IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC case no.: 155/19

GP case no.: 77944/16

In the matter between:

YAMIKANI VUSI CHISUSE	First Applicant
ELIZABETH MAFUSI NTHUNYA	Second Applicant
MARTIN AMBROSE HOFFMAN	Third Applicant
HEINRICH DULLAART	Fourth Applicant
AMANDA TILMA	Fifth Applicant

and

DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent

APPLICANTS' WRITTEN SUBMISSIONS

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INTRODUCTION

1. On 5 June 2019, the Gauteng Division of the High Court declared sections 2(1)(a) and 2(1)(b) of the South African Citizenship Act 88 of 1995 unconstitutional and invalid. It did so because those provisions deprived the Applicants—and people like them, who were born outside South Africa to a South African parent—of their citizenship rights, in two ways:

    - First, in changing the meaning of "*citizenship by descent*", the current incarnation of the Act failed to provide for continued recognition of the citizenship of people who had, under the previous version of the Act, acquired citizenship by descent.

    - Second, by affording citizenship only prospectively to people born outside South Africa to a South African parent, the current version of the Act deprived people who were born outside South Africa before the current version of the Act came into force and whose births have not yet been registered, of their citizenship rights.

2. The High Court fixed the Act's two constitutional problems through a tailored reading-in.[1]

3. The Applicants apply to this Court to confirm the High Court's declaration of invalidity and its reading-in remedy.[2]

4. To understand the unconstitutionality of the Act, some immigration-law background is needed.

- Broadly speaking, there are two main ways someone becomes a citizen: by birth and through their parents.

- Acquisition by birth looks at where someone is born: a person born in a country becomes a citizen of that country.

- Acquisition by parenthood looks at the parents' citizenship. A person becomes a citizen of the country if one of her parents is a citizen, even though she is born outside the country. This concept has also been called "*citizenship by descent"* in some of the citizenship legislation. (We refer to it as citizenship by parenthood for clarity.)

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[1] High Court's order, vol 1 p 2 para 2; p 2 para 4.

[2] Notice of motion (Constitutional Court), vol 3 p 135 para 1.

5. Citizenship has been governed by different citizenship statutes over the years, and these statutes have dealt with citizenship by parenthood differently. Three versions of the Act are relevant to this application:[3]

   - The old Act (in full, the South African Citizenship Act 44 of 1949), which was in force between September 1949 and October 1995.

   - The 1995 version of the current Act, which was in force between October 1995 and December 2012.

   - The current version of the Act, which has been in force since 2013.

6. The applicants—Yamikani, Martin, Emma, and Amanda—all acquired a right to citizenship by virtue of their parenthood.[4] They

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[3] Relevant extracts from each Act are included as an annexure to these written submissions.

[4] The founding affidavit in the High Court tells the Applicants' stories; see founding affidavit (High Court), vol 1 pp 41-46 paras 32-53. These facts are not relevant to the relief sought in the main application, as we explain in the second-last section of these submissions. But for context, this is the short version:

   - Yamikani Chisuse was born in Malawai in October 1989 to an unmarried, South African mother.
   - Martin Hoffman was born in Zimbabwe in March 1970 to a married, South African father.

were all born outside South Africa to a South African parent, under a precursor to the current version of the Act. Because of changes between the various statutes, they have been deprived of their right and ability to acquire citizenship. That infringes their right, entrenched in section 20 of the Constitution, not to be deprived of their citizenship,[5] as well as the rights to which citizenship gives rise.[6]

7. The Department offers no real justification for these infringements. Indeed, in the High Court, the Department did not even bother to file an answering affidavit—despite a two-year delay and an order directing it to do so.[7]

8. Yet, in this Court, the Department opposes the confirmation of the High Court's order of constitutional invalidity.[8] It also tries,

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- Emma Dullaart (represented in these proceedings by her grandfather and legal guardian, Heinrich) was born in Ghana on Christmas Day in 2006 to a South African father.
- Amanda Tilma was born in February 1969 in Zimbabwe to a married, South African mother.

[5] Section 20 states:

"***20. Citizenship.***—*No citizen may be deprived of citizenship.*"

[6] Including the political rights entrenched in section 19, the trade rights protected in section 22 and the right of children to a nationality from birth (section 28(1)).

[7] High Court's order, vol 1 p 18 para 2.

[8] Notice of opposition, vol 3 pp 158-159.

belatedly, to take issue with the Applicants' claims in their High Court founding affidavit and to have the matter remitted back to the High Court for hearing on oral evidence on the Applicants' status, after purportedly seeking condonation for its late attempt to do so.[9]

9. That attempt cannot succeed. The High Court refused to give the Department a further chance to file opposing papers because of the delinquent way it had conducted itself.[10] The High Court decided the application before it, and gave the Applicants both the order of constitutional invalidity and the consequential relief they asked for. The former is before this Court for confirmation; the latter is not before the Court at all. The Department has not sought to appeal or rescind the High Court's consequential order—and it bars the Department from re-opening the merits of the applicants' individual cases. The Department cannot simply disregard the procedural hurdles in its way, and re-open a matter that has been finalised.

10. Even if the procedural assistance that the Department seeks was competent (which it is not), there is no reason for the Court to throw

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[9] Department's notice of motion, vol 3 pp 161-162.

[10] See High Court's reasons, vol 1 p 16.

it the lifeline that it seeks. Of all litigants, the government is the least deserving of procedural clemency.[11] As this Court recently put it, the government is "*not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline*".[12] Quite the opposite: the government "*must do right, and it must do it properly*".[13] The counter-claim achieves neither, and should be dismissed.

CONFIRMATION OF THE HIGH COURT'S ORDER

11. The High Court correctly declared sections 2(1)(a) and 2(1)(b) of the (current) Citizenship Act unconstitutional. Some statutory background and history is necessary to show why these sections are constitutionally problematic.

Background to the acquisition of citizenship by parenthood

12. As we have said, there are, broadly speaking, two main ways of becoming a citizen.

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[11] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 82.

[12] *Kirland* (note 11) at para 82.

[13] *Kirland* (note 11) at para 82.

- Citizenship by birth looks to where you are born: if you are born in a country you may, depending on the citizenship laws of that country, become a citizen. In the United States, for example, anyone born on U.S. soil becomes a U.S. citizen.[14]

- Citizenship by parenthood (or descent) looks to your parents' citizenship. If one of your parents is a citizen of a country, you may acquire citizenship of that country even if you were born somewhere else.

13. This case is about citizenship by parenthood. Yamikani, Martin, Emma, and Amanda were all born outside South Africa to a South African parent.

14. As we have said, citizenship legislation has dealt differently with citizenship by parenthood, over time.

The Old (1949) Act

15. Under the 1949 Act, between 1949 and 1991, citizenship by parenthood turned on legitimacy.

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[14] U.S. Const. amend. XIV, § 2 states that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

- If a child's parents were married at the time of her birth, she acquired South African citizenship, once her birth was registered, if her father was a South African citizen.

- If her parents were not married, she acquired South African citizenship only if her mother was a South African citizen.

16. That was in terms of section 6 of the 1949 Act, which said, at the time, in relevant part:

1949 Act (*at date of commencement*)

"***6 Persons born outside Union after date of commencement of this Act***

(1) A person born outside the Union on or after the date of commencement of this Act shall, subject to the provisions of sub-section (2), be a South African citizen if-

(a) his father was, at the time of such person's birth, a South African citizen and he fulfils any one of the following conditions, that is to say, if either- …"

17. Citizenship by parenthood under the 1949 Act turned on legitimacy because "father" was defined, in section 1(iii), like this: "*in relation to an illegitimate child, includes the mother of that child*".

18. So, in other words, under the 1949 Act as it read at the date of commencement:

- A child born outside South Africa to a married South African father was South African citizen.

- A child born outside South Africa to a married foreign father (even if her mother was South African) was not a South African citizen.

- A child born outside South Africa to an unmarried South African mother was a citizen.

- A child born outside South Africa to an unmarried foreign mother was not a South African citizen.

The amendment of the 1949 Act

19. That is how citizenship by parenthood worked for the next forty or so years. Then, in 1991, the 1949 Act was amended to remove legitimacy as a factor in the citizenship equation.

20. This was in terms of section 6 of the amended 1949 Act, which said, in relevant part:

1949 Act (*as it was after 1991*)

"***6 Persons born outside Union after date of commencement of this Act***

(1) A person born outside the Union on or after the date of commencement of this Act shall, subject to the provisions of sub-section (2), be a South African citizen if-

(a)(i) his father was, at the time of the birth, a South African citizen and the birth is registered in terms of the provisions of section 17A of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963); or

(ii) his mother is a South African citizen and his birth has been registered in terms of subparagraph (i) …"

21. The amended version of the 1949 Act applied to all births "*on or after the date of commencement*" of the Act (which was in 1949). This, in effect, made the 1991 amendment retrospective.

22. And so, from 1991, any person born after 1949 outside South Africa to a South African parent became a South African citizen by descent. Legitimacy no longer mattered.

<u>The Restoration and Extension of South African Citizenship Act</u>

23. As the Department points out, the apartheid government enacted a raft of racist laws aimed at depriving black South Africans of their

citizenship.[15] Ultimately, black South Africans were deprived of their citizenship by:

- the Status of Transkei Act 100 of 1976;
- the Status of Bophuthatswana Act 89 of 1977;
- the Status of Venda Act 107 of 1979; and
- the Status of Ciskei Act 110 of 1981.

(We refer to these collectively as the TBVC Statutes.)

24. The TBVC Statutes were repealed and replaced in 1993, by the Restoration and Extension of South African Citizenship Act 196 of 1993. Section 2 restored the citizenship of every person who, but for the TBVC Statutes would have been a citizen.[16] Section 3 said that any person who would have been a citizen by birth or descent but for the TBVC Statutes would, once again, be a citizen by birth or descent unless she lost citizenship under the provisions of the 1949 Act.

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[15] Answering affidavit, vol 3 pp 212-220 para 10.6(a)-(w).

[16] Section 2 said:

> "*Every former South African citizen who would not have ceased to be a South African citizen in terms of any provision of the principal Act [that is, the 1949 Act] if an Act mentioned in the Schedule [that is, the TBVC Statutes] had not been passed.*"

25. So the Restoration Act extended citizenship to all South Africans by bringing everyone within the provisions of the 1949 Act. The citizenship of any South African born between 1949 and 1995 derives from the 1949 Act. The Department is, with respect, wrong to simply write it off as racist legislation and to criticise the Applicants' reliance on it.[17]

The 1995 version of the current Act

26. South Africa got a new citizenship statute in 1995: the South African Citizenship Act 88 of 1995. As the Department points out, it was enacted to afford citizenship rights to all South Africans in accordance with the requirements of the (interim) Constitution.[18] This remains the current Act, though it was amended in 2013.

27. Between 1995 and 2013—which we refer to as "the 1995 version of the current Act"—the Act preserved the citizenship of anyone who, immediately prior to its commencement, was a citizen by parenthood. It also said that anyone born outside South Africa to a

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[17] See, in this regard, answering affidavit vol 3 p 220 para 10.6(aa). See also answering affidavit, vol 3 p 236 para 27, where the Departments says "*it is puzzling that the applicants seek protection from a piece of legislation which is not only a relic of a colonial era but a law which was discriminatory and intended to protect the offsprings of European colonialists*".

[18] See answering affidavit, vol 3 p 220 para 10.6(x).

South African citizen after its enactment, acquired citizenship by descent.

28. This was in terms of section 3 of the 1995 version of the current Act, which said, in relevant part:

1995 version of current Act (*as it was between 1995 and 2013*)

> ***"3 Citizenship by descent***
>
> *(1) Any person-*
>
> *(a) who, immediately prior to the date of commencement of this Act, was a South African citizen by descent; or*
>
> *(b) who is born outside the Republic on or after the date of commencement of this Act, and-*
>
> *(i) one of whose parents was, at the time of his or her birth, a South African citizen and whose birth is registered in terms of the provisions of section 13 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992); or*
>
> *…*
>
> *shall, subject to the provisions of subsection (2), be a South African citizen by descent."*

29. So, under the 1995 version of the current Act, anyone who had acquired citizenship by parenthood under the 1949 Act continued

to hold citizenship;[19] and anyone born outside South Africa to a South African parent acquired citizenship as soon as their birth was registered.

The current version of the Act

30. The 1995 version of the current Act was then amended by the South African Citizenship Amendment Act 17 of 2010, creating the current version of the Act. The amendments came into effect on 1 January 2013.

31. Under the current version of the Act, the term of art "*citizenship by descent*" now means something different—and narrower—to what it used to mean. It no longer refers to citizenship acquired by parenthood. Now, a child acquires South African citizenship "*by descent*" when she is adopted by a South African citizen.[20]

32. Citizenship by parenthood is now a type of "*citizenship by birth*" under section 2. It says:

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[19] The Department concedes as much: see answering affidavit, vol 3 p 220 para 10.6(y).

[20] Section 3 now says:

> "***3 Citizenship by descent***
> *Any person who is adopted in terms of the provisions of the Children's Act by a South African citizen and whose birth is registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 shall be a South African citizen."*

Current Act (*without High Court's reading-in*)

"***2 Citizenship by birth***

(1) Any person-

(a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010 [1 January 2013], was a South African citizen by birth; or

(b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen,

shall be a South African citizen by birth."

33. Under the current version of the Act, then, anyone who was a citizen by birth prior to 1 January 2013 continues to be a citizen. But no equivalent provision is made for people who were citizens by parenthood. And anyone who is born outside South Africa to a South African parent after the commencement of the current version of the Act automatically acquires citizenship, whether or not her birth has been registered.

34. With all the statutory puzzle pieces now in place, we turn to consider the two constitutional problems with section 2 of the current Act.

Problem one: no preservation of citizenship acquired by parenthood

35. The various citizenship statutes have recognised and maintained citizenship rights conferred under a previous legislative regime. The reason for that is obvious: it is hugely prejudicial—and, indeed, unconstitutional—to deprive a person of their citizenship and their nationality.

36. As we understand it, the current version of the Act, like its predecessors, tried to preserve citizenship acquired under earlier legislation. That was the purpose of section 2(1)(a). The problem, though, is that section 2(1)(a) preserves citizenship acquired by birth only. It does not preserve citizenship acquired by parenthood. We understood that to be an oversight that resulted from the change in meaning of "*citizenship by birth*" and "*by descent*" between the 1949 and the current versions of the Act.

37. The Department, however, claims that this exclusion was intentional:

> *"In 2010 the amendment is intended to reverse the racist legacy of the 1949 Act. In particular section 2(1)(a) and (b) of the Citizenship Amendment Act of 2010.*

> *The Citizenship Amendment Act seeks to put a final nail in on the racist, sexist and discriminatory 1949 Act and to correct the legislative anomalies of the 1995 Act. The surviving provision of the 1949 Act which allowed children of foreigners to claim citizenship of South Africa under the 1949 Act had disastrous consequences for stable and democratic citizenship regime in South Africa. Moreover, the relevant provisions of the 1995 Act which entrenched the 1949 Act opened the floodgates for the foreigners to claim citizenship in order to access privileges and benefits flowing therefrom. It is estimated that there are approximately 17 million grant beneficiaries as opposed to taxpayers in South Africa."*[21]

38. That answer fundamentally misunderstands the meaning and effect of citizenship by parenthood under the 1949 Act. It did not allow children of foreigners to claim citizenship; it afforded citizenship to the children of South Africans born abroad. And, by the time the 2010 Amendment Act was passed, the 1949 Act had been extended to afford that citizenship to <u>all</u> South Africans, regardless of their race or sex. All South Africans born outside South Africa before 1995—black or white—source their citizenship in the 1949 Act; they are all equally deprived of it by the exclusion in section 2(1)(a).

39. The Department has not put up <u>any</u> evidence to substantiate its claims as to the purpose of section 2(1)(a), and it is not supported

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[21] Answering affidavit, vol 3 pp 220-221 para 10.6(z)-(aa).

by either the legislative history or the text. We submit that the much more likely explanation is that section 2(1)(a) failed to preserve citizenship by parenthood acquired prior to the Act merely because of an oversight.

40. Either way, the failure to preserve citizenship by parenthood results in a startling deprivation of citizenship: overnight, as the current version of the Act came into force on 1 January 2013, those who had acquired or could acquire citizenship by parenthood under predecessor legislation were stripped of their citizenship. They were citizens on 31 December 2012; but not citizens on 1 January 2013.

41. That midnight deprivation of citizenship is unavoidable on the text of the current Act. Even assuming section 2(1)(a) had the intention of preserving citizenship acquired before the amendment came into effect, it cannot be read to apply to someone who "*immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen*" by descent.

42. In this way, section 2(1)(a) infringes section 20 of the Constitution by retrospectively depriving people of the citizenship rights they

acquired under the previous legislation. It is, in every way, a "*total and irreversible*" infringement.[22]

43. The Department offers not much more than an empty denial that section 2(1)(a) is unconstitutional.[23] It suggests, somewhat equivocally, that section 2(1)(a) "*simply means that persons who were South African citizens before the 2010 Amendment Act need not take steps to re-register their births under the amended Act*"[24]—that is, that people who registered their births before the current version of the Act took effect and thus acquired their citizenship by parenthood, would be covered by section 2(1)(a). But that cannot be the correct interpretation of section 2(1)(a) for two reasons.

- It is wrong, first, because section 2(1)(a) is limited, on its terms, to those who became citizens by birth; it does not cover those who became citizens by descent at all.

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[22] *S v Makwanyane* 1995 (3) SA 391 (CC) at para 351 (Sachs J concurring).

[23] Answering affidavit, vol 3 p 231 para 12.19(b).

[24] Answering affidavit, vol 3 p 236 para 26.

- It is wrong, second, because, under the current Citizenship Act, registration of birth is not a requirement for the acquisition of citizenship by birth or by descent.[25]

44. There is simply no way to read section 2(1)(a) as preserving the citizenship of people who hold citizenship by parenthood through a previous Act.

45. Section 2(1)(a) therefore entails the wholesale deprivation of an important constitutional right; a right that—as the Department points out—deserves particular protection in light of our apartheid history.

46. It is up to the Department to justify section 2(1)(a)'s wholesale deprivation of citizenship and infringement of section 20 of the Constitution (as well as the package of other rights that come with citizenship).[26] Here, all the Department offers is an unsupported claim that any infringement is "*justifiable in terms of section 36 of the Constitution*"[27] The Department does not, however, say what

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[25] Registration of birth is required only for acquisition of citizenship under sections 2(2) and (3) of the Act, which are not relevant to this application.

[26] See, for example, *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 (CC) at para 19.

[27] Answering affidavit, vol 3 p 231 para 12.19(b).

the justification is for depriving people who held citizenship by descent of their rights.

47. There can be no justification. The importance of the right to citizenship cannot be gainsaid. It is central to personhood and dignity. It is also the gateway to a host of other rights and benefits, like the right to vote, the right to a passport, and freedom of trade. Even if there is some (for the moment, undisclosed) purpose in narrowing the scope of acquisition of citizenship by parenthood, it is irrational and disproportionate to achieve that purpose through a blanket deprivation of citizenship.

48. The High Court's fix was to read in "*or by descent*" at the end of section 2(1)(a) (so the section would read: "…*was a South African citizen by birth or by descent*"). Read this way, section 2(1)(a) rightly preserves citizenship acquired under predecessor legislation by birth and by descent. This Court should confirm that remedy.

Problem two: section 2(1)(b) is not retrospective

49. Section 2(1)(b) is unconstitutional because it is not retrospective. The use of "*is born*" in section 2(1)(b) means that the section applies only to those born after the section came into force on 1 January 2013.

50. To see why that is a constitutional problem, we need to take a brief detour into registration of births.

51. Practically, the right to citizenship counts for little without the suite of documents the government gives citizens to show citizenship: a birth certificate, an ID number, an ID, and a passport. Life gets difficult without them: a school typically wants to see an ID to enrol a child; a bank to open a bank account; a hospital to admit a patient; an employer to give a job.[28] Without an ID, you can't vote or get a needed social grant.[29] And without a passport, crossing the border is not as easy as booking a flight or bus.[30]

52. These real-world benefits of citizenship depend on a separate administrative requirement: registration of birth. A different statute deals with that, the Births and Death Registration Act 51 of 1992 (and its own predecessors). To register a birth, a parent must give notice of birth to the Director-General.[31] Ideally, that should be done at the time of birth.[32] But the regulations to the Births and Death Registration Act allow late registration (either by

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[28] Affidavit of Jessica George (High Court), vol 2 pp 111-115 paras 13-28.

[29] Affidavit of Jessica George (High Court), vol 2 pp 111-115 paras 13-28.

[30] Affidavit of Jessica George (High Court), vol 2 pp 111-115 paras 13-28.

[31] Section 9 of the Births and Deaths Registration Act.

[32] Section 9(1) of the Births and Deaths Registration Act.

the parents, or by the person herself if she is over 18).[33] Registration at the time of birth is not, therefore, the be all and end all; late registration is perfectly permissible.

53. Once the Director-General approves a notice of birth, the all-important suite of citizenship documents may be issued: birth certificate, ID (and ID number), passport.[34]

54. How does registration of births fit with citizenship law? Prior to the current version of the Act, a person born outside South Africa to a South African parent acquired South African citizenship by descent on registration of her birth. So, between 1949 and 2012, someone born outside South Africa to a South African parent had a vested right to citizenship, but acquired citizenship only after registration of birth (and registration could be done late).

55. The current version of the Act no longer makes registration of birth a requirement for citizenship. Instead, "*[a]ny person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African*

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[33] Section 9(3A) of the Births and Deaths Registration Act. See also Regulations 3 to 11 of the Regulations on the Registration of Births and Deaths, 2014 (published under GN R128 in GG 37373 of 26 February 2014).

[34] See generally Regulation 6 of the Regulations on the Registration of Births and Deaths, 2014.

citizen by birth". No more, no less. So, unlike someone born between 1949 and 2012, anyone born after 2013 to a South African parent becomes a citizen at the time of birth. It no longer matters—at least not for acquisition of citizenship—whether or when the birth is registered.

56. For reasons beyond their control, the births of Yamikani, Martin, Emma, and Amanda were not registered.[35] Many others are likely in the same position.

57. If Yamikani, Martin, Emma, and Amanda had been born after 2013, they would have acquired citizenship at the time of their births. It would not matter for acquisition of citizenship, that their births have not yet been registered. They would still be citizens because the current version of section 2(1)(b) does not require registration of birth for citizenship.

58. The constitutional problem in section 2(1)(b) arises because Yamikani, Martin, Emma, and Amanda—and others who fall in the same category were all born before 2013.

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[35] Founding affidavit (High Court), vol 1 pp 41-46 paras 32-53.

59. On its current wording, section 2(1)(b) does not help them because it is prospective only: "*is born*" makes the section apply only to people born after 1 January 2013, when the amendment to the 1995 Act came into force.

60. Nor does section 2(1)(a) help Yamikani, Martin, Emma, and Amanda because, as that section is currently worded, it preserves citizenship acquired by birth only. Yamikani, Martin, Emma, and Amanda were all born outside South Africa, so they could not have acquired citizenship by birth.

61. Reading-in "*or by descent*" into section 2(1)(a) goes some way to solve the problem. But not completely: fixing section 2(1)(a) does not help those who—like Yamikani, Martin, Emma, and Amanda (and others in the same category)—claim citizenship by parenthood but whose births were not registered before the current version of the Act took effect. Recall that under the 1995 Act as it read between 1995 and 2013, registration of birth was a requirement of citizenship. It was also a requirement of citizenship under the 1949 Act. Yamikani, Martin, Emma, and Amanda were not, therefore, "*immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010 [1 January 2013] … South African citizen[s] by birth [or by descent]*".

62. Under the current Act, Yamikani, Martin, Emma, and Amanda fall in a statutory no man's land: section 2(1)(a) does not apply because they did not previously acquire citizenship by birth (nor by descent, even if that is read in); section 2(1)(b) does not apply because it is prospective only.

63. Yamikani, Martin, Emma, and Amanda are left in much the same position as those who acquired citizenship by parenthood under predecessor legislation. Section 2(1)(b) also results in midnight deprivation of their right to citizenship. On 31 December 2012, Yamikani, Martin, Emma, and Amanda had a right to citizenship which they could enforce (and become citizens) just as soon as they registered their births (which they could do at any time). On 1 January 2013, they had nothing.

64. In this way, section 2(1)(b) of the Act infringes section 20 of the Constitution and the other rights and benefits that come with citizenship. And it does so in an entirely arbitrary manner. Had they been born just a few years later, their citizenship rights would have been secured (because registration of birth is not a prerequisite to citizenship by parenthood under the current version of the Act). Instead, by accident of birth, their citizenship and related rights are entirely denuded.

65. These rights are infringed even though Yamikani, Martin, Emma, and Amanda did not have their births registered at the time of birth. At worst, that means they did not acquire fully fledged citizenship at the time they were born under the prevailing Citizenship Act. But they did acquire a vested right to citizenship. Up until 2013, they could enforce that right by registering their births late.

66. Under the current Act, because section 2(1)(b) is prospective only, that avenue is no longer open to them. That is, they can no longer enforce their pre-existing entitlement to citizenship.

- They cannot do so under section 2(1)(a) as it currently reads because they did not acquire citizenship by birth. (They were not born in South Africa).

- They cannot even do so under section 2(1)(a) with the High Court's reading-in because, without their births being registered at the time of birth, they did not acquire citizenship under predecessor legislation.

- They cannot rely on section 2(1)(b) because it applies prospectively only—that is, to people born after 2013.

67. In the Department's view, there is nothing wrong with this. It claims that the Citizenship Act was amended in 2010 to produce precisely this result, by retrospectively close a loophole for acquiring citizenship by parenthood. According to the Department, the applicants (and those in the same position as them) "*had more than two years to regularise their affairs before the 2010 Amendment Act took effect and became operational*".[36] The Department seems to suggest that by failing to register before the current version of the Act took effect, the applicants (and those like them) forfeited their right to citizenship. And this retrospective deprivation is justified, it says, because of budgetary constraints and the government's interest in preventing immigration fraud.[37]

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[36] Answering affidavit, vol 3 p 235 para 21.

[37] Answering affidavit, vol 3 p 211 para 9.14; vol 3 p 225 para 10.7(l)-(m); vol 3 pp 231 para 12.19; vol 3 pp 239-241 para 38. The government also makes an argument based on the discriminatory purposes of the predecessor legislation. See answering affidavit, vol 3 pp 212-221 paras 10.6-10.7; vol 3 pp 227-228 para 12.11. This misses the point. The 1949 Act was amended in 1991 and then replaced in 1995. But both the 1991 amendment and the 1995 replacement preserved citizenship acquired under the 1949 Act. They also cured citizenship discrimination that was built into the apartheid-era statutes. It makes no sense to criticise these Applicants for relying on predecessor legislation as the basis for their entitlements to citizenship (compared to if, for example, the Applicants were somehow using apartheid-era statutes to deny the citizenship of others).

68. In effect, the government argues that to save money and reduce the risk of immigration fraud, it is necessary and justifiable to retrospectively deprive people of their right to citizenship.

69. That cannot, we respect, constitute a reasonable and justiable basis for the wholesale deprivation of an important constitutional right, freighted with history (as the citizenship right is).

70. In the first place, the government puts up no reliable, empirically supported evidence to support its claims about resource constraints.[38] This is fatal to its argument. This Court has long stressed that the "*absence of evidence or argument in support of the limitation has a profound bearing on the weighing up exercise, the more so as the parties who chose to remain silent have special knowledge of provincial and local government administration*".[39] Just so here. The Department has "special knowledge" of the government's alleged resource constraints. Yet it inexplicably failed to put up evidence to support these arguments in the High Court, and it continues to fail to do so in this Court.

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[38] Answering affidavit, vol 3 pp 239-241 para 38.

[39] *Moise* (note 26) at para 11.

71. In addition, this Court has now made clear that it is simply not good enough for the government to shirk its constitutional duties for budgetary reasons: "*it is not good enough for [the government] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations*".[40]

72. But even if we accept the government's claims about resource constraints and citizenship fraud at face value, they still do not justify the drastic and unprecedent step of retrospective deprivation of citizenship rights. It is entirely disproportionate to deprive an arbitrarily selected group of people of their citizenship, to save funds for the public fiscus. It is one thing to consider budgetary constraints when, for example, deciding whether to expand rights of citizenship going forward. It is quite another to take away pre-existing citizenship entitlements.

73. Finally, the government's arguments about citizenship fraud miss the point. Even with the High Court's reading in, someone claiming citizenship by parenthood under predecessor legislation must still put up adequate evidence of their claim before they can procure the suite of citizenship documents—passport, ID and birth certificate.

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[40] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) at para 74.

Nothing about the High Court's order means the government must accept a claim to citizenship without more.[41] The way to manage and prevent citizenship fraud is to properly apply the evidentiary requirements of the applicable statutes and regulations; not through a blanket deprivation of citizenship rights.

74. The High Court's fix for section 2(1)(b) was to read in "*or was*" into section 2(1)(b) of the Act. Section 2(1)(b) will then vindicate the citizenship entitlements that Yamikani, Martin, Emma, and Amanda (and others who fall in this category) had under predecessor legislation statutes, because each "*[was] born … outside the Republic, one of his or her parents, at the time of his or birth, being a South African citizen*". This Court should confirm the High Court's order.

Remedy

75. To sum up, section 2 of the Citizenship Act has two constitutional problems:

- Section 2(1)(a) of the Act is unconstitutional because it does not preserve citizenship acquired by descent under predecessor

[41] See, for example, answering affidavit, vol 3 p 229 para 12.13; pp 240-241 para 38.9.

legislation. The section only saves citizenship acquired by birth. Those who acquired citizenship by parenthood under predecessor legislation are, overnight, no longer citizens. There can be no justification—and the government has not put one up—for this complete deprivation of citizenship and infringement of section 20 (and its accompanying rights). Fortunately, there's an easy fix: read in "or by descent" at the end of section 2(1)(a).

- The second problem, though more nuanced, similarly deprives citizenship rights. The problem affects those who were entitled to citizenship under predecessor legislation but did not acquire citizenship because—often for reasons out of their control—their births were not registered. Even though birth registration is no longer a prerequisite for citizenship under the current Act, they are still left in a lurch. They cannot use section 2(1)(a) as a path to citizenship because they did not acquire citizenship (by birth or by descent) under predecessor legislation (because their births were not registered). They also cannot use section 2(1)(b)—and here is the second problem—because section 2(1)(b) applies only to those born after 2013 (when the amendments to the 1995 Act came into force). On 31

December 2012, Yamikani, Martin, Emma, and Amanda had a vested right to citizenship: they could become citizens by registering their births (which, recall, could be done late). On 1 January 2013, they had nothing. This too is an unjustifiable deprivation of citizenship and infringement of section 20 (and its accompanying rights). Fortunately there's an easy fix here too: read in "or was" at the beginning of section 2(1)(b).

76. The solution to both problems—and the effect of the reading-in in both subsections—is simply to preserve rights and entitlements to citizenship that were acquired under predecessor legislation. That is all the reading-in remedy does: preserves existing entitlements that are now, on the wording of the current Act, arbitrarily taken away.

77. Because this remedy merely preserves existing rights, the Department's concerns about immigration fraud and a drain on public finances simply do not arise. Take the Department's fear that "*[c]hildren who would not ordinarily be entitled to citizenship will claim citizenship by simply asserting without more, that one of the parents is a South African citizen*".[42] If that is a problem, it has

[42] Answering affidavit, vol 3 p 240-241 para 38.9.

nothing to do with this case and the remedy the Applicants seek. Under section 2(1)(b) of the current Act, a child born outside of South Africa to a South African parent is a citizen "without more". But the problem is, in any event, illusory because the Department has the opportunity to investigate and verify citizenship claims under the Births and Deaths Registration Act, before it issues and ID, birth certificate or passport confirming citizenship.

78. For the same reason, there is no merit in the Department's cynical argument that "*an old man or woman born in 1949 in Bulawayo (Zimbabwe) or Accra (Ghana) can approach [the Department] now and claim he or she was born of one of the parents who was a South African*".[43] Late registration of birth is allowed,[44] and the veracity of claims to citizenship must be tested on a case-by-case basis. In any event, the current Citizenship Act creates precisely the same "*absurd and irrational results*", to use the Department's hyperbolic description. Take someone born in Zimbabwe in 2015 to a South African parent. For whatever reason, his birth is not registered. Fast forward eighty years to 2095 and the (now) "old man" arrives

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[43] Answering affidavit, vol 3 p 229 para 12.13(d).

[44] Section 9(3A) of the Births and Deaths Registration Act. See also Regulations 3 to 11 of the Regulations on the Registration of Births and Deaths, 2014 (published under GN R128 in GG 37373 of 26 February 2014).

at the South African border and claims citizenship.[45] The Department would, presumably, baulk. But under section 2(1)(b) of the Act the old man would already be—and would always have been—a citizen; he would have acquired citizenship at birth because he was born to a South African parent. It would be irrelevant that his birth was not registered.

79. The High Court's declaration of invalidity should be confirmed. Sections 2(1)(a) and 2(1)(b) should be declared unconstitutional (paragraphs 1 and 3 of the High Court's order) and cured through reading-in (paragraphs 2 and 4 of the High Court's order).

80. After reading-in, these sections will read (with reading-in underlined):

Current Act (*with High Court's reading-in*)

"***2 Citizenship by birth***

(1) Any person-

(a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010 [1 January 2013], was a South African citizen by birth <u>or by descent</u>; or

[45] Answering affidavit, vol 3 p 229 para 12.13(d).

> *(b) who is or was born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen,*
>
> *shall be a South African citizen by birth."*

81. A confirmation order would dispose of the case properly before this Court.

82. That leaves only the counter-application, which we submit is ill-conceived and incompetent. It is to that issue that we now turn.

THE DEPARTMENT'S COUNTER-APPLICATION

83. In its counter-application, the Department asks this Court to somehow re-open the High Court proceedings and revive its opportunity to respond to the factual case concerning each of the individual applicants. The Department does so despite the fact that the High Court refused its application for a postponement and granted consequential relief to Yamikani, Martin, Emma, and Amanda, and the Department has neither applied to rescind nor to appeal the High Court's orders. The counter-application is incompetent.

84. There is also no warrant for the procedural lifeline that the Department seeks. The Department delayed for more than two

years in the High Court—a delay that was not explained in the High Court and is still not adequately explained in this Court. This Court should not grant condonation for this delinquent delay, even if it could.

85. To illustrate these points, we begin with a chronology of the litigation.

The High Court litigation and the Department's deplorable delay

86. This litigation was launched in September 2016, when Yamikani, Martin, Emma, and Amanda came to Lawyers for Human Rights for help. High Court proceedings were brought seeking two broad categories of relief:

- Constitutional relief, namely that section 2(1)(a) and 2(1)(b) of the Act be declared unconstitutional, and that their defects be corrected by a reading-in remedy.

- Consequential relief, namely that Yamikani, Martin, Emma, and Amanda be declared citizens and the Department be directed to register their births, assign them identity numbers, and issue them IDs and birth certificates.

87. The Department filed a notice of intention to oppose in October 2016.[46] Then came three months of silence from the Department and no answering affidavit. The application was set down on the unopposed roll in May 2017. The Department's lawyers arrived on the allocated unopposed court date and asked for more time to file an answering affidavit.[47] The High Court agreed to the Department's request, but with strict conditions.[48] The conditions were:

- The Department was ordered—not permitted, but ordered—to file an answering affidavit within twenty days.
- If the Department did not file within twenty days, the applicants "*may proceed with this application on an unopposed basis*".
- Punitive costs.

88. Twenty days came and went. No answering affidavit. Thirty days. A year. Two years. Still no answering affidavit.[49]

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[46] Applicants' answering affidavit, vol 4 pp 361-362 para 8.

[47] Applicants' answering affidavit, vol 4 p 365 para 19.

[48] High Court's order, vol 1 p 18 para 2.

[49] Applicants' condonation answering affidavit, vol 4 p 365 para 19.

89. Out of options, the Applicants went back to unopposed court. And like government groundhog day, the Department again arrived and asked for yet more time—more time over and above the two years and counting it already had—to file an answering affidavit.[50] The Department did not even offer an affidavit explaining its delay, let alone file a proper application for condonation.[51] The High Court rightly said enough was enough, and granted the Applicants' relief.

90. The High Court's June 2019 grants both the declaratory and the consequential relief that the Applicants sought.[52] The Department has not applied for leave to appeal from the High Court, nor not asked this Court for a direct appeal against those orders.

91. On 18 June 2019, the applicants filed this application to confirm the High Court's declarations of invalidity and reading-in remedy. This application deals only with the High Court's constitutional relief.[53]

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[50] Applicants' answering affidavit, vol 4 p 366 para 19.5.

[51] Applicants' answering affidavit, vol 4 p 366 para 19.5.

[52] High Court's order, vol 1 pp 1-3.

[53] Applicants' notice of motion (Constitutional Court), vol 3 pp 135-138.

92. On 21 August 2019, the Department filed a notice of motion and an answering affidavit.[54]

93. The Department's notice of motion asks for two things:

- First, condonation of the late filing of its affidavit;
- Second, remittal of this matter "*back to the High Court to hear oral evidence for the determination of the material dispute of facts*".

94. The Department's answering affidavit purports to answer the founding affidavit in the High Court – even though the Department never filed an answering affidavit in the High Court and has not made out a case to lead further evidence before this Court. While the Department's affidavit does touch on the constitutional relief, it mostly deals with the consequential relief that is not properly before this Court rather than engaging squarely with the founding papers in the confirmation proceedings.

95. It therefore appears that the Department is asking this Court to condone the late filing of the Department's answering affidavit in the High Court proceedings.

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[54] Record, vol 3 pp 161-246.

Condonation and remittal is not competent

96. The High Court granted a final order in June 2019. In terms of the *functus officio* doctrine, it has no general power to re-visit or amend a final order that it has granted.[55] Its decision is *res judicata*, subject only to (1) this confirmation application, and (2) an appeal against, or rescission of, the High Court's order (which the Department has not sought).

97. This means that Department cannot now file an answer to the Applicants' founding affidavit in the High Court proceedings. If the Department intended to challenge the High Court's order, it had to use one of the limited avenues left to do that. None of those avenues allow the Department to simply file an answering affidavit in this Court for the already-completed High Court proceedings and pretend away the High Court's binding order.

98. With respect, this Court also does not have the power to remit this case to the High Court in the absence of an order setting aside the High Court's order. The High Court's order is final and binding. If that order had been made in the face of factual disputes, the Department's recourse would have been to try appeal or rescind the

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[55] *Molaudzi v S* 2015 (2) SACR 341 (CC) at paras 35-37.

order. In the absence of an appeal or rescission, the Department cannot ask for a do-over.

99. But the Department's reliance on alleged factual disputes is, in fact, a red herring. There were no factual disputes before the High Court because the Department did not file an answering affidavit. It had every opportunity to do so. There was, accordingly, no contrary version before the High Court and consequently no dispute of fact.

100. But there's a more fundamental reason why the Department's late and lengthy discussion about alleged disputes of fact in this case is irrelevant: the alleged disputes go to the consequential relief, but the consequential relief is not before this Court. Indeed, the Department does not point to any disputes of fact relevant to the constitutional relief. Because this application relates to the constitutional relief only, there is, with respect, no reason for this Court to involve itself in the consequential relief.

101. If the Department thinks the consequential relief was wrongly granted, it should follow the proper procedural avenues: apply for leave to appeal (in the High Court, or even directly to this Court, if the Department can show why direct leave to appeal is warranted) or apply to rescind the High Court's order. The Department has

done none of those things. Instead, it wants to cut through proper procedure, ignore the High Court's order, and re-run the consequential relief. There is no reason to throw the Department, to use this Court's words, "*a procedure-circumventing lifeline*".[56]

102. For these reasons, the relief sought in the Department's notice of motion should be refused.

No case made out for condonation

103. Even if condonation could somehow competently be granted, the Department does not nearly make out a case for it. Sight should not be lost of the Department's extraordinary delays in this litigation. These delays are poorly explained in the Department's affidavit, and the attempt at explaining away such a long delay falls far short of what this Court expects—expects from ordinary condonation applicants,[57] and expects especially from government litigants.[58]

104. The Department comes up with two main explanations for its delay: the Department is very busy, and the Department thought this case

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[56] *Kirland* (note 11) at para 82.

[57] See *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at paras 20, 22.

[58] *Kirland* (note 11) at para 82.

could be settled.[59] Neither is a legitimate reason for any delay, let alone a two-year delay in filing an answering affidavit. If the Department needed an extension of filing times because of its workload, the Uniform Rules allows for applications to extend time periods. The answer to a heavy workload is not self-help, and especially not in the face of a court order requiring the Department to file an answering affidavit.

105. The Department is no ordinary litigant. This Court has made clear that the government's pleas for procedural clemency should, in general, be viewed with scepticism.[60] Regrettably, the Department's conduct in this litigation strays far from the do-right-and-do-properly standard this Court sets for government litigants.

106. The Applicants do not complain about the Department's delays for the sake of it. The Department's failure to recognise their citizenship has very real consequences; consequences for their schooling and education, consequences for their employability, consequences for their social welfare, consequences for their right to vote.[61] These on-going consequences mean that the Department's

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[59] Answering affidavit, vol 3 pp 167-174 paras 6.2-6.3.

[60] *Kirland* (note 11) at para 82.

[61] Affidavit of Jessica George (High Court), vol 2 pp 111-115 paras 13-28.

delays in this litigation cause real-world harm to the Applicants. It is simply not good enough for the Department to shrug this all off based on how many files are piling up on its desk.

107. Even if this Court could grant the condonation and remittal sought, we submit that it should decline to do so on the facts of this case.

CONCLUSION

108. Section 2(1)(a) of the Citizenship Act deprives those who acquired citizenship by descent under predecessor legislation, of their citizenship. The government offers no real justification for this startling citizenship-stripping. Fortunately, the reading-in remedy that the High Court ordered is an easy fix.

109. Section 2(1)(b) of the Act similarly results in the stripping of citizenship rights acquired under predecessor legislation. The government tries to justify this infringement, but with empty appeals to citizenship fraud and the frayed public purse. Lack of evidence aside, stripping pre-existing citizenship rights is an irrational and disproportional way of achieving those goals.

110. This Court should confirm the High Court's declaration of invalidity and reading-in remedy, with costs (including the costs of two counsel).

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5 December 2019

LIST OF AUTHORITIES

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC)

MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC)

Moise v Greater Germiston Transitional Local Council 2001 (4) SA 491 (CC)

Molaudzi v S 2015 (2) SACR 341 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)

Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC)

Annexure: different versions of the citizenship statute (1949 – current)

South African Citizenship Act 44 of **1949**				South African Citizenship Act 88 of **1995**	
(1949-1961) [Stat. bundle p 1]	(1961-1986) [p 5]	(1986-1991) [p 7]	(1991-1995) [p 10]	(1995-2013) [p 13]	(2013-current) [p 19]
"6. Persons born outside Union after date of commencement of this Act (1) A person born outside the Union on or after the date of commencement of this Act shall, subject to the provisions of sub-section 2, be a South African citizen if –	"6. Persons born outside Union after date of commencement of this Act (1) A person born outside the Union on or after the date of commencement of this Act shall, subject to the provisions of sub-section 2, be a South African citizen if –	"6. Persons born outside Union after date of commencement of this Act (1) A person born outside the Union on or after the date of commencement of this Act shall, subject to the provisions of sub-section 2, be a South African citizen if –	"6 Persons born outside Union after date of commencement of this Act (1) A person born outside the Union on or after the date of commencement of this Act shall, subject to the provisions of sub-section (2), be a South African citizen if-	"3 Citizenship by descent (1) Any person- (a) who, immediately prior to the date of commencement of this Act, was a South African citizen by descent; or (b) who is born outside the Republic on or after the date of commencement of this Act, and-	"2 Citizenship by birth (1) Any person- (a) who immediately prior to the date of commence-ment of the South African Citizenship Amendment Act, 2010, was a South African citizen by birth; or

(a) his father was, at the time of such person's birth, a South African citizen and he fulfils any one of the following conditions … [(i) to (iv) omitted]; and (b) his birth is, within one year thereof or such longer period as the Minister may in the special circumstances of the case approve, registered at a Union consulate or such other place as may be prescribed …"	(a) his father was, at the time of the birth, a South African citizen and the birth is, within one year thereof or such longer period as the Minister may in the special circumstances of the case approve, registered at a Union consulate or such other place as may be prescribed …"	(a) his father was, at the time of the birth, a South African citizen and the birth is registered in terms of the provisions of section 17A of the Births, Marriages and Deaths Registration Act, 1983 (Act 81 of 1963) …"	(a) (i) his father was, at the time of the birth, a South African citizen and the birth is registered in terms of the provisions of section 17A of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963); or (ii) his mother is a South African citizen and his birth has been registered in terms of subparagraph (i) …"	(i) one of whose parents was, at the time of his or her birth, a South African citizen and whose birth is registered in terms of the provisions of section 13 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992); or … shall, subject to the provisions of subsection (2), be a South African citizen by descent. …"	(b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth. …"

"father" defined as "in relation to an illegitimate child, includes the mother of that child"	"father" defined as "in relation to an illegitimate child, means the mother of that child"	"father" defined as "in relation to an illegitimate child, means the mother of that child"	"father" defined as "in relation to an illegitimate child, means the mother of that child"		