

A Case for the Right to Education for Stateless and Undocumented Children: A South African Analysis in the Light of International Law

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Abstract

This paper is grounded in the right to education, guaranteed to every child, whether stateless or undocumented. Being stateless means that the child is not considered to be a national by any State under the operation of its law and when a child is undocumented it means that they have no government-issued proof of identity. The *Constitution of the Republic of South Africa*, 1996 provides the right to education for all children, regardless of their nationality. However, whether stateless or undocumented, they encounter impediments when they attempt to exercise their right to education. The study questions whether the South African Government is complying with its constitutional and international legal obligations to provide the right to education to all children. The paper contends that it is not sufficient to state that every child has the right to education, and that there is a need to formulate guidelines and procedures to be followed in cases where children are undocumented or stateless. In addition, the paper analyses the relevant education laws and policies together with the immigration laws and the effects they have on one another. It further addresses how the provisions of immigration law related to education impede undocumented and stateless children from accessing the right to education. Accordingly, the study identifies the gaps in the laws regulating the right to education and their implications when stateless and undocumented children seek to exercise the right to education. This paper recommends that the South African Government adapts its education laws and procedures in ways that consider the circumstances of stateless and undocumented children.

Keywords

Statelessness; undocumented; children; education; South Africa; international law.

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1 Introduction

Various pieces of legislation deal with the right to education.¹ The study is broadly grounded on the *Constitution of the Republic of South Africa, 1996* (the Constitution) in relation to access to education. The Constitution provides that everyone has the right to basic education, including basic adult education, and the right extends to further education, which the State must gradually make available and accessible through reasonable means.² Despite the promise of further education in institutions of higher learning, the result is that no access will be given without proper documentation. This, for undocumented and/or stateless children, remains a struggle that is yet to be addressed.

Furthermore, section 28(1)(a) provides that every child has the right to a name and nationality from birth. Section 28(1)(a) is of interest in this paper because it provides for the right to nationality, which is proven through documentation such as birth certificates and identity documents which stateless and undocumented children do not possess. They do not possess identification documents which are required by national educational policies to register at schools,³ hindering them from exercising their right to basic education.

As will be discussed below, the researchers posit that the *Immigration Act 13 of 2002* (the *Immigration Act*) contains provisions that are detrimental to stateless and undocumented children. The Constitution accentuate the child's interests, showing them to be of paramount importance in every matter concerning the child. The concept contained in the Constitution, namely that of a child's best interests, is of paramount importance as it is also cemented in international and/or regional instruments such as the *Convention on the Rights of the Child* (CRC) and the *African Charter on the Rights and Welfare of the Child* (ACRWC). Article 4(1) of the ACRWC importantly provides that in "all actions concerning the child undertaken by

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¹ Other relevant legislation dealing with documented and undocumented children in South Africa include the *Children's Act 38 of 2005*, the *Births and Deaths Registration Act 51 of 1992*, and the *South African Citizenship Act 88 of 1995* (the *Citizenship Act*), and the *South African Schools Act 84 of 1996* (SASA).

² Section 29(1)(b) of the *Constitution of the Republic of South Africa, 1996* (the Constitution).

³ GN 2342 in GG 19377 of 19 October 1998 (*National Admission Policy for Ordinary Schools of 1998*).

any person or authority the best interests of the child shall be the primary consideration." Accordingly, this shows how essential it is to protect the right to education for stateless and undocumented children despite the children having nationality and identification issues. Despite the existence of various laws applicable to children's rights in South Africa, challenges are experienced in relation to access to education for stateless and undocumented children.⁴

The challenges faced by undocumented or stateless children do not end with basic education but continue to the time when they must register at institutions of higher learning. For example, at the matric level such children are unable to register with the Department of Basic Education (DBE) in order for them to write the national exams and obtain a National Senior Certificate.⁵ Consequently, even if stateless children write their exams their results will not be processed, and they will be prevented from attending tertiary institutions and acquiring formal work in the future.

2 The international normative framework

This section examines how international and regional law addresses the right to education. While some instruments guarantee everyone's right to an education, others apply only to certain groups such as children, refugees or immigrants. This study examines instruments that guarantee this right with the understanding that a reference to children would include stateless and undocumented children.

2.1 *The right to basic education in international and regional law*

The right to education is acknowledged in many human rights instruments. These instruments broadly emphasise that it is in the best interest of every child to exercise the right to education. Equality is the core foundation in providing the right to education, and no child must be discriminated against on the basis of the child's legal status. South Africa is a party to some of the instruments providing for the right to education. For example, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁶, the CRC⁷ (Articles 28 and 29), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in*

⁴ The concepts "stateless" and/or "undocumented", though they have different meanings, will be used interchangeably throughout the article. The paper refers to undocumented children because they are at risk of becoming stateless.

⁵ SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-to-join-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court> 1.

⁶ See Articles 13 and 14 of the ICESCR.

⁷ See Articles 10 and 14 of the CEDAW.

Africa (the Maputo Protocol of 2003) (Article 12).⁸ The ACRWC also provides for the right to compulsory basic education in Article 11(3)(a). It is only higher education that is provided for in Article 11(3)(c) in terms of "capacity and ability by every appropriate means". As noted above, Article 4 of the ACRWC emphasises the "best interests of the child" principle. Subsection 1 states that "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration." Again, non-discrimination is also emphasised in Article 3 and is not allowed on the basis of national and social origin, birth or any other status. Article 22 of the *Convention relating to the Status of Stateless Persons* also guarantees the right to public education.

Article 13(2)(a) of the ICESCR provides that "[p]rimary education shall be compulsory and available free to all." Article 13(1) stipulates that "education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms." Article 2(2) stipulates that the rights that are pronounced in the ICESCR shall be practised free from all forms of discrimination such as national or social origin, birth, or other status. Furthermore, Article 10(3) guarantees in the relevant parts that "[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions." As a result, the South African Government should comply with and fulfil its obligations under these instruments as provided for in sections 39 and 233 of the Constitution.

Governments violate the rights of learners by applying standards stipulating who should fully exercise the right to education.⁹ Such standards would include but are not limited to "misconception around the extent to which certain categories of persons are entitled to the enjoyment of rights, particularly for migrants in an irregular situation, stateless persons, and those without official documentation for the purpose of identification."¹⁰ This is usually done through advancing policies and practices inconsistent with the law. The South African Government is not immune to this practice as proven in the declaration it made following the ratification of the ICESCR, discussed below.¹¹

⁸ See Article 12 of the Maputo Protocol of 2003.

⁹ SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-tojoin-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court-3-4>.

¹⁰ SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-tojoin-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court-3-4>.

¹¹ Nanima and Durojaye 2019 *LDD* 270-298. See also CCL 2022 https://pmg.org.za/files/221115Submission_-_Centre_for_Child_Law.docx.

The international legal instruments examined above provide insight into the importance of the right to education. Therefore, the policies and regulations related to the right to education must be clear. This is to avoid different interpretations resulting in the violation of the right by educational institutions and any stakeholders involved with undocumented and stateless learners.¹² All rules, regulations, and policies must be consistent with the Constitution, which in section 39 considers that the interpretation of all rights must be consistent with international law. The application of section 39, read together with section 233 of the Constitution, calls for the interpretation of legislation in a manner that prefers a "reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."¹³

To the extent that some of the policies and practices experienced by the undocumented and stateless learners from the South African Government do not conform to the provisions of sections 39 and 233 of the Constitution, the South African Government has failed to comply with the international human rights standards related to the right to education. It is the authors' view that if the South African Government, especially through the DBE and Department of Home Affairs (DHA) continues to show a lack of concern in providing solutions, this translates into an uncertain future for the children affected and their immersion in a cycle of poverty-stricken generations. The contention made in this regard is in support of the removal of barriers hindering stateless and undocumented children from enjoying the fruits of the right to education.

In addition to the points made above, it is the authors argument that every child should be able to enjoy the right to education, notwithstanding the child's nationality. Accordingly, the enjoyment of the right to education should be an absolute right that every child should be able to exercise, notwithstanding the child's nationality, whether documented and/or stateless; and whether in the context of basic education or institutions of higher learning.

2.2 *The right to education for stateless children through the ACRWC*

A closer look at the provisions of the ACRWC in relation to stateless children guides the discussion towards Article 6, which pronounces the right to

¹²

SAHRC 2019
<https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-tojoin-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court> 9.

¹³

SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-tojoin-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court> 10-11.

nationality and birth registration. Of interest and particularly linked to stateless children is the wording of subsection 4, which stipulates as follows:

States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

Failure by any state to apply Article 6 would lead to the child being stateless with the consequences of not being afforded the rights guaranteed to nationals. While the right to education is provided for in the ACRWC, it is made available for every child and this means that whether the child is stateless or not, the child must be afforded the right. Furthermore, the child may not be discriminated against while the child exercises this right. In the case that the child encounters a situation that may hinder him/her from exercising any rights provided for, the ACRWC takes a step further and emphasises that any person or authority must consider the best interest of a child when making decisions related to that child. Read together, these provisions stipulate that when an issue related to a stateless child's education arises and a right is affected, the "best interest of the child" principle will be activated.

3 The normative guidance on the right to basic education in South Africa

Sections 39(1) and 233 the Constitution convey the understanding that the Bill of Rights shall be interpreted in accordance with international law. This means that international law provides details about the nature of the right to education. The ICECSR calls for the right to education to be immediately realised.¹⁴ Linked to the provisions of the ICECSR, as will be seen below, unlike some other socio-economic rights the right to basic education is immediately realisable.¹⁵ Section 29(1)(a) of the Constitution provides that everyone has the right to basic education. The courts in South Africa have consistently ruled that the right to basic education is an instant entitlement rather than one that can be realised over time, in accordance with international law.¹⁶

¹⁴ CESCR 1999 <https://www.refworld.org/pdfid/4538838c22.pdf> (CESCR General Comment No 13) paras 31, 32. See also CESCR 1990 <https://www.refworld.org/docid/4538838e10.html> (General Comment No 3) para 1.

¹⁵ *Governing Body of the Juma Masjid Primary School v Essay* 2011 8 BCLR 761 (CC) para 37 (*Juma Masjid*).

¹⁶ These cases include, for example, cases such as *Juma Masjid, Moko v Acting Principal of Malusi Secondary School* 2021 3 SA 323 (CC), *Centre for Child Law v Minister of Basic Education* 2020 3 SA 141 (ECG) (*Centre for Child Law*), *Section 27 v Minister of Education* 2013 2 SA 40 (GNP) para 21 referring to the *Juma Masjid*

Two of the relevant regulations and policies in South Africa include the National Admission Policy for Ordinary Schools of 1998 (National Admission Policy), and the *South African Schools Act* 84 of 1996 (SASA). The *National Education Policy Act* 27 of 1996 governs educational policies. According to this Act, the Minister of Education has the authority to enact educational policy in terms of sections 3(4) and 7. The National Admission Policy provides for documents that are required for admission and also provides that no student will be unfairly discriminated against.¹⁷ However, the policy does not provide for alternative documents such as refugee or asylum seeker permits to allow admission for children who may not have the documents required in the policy based on their legal status.¹⁸

The use of the word "may" in section 15 of the National Admission Policy refers to the conditional admission of students pending their final admission upon the parents ensuring "that the admission of the learner is finalised within three months of conditional admission" through the submission of the required documents.¹⁹ For example, a birth certificate will be required. Unfortunately, stateless and undocumented children will not be able to produce it, which defeats the purpose of the right to education.

Despite the existence of provisions not allowing unfair discrimination when admitting undocumented learners into schools, undocumented learners still struggle to be admitted. It is argued that in cases where a child is found without documents, the assumption must be that the child is a refugee or is stateless and must be admitted into school. This is aligned with the provisions of section 44 of the *Immigration Act*, which stipulate in the relevant parts that "any person whose status or citizenship could not be ascertained, cannot be prevented from receiving services or performance 'to which illegal foreigners and foreigners are entitled under the Constitution or any law.'"²⁰ This is due to the fact that some undocumented children or stateless children are not necessarily foreigners but instead children born in

case and *Minister of Basic Education v Basic Education for All* 2016 4 SA 63 (SCA) para 36.

¹⁷ Sections 9 and 15 *National Admission Policy for Ordinary Schools* of 1998 read with ss 19-21 (for the documents required) and s 5 of the SASA.

¹⁸ Section 15 of the *National Admission Policy for Ordinary Schools* of 1998.

¹⁹ On 10 February 2021 there was a call for comments on the *National Admission Policy for Ordinary Schools* of 1998 which includes changes such as removing words like "may". Documents such as asylum seeker visas or refugee visas have been included, but the final stages of the policy had not been reached at the time this paper was written; see GN R38 in GG 44139 of 10 February 2021. Also see SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 6-7.

²⁰ Also see SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-to-join-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court> 7.

rural areas, and whose birth was not correctly captured or not yet captured. For those that are migrants and undocumented or are stateless for various reasons, they should be afforded their right to education, as the right is provided for without excluding any child on the basis of the child being documented.

3.1 *The position of stateless children in South Africa*

This section discusses the definition of a child and who a stateless child is and contextualises the categories that undocumented children may fall under, considering their risk of becoming stateless and their status having not been ascertained in terms of the *Immigration Act*. It further contextualises the place of the four guiding principles on the rights of the child, with guidance from the ACRWC.

3.1.1 *Defining the term stateless child*

Before we define the term stateless child, it is prudent to understand the definition of a child and the rights a child has. Article 2 of the ACRWC defines a child as "every human being below the age of 18 years". The CRC also has a similar definition in Article 1. Both the CRC and the ACWRC not only define who a child is but they explain their rights too. Four essential principles form the foundation of children's rights, which must be seen as rights and as guides to practice. They are also interrelated, cannot be used in isolation, and one cannot be applied without considering the other three.²¹ These guiding principles are:

- (a) Non-discrimination, which ensures that all children without exception have equal access to their rights.
- (b) The best interests of the child guarantee that "in all actions concerning children the best interest of the child shall be a primary consideration."
- (c) Life, survival and development ensure that the child's rights to economic and social well-being are fully protected, in addition to the right to life.
- (d) Inclusion and participation maintain that all children have the right to express their thoughts, as well as the right to have those viewpoints recognised.²²

²¹ Humanium date unknown <https://www.humanium.org/en/the-guiding-principles-of-the-childrens-rights-convention/>; see also Committee on the Rights of the Child 2009 <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> (General Comment No 12) para 68.

²² Humanium date unknown <https://www.humanium.org/en/the-guiding-principles-of-the-childrens-rights-convention/>; see also General Comment No 12 1-7.

In relation to the use of the above principles when it comes to decisions and actions that affect a child in either the public or the private sphere, the child's best interests must be assessed and taken into account as the primary consideration. When it comes to children's rights "there is no hierarchy of rights in the Convention; all the rights provided for therein are in the 'child's best interests' and no right could be compromised by a negative interpretation of the child's best interests."²³ In terms of non-discrimination, the right "requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the right ... [t]his may require positive measures aimed at redressing a situation of real inequality."²⁴ In assessing and determining what is in the child's best interest, the "State must ensure full respect for [the child's] inherent right to life, survival and development."²⁵ The aim is for the State to develop an environment that respects and ensures the holistic development of all children. Finally, all children must be heard and included in every issue that affects them. This means that the functionality of the child's best interest and the right to be heard are reinforced "by facilitating the essential role of children in all decisions affecting their lives."²⁶

Article 1 of the 1954 *Convention Relating to the Status of Stateless Persons* (1954 Convention) defines a "stateless person" as a person who is not considered a national by any State under the operation of its law. On the other hand, an "undocumented person" is someone with no government-issued proof of identity (for example, a birth certificate, an identity document or a passport) either because no attempt was made to apply (for any reasons) or the document was lost but can be reapplied for.²⁷ Therefore, a stateless child will be a human being below the age of 18 years who is not considered a national by any state under the operation of its law.

The South African Government is a party to neither the 1954 Convention nor the 1961 *Convention on the Reduction of Statelessness* (1961 Convention). In 2011 the South African Government pledged to become a party to the 1954 and 1961 United Nations (UN) Conventions on Statelessness.²⁸ However, South Africa has not yet acceded to these conventions. On the positive side, Lawyers for Human Rights (LHR) posits that South Africa signals political will to resolve and prevent statelessness

²³ Committee on the Rights of the Child 2013 https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (General comment No 14) paras 1-7.

²⁴ General Comment No 14 para 41.

²⁵ General Comment No 14 para 42.

²⁶ General Comment No 14 para 43.

²⁷ LHR 2021 https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf.

²⁸ LHR 2021 https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf.

by its pledge to the Global Refugee Forum (GRF) in 2019.²⁹ Since 2019 nothing new has been done by the Government to improve the position of stateless persons or persons at risk of becoming stateless in South Africa.³⁰ This, despite the fact that the High-Level Segment on Statelessness (HLS) and the GRF galvanised an unprecedented commitment to take action to end statelessness by 2024,³¹ as has been demonstrated by the extraordinary number of statelessness-related pledges made by various States in Southern Africa.³²

As undocumented children are at risk of becoming stateless and their status may be irregular, it is important to note that the concept is "driven by multiple distinct factors and affects South African[s], migrant, and stateless persons simultaneously". Therefore, "[u]ndocumented learners can be part of the following categories":³³

- i. South African children whose birth has not been, or is unable to be, registered in terms of the Births and Deaths Registration Act in South Africa
- ii. stateless persons
- iii. *migrants in an irregular situation* (Emphasis added.)

Based on the guiding principles on how all rights related to children should be interpreted and implemented, it is posited that it is in the best interest of the stateless and/or undocumented children to be afforded the right to education without any form of discrimination, especially based on their nationality or lack of documentation. These are the principles that states should consider in all issues related to stateless and undocumented children. Other scholars support the best interest principle and it has been noted that "this principle serves as a gap-filling tool that reconciles the violation of the rights of a child with the expected solution to the violation ... clarifies approaches and meanings of the rights under a given law and gives a mediating principle to resolve conflicts among competing rights."³⁴

²⁹ LHR 2021 https://static.pmg.org.za/210309Presentation_by_LHR_on_Statelessness.pdf.

³⁰ Agenzia Fides 2023 https://www.fides.org/en/news/73747-AFRICA_SOUTH_AFRICA_Stateless_children_An_invisible_problem_in_southern_Africa. Also see Ngala 2023 <https://cruxnow.com/church-in-africa/2023/05/african-prelate-says-war-migration-and-trafficking-drive-statelessness>.

³¹ UNHCR 2019 <https://reporting.unhcr.org/globalreport/southern-africa>.

³² UNHCR 2019 <https://reporting.unhcr.org/globalreport/southern-africa>.

³³ SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-to-join-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court-2>.

³⁴ Nanima and Durojaye 2019 *LDD* 281.

4 A critical analysis of the courts in relation to access to basic education by stateless children

This section evaluates how courts deal with basic education and stateless children. The discussion shows the challenges that they experience which they attempt to resolve by approaching the courts.

4.1 The challenges to the right to education for stateless and undocumented children in South Africa

There is a broad swathe of literature discussing the role of the 1954 and 1961 Conventions in addressing issues arising from statelessness. This study is not grounded on such discussions but closely looks into the realities and challenges of statelessness as it impacts on access to education. The issue of statelessness seems to be an ongoing problem, and there are few ameliorative mechanisms for addressing the challenges attached thereto. Hence, there appears to be room for improvement.

According to Tigere,³⁵ although the information of the undocumented migrant children may be processed as per the *Children's Act* 38 of 2005 (*Children's Act*), there are no means for stateless and undocumented children to be issued South African birth certificates. However, undocumented refugee children may be assisted with their asylum applications.³⁶ For undocumented migrant children whose parents are not refugees – most of them reach the age of majority without any documentation.³⁷

In the case of the *Governing Body of the Juma Masjid Primary School (Juma Masjid)*,³⁸ the court held as follows:

It is important ... to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. *There is no internal limitation* requiring that the right be 'progressively realized' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. *This right is therefore distinct from the right to 'further education'* provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'. (Italics added only for purposes of emphasis.)

Relying on the *Juma Masjid* case, the authors ask the question: what does it help for a child to be given the right to basic education *which is*

³⁵ Tigere 2015 *De Rebus* 41.

³⁶ Tigere 2015 *De Rebus* 41.

³⁷ Tigere 2015 *De Rebus* 41.

³⁸ *Juma Masjid* para 37.

disconnected from the right to further education? How does this right assist the children after they have completed their basic education, as they would not have access to higher education in the country that gave them the right to basic education? Presumably, the net effect of all this is to disregard that educating our children should be the most urgent priority.³⁹

Most importantly, as has been held in case law, children "are the soul of our society", and if they are failed, "then we have failed as a society".⁴⁰ Although courts in South Africa acknowledge that socio-economic rights can be realised over time, they hold that the right to basic education can be realised right away. This interpretation places a greater responsibility on the State and all other parties, both public and private, to ensure that all decisions are geared towards realising the right to basic education now and in the future.⁴¹ Despite the challenges that may be faced when it comes to access to further education, there are still challenges that are yet to be addressed in the context of basic education.

Arguably, identification documents must be provided before the child is registered. In the 2020 case of *Centre for Child Law v Minister of Basic Education* (the *Centre for Child Law*), it was highlighted that "there are over a million children who have been admitted subject to the condition that they will be excluded should they not produce the requisite documents."⁴² This prompted the authors to consider the background of the case of the *Centre for Child Law*. *In casu*, the Center for Child Law applied on behalf of 37 children in 2018 for permission to attend school. The High Court denied the application and ruled that although children have a right to an education, this right was not unalienable.⁴³ Following this order, the High Court (per Mtshabe AJ), refused an urgent application for leave to appeal. An appeal was made to the Constitutional Court in February 2019 and the court set aside the decision by the High Court pending the hearing of another case relating to the same issues launched in 2016, which was heard on 18-19 September 2019, after which the court ordered that the respondents in the matter should not deny undocumented children the right to education; thus, undocumented children should be enrolled and admitted in public schools.

Eventually the High Court found that restricting undocumented children's access to education was against the Constitution, which guarantees the rights to equality, dignity and a basic level of education, and further asserts

³⁹ Mandela Nelson Mandela by Himself 129.

⁴⁰ *SS v Presiding Officer of the Children's Court: District of Krugersdorp* 2012 6 SA 45 (GSJ) para 1.

⁴¹ *Nanima and Durojaye* 2019 LDD 279. Also see *Juma Musjid* para 37.

⁴² *Centre for Child Law* para 65.

⁴³ *Centre for Child Law v Minister of Basic Education* (ECG) (unreported) case number 3317/2018 of 10 December 2018.

that children's best interests come first.⁴⁴ In addition, the court in the *Centre for Child Law* case mentioned various circumstances that propelled the inability of the parents and/or caregivers to produce documentation to attach to stateless and undocumented children's applications. The circumstances included "parents who have abandoned their children, leaving them in the care of relatives or other care-givers, and rendering it impossible for the children (invariably born at home or residing in other inaccessible areas due to geographical remoteness) to obtain birth certificates."⁴⁵ The orders by the Constitutional Court⁴⁶ and later the High Court⁴⁷ serve as an instructive example. However, it should be noted that the court retains control over the legal proceedings, including applications for stateless children's access to education. Depending on the decision made by a court, litigation might take a long time until a favourable decision is taken. Such processes are expensive and are not available to everyone.⁴⁸

The Constitutional Court on appeal made an order that the learners be readmitted to school. The history of the *Centre for Child Law* case resonates with the argument that despite the Constitution and other laws providing for the right to basic education for all children, stateless and undocumented children struggle to access their right to basic education. When a court is approached to decide whether to allow learners to access their right to basic education and in doing so the court makes an unfavourable order or an order that is not in the best interest of the learners, as the High Court did initially in this case,⁴⁹ such a decision negatively impacts on the learners. As a result, the learners are unable to enjoy their right to education because they will not be admitted into school. The authors are of the opinion that such decisions delay the process and are a disadvantage to the learners.

The stateless and undocumented children's only hope, in this case, then came from the Constitutional Court, which overruled the High Court's first ruling. If it were not for the Constitutional Court's order, which was followed by a second High Court judgment allowing the children to attend school, the children would still not be admitted. It is also contended that children who lack legal status and are stateless may not even benefit from a foundational

⁴⁴ *Centre for Child Law*.

⁴⁵ *Centre for Child Law* para 65.

⁴⁶ *Centre for Child Law v Minister of Basic Education* (CCT 19/19) Constitutional Court order of 15 February 2019; this order set aside the order granted by Mtshabe AJ, dated 10 December 2018. The Constitutional Court order directed, *inter alia*, that the learners be admitted pending the final determination of the litigation instituted in the High Court under case number 2480/17.

⁴⁷ *Centre for Child Law*. Also see ESCR-NET 2020 <https://www.escr-net.org/caselaw/2022/centre-child-law-and-others-v-minister-basic-education-and-others-28402017>.

⁴⁸ Mahleza *Interplay of Citizenship* 23-26.

⁴⁹ *Centre for Child Law v Minister of Basic Education* (ECG) (unreported) case number 3317/2018 of 10 December 2018.

education when they reach adulthood because they will not be able to find employment, open bank accounts and access healthcare, and will not be able to avoid being detained frequently, among other things.⁵⁰ Looking into the challenging circumstances surrounding identification documentation, the court held as follows:

Besides facing the danger of being stateless, the children are beset by two problems: first, *being abandoned by their parents* and, second, *being denied the right to basic education* on the basis that they lack a piece of paper identifying who they are and lack the means, themselves, to acquire identification documents.⁵¹ (Emphasis added.)

In addition, other challenges include the problem of undocumented mothers who live and give birth to children in South Africa and are unable to register the births of stateless and undocumented children.⁵² Such undocumented children fall into a perpetual cycle of statelessness due to the challenges of applying for identification documents.⁵³ Looking into the challenges that stateless and undocumented children face, in the case of *Centre for Child Law* the court made the following order:

[5]. Sections 39 and 42 of the Immigration Act 13 of 2002 do not prohibit the admission of illegal foreign children into schools and do not prohibit the provision of basic education to illegal foreign children.

[6]. The first, second and third respondents are interdicted and restrained from, in any manner whatsoever, 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.⁵⁴

Furthermore, it is argued that while the right to education for stateless and undocumented children should be defended, more should be done for them to become documented and regularised. Fighting for their education is only a part of the solution, which is in some ways counterproductive if they are not going to be accepted as citizens or if their status is not regularised because they will not be able to work or even enrol in a tertiary institution.⁵⁵

The challenges of statelessness and being undocumented are not unique to non-nationals but affect many South Africans as well.⁵⁶ Children born to South African parents can be stateless for various reasons. They may not have had their births registered at all, or if they have, they may not have their birth certificates with them and may be unable to obtain them from the

⁵⁰ Mahleza *Interplay of Citizenship* 23-26.

⁵¹ *Centre for Child Law* para 65.

⁵² *Centre for Child Law* para 5.

⁵³ Bennett 2020 <https://www.dailymaverick.co.za/article/2020-11-29-no-country-no-future-the-bleak-plight-of-stateless-children-in-south-africa/>.

⁵⁴ *Centre for Child Law* para 135.

⁵⁵ Mahleza *Interplay of Citizenship* 24.

⁵⁶ LRC 2015 http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf11.

DHA.⁵⁷ Litigation has been taking place regarding such circumstances, but it does not always resolve issues, necessitating the development and use of other workable, less restrictive remedies.⁵⁸

To comply with the "international law norms for access to nationality in international treaties to which several SADC States are signatories",⁵⁹ South African legislation must be "re-designed" to provide people the right to a nationality. If the issue is not resolved, it will be passed down from parents to children, as it currently is for certain people.⁶⁰ Furthermore, to be able to enjoy their rights fully, stateless persons have litigation as the only option open for them. It should be considered that it is an expensive route that is out of reach for many because the majority of them struggle with poverty. This makes access to justice a privilege for those who can afford it.⁶¹

In addition, there are conversations on inclusive education. South Africa has adopted an inclusive education policy to address barriers to learning in the education system.⁶² Serfontein posits that "[t]he overwhelming purpose of an inclusive education system must be to protect and safeguard equally the human rights and social needs of all learners within the country's borders."⁶³ According to du Plessis, inclusive education has evolved as a movement that seeks to challenge exclusionary policies and practices, and that it can therefore be regarded as part of a wider struggle against the violation of human rights, and unfair discrimination.⁶⁴ Furthermore, the latter denotes that the policy of "building an inclusive education and training system"⁶⁵ is centrally situated in the agenda of education for all, the millennium goals, the CRC, and the United Nations *Convention on the Rights of Persons with Disabilities*.⁶⁶

The 1951 *Convention Relating to the Status of Refugees* makes provision for states to consider providing documentation to the beneficiaries of the Convention to enable them to exercise their rights, such as the right to

⁵⁷ LRC 2015 http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf 11; Mahleza *Interplay of Citizenship* 25.

⁵⁸ LRC 2015 http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf 14.

⁵⁹ Muller 2017 <http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Muller.pdf>.

⁶⁰ Mahleza *Interplay of Citizenship* 25.

⁶¹ LRC 2015 http://lrc.org.za/art_external/pdf/2015_06_12_Submission_UN_Arbitrary_deprivation_of_Nationality.pdf 15. See also Mahleza *Interplay of Citizenship* 25.

⁶² Dalton, Mckenzie, Kahonde 2012 *Afr J Disabil* 1-7.

⁶³ Serfontein 2019 *Obiter* 139.

⁶⁴ Du Plessis 2013 *De Jure* 76-92.

⁶⁵ Department of Education 2001 https://www.vvob.org/files/publicaties/rsa_education_white_paper_6.pdf.

⁶⁶ *United Nations Standard Rules on the Equalization of Opportunities for Persons with Disabilities* GA Res 48/96, UN Doc A/RES/48/96 (1993).

education. Furthermore, the *Children's Act* applies to all children, and this places direct responsibility for meeting the socio-economic and educational needs of refugee, stateless and undocumented children on the South African Government.⁶⁷ The application of these provisions is critical as this is consistent with what is provided for in the Constitution, which guarantees the right to education to everyone.

There is a need for children to realise the role played by education in their lives. It is doubtful that any child may reasonably be expected to succeed in life if s/he is denied the opportunity of an education.⁶⁸ Accordingly, citizenship is more fundamental than civil rights.⁶⁹ Furthermore, the DBE provides funding to schools, therefore its funding methods must comply with the norms and standards for funding schooling. The methods must be inclusive and must not unfairly discriminate against or negatively impact on undocumented and stateless students. When considering such matters, the numbers should include both documented and undocumented learners for the funding to be enough for every student.⁷⁰

Arendt argues that it is not just "a question of statelessness but one of common humanity and the responsibility we have to one another as human beings who share the world in common."⁷¹ Hill is also of the view that since "we live in a world that is territorially organised into national states, a stateless person 'is not simply expelled from one country', they are 'expelled from humanity'.⁷² As children have a fundamental right to be registered immediately after birth in order to acquire a nationality, it is not in their best interests to be rendered stateless.⁷³

In addition to the points made in the paragraph above, the courts in South Africa have noted the practice of the DHA of failing to recognise the applicants' citizenship and to give effect to the rights emanating from it without providing adequate reasons for this denial in a manner consistent

⁶⁷ Serfontein 2019 *Obiter* 131.

⁶⁸ *Centre for Child Law* para 4 following remarks articulated by the United States Supreme Court case of *Brown v Board of Education of Topeka* 347 US 483 (1954) 493.

⁶⁹ Arendt *Origins of Totalitarianism* 296-297.

⁷⁰ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%2012092019.pdf> 20.

⁷¹ Arendt discussed in Hill 2018 <https://medium.com/quote-of-the-week/arendt-on-citizenship-d9e23beb4aad>. Also see *Minister of Home Affairs v Jose* 2021 6 SA 369 (SCA) para 1 where the Supreme Court of Appeal cited this.

⁷² Hill 2018 <https://medium.com/quote-of-the-week/arendt-on-citizenship-d9e23beb4aad>. See also *Minister of Home Affairs v Jose* 2021 6 SA 369 (SCA) para 1 where the Supreme Court of Appeal cited this.

⁷³ *Centre for Child Law v Director-General: Department of Home Affairs* 2022 2 SA 131 (CC) para 21.

with the superior court orders and procedural requirements.⁷⁴ Such a failure propels the need to investigate the governmental structures and processes to alleviate such consistent challenges faced by individuals. This is important because citizenship is the gateway through which several rights in the Constitution can be accessed.⁷⁵ The case of *Chisuse v Director-General, Department of Home Affairs* sketched out the different pathways for acquiring citizenship in terms of the *South African Citizenship Act 88 of 1995* as follows:⁷⁶

[43] In terms of the 1995 Citizenship Act, citizenship by birth was acquired in the following ways. First, any person who, immediately prior to the commencement of the 1995 Citizenship Act was a citizen by birth, remained a citizen by birth under the new legislation.⁷⁷ Secondly, any person born in South Africa on or after the commencement of the 1995 Citizenship Act, became a citizen by birth, unless one of their parents was in the diplomatic service of a foreign country or was not lawfully a permanent resident, and the other parent was not a South African citizen.⁷⁸ Thirdly, certain categories of individuals who would qualify for citizenship by descent would be citizens by birth if they were born outside of South Africa while one of their parents was involved in certain forms of government service.⁷⁹ Fourthly, citizenship by birth could be acquired if a person, born in South Africa but who did not qualify as a citizen by birth, was subsequently adopted by a South African citizen in terms of the *Child Care Act*.⁸⁰ Fifthly, if a person was born in South Africa but was not entitled to any other citizenship or nationality, they were a citizen by birth if their birth was subsequently registered.⁸¹

In addition, the Constitutional Court held as follows:⁸²

[44] A person could acquire citizenship by descent in the following ways. First, if they were a citizen by descent immediately before the 1995 Citizenship Act commences, they would remain so.⁸³ Secondly, a person could acquire citizenship by descent if they were born outside of South Africa and one of their parents was a South African citizen and their birth was registered.⁸⁴ Thirdly, if a person was born outside of South Africa and one of their parents had resumed South African citizenship and they had entered South Africa to reside in the country permanently, that person would be a citizen by descent.⁸⁵ Fourthly, a person would acquire citizenship by descent if they were born

⁷⁴ *Chisuse v Director-General, Department of Home Affairs* 2020 6 SA 14 (CC) (*Chisuse*) para 84.

⁷⁵ *Chisuse* para 24.

⁷⁶ *Chisuse* para 43.

⁷⁷ Section 2(1)(a) of the *Citizenship Act 88 of 1995*.

⁷⁸ See ss 2(1)(b), (2)(a)-(b), and (3) of the *Citizenship Act 88 of 1995*.

⁷⁹ Section 2(1)(c) of the *Citizenship Act 88 of 1995*.

⁸⁰ *Child Care Act 74 of 1983*. See also s 2(4) of the *Citizenship Act 88 of 1995*.

⁸¹ Section 2(4) of the *Citizenship Act 88 of 1995*. This was intended to ensure that no person born in South Africa would be considered stateless.

⁸² *Chisuse* para 44.

⁸³ Section 3(1)(a) of the *Citizenship Act 88 of 1995* states that "[a]ny person ... who, immediately prior to the date of commencement of this Act, was a South African citizen by descent ... shall, subject to the provisions of subsection (2), be a South African citizen by descent."

⁸⁴ See s 3(1)(b)(i) of the *Citizenship Act 88 of 1995*.

⁸⁵ Section 3(1)(b)(ii) of the *Citizenship Act 88 of 1995*.

outside of South Africa and they had subsequently been adopted by a South African citizen in terms of the Child Care Act and their birth was registered.⁸⁶

It is against this background that we see the impact that statelessness has on the right to education. The significant causes of statelessness are the lack of the registration of births and the issuing of birth certificates.⁸⁷ Registering births and issuing certificates are essential as they serve as an authentication of where the child was born and identify their parents.⁸⁸ However, the birth registration certificate requirement of schools for enrolment, and registration in the Department of Education's system at the matric level, is discriminatory against children who do not have birth certificates or, for one reason or another have been denied access to birth certificates.⁸⁹

In some cases, the DBE has used its lack of resources as an excuse not to admit stateless or undocumented children into schools.⁹⁰ Most importantly, this cannot be considered a reasonable and rational explanation for treating stateless and undocumented children differently. Irrespective of whether a child has been left stateless because of discriminatory nationality laws or for other reasons, childhood statelessness is entirely preventable.⁹¹ Thus, there is a need to recognise the harm that childhood statelessness inflicts and to implement straightforward legal and practical measures to prevent it, which would allow governments to ensure that children's very real connections to their countries are recognised through the granting of nationality.⁹² Furthermore, while states have the power to limit rights in certain circumstances, stateless and undocumented children must not be excluded from enjoying their rights. Nor should states be permitted to use excuses such as a lack of resources to control immigration indirectly. Stateless and undocumented children should not be made to suffer for

⁸⁶ Section 3(1)(b)(iii) of the *Citizenship Act* 88 of 1995.

⁸⁷ Sustainable Development Knowledge Platform 2019 <https://sustainabledevelopment.un.org/sdg16>; Muller 2017 <http://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-BookMuller.pdf> 140; and the African Commission on Human and Peoples' Rights 2014 <https://www.refworld.org/pdfid/54cb3c8f4.pdf> 5.

⁸⁸ Article 7 of the *Convention on the Rights of the Child* (1990) and Article 6 of the *African Charter on the Rights and Welfare of the Child* (1999).

⁸⁹ See in general SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%2012092019.pdf>.

⁹⁰ *Centre for Child Law* para 29 also referred to as the *Phakamisa* judgment; also see in general cases about a lack of resources discussed in *Nanima and Durojaye* 2019 *LDD* 270-298.

⁹¹ UNHCR 2015 https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-Stateless-Report_ENG16.pdf.

⁹² UNHCR 2015 https://www.unhcr.org/ibelong/wp-content/uploads/2015-10-Stateless-Report_ENG16.pdf.

choices they did not make, as education ensures a dignified self-sufficient future, and the lack thereof fosters a culture of poverty and dependency.⁹³

5 The executive's position considering the interpretative declaration by the government following the ratification of the ICESCR

This section analyses the executive's position considering the interpretative declaration by the government following the ratification of the ICESCR. It is important to note the executive's compliance or non-compliance in this regard. The section further interrogates whether the South African Government meets international law standards on human rights in relation to the executive's position on education for stateless and/or undocumented children. It also critically examines whether the policies violate the children's rights and the position of the jurisprudence in that regard.

The South African Government's declaration that in ratifying the ICESCR it would "give progressive effect to the right to education, as provided for in Article 13(2)(a) and Article 14, within the framework of its National Education Policy and available resources" was not spared of criticism.⁹⁴ This declaration focusses only on the gradual realisation of the right to education recognised by international law, and this realisation would be conditional on the availability of resources. The ICESCR's and more importantly the Constitution's guarantees of the right to a fundamental education was not, however, immediately realised in the declaration.⁹⁵ However, the declaration is inconsistent with the guarantees of basic education's being immediately available.⁹⁶ Consequently the declaration presented an inadequate argument that was inconsistent with the Constitution and it undermined the Republic's duties under international law regarding the provision of basic education as an immediately realisable right.⁹⁷ Unfortunately, such inconsistencies are the reasons why a state will be able

⁹³ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf>. Also see *Centre for Child Law v Minister of Basic Education* (ECG) (unreported) case number 3317/2018 of 10 December 2018 (this case illustrates how a court can make a decision that is not in the best interest of undocumented learners) and a discussion by Buttle 2019 <https://ohrh.law.ox.ac.uk/protecting-the-right-to-a-basic-education-for-undocumented-learners-an-update-from-the-legal-resources-centre/>, discussing the *Centre for Child Law* case, which is also known as the *Phakamisa* judgment.

⁹⁴ Education declaration mars ICESCR ratification by Section 27 21 Jan 2015 available at <http://section27.org.za/2015/01/education-declaration-mars-icescr-ratification/>, cited in Nanima and Durojaye 2019 LDD 276.

⁹⁵ Nanima and Durojaye 2019 LDD 276.

⁹⁶ CDESCR General Comment No 13 paras 51 and 57.

⁹⁷ Nanima and Durojaye 2019 LDD 276.

to create policies that might violate rights, basing their reasons on declarations such as this one, which is not consistent with the Constitution.

5.1 Whether South Africa meets international law standards on human rights

The existence of the legal gaps and practical impediments that prevent stateless and undocumented learners from fully exercising their right to education⁹⁸ is interpreted by the authors as indicating South Africa's failure to comply with the standards on human rights or the international obligation it has in terms of the right to education. This has been seen throughout the paper. It is our argument that the Government of South Africa has not shown a strong political will to comply with its international obligations with respect to its implementation of the immigration laws, education rules and regulations. This argument is advanced on the basis that the South African Government is failing to consider fundamental issues related to compliance and enforcement.⁹⁹

Compliance and enforcement become difficult to implement if in deciding cases involving undocumented or stateless children the judiciary interprets the law in such a manner as to exclude them. This observation emanates from the outcome of the *Centre for Child Law v Minister of Basic Education*,¹⁰⁰ which as illustrated above initially concluded that undocumented children did not have the right to basic education. The High Court also questioned whether undocumented children could challenge the decision to be granted access to basic education without their compliance with the laws and policies regulating that access. In this regard, the High Court's answer was in the negative.¹⁰¹ When part of the judiciary is oblivious to such impediments, it makes it difficult for effective compliance and enforcement to occur. In other words, the situation is far more complex than sheer and wilful noncompliance.¹⁰²

⁹⁸ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf>.

⁹⁹ Guam and Esterhuizen 2019 <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen>.

¹⁰⁰ *Centre for Child Law v Minister of Basic Education* (ECG) (unreported) case number 3317/2018 of 10 December 2018.

¹⁰¹ *Centre for Child Law v Minister of Basic Education* (ECG) (unreported) case number 3317/2018 of 10 December 2018. Also see Guam and Esterhuizen 2019 <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen>.

¹⁰² Guam and Esterhuizen 2019 <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen>.

It is the thesis of this paper argues that when educational policies, rules, and regulations exclude undocumented or stateless children, it proves that states are failing to comply with international and regional standards providing for the right to education. Different treaties¹⁰³ and domestic law¹⁰⁴ call for the equal treatment of all people and provide that every child has the right to education without any form of discrimination. A balance should be struck between the government's implementation of immigration control rules and its observance of international obligations relating to children's rights in its enforcement of education laws. In essence, our argument is that immigration control must be practised in a manner that does not violate the exercise and protection of fundamental rights relating to undocumented children.¹⁰⁵ Furthermore, where immigration control authorities share immigration information with different stakeholders for immigration control purposes, this will deter stateless and undocumented children from attending school for fear of being 'victimised'.¹⁰⁶ This violates the right to education as it creates fear amongst undocumented and stateless learners and prevents them from accessing basic education.¹⁰⁷ Consideration should also be given to the fact that gaps in the South African legal and policy framework relating to the registration of births cause many children to be undocumented and this causes statelessness.

Quite clearly there are gaps with respect to immigration control and education policies or laws of South Africa. These gaps include uncertainty on the procedures to follow in matters concerning stateless and undocumented learners. These gaps contribute to the difficulties in obtaining children's documentation and often lead to litigation, as may be seen in the cases discussed above. Hence, more problems in terms of compliance are created by these existing gaps. The failure by the Government to fulfil its obligation, as provided for by the Constitution, exacerbates these challenges. It is therefore suggested that the DHA should work together with civil society groups to eradicate the existing impediments

¹⁰³ *Convention on the Rights of the Child* (1990) in Arts 28 and 29, the *International Covenant on Economic, Social and Cultural Rights* (1966) in Arts 13 and 14 and s 29 of the Constitution.

¹⁰⁴ Sections 9 and 29(1)(b) and of the Constitution.

¹⁰⁵ SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-tojoin-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court> 11.

¹⁰⁶ SAHRC 2019 <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1976-media-statement-sahrc-s-application-tojoin-undocumented-learners-litigation-to-be-heard-in-grahamstown-high-court> 11-15.

¹⁰⁷ European Union Agency for Fundamental Rights 2013 https://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf para (e), as read in SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%2012092019.pdf> 15.

that hinder access to education. The same can be said about the DBE. It could also work with civil society groups with the support of the DHA to develop a guide to help all parties involved in issues relating to education. This is not impossible, as an example may be drawn from the recent activity of "[t]he Children's Institute and the Legal Resources Centre, with the support of the [South African Social Security Agency], [who] have developed a guide to help parents and caregivers without Home Affairs documentation to understand the grant application process and to navigate the barriers to access."¹⁰⁸

As noted above, the right to education is immediately realisable. Therefore, South Africa cannot rely on the defence of limited resources as a basis for excluding stateless and undocumented children.¹⁰⁹ Section 29(1)(a) of the Constitution does not restrict the right to documented children only. The only limitation in existence is in section 36 of the Constitution, which applies to all learners. However, this limitation is subject to a high threshold for it to be reasonable and justifiable, considering the impact of the right to education on a child's development.¹¹⁰ This paper views the exclusion of undocumented and stateless children as non-compliance with the Constitution by the state because it denies "them the ability to become active participants in economic life and the nation in the long term."¹¹¹

Some of the provisions in the National Admission Policy and the *Immigration Act*, and practices such as utilising immigration control in a manner that violates the exercise and protection of fundamental rights are a violation of the right to education. Such practices have created fear and resulted in the conclusion that South Africa has not fully complied with its obligation to realise the right to education for every child, because through such practices it excludes stateless or undocumented learners.¹¹² South Africa has not complied with one of the most prominent rights through formulating rules and regulations that exclude and violate their rights, such as sections 39 and 42 of the *Immigration Act*. The policies and practices relating to education must be proactive and responsive. The South African

¹⁰⁸ Van Schalkwyk, Nyathi and Proudlock 2023 <https://www.dailymaverick.co.za/article/2023-04-25-new-guide-released-on-how-to-apply-for-sassa-grants-for-children-without-birth-certificates/>.

¹⁰⁹ As confirmed by the Constitutional Court in the case of *Juma Musjid* para 37.

¹¹⁰ See *Juma Musjid* para 37 and SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 4-5.

¹¹¹ Guam and Esterhuizen 2019 <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1772-thousands-of-undocumented-children-are-being-deprived-of-the-basic-right-to-education-write-andre-gaum-and-eden-esterhuizen>.

¹¹² SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 11-15.

Government must address the inequalities and discriminatory conditions undocumented and stateless learners face.

As noted above, South Africa's non-compliance and exclusionary tendencies are found in section 42(1) of the *Immigration Act*, which provides that it is a criminal offence to "aid, abet, assist, enable or in any manner help" an "illegal foreigner" or a "foreigner" "in a manner that violates their status, including by providing instruction or training to him or her, or allowing him or her to receive instruction or training."¹¹³ If anyone contravenes this provision and is found guilty, the person will be liable upon conviction to a fine or imprisonment. This provision of the *Immigration Act* is inconsistent with the provisions of sections 3(5) and 3(6) of the SASA, which provide the framework of compulsory basic education for every child from the age of seven to the age of fifteen or the ninth grade.¹¹⁴

The provisions in the SASA do not exclude any learner based on documentation. In this regard, this paper notes that there is no documentation requirement in the sections for accessing basic education. The Committee on Economic, Social and Cultural Rights (CESCR) regards the birth registration certificate requirement as possible indirect discrimination against persons who do not have the certificates.¹¹⁵ Furthermore, section 39 of the *Immigration Act* "prohibits learning institutions from knowingly providing training and instruction to 'illegal foreigners', or a foreigner whose 'status does not authorise him or her to receive such training or instruction'" and by status, this would include undocumented and stateless children.

In support of the above observations it is noted that other international bodies¹¹⁶ have contended that the right to access basic education applies to everyone, notwithstanding their status.¹¹⁷ While the position of the South African executive is that of progressive realisation as mentioned above, the fact that South Africa is a party to some treaties that constituted these

¹¹³ See s 44 of the *Immigration Act* 13 of 2002, which refers to "any illegal foreigner, or any person whose status or citizenship could not be ascertained." The fact that a person's status or citizenship cannot be ascertained may make the person fall under the category of having an irregular status. Also see the term "undocumented" as explained in this paper.

¹¹⁴ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 7.

¹¹⁵ CESCR General Comment No 13.

¹¹⁶ CESCR General Comment No 13 para 34; CESCR 2005 <https://www.refworld.org/docid/42dd174b4.html> (CESCR General Comment No 6) para 41; and the Committee on the Protection of the Rights of All Migrant Workers 2011 <https://www.refworld.org/docid/4ed3553e2.html> para 57.

¹¹⁷ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 4.

bodies and that provisions of these treaties have become part of customary international law means that South African is bound to provide the right of access to basic education to everyone, and that it violates these rights by refusing such access.¹¹⁸ Therefore, South Africa is urged to enact responsive policies, rules and regulations because this will assist the learners in securing their right to education in a manner that is coherent with human dignity.

In summary, South Africa must address the issues faced by undocumented and stateless learners "in accessing basic education as a result of multiple barriers, including a lack of clarity in the legal and policy framework, legal gaps, administrative and socio-economic barriers, funding models for schools, the lack of awareness of applicable laws and policies, and the lack of separation between the provision of basic services and immigration control."¹¹⁹ Furthermore, there is a need to review the National Admission Policy. This is possible if the DBE guarantees the following:

- that there must be clarity in terms of the documentation required for every classified learner; substitute identification documents must be accepted if birth certificates cannot be presented;¹²⁰
- that there must be a process to be followed when children fail to present documentation;
- that there must be a clear prohibition of demanding a legal resident status as a condition for admission; and
- that there must be explicit instructions to schools specifying that every learner has a right to access schools, as well as a list of considerations and procedures to be followed where section 36 of the Constitution is applicable.¹²¹

Another aspect worth considering is the creation of substantial information enlightening people (the beneficiaries and officials) on the rules, regulations,

¹¹⁸ In this regard, see the *International Covenant on Economic, Social and Cultural Rights* (1966) in Arts 13 and 14 and the *Convention on the Rights of the Child* (1990) in Arts 28 and 29.

¹¹⁹ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 8.

¹²⁰ This provision should also be available where the following documents are not available: permits, travel documents such as passports, affidavits etc.

¹²¹ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 19.

procedures and rights concerning the admission of stateless or undocumented students.¹²²

6 Conclusion and recommendations

It is against this background that it has been observed that there are many gaps the State needs to address in the educational, legal and policy framework. It is concluded that since it has been established that the right to education serves as an essential right that assists in eradicating poverty, every child should be able to fully exercise it despite their legal status or whether they are documented or not.¹²³ Furthermore, policies and regulations preventing migrant children from registering at schools and educational facilities must be reformed.¹²⁴ Most importantly, South Africa must show that it is willing to solve the issue "by giving voice to [children's] rights and working to ensure obstacles to their recognition as equal members of society are addressed."¹²⁵ South Africa must also adapt its education laws and the procedures governing those laws in ways that consider the circumstances of stateless and undocumented children.

In addition to all the observations and findings that have been highlighted throughout this article, it is suggested that the rules and regulations for birth registration should be revisited and amended to accommodate undocumented and stateless children. If this ineffectiveness is not addressed, South Africa will be non-compliant with the international instruments that have been discussed in this paper.

As noted above, the DBE must ensure that when policies and processes related to education are updated, issues such as access to writing Matric Examinations and access to results for undocumented and stateless children must be addressed. This information should be distributed to all stakeholders.¹²⁶ In addition to that, the DBE must disseminate awareness material defining all relevant laws, processes, and procedures including defining schools' duties towards undocumented and stateless children. The

¹²² SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 21.

¹²³ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf>.

¹²⁴ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 4.

¹²⁵ UNHCR 2021 <https://www.unhcr.org/research/evalreports/60f18fcd4/evaluation-unhcr-led-initiatives-end-statelessness.html> iv.

¹²⁶ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 20.

information must be disseminated to all schools and district offices. Furthermore, the information in the awareness material should also be considered when the National Admission Policy is updated with specific reference to information such as: allowing the admission of learners and access to school despite a lack of documentation; schools should not threaten removal from classes based on a lack of documentation; there is to be no exclusion from school post the lapsing of the period specified for the completion of admission; and any circular from the Department impeding the admission to schools of undocumented, stateless and migrant children should be withdrawn.¹²⁷

Lastly, South Africa should make provision to implement educational policies and practices aligned with the existing international and regional treaties and should comply with its obligation to provide the right to education, for example by eradicating any policies and practices preventing stateless and undocumented learners from accessing education, by ensuring that administrative barriers such as the requirement of identification documentation are removed, and by affording stateless and undocumented learners prospects of formal and informal learning.

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¹²⁷ SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Position%20Paper%20on%20Access%20to%20a%20Basic%20Education%20for%20Undocumented%20Learners%20in%20South%20Africa%20-%202012092019.pdf> 19; also see CCL 2022 https://pmg.org.za/files/221115Submission_-_Centre_for_Child_Law.docx.

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List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
Afr J Disabil	African Journal of Disability
CCL	Centre for Child Law
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DBE	Department of Basic Education
DHA	Department of Home Affairs
GRF	Global Refugee Forum
HLS	High-Level Segment on Statelessness
ICESCR	International Covenant on Economic, Social and Cultural Rights
LDD	Law, Democracy and Development
LHR	Lawyers for Human Rights
LRC	Legal Resources Centre
SAHRC	South African Human Rights Commission
SASA	South African Schools Act 84 of 1996
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees