



Response

20th January 2023

Access to Education Denied (again)

The beginning of the school year sadly brought with it more indefensible xenophobic, anti-constitutional activity, this time aimed in the main against foreign nationals in the Gauteng area. According to the Zimbabwean Exemption Permit Holders Association, several schools in that region refused to admit the children of the ZEP holders to school this year on the grounds that, in all likelihood, they would not be able to complete the year due to the expiry of the ZEPs at the end of June 2023.

This decision ignores several points. Firstly, three separate court cases around the ZEPs will be heard soon, and the judgements may well suggest a different outcome to that announced by the Department of Home Affairs and agreed to by Cabinet. Secondly, the Minister of Home Affairs conceded at the end of 2022 that the finalizing of visas of various categories would be completed only sometime in 2024. ZEP holders who have applied for scarce skills visas or similar visas will thus not know the result of their applications until then, which means that their children would in all probability finish this academic year and beyond.

Thirdly, school access is being applied for for the present academic year, when these children are here legally and thus, despite whatever conjecture there might be about their future, the *status quo* should be the primary – indeed only – consideration for entry into the school system. It feels as if those who are hell-bent on denying the constitutionally-guaranteed right of every child, irrespective of status, to education, are seeking more devious and flimsy grounds for their actions. Even before the schools re-opened, Operation Dudula indicated that it would take action to bar foreign children and teachers from entering schools. Laudably, the ZEPHA has taken the issue to court.

In a similar vein, it is shameful that political leaders such as Patriotic Alliance leader Gayton McKenzie could recently tweet that undocumented children should not be allowed to register for school. Equally disheartening has been the high levels of support that his sentiment received on various social media platforms. The clear implication of such support is that there is a stubborn, growing xenophobic sentiment in South Africa, which is a frightening prospect.

A recent Human Rights Watch Report stated that, while there were some attempts to deal with the scourge of xenophobia, the phenomenon really remains unchecked and foreign nationals continue to be discriminated against, bullied and denied, often violently, their basic human rights. The deliberate ramping-up of xenophobic rhetoric and activities is reckless and creates an environment that allows vigilante groups to act with impunity. It is also worth remembering that such sentiments shape the environment in which the 2024 elections will be held, and thus the kinds of content that parties will canvass around.

With regard to Mr Mc Kenzie's tweet and the action taken by a number of Gauteng schools, the legal situation is very clear. The SA Constitution sets the matter out quite unambiguously in section 29(1)(a): every child within the borders of South Africa has the right to basic education. There are no qualifications to this right; it cannot be denied on the basis of race, religion, language, disability, nationality or migrancy status. Later jurisprudence has restated this principle very clearly, and this office has analyzed the jurisprudence and the legal situation in the past. In the important *Juma Masjid* case in 2011, the Constitutional Court interpreted s29 of the Constitution to mean that every child/learner enjoyed the

right to education, with no exception. In the 2019 *Centre for Child Law* case, heard in the Eastern Cape, the High Court again upheld the principle, clarifying that the lack of a birth certificate or official documents was not a bar to accessing education. Thus, the position is abundantly clear and those who seek to undermine it act with no legal basis. Their actions are to be roundly condemned.

Sadly, the very same unconstitutional and hateful behaviour has taken place around clinics in Gauteng, where Operation Dudula activists have launched a campaign aimed at denying medical care to foreign nationals. This has involved physical attacks and the barring of entry to clinics. The spokesperson for the Gauteng Department of Health reminded the press that such actions were illegal and that any disruption of its services was reprehensible. He underlined that there are channels for registering unhappiness with any aspect of their services. There are also reports of the ongoing practice of charging foreign nationals living in South Africa, and thus entitled to free basic health care, rates prescribed for foreign patients.

The fundamental rights to education and health-care, arguably two of the most critical spaces for achieving wellbeing and human flourishing, are under the most vicious attack; this must be robustly resisted for the good of those who are vulnerable in such situations, and indeed for the good of all.

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