of whether the learner or the parent of the learner does not produce the documents listed in paragraphs 15, 17 to 20 of the policy'.

Unfortunately, clause 23 fails to reflect the gravity of the constitutional violation that the *Centre for Child Law* judgment addresses and the mandatory nature of the Constitution itself.[91] First, the judgment *directs* the educational authorities to admit undocumented learners and does not simply *advise* them to admit the learners.[92] The wording of this clause is not strong enough to reflect the actual findings of the Court and to appropriately reflect

91 Legal Resources Centre 'Submission to the Department of Basic Education on the Admission Policy for ordinary public schools' (March 2021) 8.
92 *Centre for Child Law* para 6 of the order.

what the Constitution requires in respect of the admission of undocumented learners.[93]

In addition to this, clause 24 of the draft policy reiterates the obligation placed on the head of department to hold parents of undocumented learners accountable for acquiring birth certificates for their children. The draft policy does not clarify what form this accountability will take, or what steps the head of department must take to hold parents to account. In addition, this provision of the draft policy perhaps incorrectly assumes that the lack of documentation is the result of the dereliction of the parents' duty to obtain documents. As discussed above, the lack of documentation very often is not the fault of the parent, guardian or care giver, but rather the result of a myriad of challenges at Home Affairs.

This includes cases related to the inability of unmarried fathers to register the birth of their children, difficulties in obtaining citizenship, and problems with obtaining birth certificates due to an inability to meet the requirements for late birth registration in the Birth and Death Registration Act.[94] By the time that the child accesses school, parents, guardians and care givers have often tried multiple avenues to ensure that the births of their children are registered and that they obtain documentation for the child. Their inability to do so often is through no fault of their own, and holding these parents to account will achieve very little if state departments responsible for the issuing of documents do not align their laws and practices to assist children to obtain documents. While the draft policy was published for comments, no further steps have been taken to move the policy through the legislative process, and it is unclear when, if ever, the policy will be promulgated. Part of the delay in the finalisation of the draft policy may be the legislative process currently being undertaken to promulgate the Basic Education Laws Amendment Act (BELA). BELA will amend the South African Schools Act and sets out the requirements for the admission of learners to ordinary public schools. It was adopted by the National Assembly and the National Council of Provinces and awaits the President's signature.

BELA proposes amendments to the South African Schools Act and sets out requirements for the admission of learners to ordinary public schools. It was adopted by the National Assembly on 27 September 2023, and has been referred to the National Council of Provinces for concurrence. It provides a definition for 'required

93 LRC (n 91) 8.
94 As above.

documents' and proposes an amendment to section 5 of the Schools Act. Section 5(1) of BELA states that '[a] public school must admit and provide education to learners and must serve their educational requirements for the duration of their school attendance without unfairly discriminating in any way'. It then proposes a new section 1A and 1B which read as follows:

> 1A Any learner whose parent or guardian has not provided any required documents, whether of the learner or such adult person acting on behalf of the learner, during the application for admission, shall nonetheless be allowed to attend school.
>
> 1B The principal of the school must advise the parent or guardian to secure the required documents.

There are several difficulties with the proposed amendment, particularly considering the *Centre for Child Law* judgment. First, civil society organisations have pointed out that considering the judgment, documents are in fact not required at all.[95] The term 'required' documents, therefore, is misleading and gives the impression that they *must* be provided, failing which the child will not be able to attend school. Second, the actual list of required documents is problematic. The definition creates four categories of learners whose documents are required for purposes of admission to a public school. It refers to children born to a South African parent;[96] children born to two foreign national parents who are permanent residents or temporary residents;[97] refugees and asylum-seeker children;[98] and children in alternative care.[99]

95 Equal Education Law Centre & Equal Education 'Joint submission on the Basic Education Laws Amendment Bill – 2022' (15 June 2022) 34, https://equaleducation.org.za/wp-content/uploads/2022/06/EELC-EE-SUBMISSION_DRAFT-BELA-BILL-2022_FINAL-1.pdf (accessed 30 September 2023).

96 'Where at least one or both biological or adoptive parents of a learner are South African citizens, the following documents: (i) an unabridged birth certificate of the learner; (ii) the South African identity documents or cards of the learner's parents; and (iii) where either or both parents are deceased, the relevant death certificates.'

97 'Where both parents of the learner are foreign nationals and hold either permanent residence permits or temporary residence visas, the following documents: (i) the learner's foreign issued birth certificate; (ii) the learner's passport; (iii) a study visa or permanent residence permit issued to the learner; (iv) the parents' passports; and (v) the parents' temporary residence visas or permanent residence permits.'

98 'Where the parents of the learner are refugees or asylum seekers, the following documents: (i) the parent's asylum seeker or refugee visa; (ii) the learner's asylum seeker or refugee visa; (iii) the learner's birth certificate if the learner was born in the Republic; and (iv) where asylum seeker visas are provided, a refugee or long term study visa must be provided within three years of admission of the learner.'

99 'Where the learner is in alternative care, the following documents: (i) the relevant court order granting guardianship or custody; and (ii) the learner's unabridged birth certificate.'

Many of the documents that are listed as part of these categories are either impossible to obtain, are not legal requirements under other laws, or do not appear to serve a valid purpose.[100] As set out above, South African children often are unable to obtain their birth certificates due to obstacles within the Department of Home Affairs. The same is true for their parents, whose identity documents are now also required by schools. Permanent and temporary resident children must produce foreign-issued birth certificates, their passports, permanent or temporary residence visas, their parents' passports, and their parents' temporary or permanent residence permits. Many permanent or temporary residents never had passports or foreign-issued birth certificates, or no longer have access to these documents.[101]

Asylum-seeker children must produce a refugee permit or study visa within three years after being admitted to school. However, the Refugees Act does not state that an asylum claim will be determined within three years.[102] In reality, it can take many years for these documents to be provided by Home Affairs. Just like clauses 15 and 21 of the Admission Policy, which placed an obligation on parents to obtain documents within three months, the proposed three-year obligation for asylum children can result in schools interpreting the provision as requiring them to exclude those learners who are unable to meet this requirement. Not only is this provision contrary to the *Centre for Child Law* judgment, but it is completely irrational considering the provisions of the Refugees Act and the challenges faced by asylum-seeker children in obtaining documentation.

It is also important to note that many of these documents do not appear to serve any practical purpose for school administration or learning.[103] It is unclear why schools would require asylum seekers' refugee permits or long-term study visas within three years, or why both the birth certificate from South Africa and the country of origin would be required for temporary or permanent residents. It is also unclear why the documents of the parents would need to be provided. Under the current Admission Policy, these documents are not required. The *Centre for Child Law* case specifically addressed the challenges of providing documents to schools that are difficult to obtain, thus adding further documentary burdens for parents and care givers, effectively multiplying these challenges. In this sense, it has the potential to undo much of the progress that was

100 Equal Education & Equal Education Law Centre (n 95) 34.
101 Equal Education & Equal Education Law Centre (n 95) 35.
102 As above.
103 Equal Education & Equal Education Law Centre (n 95) 36.

made through the *Centre for Child Law* case and create a legislative framework that will again lead to the exclusion of learners, or act as a barrier to admission.

The four categories of learners that must provide the required documents does not include children whose parents are Zimbabwean special permit holders, Lesotho special permit holders, and children who are completely undocumented.[104] This has the potential to create confusion. The definition of 'required documents' sets out certain strict categories of children and the documents that are required for them. The categories of children contained in the 'required documents' section are South African children; permanent residents; temporary residents; refugees; and asylum seekers, giving the impression that if a child does not fall into one of these categories, there is no way to facilitate their admission into school.

It also does not reflect the finding in *Centre for Child Law* that an affidavit or sworn statement can be provided in lieu of documentation. Instead, sections 4(1A) and 4(1B) state that where these documents cannot be provided, the learner must still be admitted and that the principal must advise the parent or guardian to secure the documents. When section 5(1A) states that a child who is unable to produce the 'required documents' shall nonetheless be admitted to school, it by implication is silent on the status of undocumented children and children who are not covered by the categories listed under 'required documents'. Read as a whole, BELA does not sufficiently address the position of undocumented learners, places an irrational documentary burden on learners trying to obtain admission to school, and does not make it clear that, in line with *Centre for Child Law*, undocumented learners can attain admission by submitting a sworn statement or affidavit to the school.

Lastly, the list of required documents does not align with the list of documents that will be required through the Amended National Admission Policy for Ordinary Public Schools, should those amendments pass. The same is true for the procedures regarding what will happen if the documents are not produced – there are different procedures in the Amended National Admission Policy for Ordinary Public Schools than those currently set out in BELA. It is not clear whether the legislature is awaiting the finalisation of BELA before addressing the amendments to the National Admission Policy for Ordinary Public Schools to align the provisions of the legislative and policy framework.

104 Equal Education & Equal Education Law Centre (n 95) 39.

These proposed legislative and policy changes have the potential to negate some of the advances made because of the *Centre for Child Law* judgment. The legislature makes no reference to the Court's directive that an affidavit or sworn statement can be accepted as alternative proof of identity, but rather places a more cumbersome documentary burden on learners. Should BELA and the Admission Policy be promulgated, it creates scope for further litigation on this issue, where the courts will again have to step in to ensure that the right to education for undocumented learners are realised.

8 Conclusion

The litigation in *Centre for Child Law* was an incredibly important tool to provide clarity on the legal rights of undocumented learners in South Africa. The judgment and order, although not perfect, significantly improved access to education for undocumented children in the country and brought about positive steps on the part of the education authorities to ensure that undocumented learners access education. It set an important precedent for future litigation on the issue, particularly in respect of documentary status as an analogous ground of discrimination under section 9(3) of the Constitution.

However, it is clear that judgments of this nature are not a silver bullet that immediately solves all the challenges faced by undocumented learners. Challenges in implementing the judgment and the order remain and, as set out, potential new law and policy developments could require further interventions by the court. In this sense, the role of the court, while important, is limited. Judgments and orders of this nature are partly dependent upon a willing government that will take action to implement it, an active civil society that will monitor implementation, and a clear understanding of the judgment and the order by those most affected by it.