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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 12 March 2025

Case No. 21970/2021

In the matter between:

E[...], M[...] M[...]

FIRST APPLICANT

B[...], K[...] Y[...] N[...]

SECOND APPLICANT

E[...], M[...] M[...] obo

THIRD APPLICANT

E[...], A[...] H[...] U[...]

And

**THE DIRECTOR GENERAL, DEPARTMENT
OF HOME AFFAIRS**

FIRST RESPONDENT

THE MINISTER OF HOME AFFAIRS

SECOND RESPONDENT

Coram: Millar J

Heard on: 17 February 2025

Delivered: 12 March 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 09H00 on 12 March 2025.

JUDGMENT

MILLAR J

- [1] It is a foundational pillar of our law that “*every child has the right to a name and nationality from birth*”¹ and to “*family care or parental care*”² and overarchingly, “*a child’s best interests are of paramount importance in every matter concerning the child*”³ The present application finds its genesis in the efforts on the part of the first and second applicants (the Applicants), the parents of a minor child, to obtain for that child, a legal status within the Republic of greater certainty than their own.
- [2] The Applicants are legally recognised refugees from Rwanda.⁴ The First and Second Applicants were married to each other in Johannesburg on 7 April 2011. They have made their life in South Africa.

¹ Section 28(1)(a) of the Constitution of the Republic of South Africa 1996.

² *Ibid* Section 28(1)(b).

³ *Ibid* Section 28(2).

⁴ The First Applicant was recognised as a refugee in terms of section 24(3)(a) of the Refugees Act, 130 of 1998 on 30 June 2014. The Second Applicant was recognised as a refugee on 6 June 2001 and obtained primary residence by virtue of her status as a refugee in terms of section 27(d) of the Immigration Act, 13 of 2002 on 18 July 2011.

- [3] The Applicants have both lived in the Republic for many years. During their married life here, two children were born. Their eldest daughter, in consequence of the law as it stood at the time of her birth and because she was born within the Republic, was automatically granted South African citizenship. Their youngest daughter, to whom the present application relates, and who was born after a change in the law, finds herself in a different position. She does not automatically qualify for citizenship in South Africa in consequence of the change in the law.
- [4] The Applicants applied to the First Respondent to have their youngest child recognised as a South African citizen. The First Respondent for its part, refused the application *inter alia* on the basis that if it were to grant the application, it would be acting *ultra vires* the Citizenship Act.⁵
- [5] It is not in issue between the parties that the decision taken by the First Respondent is an administrative decision that is reviewable under the Promotion of Administrative Justice Act⁶ (PAJA). The Applicants also applied for condonation for bringing the application outside the 180-day period referred to in PAJA. This application was not opposed.
- [6] It is self-evident that if this Court is to find for the Applicants, given the approach adopted by the First Respondent, that a remittal to the First Respondent for reconsideration would be inappropriate and that this Court should exercise its discretion and make an appropriate order in terms of section 6(2)(g) read with section 8(1)(d) of PAJA.
- [7] It is the case for the Applicants that the failure on the part of the First Respondent to recognise the status of their youngest minor child as a citizen of the Republic should be reviewed and set aside in consequence of the provisions of section 2(2) of the Citizenship Act, and that the minor child should be granted citizenship of the Republic.

⁵ 88 of 1995 as amended with effect from 1 January 2013.

⁶ 3 of 2000.

- [8] Prior to 1 January 2013, when the Applicants eldest child was born, in terms of the Citizenship Act, a person born within the Republic was a South African citizen by birth if one of the parents of such a person born had been lawfully admitted to the Republic for permanent residence.⁷
- [9] From 1 January 2013, the Act was amended to allow only for citizenship in circumstances where one of the parents, at the time of the child's birth, was a South African citizen.⁸
- [10] The Applicant's eldest child was born on 2[...] D[...] 2012, three days prior to the amendments to the Citizenship Act coming into operation. When she was born, the Second Applicant was legally within the Republic and had been granted permanent residence.
- [11] It is the situation that prevails after 1 January 2013 when the youngest child was born on 2[...] M[...] 2015, which gives rise to the present application.
- [12] The Citizenship Act now provides for citizenship by birth in one of three ways:
- [9.1] A person who is born in or outside the Republic, where one of his or her parents, at the time of his or her birth, is a South African citizen, shall be a citizen by birth.⁹
- [9.2] A person born in the Republic and who is not a South African citizen by virtue of subsection (1) shall be a South African citizen by birth if he or she does not have the citizenship or nationality of any other country or has no right to such citizenship or nationality and his or her birth is

⁷ Section 2(1)(b) of the Citizenship Act, 88 of 1995.

⁸ Section 2(1)(b) of the South African Citizenship Amendment Act.

⁹ Section 2(1)

registered in the Republic in accordance with the Births and Deaths Registration Act, 1992.¹⁰

[9.3] Any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth if he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992.¹¹

[13] Section 2(1) is not of application as neither of the Applicants are citizens of the Republic. Section 2(3) allows the youngest child, of a parent who as permanent residence, to apply for citizenship once she has reached the age of majority provided, she has lived in the Republic from birth.

[14] Section 2(2) in its terms, provides for a situation, such as the present, where a child is born within the Republic, the birth is registered but the child has no nationality or right to nationality of any other state.

[15] In the present case, since both Applicants are refugees and not citizens of the Republic, the youngest child finds herself in a situation where she is without South African citizenship conferred on her automatically and to obtain citizenship upon application, would have to wait until she was a major to do so. This of course presupposes that notwithstanding that the Applicants are refugees, the minor child is as a matter of right or law for that matter, a citizen or national of the country of the Applicants origin – Rwanda.

[16] The Citizenship Act specifically recognises in section 2(2), that notwithstanding any other path to citizenship of the Republic, that any person, ought not to be

¹⁰ Section 2(2).

¹¹ Section 2(3).

stateless. While South Africa is not a signatory to either the 1954 Convention on the Status of Stateless Persons or the Convention on the Reduction of Statelessness,¹² adopted by the United Nations on 20 August 1961, the principles set out in both those Conventions have nonetheless been recognised and made part of our domestic law through section 2(2) of the Citizenship Act.¹³

- [17] While the status of the Applicants as majors is that of refugees, and of their eldest minor child is that of a citizen of the Republic, what then is to become of the youngest child? Since the youngest child does not automatically qualify for South African citizenship, does she automatically qualify for the citizenship of Rwanda?
- [18] The Respondents have refused to recognise the minor as a citizen and argue that there are two alternative remedies available to the Applicants. The first of these, is that the Applicants should approach the Rwandan authorities to have the minor's birth registered so that she may acquire Rwandan citizenship and thereby remedy her statelessness.
- [19] The second is that the minor child be added to the Refugee Permits of either of the Applicants and then simply wait until she reaches the age of majority before making application for citizenship as provided for in section 2(3) of the Citizenship Act.¹⁴ I intend to deal with each of these in turn.

¹² The 1954 Convention relating to the Status of Stateless Persons defined a "*stateless person*" as any person "who is not considered as a national by any State under operation of its law".

¹³ *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC at para [23], *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para [28], *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* 2001 (1) SA 545 (CC) at para [22]. See also Khan F, "*Exploring Childhood Statelessness in South Africa*" PER/PELJ 2020 (23).

¹⁴ *Minister of Home Affairs and Another v Ali and Others* 2019 (2) SA 396 (SCA) where the court dealt with the provisions of section 4(3) of the Citizenship Act, a section not of application in the present case but which would if it did apply would have the same consequence of requiring the minor to remain without certainty of status until after reaching the age of majority when they would have the locus to apply themselves.

- [20] The Respondents suggest that, instead of being recognised as a South African citizen, the Applicants should register the birth of the minor with the Rwandan embassy to obtain citizenship of Rwanda for her.
- [21] The minor does not qualify to be a citizen of Rwanda simply by virtue of the fact of her birth to Rwandan parents outside of the territory of Rwanda. An application is required to the authorities in Rwanda.¹⁵
- [22] There are two difficulties with this-
- [19.1] Firstly, this only gives the minor a right to apply for Rwandan citizenship and a right to apply is not synonymous with having a vested right. Citizenship does not depend upon a discretionary decision; it is a question of law.
- [19.2] Secondly, this will mean that the First and Second Applicants would have to avail themselves of the protection of the country from which they have fled and are refugees. They are still refugees and the circumstances which led to them applying for and being granted refugee status still obtain.
- [23] Section 5(1)(a) of the Refugees Act provides that a person ceases to qualify for refugee status if he or she voluntarily re-avails himself or herself in the prescribed circumstances of the protection of the country of his or her nationality.

¹⁵ See www.rwandinuk.gov.rw/services/service-details/twandan-citizenship and also Rwandan Government Ministerial Order No 007/01 of 23/03/22 Relating to Rwandan Nationality (Official Gazette no Special of 25/03/2022) which confirms the various circumstances under which application can be made for Rwandan nationality. (My underlining). Citizenship is only automatic if born in the country to Rwandan parents or persons residing there legally.

- [24] Regulation 4(1)(b) includes in the prescribed circumstances,¹⁶ acts such as voluntarily seeking consular services, applying for and receiving benefits afforded to citizens of his or her country, applying for citizenship related documents, and even presenting him or herself on the premises of any diplomatic mission of his or her country of origin or nationality.
- [25] The Applicants face an impossible choice. If they seek any recourse or make any application to assist their minor child, they imperil their own status within the Republic and render themselves potentially liable to deportation. The choice is an impossible one because their eldest minor child is a South African citizen who has an unqualified right to reside in the Republic and can never be deported.
- [26] This leaves the Applicants in a position where they are unable, because it would imperil their status and their family, to do anything to apply for Rwandan citizenship for the youngest minor child.
- [27] The youngest minor child is accordingly, without a nationality or citizenship and in consequence, stateless.
- [28] Having a right without being able to exercise that right, leaves a person with no right at all. It is in circumstances such as this that Section 2(2) of the Citizenship Act is clearly meant to find application. This is particularly apposite in the present case of the child of refugees who have fled states where citizenship is not automatically granted at birth, no matter where they are born.
- [29] The second argument by the Respondents is that the minor child should be registered as a refugee in terms of section 21B of the Refugees Act, under the status of the First Applicant.

¹⁶ Refugees Regulations, 2018 published under GN R1707 in GG 42932 of 27 December 2019 and applying with effect from 1 January 2020.

- [30] Section 21B of the Refugees Act only gives the minor the same status as the First Applicant, i.e. a recognised refugee. However, unlike the Applicants who have Rwandan citizenship, the minor will still not have citizenship of that state.
- [31] She would be classified as a refugee from a state that she did not have citizenship of and to which she had never been and in respect of which the Applicants could not without imperiling themselves and their elder child even apply for such citizenship for her.
- [32] Similarly, in consequence of the change to the Citizenship Act, she is not a citizen in the country of her birth.
- [33] After she attains the age of majority she will have to apply to be recognised as a refugee in her own name and only thereafter, if her application is granted, will she be able to apply for citizenship of South Africa by way of naturalisation.
- [34] There is no certainty that the minor, having reached majority, will be granted refugee status in her own name or that any application for naturalisation would be granted without further ado.
- [35] This proposed course of action will only give her a right to apply, and not a vested right as guaranteed by the Constitution. This only serves to perpetuate her current predicament, and she would still have no nationality and remain stateless.
- [36] Section 2(2) of the Citizenship Act provides that:

“Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if-

- (a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and*

(b) *his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992)."*

[37] In the present case as set out above, the minor has no citizenship or nationality of either the Republic or any other country. It is common cause that her birth was registered in accordance with the *Births and Deaths Registration Act*.¹⁷

[38] The argument for the Respondents while necessarily following the letter of the law, pays no heed to the obligation upon them, in the interpretation and application of the Citizenship Act, to have regard to the best interests of the minor child in this matter.

[39] In cases such as the present one, "*it must not be forgotten that procedure is, but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities.*"¹⁸

[40] The circumstances in which the minor child finds herself, fall squarely within the provisions of section 2(2) of the Citizenship Act. It is constitutionally directed that a child is to have a nationality from birth, and it follows axiomatically that it is in the best interests of the child that this is so. In the circumstances, the minor child is to be declared a citizen of the Republic of South Africa.

[41] The costs of this application will follow the result, and it is for this reason that I intend to make the order for costs that I do.

[42] In the circumstances, it is ordered:

[42.1] The late filing of this application is condoned.

¹⁷ In terms of section 9(1) read with section 5 of said Act.

¹⁸ *S.P. Gupta vs Union of India and Another* 1982 (2) SCR 365.

- [42.2] The decision of the First Respondent not to register the minor child A[...] H[...] U[...] E[...] born on 2[...] M[...] 2015 as a citizen of the Republic of South Africa, is declared unlawful and is hereby reviewed and set aside.
- [42.3] A[...] H[...] U[...] E[...] born on 2[...] M[...] 2015 is declared to be a South African citizen by birth in terms of section 2(2) of the South African Citizenship Act, 88 of 1995 as amended.
- [42.4] The Respondents are hereby directed to do all things necessary to register A[...] H[...] U[...] E[...] born on 2[...] M[...] 2015 as a citizen of the Republic of South Africa in terms of section 2(2) of the Citizenship Act, 88 of 1995 as amended which includes but is not limited to the following:
- [42.4.1] Entering A[...] H[...] U[...] E[...] born on 2[...] M[...] 2015 into the National Population Register as a citizen.
- [42.4.2] Issuing A[...] H[...] U[...] E[...] born on 2[...] M[...] 2015 with a citizen identity number; and
- [42.4.3] Amending and re-issuing A[...] H[...] U[...] E[...] born on 2[...] M[...] 2015 with a birth certificate to reflect the aforesaid.
- [42.5] The Respondents are hereby ordered to comply with this order within three (3) months from date of service of this order by the Sheriff of the Court upon them.

[42.6] The Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

A MILLAR

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

HEARD ON: 17 FEBRUARY 2025

JUDGMENT DELIVERED ON: 12 MARCH 2025

COUNSEL FOR THE APPLICANTS: ADV. L PRETORIUS

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