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# Legal Services Newsletter

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## UNDOCUMENTED LEARNERS

A full bench of the Eastern Cape High Court (sitting in Grahamstown) delivered a judgement in December with regard to the admission to schools of learners without proof of identity.

This judgement is significant due the different interpretations of law and policy contained therein, and the practical application of the decision throughout the country.

It is general knowledge that there are parts of the country where Department Home Affairs officials don't hesitate to threaten school principals with criminal charges if they were to allow undocumented "foreigners" in their schools.

## THE JUDGEMENT SHINES A LIGHT ON THIS PROBLEM

A well known NGO approached the Eastern Cape High Court in 2016 on behalf of 99 children (which was later reduced to 37 children from a particular school). These children were refused education, specifically access to schools due to the fact that they had no means of identification. (In this case there was no indication that the learners were not RSA citizens).

Their exclusion from the school environment was due to Sections 15 and 21 off the Admissions policy and a 2016 circular from the ECDE which indicated that they are not allowed to be admitted, and (insofar as they were admitted) would not count towards the headcount of the school for the purposes of calculating subsidies.

Various other NGOs joined the litigation during this process. The Departments of Basic Education as well as Home Affairs were also joined to the matter.

The *case proceeded along a very complicated litigation pattern, the details of which will not be mentioned herein in its entirety.*

There were various detailed arguments heard by the Court in the conclusion of this matter.

The "Children's" argument was that the Constitution provided "EVEYONE" with the right to basic education; and that this should be considered in conjunction with the duty to always act in the best interest of a child above all else.

The argument was that this right cannot be limited or qualified (and that it is an immediately realisable right).

The opposition from the two state departments was that legislation required that every child be

registered at birth; and that they were acting in accordance with the Constitution, the Children's Act, Immigration legislation and the legislation pertaining to the registration of births and deaths.
They argued further that the restrictions put in place by the Circular were based in sound reasoning, and are allowed in terms of Sec 36 of the Constitution.
In the period between the first court case in 2016 and 2019, the ECDE amended the 2016 circular with a new circular 1 of 2019 alleviated the situation somewhat in that these learners would be admitted, but with a set timeframe by which the parents/guardians of the child must submit identification documents.
The Departments argued in the final sitting in 2019 that the matter had become moot.
The Court was not impressed
In light of the fact that there are approximately 1 190 434 undocumented learners (830 689 citizens and 167 734 foreigners) the matter was deemed quite significant.
According to the Courts analysis of how these learners came to be in this situation, it concluded that such learners would find it very difficult, if not impossible to ever obtain sufficient identification documentation.
The Court found: *"[ para 65 ] …….. Attempts to register some of the children, absent their biological parents whose whereabouts are unknown, have proved futile. Resulting from this. the children are stuck in limbo and there are no prospects of them obtaining the birth certificates which are a prerequisite to obtaining identification documents …"*
The Court found that the parts of the Circular of 2016 (and therefor the policy), which placed restrictions on registration at schools were unconstitutional.
The Court further found that Constitutional rights (especially those that are unrestricted), cannot be limited or qualified by mere policy.(Section 36 in the Constitution only allows limitation through a "…law of general application…").

## THE DIFFICULT PART OF THE JUDGEMENT DEALS WITH THE INTERPRETATION OF PROVISIONS OF SECTIONS 39 AND 42 OF THE IMMIGRATION ACT

1. The provisions reads: "……*[108]* Section 39 *provides:*
   *1.1 No learning institution shall knowingly provide training of instruction to—*
      *1.1.1. an illegal foreigner;*
      *1.1.2. a foreigner whose status does not authorise him or her to receive such training or instruction by such person; or*
      *1.1.3. a foreigner on terms or conditions or in a capacity different from those contemplated in such foreigner's status.*

      *If an illegal foreigner is found on any premises where instruction or training is provided, it shall be presumed that such foreigner was receiving instruction or training from, or allowed to receive instruction or training by, the person who has control over such premises, unless prima facie evidence to the contrary is adduced."*

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

      *[110] Anyone failing to comply with the duties and obligations set out, inter alia, under* sections 39 *and* 42 *shall be guilty of an offence and liable on conviction to a*

*fine or imprisonment not exceeding five years.*[90]"

2. The court made short work of the general principal of the sections.
   [ in para 124 – 125 ] ''…….*[124] There is a longstanding presumption that the legislature does not intend to alter the existing law more than is necessary.*[101] *The legislature is also presumed to know the existing laws.*[102] *The Schools Act was promulgated before the enactment of the* Immigration Act. The *preamble to the Schools Act recognises that the country requires a new national system of schools that will provide education to "all learners". Learners are defined in the Schools Act as "any person receiving an education or obliged to receive education in terms of the Act." This definition does not draw any distinction between learners that are legally present in the country and those that are not. Instead, section 3(1) 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. 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 unfairly discriminating in any way.*
   *[125] In light of the a foregoing, and in the absence of an express indication that the* Immigration Act intended *to repeal or amend the Schools Act, the* Immigration Act must *be interpreted not to detract from the right recognised under the Schools Act for all learners to receive education……. ''*
3. The Court further finds that the South African Schools Act (which is specific) preceded the Immigration Act, and that the more general wording used in the Immigration Act does not refer to basic education.
   ''…….*[126] The* Immigration Act makes *no reference to "school", "education" or "basic education". The significance of this 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. Accordingly, in light of these provisions, 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. Had it been the intention of Parliament to do so,*[103] *it would have had to be explicit in using these terms. It did not. Instead, it referred to "learning institutions" and to "training and instruction". These terms ought to be interpreted to refer not to the rights of the children who receive basic education, but adults attending "learning institutions" to obtain something over and above "basic education" and are thereby trained or instructed in furtherance of their pursuits. Were the* Immigration Act to *be interpreted in this way, none of the rights protected in the Constitution, international law, and the Schools Act would thereby be trumped.*
   *[127] Therefore,* sections 39 *and* 42 *of the* Immigration Act fall *to be interpreted in a way that does not prohibit children from receiving basic education from schools. This interpretation is consistent with the right to basic education as enshrined in* section 29*; every child's rights under* section 28(2) *to have their best interests taken into account in matters concerning them; international conventions' emphasis on providing education to all children irrespective of their status and the existing obligation in the Schools Act placed on parents; and Schools to ensure that all learners receive basic education.*

The Court continued on to:

Find that the 2016 ECDE circular and the provisions of the admission policy were unconstitutional;
Order the DBE and Provincial Department to admit learners who do not have the prescribed birth-certificates;
Find that: "*….. the Principal of the relevant school is 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 … "*
Find that: The authorities are not permitted to remove or exclude learners who have already been admitted – whist still lacking identification documents.
Find that: The authorities are not permitted to remove or exclude learners who have already been admitted – whist still lacking identification documents.
The above mentioned represents the situation from the date of the judgement.
This might change if a legitimate appeal is filed.
A later Court might make a different ruling on appeal.
The past practice of refusing to count "undocumented learners" might affect a schools grading.
The Court did not give any detail in relation to what would be regarded as other sufficient methods of identifying the particulars or identity of a learner.