

INTERROGATING THE RIGHT TO BASIC EDUCATION OF UNDOCUMENTED CHILDREN IN THE CONTEXT OF THE CALL FOR THEIR EXCLUSION FROM PUBLIC SCHOOLS IN SOUTH AFRICA

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SUMMARY

The right to basic education is recognised as a fundamental human right that is guaranteed to everyone, including undocumented children under international and domestic law. However, the question needs to be asked whether this right extends to undocumented children living in South Africa when, at the start of every academic calendar, tales of children being denied enrolment in public schools owing to a lack of required identification or birth certificates dominate the media space. Apparent legal contradictions, a lack of proper understanding of extant laws protecting the right to basic education, and a lack of effective cooperation among stakeholders in the education sector have continued to affect access to basic education for undocumented children in South Africa. This article reflects on the right to basic education of undocumented children in the context of the legality of the lingering call for the exclusion of undocumented children from public schools in South Africa.

1 INTRODUCTION

The significance of education to human and societal transformation has been well documented.¹ In his judgment delivered on the Limpopo textbook case in 2012, Kollapen J described education as operating on two levels: the “micro and the macro level”.² At the macro level, education is a necessary tool for societal transformation; at the micro level, “it enables each person to

¹ United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 13: The Right to Education (Article 13) (1999)* E/C.12/1999/10. Adopted: 8/12/1999 par 1.

² *Section 27 v Minister of Education* [2012] ZAGPPHC 114 par 5.

live a life of dignity and participate fully in the affairs of society.”³ Education is viewed as a vital means of realising other human rights.⁴ Education, according to Fafunwa, is the culmination of all the processes by which a child or young adult acquires the skills, attitudes and other types of behaviour that contribute to the betterment of the society in which they live.⁵ The significance of education prompted its recognition as a fundamental human right by various international and regional human rights instruments.⁶ It is on this basis that Onuora-Oguno describes the right to education as “one of the most important rights of our lifetime”.⁷

It is therefore not surprising that the academic calendar begins every year with thousands of new learners registering for their schooling careers in South Africa and other parts of the world. The 2024 academic year in South Africa was no exception, and the media space was once again flooded with news of thousands of students starting their academic journey. While this moment represents a moment that is being celebrated by many, it also represents a sad reality for thousands of undocumented children residing in the country. For some, this moment represents anguish, denial, rejection and frustration, as they are denied placement in public schools either on account of their immigration status or as a result of the lack of relevant identity documents required by the national admission policy for admission into public schools. This is despite the explicit guarantee of the right to basic education to everyone by the Constitution of the Republic of South Africa, 1996 (Constitution), and by international legal instruments. It seems that legal contradictions, lack of proper understanding of extant laws protecting the right to basic education, and other conditions continue to affect access to basic education for undocumented children in South Africa. This article therefore examines the right to basic education of undocumented children in South Africa in the context of the legality of the lingering call for the exclusion of undocumented children from public schools in South Africa.

Drawing on international law, domestic and case law, the author argues that the right to basic education is a fundamental human right that is guaranteed to every child. This is irrespective of whether such child has a birth certificate, identity document and other related documents. Furthermore, the enjoyment of this right is not dependent on the immigration status of such child. To address and unpack these issues, the article is divided into four main sections. The first provides a contextual understanding of what it means to be an undocumented child in South Africa and its impact on their right to basic education. The second section of the article highlights the legal framework protecting the right to basic education, both from

³ *Ibid.*

⁴ UN CESCR *General Comment No 13* par 1.

⁵ Fafunwa *History of Education in Nigeria* (1974) 17.

⁶ UN *Universal Declaration Human of Rights (UDHR)* (1948) art 26; UNGA *International Covenant on Economic Social and Cultural Rights (ICESCR)* 999 UNTS 171 (1966) Adopted: 16/12/1966 art 13; UN *Convention on the Rights of the Child (UNCRC)* 1577 UNTS 3 (1989) Adopted 20/11/1989 art 28; *African Charter on the Rights and Welfare of the Child (ACRWC)* (1990) art 11; Organisation of African Unity *African Charter on Human and Peoples' Rights (ACHPR)* (1981) Adopted: 27/06/1981 art 17.

⁷ Onuora-Oguno *Development and the Right to Education* (2019) vii.

international and domestic law perspectives. This section examines the legal framework in the context of determining whether the right to basic education extends to undocumented children in South Africa. This section further interrogates the court's interventions in determining whether the right to basic education extends to undocumented children in South Africa. In so doing, the article focuses on the case of the *Centre for Child Law v Minister of Basic Education*,⁸ (*Phakamisa* judgment). The third section of the article looks at the measures put in place to implement the outcome of the judgment to ensure that barriers affecting the right to basic education of undocumented children are eradicated. The final section interrogates the factors that have not only impeded the implementation of the outcome of the judgment but factors that have continued to impede access to basic education of undocumented children in the country.

2 CONTEXTUALISING THE MEANING OF “UNDOCUMENTED” AND ITS IMPACT ON THE EDUCATIONAL REALITIES OF UNDOCUMENTED CHILDREN IN SOUTH AFRICA

The term “undocumented” is viewed by the United Nations International Conference on Population and Development as referring to “a person who do not fulfil the requirements established by the country of destination to enter, stay or exercise an economic activity”.⁹ The South African Human Rights Commission views “undocumented” as a complex umbrella concept in the South African context, driven by diverse factors that affect South Africans, migrants and stateless persons concurrently.¹⁰ Writing in the South African context, the Commission defined undocumented learners as individuals of school-going age who desire to be enrolled at a school but do not possess the official documentation required for proof of identity or legal residency.¹¹ The Commission identified three categories of undocumented person: namely, (1) South African children whose births have not been registered or are unable to be registered in terms of the Births and Deaths Registration Act¹² in South Africa; (2) stateless persons; (3) migrants in an irregular situation. While the definition of “undocumented” is broad and also covers South African children whose births could not be registered in accordance with extant laws, this article focuses on the third category of undocumented persons, who are migrants in an irregular situation.

Children become undocumented in South Africa owing to several factors. The Department of Home Affairs (DHA) is saddled with the responsibility of issuing birth certificates or identity documents. However, obtaining these

⁸ [2019] ZAECGHC 126.

⁹ UN International Conference on Population and Development, Cairo (5–13 September 1994) https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pdf/files/a_conf.171_13_rev.1.pdf (accessed 2023-09-10) par 10.15.

¹⁰ South African Human Rights Commission *Position Paper: Access to a Basic Education for Undocumented Learners in South Africa* (2019).

¹¹ *Ibid.*

¹² 51 of 1992.

documents from the DHA may be either near impossible or challenging for children born of parents residing in the country without the required documents.¹³ Refugees and asylum seekers who fled their country for fear of maltreatment or persecution, in most cases, find it difficult to obtain assistance from their country of birth to obtain birth certificates. As a result, many such children end up being undocumented in South Africa. While it is difficult to ascertain an accurate number for undocumented children in South Africa, it is estimated there are more than one million such children in South Africa, with a significant number of them having been born in South Africa, but their births not registered for various reasons.¹⁴

Undocumented children are extremely vulnerable and face several impediments to accessing basic social services, including education. Registration of a child in a South African public school requires parents to produce certain documents. Paragraph 15 of the Admission Policy for Ordinary Public Schools (Admission Policy)¹⁵ requires that parents applying for admission of their children into public schools must provide birth certificates and identity documents of the parent. The Admission Policy further provides that, in situations where parents are unable to produce a birth certificate, the child may be admitted conditionally, but could be excluded after three months if the document is not provided.¹⁶ However, some schools either do not understand this aspect of the provision or deliberately ignore it. Consequently, undocumented children are refused admission into some public schools.

Adding to this challenge is the Immigration Act,¹⁷ which reiterates the need for learners to have the required documents to be admitted into learning institutions. Section 39 of the Immigration Act goes so far as to prohibit learning institutions from knowingly providing training or instruction to those without the required documents, or to what is referred to as “illegal foreigners”.¹⁸ Section 42(1) of the Immigration Act makes it a punishable offence for any learning institution knowingly to provide learning or instruction to an illegal foreigner.¹⁹

Section 44 of the Immigration Act adds another dimension to this complexity, as it provides that persons whose status or citizenship cannot be verified, or an undocumented person, should not be prevented from receiving services or performance to which such undocumented or illegal foreigners are entitled under the Constitution or any other law. This provision seems to contradict section 39 of the Immigration Act, which prohibits learning institutions from providing services to illegal foreigners. If section 44

¹³ Sibanda “The Right to Birth Registration of Foreign Children in South Africa: A Human Rights Perspective” (master’s thesis, University of the Western Cape) 2020 61.

¹⁴ Broughton “Undocumented Children Win Right to Basic Education” (2019) <https://www.newframe.com/undocumented-children-win-right-to-basic-education/> (accessed 2023-05-13).

¹⁵ GN 2432 in GG 19377 of 1998-10-19.

¹⁶ Par 15 of the Admission Policy.

¹⁷ 13 of 2002.

¹⁸ S 39 of the Immigration Act.

¹⁹ S 42(1) of the Immigration Act.

is to be interpreted in the context of the right to basic education, it can be argued that basic education is a service guaranteed to everyone by section 29(1)(a) of the Constitution;²⁰ and undocumented children should consequently not be denied access to basic education on account of a lack of documentation. This aspect is further explored in the next section of this article.

However, owing to these legislative provisions, undocumented children who do not have appropriate documents for admission to public schools are either denied admission or face a high chance of having their admission application rejected. The measures put in place to exclude undocumented children from public school were revealed in a 2016 circular that was issued by the Eastern Cape Department of Education (ECDE). The ECDE took a decision and issued a circular to withhold funding to schools in respect of learners who did not have identity documents or passport numbers captured in the Education Department's Management System Database (SASAMS).²¹

This decision implied that schools would no longer receive funding for undocumented learners enrolled. This resulted in the exclusion of undocumented learners from some schools that were either unwilling or unable to shoulder the burden of providing an education to unfunded learners. Adding to this has been the harassment and intimidation that school principals have received from the DHA and other stakeholders for admitting undocumented children into their schools. It was reported that three principals were fined by the DHA for allowing undocumented learners into their schools.²² In January 2023, the former mayor of the Central Karoo District and the president of the Patriotic Alliance, Gayton Mckenzie, once again brought the issue of undocumented children's access to basic education into sharp focus, when he called for the removal of undocumented children from South African public schools.²³

If such a public figure can use a public platform to make such a call, it raises the question whether the right to basic education as enshrined in the South African Constitution and other international legal instruments extends to undocumented children residing in South Africa. The next section of the article responds to this question by interrogating the various legal instruments protecting the right to basic education, and examines whether this right extends to undocumented children in South Africa.

²⁰ S 29(1)(a) of the Constitution.

²¹ Southern African Catholic Bishops' Conference Parliamentary Liaison Office "Access to Public Schools for Undocumented Children" (February 2020) *Briefing Paper 494* 1.

²² October "Calls for Policy Certainty on Undocumented Learners" (1 March 2019) *Dullah Omar Institute* <https://dullahomarinate.org.za/women-and-democracy/partybeat/calls-for-policy-certainty-on-undocumented-learners> (accessed 2023-05-12).

²³ Venter "You're Wrong, Gayton Mckenzie: Undocumented Children Do Have the Right to Basic Education" (15 January 2023) *Daily Maverick* <https://www.dailymaverick.co.za/opinionista/2023-01-15-youre-wrong-gayton-mckenzie-undocumented-children-do-have-the-right-to-basic-education/> (2023) (accessed 2023-05-10).

3 LEGAL FRAMEWORK PROTECTING THE RIGHT TO BASIC EDUCATION

Several international and regional human rights instruments recognise and affirm the right to basic education. At the international level, these include the Universal Declaration of Human Rights (UDHR),²⁴ the United Nations Convention on the Rights of the Child (UNCRC),²⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁶ Article 22 of the United Nations Convention Relating to the Status of Refugees (UNCRSR)²⁷ also obligates member states to accord refugees the same treatment it accords its national citizens in terms of providing elementary education. All these instruments recognise the right to education as a fundamental human right, and urge States Parties to these treaties to provide free compulsory basic education to every child within their jurisdiction.

Given the significant role that education plays in society, there was a need to ensure that it was provided without any form of discrimination. This prompted the United Nations Educational, Scientific and Cultural Organisation (UNESCO) to adopt the Convention Against Discrimination in Education (CDE) in 1960. The CDE prohibits all forms of discrimination based on race, colour, sex, language, religion, political or other opinion, nationality, social origin, economic circumstances or birth.²⁸ Most importantly, article 4a of the CDE provides that States Parties to the Convention must undertake to make primary education free and compulsory and ensure that secondary education in its different forms is generally available and accessible to all.²⁹ South Africa has ratified almost all of these international law instruments, and is thus bound by their provisions to ensure that all children within its jurisdiction have access to basic education without discrimination, including undocumented children.

At the regional level, the right to education has been enshrined in a number of regional legal instruments³⁰ – for example, in the African Charter on Human and Peoples' Rights (ACHPR)³¹ and the African Charter on the

²⁴ S 26(1) of the UDHR. Note also UNGA *Declaration on the Rights of the Child* (non-binding) (1959) art 7 states: "The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages."

²⁵ Art 28(1)(a) of the UNCRC.

²⁶ Art 13(2)(a) of the ICESCR.

²⁷ 189 UNTS 150 (1951) Adopted: 28/07/1951; EIF: 22/04/1954.

²⁸ Art 1 of the CDE.

²⁹ Art 4a of the CDE.

³⁰ Art 11 of the ACRWC; OAU *Protocol to the ACHPR on the Rights of Woman in Africa* (2003) Adopted: 1/07/2003; EIF: 25/11/2005 art 2; African Union *African Youth Charter* (2006) art 13; Organization of American States *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (1999) art 13; Association of Southeast Asian Nations (ASEAN) *ASEAN Human Rights Declaration* (2012) art 27.

³¹ Art 17 of the ACHPR provides that everyone shall have the right to education.

Rights and Welfare of the Child (ACRWC).³² South Africa has also ratified these treaties and is bound by their provisions.

Pursuant to fulfilling its international obligations under these treaties and to addressing the historical educational injustices of the past,³³ South Africa has enshrined the right to basic education in its Constitution. Section 29(a)(1) of the Constitution provides that everyone has the right to basic education. Similarly, section 3 of the South African Schools Act³⁴ provides that basic education is compulsory for every child from age 7 to age 15 or the ninth grade, whichever comes first. This begs the question whether this right extends to children residing in South Africa without proper documentation. Is it not discriminatory to deny children access to basic education on account of a lack of proper documentation? The next section of this article responds to these questions.

3 1 Does the right to basic education extend to undocumented children in South Africa?

The right to basic education as stated above is a fundamental human right that is universally applicable. Documentation is not a requirement for enjoyment of this right. This has been confirmed by international human rights treaty bodies. For example, the UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No 20 provides that all children within a state, including those with undocumented status, have the right to receive an education.³⁵ This suggests that South Africa as a party to this instrument has a duty to provide basic education to all children, including undocumented children in the country. Also, the CESCR in General Comment No 13 reaffirms this position by providing 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.”³⁶

Thus, the right to basic education should be enjoyed by everyone, and no one should be discriminated against in the enjoyment of such right, irrespective of their immigration status. In this instance, undocumented children residing in South Africa should not be denied access to basic education on account of a lack of proper documentation. Similarly, the UN Committee on the Rights of the Child (CRC) in General Comment No 6 provides for the need to ensure access to basic education for all children,

³² Art 11 of the ACRWC also provides that everyone shall the right to an education. It further urges member states to provide free, compulsory basic education.

³³ On the historical educational injustices of the past resulting from the apartheid educational policy, see Veriava *Realising the Right to Basic Education: The Role of the Court and Civil Society* (2019); also see McConnachie and Brener “Litigating the Right to Basic Education” in Brickhill (ed) *Public Interest Litigation in South Africa* (2018) 281.

³⁴ 84 of 1996.

³⁵ CESCR *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)* (2009) E/C.12/GC/20. Adopted 02/07/2009 par 30.

³⁶ UN CESCR *General Comment No 13* par 34.

irrespective of their legal status in their country of residence.³⁷ The CRC reiterated that such education should be provided without discrimination. Again, South Africa as a signatory to these legal instruments is under an obligation to ensure the enjoyment of the right to basic education for all children within its jurisdiction, regardless of their documentation status.

In 2018, the CESCR, in its concluding observation on South Africa, raised concerns around the number of undocumented migrants, refugees and asylum-seeking children who are not enrolled in formal education.³⁸ The CESCR thus recommended that South Africa ensure that children have access to education regardless of their immigration status.³⁹ It is evident from an international law perspective that refusing to enrol undocumented children at public schools or calling for their removal from public schools is not legal, and is a violation of the right to basic education of the affected children. The courts in South Africa have also made a pronouncement on the question of whether undocumented children have the right to basic education in South Africa. The next section of this article examines the intervention of the court in determining whether undocumented children have the right to basic education in South Africa.

3 2 Court intervention in determining the legality of denying undocumented children admission into public schools

In the case *Centre for Child Law v Minister of Basic Education*⁴⁰ (popularly known as the *Phakamisa* judgment), the courts had the opportunity to respond to the question whether excluding undocumented children from enrolment in public schools in South Africa is legal. The case involved two distinct applications. The first was filed by the Centre for Child Law and the School Governing Body of Phakamisa High School, and concerned the legality of an Eastern Cape Department of Education (ECDE) policy decision to withdraw financing to schools with undocumented learners.

Prior to 2016, the ECDE provided funding to all learners at Eastern Cape Schools, regardless of whether such learners had identity documents. This was to ensure that all children had access to basic education and basic nutrition through the National School Feeding Programme. However, in 2016, the ECDE sent out circular informing schools of its intention to withhold funding to schools in respect of learners who did not have an identity document or passport captured on the South African Schools Administration and Management System (SASAMS).⁴¹ The implication of this decision was that schools enrolling undocumented learners would no longer receive funding for those learners. This also meant that

³⁷ UN CRC *General Comment No 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (2005) par 41.

³⁸ Committee on Economic, Social and Cultural Rights concluding observations on the initial report of South Africa E/C 12/ZAF/CO/1 par 72.

³⁹ *Ibid.*

⁴⁰ *Supra* par 126.

⁴¹ *Centre for Child Law v Minister of Basic Education supra* par 5–9.

undocumented learners would be excluded from schools that did not make provision for unfunded learners.

The second aspect of the application was brought by 37 children on behalf of all children in a similar situation in South Africa. The application challenged the lawfulness of paragraphs 15 and 21 of the Department of Basic Education (DBE)'s Admission Policy as well as sections 39 and 42 of the Immigration Act, on the basis that they violate several constitutionally protected rights of undocumented children.

Paragraph 15 of the Admission Policy requires that a parent must provide a birth certificate for a child when applying for admission for their children to a public school. The paragraph further stipulates that if a parent is unable to produce a birth certificate, the child may be admitted conditionally, but still faces potential exclusion from school after three months if the document is not forthcoming.

Paragraph 21 of the Admission Policy provides that persons who are unlawfully in the country applying for admission of their children into public school must show evidence that they have applied to the Department of Home Affairs to legalise their stay in the country in terms of the Immigration Act. The Department of Basic Education and the Department of Home Affairs defended both applications vigorously, arguing that the policies and provisions challenged by the applicants were put in place to discourage people from illegally entering the country to acquire free education for their children.

In a robust judgment, the court found that paragraphs 15 and 21 of the Admission Policy for public schools were inconsistent with the Constitution and, therefore, invalid. The court observed that children could not be prevented from accessing education because it is significant to the development of children. The judgment underlines the significance of education for all children in the following manner:

“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 work opportunities. To this end, access to school – an important component of the right to a basic education guaranteed to everyone by section 29(1)(a) of the Constitution – is a necessary condition for the achievement of this right.”⁴²

Consequently, the court held that there is no justifiable reason for undocumented children to be denied access to basic education on account of a lack of proper documentation.

The court also declared that the circular issued by the ECDE in 2016 was invalid and inconsistent with the South African Schools Act⁴³ and the Constitution.⁴⁴ The circular provided that funding to schools would be based only on learners with valid identity documents, permits or passports. The

⁴² *Centre for Child Law v Minister of Basic Education supra* par 3.

⁴³ 84 of 1996.

⁴⁴ *Centre for Child Law v Minister of Basic Education supra* par 135.

court noted that section 29(1)(a), read with section 28(2)(a) of the Constitution, accords everyone a right to basic education that is not subject to the condition of the provision of an identity document. The court also held that the decision of the ECDE was contrary to section 28(2)(a) of the Constitution, which provides that the best interests of the child are of paramount importance in every issue concerning the child.⁴⁵

The court further held that the exclusion of undocumented children on the basis of a lack of identity document is discriminatory within the meaning contemplated in the equality clause and in section 5 of the South African Schools Act, which states:

“A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.”⁴⁶

The court also found that the decision of the ECDE infringes on the right to dignity of the affected children, as provided for by section 10 of the Constitution. Consequently, the court ordered the ECDE to admit all children who are not in possession of official birth certificates into public schools; and where a learner cannot provide a birth certificate, the school is directed to accept alternative proof of identity, such as an affidavit or sworn statements deposed to by the learner’s parent or caregiver.⁴⁷

The court also pronounced that sections 39 and 42 of the Immigration Act do not prohibit the admission of illegal foreign children into school, and do not prohibit the provision of basic education to illegal foreign children. The judgment, therefore, prohibits the ECDE from removing or excluding children from schools, including illegal foreign children already admitted, on the basis that the children do not have identity documents or passports.⁴⁸

The outcome of this case was important in the context of access to basic education for undocumented children in South Africa. The judgment affirms that the right to basic education as provided for in the Constitution is guaranteed to all children, irrespective of the immigration status of the child or the lack of identity documentation. However, despite this robust judgment, it is surprising that in 2023, the media space is still inundated with the rejection of undocumented children into public schools owing to the lack of identity documents. This raises the question of the measures put in place to implement the judgment. What gaps exist? The next section of the article interrogates these issues.

⁴⁵ *Ibid.*

⁴⁶ *Centre for Child Law v Minister of Basic Education supra* par 82–84.

⁴⁷ *Centre for Child Law v Minister of Basic Education supra* par 135.

⁴⁸ *Ibid.*

4 MEASURES TO IMPLEMENT THE OUTCOME OF THE JUDGMENT AND THE IMPACT OF SUCH MEASURES

Indications are that efforts have been made to ensure the implementation of the *Phakamisa* judgment, and that such efforts have achieved some levels of success. This section examines some of the efforts made to implement this judgment.

4.1 Circular 1 of 2020 by the Department of Basic Education

Following the *Phakamisa* judgment, the Department of Basic Education issued Circular No 1 of 2020, titled “Admission of Learners to Public Schools”. The circular was issued to all provincial heads of department and other stakeholders. The circular not only explained the judgment of the court, but also alerted all stakeholders across the country to the fact that, while the judgment affected an issue that arose in the Eastern Cape, “it set the tone of the appetite of the Courts on the learners’ right to basic education throughout the country.”⁴⁹ Consequently, the Department of Basic Education in the circular, noted that the Admission Policy for Ordinary Schools will be amended in due course to reflect the recommendation of the judgment, and advises all schools across the country to follow the precedent set out in the judgment, which is to ensure that children are not denied access to basic education on the basis that they do not possess identity documents or on the basis of their immigration status.⁵⁰

The circular strives to ensure that the court’s ruling is clarified and made available to all stakeholders. This was to ensure that the impediments that have prevented undocumented children from exercising their right to a basic education were removed. However, the impact of this endeavour on securing undocumented children’s access to basic education remains slow to emerge. More of this is discussed in a later section of this article.

4.2 New draft admission policy for public schools

On 10 February 2021, as part of the measures aimed at implementing the outcome of the judgment, the Department of Basic Education submitted for public comment a new draft Admission Policy for Ordinary Public Schools.⁵¹ While the new admission policy still requires learners to produce identification documents, it states that schools may not prevent the admission of learners from schools, or exclude learners from enjoying the

⁴⁹ Minister of Basic Education “Admission of Learners to Public Schools” (11 February 2020) *Circular No 1 of 2020* par 2.1.

⁵⁰ *Ibid.*

⁵¹ Department of Basic Education *Call for Comments on the Admission Policy for Ordinary Public Schools* GN 38 in GG 44139 of 10-02-2021 Schedule.

right to basic education, owing to a lack of documentation.⁵² Although such provisions may serve as a guide for education departments and stakeholders across the country to remove barriers that impede undocumented children's access to basic education, certain aspects of the policy still leave room or gaps that could be detrimental to undocumented learners' access to basic education.

For example, the new policy includes a long list of documents that parents or guardians must provide when requesting the admission of children who are not South African nationals.⁵³ The former policy did not require several of these documents. Civil society organisations (CSOs) have raised concerns as to whether learners will be admitted if their parents or guardians are unable to submit these documents.⁵⁴

The draft policy requires school officials to report situations where parents or guardians are unable to produce certain documents, or where certain information cannot be verified, to the Department of Home Affairs or the Department of Justice and Correctional Services.⁵⁵ The inference is that parents who are not legally present in the country will be afraid to send their children to school for fear of being reported to the Department of Home Affairs for failing to produce the requisite documentation, and of being deported. Such a move will have adverse impact on the right to basic education of children that do not have the required documents.

As can be seen from the preceding discussion, initiatives have been undertaken to put the court's decisions into action. As may also be seen, gaps exist in the measures put in place giving effect to the judgment. If not handled appropriately, these loopholes could restrict undocumented children's access to basic education in the country. The following section of the article investigates the challenges that have continued to obstruct undocumented children's access to basic education in the country, despite the law's clear statement that the right to basic education extends to everyone.

5 FACTORS THAT HAVE CONTINUED TO IMPEDE ACCESS TO BASIC EDUCATION FOR UNDOCUMENTED CHILDREN

The preceding discussion has demonstrated that the right to basic education applies to every child in South Africa, and the courts have affirmed that the enjoyment of this right is not contingent on the submission of a birth certificate, identity document or a child's immigration status. Despite this

⁵² Par 23 of the draft Admission Policy 2021.

⁵³ Par 20 of the draft Admission Policy 2021.

⁵⁴ SECTION 27, Centre for Child Law, Children's Institute, Legal Resources Centre, Equal Education Law Centre and Lawyers for Human Rights *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).

⁵⁵ Par 21 and 22 respectively of the draft Admission Policy 2021.

position, factors such as a lack of proper awareness or understanding of the laws protecting undocumented children's right to basic education, a lack of collaboration among various stakeholders in the education sectors, and the introduction of an online admission application portal have continued to work against undocumented children's access to basic education in South Africa. The next section discusses some of these concerns.

5 1 Continued lack of awareness of the right to basic education of undocumented children

As extensively discussed in this article, the right to basic education is a fundamental human right to which everyone is entitled. Unfortunately, there appears to be a lack of basic understanding among education stakeholders in the country concerning the nature of the right to basic education, and who is entitled to it. This viewpoint was expressed in a joint report submitted to the CESCR by CSOs on the review of the information received from South Africa on follow-up to the concluding observations on its 2021 report. According to the report, schools across the country are not adequately informed about undocumented children's right to access basic education.⁵⁶

The report further noted that several schools in the country are unaware of Circular 1 of 2020 or the *Phakamisa* judgment, which explicitly states that undocumented children have the right to basic education and should not be denied access because they lack a birth certificate or identity document.⁵⁷ Furthermore, schools that are aware of the judgment or circular believe that they apply solely to schools in the Eastern Cape.⁵⁸ Consequently, undocumented children continue to be denied access to basic education on account of a lack of proper communication and awareness on the right to basic education of undocumented children.

5 2 Weak collaboration among stakeholders

Fulfilling or realising the right to education necessitates the collaboration of various stakeholders, including the Department of Basic Education, provincial education departments, school governing bodies and the Department of Home Affairs. Unfortunately, there is a seeming lack of, or insufficient, collaboration among the multiple stakeholders, which has impacted undocumented children's access to basic education. Inadequate cooperation has made the successful implementation of the *Phakamisa* judgment problematic. This was evident in SECTION 27 Joint Submission to CESCR.⁵⁹ It was noted in the joint submission that during a training session organised for school administrators and social workers held in Mpumalanga from 23 to 25 August 2021 by Lawyers for Human Rights in collaboration with the Consortium for Refugees and Migrants in South Africa, where the

⁵⁶ SECTION 27 *et al* Joint Submission to CESCR par 22 and 27.

⁵⁷ *Ibid.*

⁵⁸ SECTION 27 *et al* Joint Submission to CESCR par 23.

⁵⁹ SECTION 27 *et al* Joint Submission to CESCR par 27.

participants revealed that they have neither received nor heard of the *Phakamisa* judgment or the accompanying circular.⁶⁰

The fact that some school officials were still unaware two years after the judgment, of both the ruling and the circular issued following the judgment reinforces the notion that there is a lack of effective collaborative effort among various stakeholders to implement the judgment. It is hardly surprising that the judgment did not accomplish its anticipated objective, and that schools continue to refuse admission applications from undocumented children owing to a lack of requisite documentation.

The lack of collaboration is also evidenced by several reports on the problems experienced in obtaining from the DHA birth certificates and other associated documents that are required by the Admission Policy.⁶¹ While the Admission Policy requires learners to provide identity documents or birth certificates, obtaining such documentation from the DHA has proved difficult for parents and guardians of these undocumented children.

Speaking about why children become undocumented in the country, Anjuli Maistry, a senior attorney, stated that parents and caregivers are unable to meet the strict requirements of the Births and Deaths Registration Act,⁶² which include the supply of documentation that they are unable to receive from the DHA.⁶³ For example, unmarried fathers are not permitted to register the birth of their children without the presence of the mother, and an expensive paternity test.⁶⁴ Several children who may have qualified for asylum are unable to receive the necessary documentation owing to the DHA's well-documented problems and practices.⁶⁵ There is a need for the various stakeholders to collaborate and work together to ensure that every child, including undocumented children, has access to basic education as required by the law.

⁶⁰ *Ibid.*

⁶¹ South African Human Rights Commission *Position Paper: Access to a Basic Education for Undocumented Learners in South Africa* (September 2019). Also see Beko *The Impact of Unregistered Births of Children in South Africa and How Their Rights to Essential Services and Basic Education Are Affected* (master's dissertation, University of the Western Cape 2021); Macdonald "South Africa's Birth Registration System Challenged Over 'Unconstitutional' Requirements" (2023) *BiometricUpdate.com* <https://www.biometricupdate.com/202303/south-africas-birth-registration-system-challenged-over-unconstitutional-requirements#:~:text=South%20African%20human%20rights%20organization,children%20born%20in%20the%20country> (accessed 2023-05-10).

⁶² 51 of 1992.

⁶³ Broughton <https://www.newframe.com/undocumented-children-win-right-to-basic-education/>.

⁶⁴ S 10(1)(a) of 51 of 1992.

⁶⁵ Kavuro "Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market" 2015 *Law Democracy & Development* 258. Also see Schockaert and Venables "Behind the Scenes of South Africa's Asylum Procedure: A Qualitative Study on Long-Term Asylum-Seekers From the Democratic Republic of Congo" 2020 39 *Refugee Survey Quarterly*; Scalabrini Centre of Cape Town "The Asylum System in South Africa: 5 Problems and 5 Solutions" (2019) <https://www.scalabrini.org.za/the-asylum-system-in-south-africa-5-problems-and-5-solutions/> (accessed 2023-05-09).

5 3 Online application portal for admission to public schools

Another factor that has continued to affect access to basic education for undocumented children is the use of online application portals. Gauteng,⁶⁶ the Western Cape,⁶⁷ and the Northern Cape⁶⁸ have established an online application portal for admission into public schools. Online applications require parents and guardians to submit identity documents. No provision is made for those without an identity document to bypass this requirement in the portal. The provincial governments do not provide any information on the portal on what learners without identity documents should do or what additional documents they need to provide.⁶⁹

It was reported that, people who approach schools physically to hand in alternative documentation, such as affidavits, face hostility and threats of being reported to security officials.⁷⁰ As a result, a substantial number of children living in these provinces who do not have an identity document may be barred from attending public schools. While the online application system is already in place in the three provinces mentioned above, there are hints that other provinces will implement this as well, implying that the number of undocumented children who will be unable to attend public school will skyrocket.

The implementation of an online admission application is a novel initiative that aims to increase transparency and sanity in the admissions process. However, a more flexible approach is required to satisfy the application needs of undocumented children, as mandated by law. Until that happens, a considerable number of undocumented children will be denied admission to basic education in provinces that have implemented the online application process. A combination of these obstacles has continued to limit undocumented children's access to basic education in South Africa.

6 CONCLUSION

In the discussion above, the article has demonstrated that the call for the exclusion of undocumented children from public schools in South Africa is not consistent with extant laws, and is, as such, illegal. The right to basic education, as embodied in numerous international and domestic legal instruments, is a universal right, and can only be restricted on justified grounds. The enjoyment of this right does not require the right holder to

⁶⁶ Gauteng Provincial Government "Apply for Admission to Public Schools" (no date) <https://www.gauteng.gov.za/Services/GetServices?serviceld=CPM-001592>.

⁶⁷ South African Government "Western Cape Education on 2024 School Admission Process" (8 March 2023) <https://www.gov.za/speeches/monday-13-march-2023-2024-school-admission-process-begins-8-mar-2023-0000>.

⁶⁸ Province of the Northern Cape "All Systems GO for Online Admission System" (no date) <http://www.northern-cape.gov.za/index.php/component/content/article?id=1610:all-systems-go-for-online-admission-system> (accessed 2023-05-11).

⁶⁹ SECTION27 *et al Joint Submission to CESCR* par 26.

⁷⁰ SECTION27 *et al Joint Submission to CESCR* par 24.

produce or possess a birth certificate or identity documents. While South Africa, as a sovereign state, has the power to enforce its immigration laws, the right to basic education is not determined by the immigration status of the children involved; there is therefore a need to separate immigration-related issues and undocumented children's access to basic education. This position was affirmed by the court in the *Phakamisa* case, as discussed. Despite clear provision in the law protecting the right to basic education of undocumented children in the South Africa, access to basic education has remained problematic for children.

The lack of basic understanding of the nature of the right to basic education, administrative gaps, and a lack of effective collaboration among stakeholders have continued to jeopardise undocumented children's access to basic education in the country. Resolution of some of these challenges calls for concerted effort and collaboration among stakeholders. It requires that stakeholders be well informed about the nature of the right to basic education and the obligation it imposes on the State to ensure that all children, regardless of whether they have the required documents, have access to basic education. Considering the pivotal role education plays for both individuals and society in general, educating children significantly enhances their contribution to the development of the country and society at large. Conversely, denying these children access to education for lack of necessary documents will result in some of them taking to criminality and constituting a threat to the social fabric of society in the near future. In essence, a cost-benefit analysis would suggest that the benefit of granting these children access to education far outweighs the cost.