

"X"

M Maritz AJ
27/02/2023



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

<p>(1) REPORTABLE: YES (2) OF INTEREST TO OTHER JUDGES: YES (3) REVISED:NO</p> <p><u>27 February 2023</u> DATE</p> <p><i>M Maritz AJ</i> SIGNATURE</p>
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CASE NO: 6700/2022

In the matter between:

TEBOGO KHOZA

APPLICANT

and

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

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

SECOND RESPONDENT

JUDGMENT

MARITZ AJ

A. INTRODUCTION

[1] The Applicant, Mr Tebogo Khoza, (“the Applicant or Mr Khoza”) brought an application in terms of which the following relief is sought¹:

- 1.1 Directing the First Respondent to register the Applicant’s birth in terms of the Birth and Deaths Registration Act, 51 of 1992, as amended, (“the BDRA”) within 30 days of this order.
- 1.2 Declare the Applicant to be a South African citizen by birth in terms of section 2(2) of the South African Citizenship Act, 88 of 1995 (“the Citizenship Act”), as amended.
- 1.3 Alternatively, declare the Applicant to be a South African citizen by naturalization in terms of section 4(3) of the Citizenship Act.
- 1.4 Directing the First Respondent to enter the Applicant into the National Population Register as a citizen, to issue him with an identity number and to amend and re-issue his birth certificate accordingly, within 30 days of this order.
- 1.5 Directing the First Respondent to make regulations in relation to section 2(2) of the Citizenship Act pursuant to section 23 within a period that the Court deems reasonable.
- 1.6 Directing the First Respondent to accept and adjudicate applications in terms of section 2(2) on affidavit pending the promulgation of regulations.
- 1.7 Ordering the Respondents to pay the costs of this application jointly and severally, the one to pay the other to be absolved.

[2] The Respondents, the Minister of Home Affairs (“the First Respondent”) and the Director General: Department of Home Affairs, (“the Second Respondent” or “Home Affairs” or “Department”) pray for the dismissal of the Applicant’s application with costs.²

B. RELEVANT BACKGROUND FACTS

¹ Notice of Motion

² Respondents Answering Affidavit last paragraph (not numbered)

- [3] The Respondents raised a litany of disputes against almost every aspect of Mr Khoza's founding affidavit. The following is a summary of Mr Khoza's evidence, investigations done by the Department of Home Affairs and relevant parties and the subsequent report of the Department.
- [4] Mr Khoza's evidence is that he was born in South Africa on 17 April 1997³ and has lived in South Africa his entire life.⁴ It is further his evidence that he has never left South Africa. Mr Khoza currently resides at Thaba Tholo on a game farm named Farm Amsterdam, Rooibokkraal Road, near Thabazimbi, Limpopo.⁵
- [5] When Mr Khoza was 6 (six) years old his mother, Ms Martha Nthane ("the Applicant's mother"), passed away, before his birth was registered by his biological parents. Both parents were illegally in South Africa at the time of his birth. On 12 December 2006, when the Applicant was 9 (nine) years old his grandmother, Ms Lucy Ndlovu ("the Applicant's grandmother") from Bushbuckridge in Mpumalanga⁶, brought him to the Thabang Youth Centre ("the Centre), in Limpopo.⁷ The Applicant's grandmother as well as the his mother resided at the 'Smash Block' informal settlement. They were assisted by Thabang Home Based Care.⁸ When the Applicant's mother passed away she was given a pauper's burial by the municipality. Neither the Applicant's grandmother nor his mother had any South African documents. The Applicant states that during his mother's illness two employees of the Centre's home-based care programme cared for her until her death. These employees made arrangements with the municipality for his mother's burial, but due to the fact that she was undocumented he has struggled to ascertain where his mother is buried and neither he nor the Centre were able to obtain a copy of her death certificate.⁹ He states that he does not know where she was buried.

³ Founding Affidavit at par 1

⁴ Founding Affidavit at par 13

⁵ Founding Affidavit at para 1 & 14

⁶ Founding Affidavit, Annexure "TK1", para 9 – 11 of Application for Late Registration of Birth, dated 10 March 2017; Founding Affidavit at par 14

⁷ Founding Affidavit at par 14; A copy of the Centre's register recording his arrival can be found at Annexure "TK4" to the Founding Affidavit

⁸ Founding Affidavit, Annexure "TK1" at par 10 & 11 of Application for Late Registration of Birth, dated 10 March 2017

⁹ Founding Affidavit at par 17

- [6] During 2007, he was placed in the Centre's care, which is confirmed by various Children's Court orders.¹⁰ The Applicant was found to be in need of care and protection by the Children's Court, because he was an orphaned child. The Children's Court could not provide copies of the Court orders issued between 2006 to 2012. It could only provide copies of the Court Orders from 2012. The Applicant attached a copy of the Centre's register recording the fact that he arrived at the Centre on 12 December 2006.¹¹ Since the Applicant turned 21 (twenty-one) years of age he has not been officially placed at the Centre by a Court, but he is part of Thabang's Independent Living Programme which support young adults to acquire skills training and secure employment.¹²
- [7] In 2013, when he was 16 (sixteen) years old, Mr Khoza applied at his local Home Affairs office for birth registration and an identity document. A copy of a report by the Centre, dated 7 September 2015, summarises his interactions with Home Affairs during this time.¹³ It is evident from this report that Mr Khoza finished his grade 9 in 2013 and in 2014 he attended Itereleng Skills Training Centre where he did a welding course and ended the year with a sewing course. In 2015 he was enrolled in a learnership for game rangers and general workers at a local game farm. He is still there and is progressing well.¹⁴
- [8] Mr Khoza was represented by the Centre's manager, Mr Cecil White ("Mr White") throughout the registration process during 2013. Mr Khoza was interviewed for his late registration of birth by the Centre's in-house social worker, Ms Pilane. The Control Immigration Officer in Lephalale, Ndanduleni Phadagi ("Mr Phadagi"), along with other officials interviewed Mr Khoza and Mr White in order to determine the Applicant's surname origin and his place of birth.¹⁵

¹⁰ Founding Affidavit at par 15; See also Annexure "TK3" to the Founding Affidavit (Copies of Court Orders)

¹¹ Founding Affidavit at par 16; See also Annexure "TK4" to the Founding Affidavit

¹² Founding Affidavit at par 16

¹³ Founding Affidavit at par 18; A copy of the report is attached as Annexure "TK5" to the Founding Affidavit

¹⁴ Founding Affidavit: Annexure "TK5" at par 3

¹⁵ Founding Affidavit at para par 18-19

[9] From the evidence before this Court it appears that the clinic card given to the Applicant by his grandmother seemed not to be his and it is unknown from where his grandmother got it. As no documents could be issued on the above information as well as the interviews held, Mr Phadagi agreed to interview Mr Khoza's only living relatives namely his grandmother and aunt in Bushbuckridge, Mpumalanga.¹⁶ This led to Mr Phadagi issuing a report, dated 2 April 2015 ("the Phadagi Report").¹⁷

[10] It appears from the answering affidavit that the Department of Home Affairs is disputing the findings of the Phadagi Report although Mr Phadagi, who drafted the report, is one of its own officials. Mr Phadagi states in the Phadagi report that he is appointed as the Control Immigration Officer based in Lephalale Home Affairs Local Office. He further states his duties which include, *inter alia* the duty to conduct late registration of births. He further confirmed that he and his colleagues went to Bushbuckridge on 24 February 2015 to investigate and verify the information provided by Mr Khoza when he applied for his identity book in Thabazimbi on 4 November 2013.

[11] It is necessary to briefly summarise what Mr Phadagi found:

11.1 Mr Khoza's mother, Martha Nthane and his father, Mr Armando Tibane, were both foreigners as birth extract (*sic*) does not show any ID numbers or passport number (*sic*).

11.2 Mr Khoza's mother was illegally in the country at the time of Mr Khoza's birth.

11.3 Mr Khoza's mother and grandmother are from Namahanza in Swaziland (now known as Eswatini).

11.4 Mr Phadagi states that "*I cannot dispute that Tebogo (Mr Khoza) was born in South Africa but parents (sic) were illegal in the country which means they did not register Tebogo for foreign birth so that they can properly register Tebogo in Swaziland since*

¹⁶ Founding Affidavit at par 20; par 13 of Annexure "TK1" to the Founding Affidavit

¹⁷ Report: Annexure "A" to Annexure "TK1" & Annexure "TK7"

both parents were undocumented." In other words, Mr Phadagi could not dispute Mr Khoza was born in South Africa nor that his parents did not register him at birth.

11.5 Mr Khoza is not familiar with Swaziland, as he was born and grew up in South Africa.

11.6 Mr Phadagi states: "*I cannot remove him as he don't [sic] know where to go.*"¹⁸

11.7 Mr Phadagi requested Mr Khoza's family to assist him in registering him in Swaziland.

11.8 Mr Phadagi requested the relevant officials to let Mr Khoza pass into Swaziland so Mr Khoza could register his birth and obtain a passport.

[12] Mr White then met with Mr Phadagi to find a way forward.¹⁹ A copy of the confirmatory affidavit of Mr White is attached to the Applicant's founding affidavit as Annexure "TK8". They reached an agreement that Mr Khoza would not be arrested or deported if Mr White accompanied him to the Eswatini border. Mr Khoza was also issued with an "*Order to illegal foreigner to depart from the Republic*" to produce at the border.²⁰

[13] It is evidence that when Mr White and Mr Khoza eventually got to the border, the Eswatini officials refused them entry. The officials claimed that Mr Khoza's mother and grandmother's surnames were not from Eswatini. A letter, was issued on 7 April 2015 by a Swaziland immigration official, Mr Dlamini, confirming this.²¹

[14] At the next meeting with Mr Phadagi on 30 June 2015, he (Mr Phadagi) confirmed that Mr Khoza was a stateless person. He advised Mr Khoza and the Centre to contact one Advocate Moses Malakate ("Adv Malakate") at Home Affairs in Pretoria, as well as Lawyers for Human Rights ("LHR"), Mr Khoza's current legal representatives.²²

¹⁸ Founding Affidavit: Annexure "TK7", second last line on the page

¹⁹ Founding Affidavit at par 21; Mr White's confirmatory at Annexure "TK8"

²⁰ Founding Affidavit at par 22; the Order at Annexure "TK9"

²¹ Founding Affidavit at para 23-24; the letter from an official, Mr Dlamini, is reproduced at Annexure "TK10"

²² Founding Affidavit at par 25

- [15] From the evidence it appears that two months went by with no response from the Department of Home Affairs. On or about 9 September 2015, the Centre emailed Adv Malakate, with the facts of the matter and provided him with the relevant documents.²³ No reply was forthcoming and on 17 September 2015 a follow-up email was sent.
- [16] From the evidence it appears that on 17 September 2015 a call was made to the Department of Home Affairs' call centre which deals with identity book problems. After numerous referrals to different people the Applicant was advised to approach the Court for assistance.
- [17] On 21 September 2015 Adv Malakate replied, indicating that Mr Phadagi has not contacted him. Adv Malakate advised that since the Centre had dealt with Mr Phadagi, they should communicate directly with Mr Phadagi.²⁴ It follows that the Applicant's efforts at acquiring assistance from Adv Malakate subsequently failed.
- [18] Ms Pilane, an in-house social worker at the Centre approached a Magistrate in Thabazimbi for help, who assured Ms Pilane and the Applicant that there was a legal solution to the Applicant's statelessness. The Magistrate referred them back to Mr Phadagi with a letter requesting assistance.²⁵
- [19] Thereafter a meeting was held between Ms Pilane, Mr Phadagi and Mr Phoko (Mr Phadagi's manager) in Lephalale on 9 December 2015, and the conclusion at his meeting was that the Applicant did not have a claim of citizenship and consequently Home Affairs would not register his birth. At that stage Mr Khoza was already 18 (eighteen) years old.²⁶
- [20] On 23 June 2016, Mr Khoza's legal representatives sent correspondence to Mr Phadagi in which they requested late registration of Mr Khoza's birth in line with his findings that Mr

²³ Founding Affidavit at par 26

²⁴ Founding Affidavit at par 27; Mr Malakate's email to be found at Annexure "TK11"

²⁵ Founding Affidavit at par 28; The only copy of this letter was given to Mr Phadagi and thus it cannot be reproduced

²⁶ Founding Affidavit at par 29

Khoza was born in South Africa. This was a final attempt to resolve Mr Khoza's statelessness. Mr Phadagi did not respond.²⁷ Mr White then went in-person to deliver a copy of this letter directly to Mr Phadagi. Mr Phadagi signed an acknowledgement of receipt of this letter.²⁸ No response to this letter was received.²⁹

[21] On 8 June 2018 (two years later), LHR attempted to contact the embassy of Eswatini to confirm whether they recognised Mr Khoza as a citizen. The embassy did not respond.³⁰

[22] In paragraphs 32 and 33 of the Applicant's Founding Affidavit it is stated that in terms of the Constitution of Eswatini, only a father who recognises his paternity can confer his citizenship. It is not possible to acquire citizenship through a mother in terms of Swazi law. The Applicant states that he has no knowledge of who his father is nor whether he is alive and that all attempts to identifying his father have failed. Consequently, he is unable to claim citizenship in Eswatini and that he has no links to any other country.

[23] He further states that according to Mr Phadagi's report his father was one, Armando Tibane, but that he has never known this person. His nationality is unknown, and that he has not acknowledged him as his son.

[24] In the Applicant's Founding Affidavit³¹ the Applicant states the prejudice he is suffering as a result of the Department's refusal to recognise his citizenship. It can be summarised as follows:

24.1 It has been a decade (2013 to 2023) since his first attempt to have his birth registered.

²⁷ Founding Affidavit at par 30; LHR'S letter at Annexure "TK12"

²⁸ Founding Affidavit at par 30; Mr Phadagi signed an acknowledgment of receipt, which can be Found at Annexure "TK13"

²⁹ Founding Affidavit at par 30

³⁰ Founding Affidavit at par 31, LHR's letter can be found at Annexure "TK14"

³¹ Founding Affidavit at para 34 - 46

- 24.2 The Department has: (i) refused to register his birth and to recognise his citizenship, (ii) refused to aid him in obtaining details or to provide a proper procedure to follow, and (iii) failed to correspond for months at a time.
- 24.3 As a result of the Department's actions – and lack thereof – he cannot study, work legally, get married, get a driver's licence, open a bank account, or access any formal social assistance.³²
- 24.4 He has no citizenship of any country, including Eswatini, and accordingly he cannot be deported to any country.³³
- 24.5 He was informed that because his birth is not registered, he is unable to meet the requirements for having his citizenship recognised. If his birth is not registered, he will remain stateless indefinitely.³⁴
- 24.6 A lack of documentation puts his employment under strain. The Centre also no longer provides him with accommodation.³⁵
- 24.7 Mr Khoza states that being an orphan with no ties to other countries, continues to cause him great distress. He is afraid of being deported to a country he does not know, with no ties to help him. The fact that he was orphaned and abandoned at a young age is not his fault.³⁶
- 24.8 At a young age, even with his caregivers at the time, he attempted to do everything legally possible to register with the Department but to no avail. He even approached Eswatini twice, a country he does not know and was, firstly, refused entry and secondly, received no assistance from its embassy.³⁷
- 24.9 Mr Khoza is in limbo, unable to progress or flourish, despite offers to progress in his career which he cannot take due to a lack of citizenship.³⁸ He cannot even be registered as the father of his biological child, Junior, nor marry his child's mother.³⁹ He is thus also at risk of being separated from his family.⁴⁰

³² Founding Affidavit, par 35

³³ Founding Affidavit, par 36

³⁴ Founding Affidavit, par 37

³⁵ Founding Affidavit, par 38

³⁶ Founding Affidavit, para 39 - 40

³⁷ Founding Affidavit, par 41

³⁸ Founding Affidavit, par 44

³⁹ Founding Affidavit, para 42-43

⁴⁰ Founding Affidavit, par 46

24.10 He states that because he was born in South Africa and have grown up here, he has significant social links to the community and the culture. He states that he speaks Setswana, IsiZulu, English and some Afrikaans. He states that he does not speak siSwati.⁴¹

[25] According to the Applicant he has no other alternative, but to approach this Court for assistance.

C. ISSUES FOR DETERMINATION

[26] The issues for determination are as set out in paragraphs 1.1 to 1.7 above, which include *inter alia*, the following:

26.1 Whether the Applicant has made out a proper case for the late registration of his birth in terms of the BDRA.

26.2 Whether the Applicant has made out a proper case to be recognised as a South African citizen by birth in terms of section 2(2) of the Citizenship Act *alternatively* by naturalisation in terms of section 4(3) of the Citizenship Act.

26.3 Whether the Applicant has made out a proper case to direct the First Respondent to make regulations in relation to section 2(2) of the Citizenship Act pursuant to section 23.

D. JUDGMENT

[27] Against this background is the application before this Court.

[28] It is the case of the Applicant that the application arises as result of continued and obstinate refusal by the Department of Home Affairs to recognise his citizenship, being an orphan born

⁴¹ Founding Affidavit at par 45

in South Africa, who has no ties to other countries, and register his name in the national population register.

[29] The Respondents disputes virtually every aspect of the Applicant's founding affidavit. The Court will address the crux of these factual disputes hereinunder.

[30] Factual Disputes

[31] As this is an application, the applicable framework for determining disputes of facts must be done with regards to the *Plascon-Evans*⁴² rule. As the SCA in *DPP v Zuma* summarised:

*"It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raised fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*⁴³

[32] It is trite that bare or bald denials are insufficient to constitute a proper dispute. The SCA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) ("Wightman") at par 13 noted instances where such denials nevertheless rise to the level of being real, genuine and bona fide disputes in itself. This is because *"there is no other way open to the disputing party and nothing more can therefore be expected of him."*

⁴² *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A); 1984 (3) SA 620 (A)

⁴³ Harms DP (Farlam, Ponnann, Maya and Cachalia JJA Concurring) in *National Director of Public Prosecutions v Zuma* 2009 (4) BCLR 393 (SCA) at par 26

[33] However, “even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment.”⁴⁴

[34] As the SCA further explains in *Wightman*:

*“When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.”*⁴⁵

[35] The above legal principles are relevant in determining whether the Respondents’ disputes are real, genuine and bona fide.

[36] The Respondents’ take issue with the following aspects:

Applicant’s date of birth

36.1 The Respondents take issue with the Applicant’s date of birth.⁴⁶ The Respondents note that the Applicant’s legal representatives indicate his date of birth in their letter to the Minister on 28 March 1996.⁴⁷ It is further averred by the Respondents that in the Applicant’s founding affidavit his date of birth is recorded as 17 April 1997, which creates a lack of clarity with respect to the Applicant’s correct date of birth.⁴⁸ In the replying affidavit the Applicant states that it was a *bona fide* mistake by his attorney in a single correspondence, which his attorney confirms.⁴⁹ This Court finds that all

⁴⁴ *Wightman* at par 13

⁴⁵ *Wightman* at par 13

⁴⁶ Answering Affidavit at para 22 & 27.3

⁴⁷ Letter to the Minister, dated 10 March 2017, Founding Affidavit: Annexure “TK1” at par 3

⁴⁸ Answering Affidavit at par 27.3

⁴⁹ Replying Affidavit at par 12; A copy of confirmatory affidavit by Applicant’s attorney is attached to his

other relevant documents indicate the Applicant's date of birth as 17 April 1997, save for a single correspondence as referred to above, which mistake was adequately clarified. The Court finds the Respondents' dispute in this regard untenable.

Applicant was born in South Africa

36.2 The Respondents take issue with the Applicant's claim that he was born in South Africa. The crux of the Respondents denials in this regard is that the Applicant did not provide a detailed timeline of his life dating from time of supposed date of birth to date.⁵⁰ The Respondents is unsatisfied that *"he merely outlining details of life from the time he personally made efforts of having his birth registered ..."*⁵¹

36.3 The Respondents further submitted that *"there is no evidence produced indicating any trace attesting to the circumstances surrounding the Applicant's birth in South Africa, precisely where in the Republic he was born and any documentation, by means of a clinic card or as sufficient as possible to attest to that fact."*⁵²

36.4 The Respondents highlights the Birth and Deaths Registration Act⁵³ and lists various routes that ought to have been followed at the Applicant's birth, by parents or other competent persons, so that proper documentation could have been acquired detailing his birth.⁵⁴

36.5 Counsel for the Applicant submitted that it is unknown how the Applicant, a person orphaned from a young age (6 years), can change history, not least the conduct of those adults who were supposed to act in his interests weeks after his birth. It was further submitted that it is unknown how the Applicant is expected to provide a

Replying Affidavit as Annexure "TKR1"

⁵⁰ Answering Affidavit at par 23.1

⁵¹ Answering Affidavit at par 23.2

⁵² Answering Affidavit at par 25.2

⁵³ Act 51 of 1992

⁵⁴ Answering Affidavit at par 25.1

detailed timeline of his life since his birth. The Applicant was an orphaned child who relied on the assistance of adults. To expect that level of detail is absurd. The Court finds nothing to deviate from these submissions.

36.6 In addition to the above, Mr Phadagi's report further confirms that the Applicant was born in South Africa, that his parents were illegal and undocumented in the country and that they did not register him. Mr Phadagi, an official of the Department of Home Affairs, states as follows: *"I cannot dispute that Tebogo (Mr Khoza) was born in South Africa but parents (sic) were illegal in the country which means they did not register Tebogo for foreign birth so that they can properly register Tebogo in Swaziland since both parents were undocumented."*⁵⁵ The Phadagi report concludes as follows: *" Conclusion is that Tebogo is not familiar with Swaziland since he was born here and grew up here and I cannot remove him as he don't (sic) know where to go."*⁵⁶

36.7 The Respondents' denials are therefore an absurdity and baseless if one have regard that an investigation was done by an official of the Department of Home Affairs, whereafter a report was compiled and a conclusion reached that the Applicant was born in South Africa.

36.8 The Court rejects the Respondents' denials in this regard and finds them clearly far-fetched.

Applicant does not have documentation and the Respondents dispute the findings of the Phadagi report

36.9 The Department takes issues with the fact that Mr Khoza does not have the necessary documentation to prove his birth as well as disputes the accuracy of the findings of the Phadagi report.

⁵⁵ Founding Affidavit: Annexure "TK7" at par 3

⁵⁶ Founding Affidavit: Annexure "TK7" under the heading "Conclusion"

36.10 The entire basis of Mr Khoza's application is, *inter alia*, to register his birth. The reason why Mr Khoza approached the Department and now the Court is that he had no documentation. Mr Khoza in his replying affidavit states that "*It has been, and still is, my evidence that I have no record of my birth, and thus the relief I seek directing the respondents to register my birth.*"⁵⁷

36.11 The Department itself notes that this is an "*application to this honorable [sic] court for late registration of birth.*"⁵⁸ The Department says it "*requires a thorough and concise chain of events, to account and prove adequately thereof, that Applicant was born in South Africa.*"⁵⁹ The Court notes that there is no legal basis for such an arduous process as there are currently no regulations in place regarding the procedure to follow. It has always been the case of Mr Khoza that he has no documentation of his birth.⁶⁰ Mr Phadagi's report further confirms that Mr Khoza was born in South Africa.

36.12 How Mr Khoza, who came to the Department because he had no documentation and no parents, is supposed to provide a "*thorough*" chain of events to account for his birth is unknown and such proposition in itself is an absurdity. The Department raises no basis for disputing Mr Khoza's version, which is explained in as much detail as an orphan, with no documentation or family, can provide. This Court finds that the Department's denial in this regard is a bald denial and therefore rejects it.

36.13 The Department asserts further:

*"The Applicant's reliance on Mr Phadagi's report as to whether he was born in South Africa is groundless, as Mr Phadagi's report has no tangible evidence to back up his conclusion that the Applicant was indeed born in South Africa."*⁶¹

⁵⁷ Replying Affidavit at par 24

⁵⁸ Answering Affidavit at par 27.6

⁵⁹ Answering Affidavit at par 27.6

⁶⁰ Founding Affidavit at para 6, 35, 40 and 50. Answering Affidavit at par 24

⁶¹ Answering Affidavit at par 27.2

36.14 Mr Phadagi is a Home Affairs official. The Department itself refers to Mr Phadagi as being “*appointed in terms of section 33 Immigration Act 13 of 2002 (sic), as amended, to conduct late registration of births and other related duties; [and he] was actively involved in [Mr Khoza’s] case.*”⁶² Mr Phadagi was thus the relevant Department official handling the matter.

36.15 The Department further blames Mr Khoza for failing beyond his control:

*“Findings of Mr Phadagi that [Mr Khoza] was born in South Africa are not substantiated by any relevant documents, and as such they cannot be relief on. [Mr Khoza] needs a road to health care or birth registration documents to confirm that he was indeed born in South Africa.”*⁶³

36.16 It is trite that the testimony of a witness stands as evidence, even where there is no documents available. It is nonsensical to claim that Mr Khoza, who is seeking late birth registration, should have birth registration documents.

36.17 In addition to the above, this Court notes that in Mr Khoza’s reply he notes that, after filing his founding affidavit, the Centre came across a report by a social worker in 2014 (“the 2014 report”).⁶⁴ This report explains in some detail Mr Khoza’s history before coming to the Centre. It confirms Mr Khoza’s version, save that the 2014 report notes parent names that are different to those in Mr Phadagi’s report. The 2014 report lists his mother as Irene Mkhabela and his father with possible surname of Khoza to explain Mr Khoza’s surname. However, the Phadagi report lists Mr Khoza’s mother as Martha Nthane and his father as Amando Tibane. The importance thereof is that this now constitutes two reports by two officials outlining Mr Khoza’s life, which due to unfortunate circumstances, cannot be any more detailed. This Court is satisfied,

⁶² Answering Affidavit at par 29.8

⁶³ Answering Affidavit at par 33

⁶⁴ Replying Affidavit at par 18. Report is attached as Annexure “TKR2”. The Centre, via its current manager, confirms it found this report in Annexure “TKR3”

based on the evidence, that Mr Khoza has provided all relevant information at his disposal to the Department.

36.18 This Court finds that the Department raises no basis for disputing the veracity or accuracy of the findings of its own official and as such the Court rejects its dispute in this regard.

As a child, Mr Khoza did not need care and protection

36.19 Although the Department admits that Mr Khoza was brought to the Centre when he was nine year old, it disputes that when he was brought to the Centre that he was a child who needed care and protection. Then, throughout its dispute with this fact, the Department outlines the legal framework of such centres and how they operate to care for vulnerable children, separated or no longer with their biological parents.⁶⁵

36.20 Mr Khoza merely alleges in his founding affidavit that he was a child in need of care and protection, as per Children's Court orders that were annexed. The Department does not even deal with the Children's Court orders.⁶⁶

36.21 It is common cause that Mr Khoza's mother passed away when he was six years old and that he was brought to the Centre when he was nine years old. Furthermore, that he was placed in the care of the Centre by Children's Court orders. To deny that Mr Khoza was not a child in need of care and protection is absurd.

36.22 For reasons stated above, this Court finds that this dispute is ambiguous and far-fetched.

⁶⁵ Answering Affidavit at para 29.2 – 29.4

⁶⁶ Founding Affidavit: Annexure "TK3"

Mr Khoza does not know where his mother is buried

36.23 The Department disputes Mr Khoza's evidence that he does not know where his mother is buried.

36.24 Mr Khoza's evidence is that he does not know where his mother is buried.⁶⁷ The Department claimed that Mr Khoza should contact social workers in order to obtain information regarding his mother's funeral and burial. The Department also ignores that information provided which details how those who cared for this mother during her illness made arrangements and yet were unable to locate a death certificate. The Centre itself was unable to do so.

36.25 The Department, during its investigation, was also unable to locate a death certificate of Mr Khoza's mother and/or where she was buried. To now expects Mr Khoza to obtain this information is absurd. It is common cause that Mr Khoza's parents were undocumented and therefore it is virtually impossible to trace his mother's burial place.

36.26 This Court finds that this dispute is untenable and therefore rejects it.

Mr Phadagi's report is contradictory

36.27 The Department claims that Mr Phadagi's report is confusing. The Department avers: *"Mr Phadagi concluded that [Mr Khoza] was born in South Africa, however, the same Mr Phadagi in this paragraphs wants to arrest and deport [Mr Khoza]."*⁶⁸

⁶⁷ Founding Affidavit at par 17

⁶⁸ Answering Affidavit at par 34

36.28 For purposes of clarity, it is important to quote the entire paragraph from the Phadagi report that outlines Mr Phadagi's findings:

"Conclusion is that Tebogo is not familiar with Swaziland since he was born here and grew up here and I cannot remove him as he don't (sic) know where to go. I requested his family to assist him to register him in Swaziland where his mother used to stay to take domicile of his mother (sic). Teboho [sic] Khoza is residing in THABANG CHILDRENS PROJECT since 2006 in Thabazimbi and MR Cecil Clive White ID NO 6211265168085 is legal guardian for Tebogo Khoza.⁶⁹

36.29 From the above it appears that the words "arrest" and "deport" do not appear in the final paragraph of the Phadagi report.

36.30 Furthermore, Mr Khoza states in his founding affidavit that it is not possible to acquire citizenship through a mother in terms of Swazi law.⁷⁰ That he has no knowledge who his father is nor whether he is alive and that all attempts to identify his father has failed. Consequently, he is unable to claim citizenship in Eswatini and that he has no links to any other country.

36.31 Mr Khoza explains the purpose of the "Order to illegal foreigner to depart from republic",⁷¹ issued by Mr Phadagi that it was only issued to facilitate his approach to the Eswatini border and to be handed to the officials at the border.⁷² No more, no less.

36.32 For reasons stated above, this Court finds that the Phadagi report is not contradictory and therefore it rejects this dispute.

⁶⁹ Founding Affidavit: Annexure "TK7" under the heading "Conclusion"

⁷⁰ Founding Affidavit at par 32

⁷¹ Founding Affidavit: Annexure "TK9"

⁷² Founding Affidavit at par 22

Mr Khoza's family having different surnames that undermines his case

36.33 Mr Khoza's evidence is that upon arriving at the Eswatini border, he was denied entry since the surnames he provided did not match any in Eswatini. He annexed a letter confirming this from an Eswatini official (Mr Dlamini) to his founding affidavit.⁷³

36.34 The Department denies this fact. It claims that the surnames are all different and people do not "appear" to be related to each other. The Department then questions "*how and under what circumstances did [Mr Khoza] acquire the surname he currently carries.*"⁷⁴

36.35 In Mr Khoza's reply he confirms that this is just the name he has known his whole life. Mr Khoza states that "*For as long as I can remember, I have been addressed as Tebogo Khoza, I have no knowledge of who gave me this name and why.*"⁷⁵

36.36 It is also clear from the evidence that Mr Khoza approached the Eswatini border on the recommendations and instructions of the Department's own official. To deny Mr Khoza's version of events, where he attempted compliance with the Department's own official's evidence is nonsensical and absurd.

36.37 Furthermore, the 2014 report lists his mother as Irene Mkhabela and his father with the possible surname of Khoza, which possibility could explain Mr Khoza's current surname. The Department does not deny that, in terms of Eswatini law, "*only a father who recognizes his paternity can confer his [Eswatini] citizenship*" on his children.⁷⁶

⁷³ Founding Affidavit: Annexure "TK10"

⁷⁴ Answering Affidavit at par 35

⁷⁵ Replying Affidavit at par 39

⁷⁶ Answering Affidavit at par 37.1

The Department raise no factual or legal basis to deny Mr Khoza's surname and/or his evidence in this regard.

36.38 For reasons stated above, this Court rejects the Department's denials in this regard and finds that the alleged disputes are far-fetched.

The Department baldly denies almost half (30 paragraphs) of the Founding Affidavit in a single paragraph⁷⁷ (which include sub-paragraphs without reference to which paragraphs in the founding affidavit it is referring to)

36.39 In considering these disputes this Court finds that the Department's answering affidavit does not reflect its disputes fully and accurately and this Court therefore takes a robust view of the matter and rejects these denials/disputes from the Department.⁷⁸

Emaswati lineage

36.40 As stated above, the Department does not dispute that, in terms of Eswatini law, "*only a father who recognizes his paternity can confer his [Emaswati] citizenship*" on his children.⁷⁹

36.41 Forgoing its previous dismissal of the Phadagi report, the Department asserts:

⁷⁷ Replying Affidavit at par 37

⁷⁸ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at par 13*

⁷⁹ Answering Affidavit at par 37.1

“Report issued by Mr Phadagi, established that Applicant’s father is Armando Tibane. Investigation towards that lead may provide Applicant with direction in as far as which Country he originates from and offer a solution to his statelessness.”⁸⁰

36.42 It is notable that the Department now seems to accept the findings of the Phadagi’s report that it previously dismissed.

36.43 It is the evidence of Mr Khoza that he does not know someone called “Armando Tibane”, his father’s nationality or where to find his father, and is thus unable to acquire such citizenship.⁸¹ This Court finds that the Department lays no foundation for disputing this.

36.44 The Department further asserts that Mr Khoza ought to conduct some kind of investigation. Such investigations are the purview of the Department and its officials. Furthermore, the Department says in its own papers that Mr Phadagi was “*appointed in terms of section 33 Immigration Act 13 2002 [sic], as amended, to conduct late registration of births and other related duties; was actively involved in [Mr Khoza’s] case.*”⁸²

36.45 There is no guarantee that the Department will accept any findings of a lay investigation. In the Court’s view these investigations should have been done by the Department and its officials.

36.46 This Court finds that the Department’s alleged dispute in this regard is nonsensical and therefore it is rejected.

Further alleged disputes

⁸⁰ Answering Affidavit at par 37.2

⁸¹ Founding Affidavit at par 33; Replying Affidavit at par 9

⁸² Answering Affidavit at par 29.8

- 36.47 The Department asserts that there is “*insufficient proof*” to account for Mr Khoza’s birth details and family history “*apart from what is deposed by Applicant himself*.”⁸³
- 36.48 What Mr Khoza deposed to is evidence. The Department ignores that Mr Khoza has provided as much evidence as he can, given his traumatic and tragic history as a young orphan. The Department further ignores the evidence of others, including Mr Phagagi, one of its own officials. Furthermore, Mr Khoza has in his replying affidavit annexed a slightly more up-to-date report of his history.⁸⁴
- 36.49 The Department further asserts that “[Mr Khoza’s] application to this honorable [sic] court for late registration of birth requires a thorough and concise chain of events, to account and prove adequately thereof, that [Mr Khoza] was born in the Republic.”⁸⁵ This Court finds that no legal basis is laid by the Department for such an assertion and therefore it is rejected.
- 36.50 The Department’s own officials and a social worker could gather little further information and what information was gathered has been provided by Mr Khoza. It is also clear from the evidence that Mr Khoza is a person orphaned and abandoned at a young age, with no one to provide him with more details. It is unclear what more Mr Khoza could do, if even the Department’s own officials and a qualified social worker could not meet this unknown threshold namely “*a thorough and concise chain of events*”.
- 36.51 Counsel for the Applicant referred the Court to *Zhao v Netherland*⁸⁶ and submitted that, in cases of statelessness, because of the difficulties that often arise when determining whether an individual has acquired a nationality, the burden of proof must be shared between the stateless claimant and the authorities of the State to

⁸³ Answering Affidavit at par 37.3

⁸⁴ Replying Affidavit: Annexure “TKR2”

⁸⁵ Answering Affidavit at par 37.4

⁸⁶ *Zhao v Netherland CCPR/C/130/D/2918/2016* (United Nations Convention on Civil and Political Rights) at par 8.3. South Africa ratified this Convention in 1998

obtain evidence and establish the facts as to whether an individual would otherwise be stateless. This Court agrees herewith.

36.52 In the Court's view Mr Khoza's evidence is substantially unchallenged and the Department's disputes must therefore be dismissed on the papers.

36.53 This Court agrees with the submissions of Counsel for the Applicant that the Department cannot be supine in discharging its own evidentiary burden, assuming it has grounds to justify its claims, in matters of statelessness and act only to fruitlessly discredit Mr Khoza's, a stateless person's, evidence, by creating fictitious standards of proof like "*thorough and concise chain of events*" and "*adequate*" proof. It is not for Mr Khoza to prove his birth and citizenship beyond any doubt. Furthermore, the Department's officials have been involved in Mr Khoza's case for a decade (2013 to 2023) and still this matter has not been resolved. Whatever, flawed investigations there might be is a failing on the Department, not on Mr Khoza, who came to the Department to assist him, which is mandated as such.⁸⁷

36.54 For reasons stated above, this Court finds that the Respondents' alleged factual disputes are not real, genuine and bona fide and therefore this Court rejects them on the papers.

[37] Legal issues

[38] The Court will now deal with the Applicant's application for the late registration of his birth, his application for citizenship and his application to direct the First Respondent to promulgate regulations in relation to the Citizenship Act.

[39] **Late registration of birth**

⁸⁷ Applicant's Heads of Argument at para 94.1 – 94.6

- [40] The 1954 United Nations Convention⁸⁸ relating to the status of stateless persons defines statelessness as ‘*a person who is not considered as a national by any State under the operation of its law.*’ One of the ways in which a person may become stateless is when his/her birth has not been documented in any country. This is exactly the predicament in which Mr Khoza found himself. His difficulty was not helped by the Department’s lack of action and manifested bad faith in the handling of his case.
- [41] Section 2 of the Births and Death Registration Act, 51 of 1992, (“BDRA”) provides that the BDRA applies to all South African citizens including “*persons who are not South African citizens but who sojourn permanently or temporarily in South Africa.*”
- [42] Section 9 of the BDRA deals with notices of births and indicates it applies to “*any child born alive*” in South Africa, regardless of the parent’s nationality. Section 9 states that in the case of any child born alive in South Africa notice of his/her birth should be given within 30 days after the birth of such child. Section 9(3A) provides that where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered unless the notice of the birth complies with the prescribed requirements for a late registration of birth. It is the case of the Respondents that Mr Khoza’s application for the late registration of his birth does not meet the mandatory requirements which included *inter alia*, proof of his birth in South Africa attested by a medical partitioner who attended to the birth or if not born in a hospital, an affidavit by a person who witness his birth. As the Applicant’s mother is deceased, a death certificate should have also accompanied his application.
- [43] On the Department’s own version it interviewed Mr Khoza’s only living relatives namely his grandmother and his aunt and notwithstanding these interviews and an investigation done, the Department was unable to obtain any of the above information and/or documentation regarding Mr Khoza’s birth and/or his mother’s burial place. The Department was unable to obtain a death certificate in respect of the Applicant’s late mother. Furthermore, it is evident that the Applicant’s grandmother and his mother resided in an informal settlement, that they were illegal in the country and undocumented from which one can conclude that it is highly

⁸⁸ 1954 United Nations Convention: Statelessness

probable that Mr Khoza was born at home, which explains the lack of hospital records. The Department is to blame for its failure to obtain the relevant information as well as an affidavit from Mr Khoza's grandmother or aunt in this regard.

[44] Mr Phadagi, the Control Immigration Officer based in Lephalale Home Affairs Office, compiled a report subsequent to the investigation and found that *"I cannot dispute that Tebogo was born in South Africa but parents were illegal in the country which means they didn't register Tebogo for foreign births so that they can properly register Tebogo in Swaziland since both parents were undocumented...conclusion it that Tebogo is not familiar with Swaziland since he was born here and grew up here and I cannot remove him as he don't know (sic) where to go."* Mr Khoza was not only born in South Africa, but he has nowhere to go.

[45] From the evidence before this Court as well as the investigation done by the Department and its findings subsequent thereto, this Court is satisfied that Mr Khoza was born in South Africa. Mr Khoza's inability to provide the required documents as referred to above is due to the fact that his parents were illegal in the country and undocumented. Furthermore, he was orphaned at the age of 6 (six) years and placed in the care of the Centre at the age of 9 (nine). To expect Mr Khoza to provide the details as required by the Department is absurd, especially if one takes into account that the Department was unable to obtain this information during its investigation. Unlike, Mr Khoza, the Department has *"at its disposal the full machinery of the state."*⁸⁹

[46] For reasons stated above, this Court finds that Mr Khoza substantially complied with the mandatory requirements to be successful with his application for the late registration of his birth.

[47] Section 12 of the BDRA deals with notice of birth of an abandoned child, putting obligations on social workers to conduct an enquiry and thereafter provide notice of birth of such child. It appears that this was not done in Mr Khoza's case, as the Department admits, yet for which Mr Khoza is blamed. The Department conducted an investigation and should have obtained

⁸⁹ *Minister of Home Affairs and Others v Jose and Another 2021 (6) SA 369 (SCA)* at par 19

this information from the social worker during its interview with her. Various Children's Court order are attached to Mr Khoza's application. There is no evidence that the Department made any enquiry at the Children's Court regarding this aspect. Mr Khoza disclosed all information at his disposal to the Department. He cannot be blamed for the Department's lack of action and manifested bad faith in the handling of his case.

[48] It is evident that Mr Khoza's birth has not been documented in any country and that he is stateless. His birth was neither documented in South Africa nor in Eswatini. All attempts by the Department to "deport" him to Eswatini failed for reasons already stated. Children without birth certificates are "invisible".⁹⁰ Such children are exposed to the risk of being excluded from the education system and from accessing social assistance and healthcare. They are denied support and assistance considered necessary for their positive growth and development. There is undoubtedly a disproportionate severity of such consequences for children from indigent families⁹¹, as is the case with Mr Khoza.

[49] For reasons stated above, this Court is satisfied that Mr Khoza was born in South Africa and his application for the late registration of his birth should succeed.

[50] **Citizenship by Birth**

[51] The Applicant's application for citizenship by birth is premised on section 2(2) of the Citizenship Act.

[52] Section 2(2) of the Citizenship act provides:

⁹⁰ Full Bench Decision: *Centre for Child Law v Director-General: Department of Home Affairs and Others* [2020] JOL 47299 (ECG) at par 4

⁹¹ Full Bench Decision: *Centre for Child Law v Director-General: Department of Home Affairs and Others* [2020] JOL 47299 (ECG) at par 4

“Any person born in South Africa 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 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.”*

[53] Section 2(2) of the Citizenship Act has three legs that must be met before citizenship can be conferred on a person: (i) they must not fit the requirements of section 2(1) of the Citizenship Act; (ii) they must have no ties to other countries; and (iii) their birth must be registered in terms of the BDRA.

[54] Mr Khoza was not a South African citizen by birth prior to the Citizenship Act, nor is it clear that either one of his parents, at the time of his birth, was a South African citizen. This therefore puts him beyond section 2(1) of the Citizenship Act. Mr Phadagi confirms that Mr Khoza’s parents were illegal in the country and undocumented, which explains Mr Khoza’s lack of documents and nationality.

[55] In addressing the second requirement in section 2(2) of the Citizenship Act this Court finds, based on the evidence, that Mr Khoza has no ties to any other country and has no right to such citizenship or nationality. It was further the evidence of Mr Khoza that the Department appears to dispute this by denying that Mr Khoza has thoroughly explained his every movement and location. This is not a proper denial and all possible evidence at the disposal of Mr Khoza has been provided. Furthermore, Mr Phadagi’s own report confirms it cannot be disputed that Mr Khoza was born in South Africa and knows no other country. In addition to this, this Court has already found that Mr Khoza was born in South Africa.

[56] This Court has also found that the Department’s claims that Mr Khoza ought to conduct some kind of lay investigation, which may not even be accepted by the Department, to trace his paternal lineage, which may or may not lead to citizenship in Eswatini, are baseless. This Court also considered the fact that Mr Khoza went, on the recommendations of Mr Phadiagi (an

official of Home Affairs) to the Eswatini border whereafter he was refused to enter Eswatini for reasons already stated above. The evidence before this Court also shows that Mr Khoza lived his entire life in South Africa.

[57] If the Department can provide evidence showing how Mr Khoza has a right to citizenship or nationality to a foreign country, it ought to have provided the Court with this information. Indeed, it ought to have provided Mr Khoza with that information over the last ten years of his trials and tribulations with the Department. No basis has been laid to dispute Mr Khoza's evidence or the findings of the Department's own official in this regard.

[58] This Court finds that Mr Khoza has no ties to any other country or citizenship or nationality of any other country nor does he has a right to citizenship or nationality of another country.

[59] It is common cause that Mr Khoza's birth was not registered. This aspect has already been addressed above. This Court has already found that Mr Khoza's application for the late registration of his birth should succeed and it follows that on compliance with that order Mr Khoza will meet the requirement in section 2(2) of the Citizenship that his birth should be registered. It follows that Mr Khoza meets the requirements for citizenship in terms of section 2(2) of the Citizenship Act and this Court finds that citizenship should be conferred upon him.

[60] **Citizenship by Naturalisation**

[61] The Applicant's application is, in the alternative, premised on section 4(3) of the Citizenship Act. If Mr Khoza meets the requirements he will qualify to apply to the Minister for recognition of his citizenship.

[62] Section 4(3) of the Citizenship Act provides:

“A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if_

(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and

(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act 51 of 1992).”

[63] From the above it is clear that the four requirements that Mr Khoza should meet to have his citizenship recognized by the Minister are the following: (i) that he was born in South Africa; (ii) that he was born from parents who are not South African citizens and who have not been admitted to South Africa for permanent residence; (iii) that he has lived in South Africa since birth until becoming an adult and (iv) that his birth is registered.

[64] This Court has already found that Mr Khoza was born in South Africa and that he grew up in South Africa. It is Mr Khoza's evidence that he has never lived or known any other country. These facts were confirmed in the Phadagi report. It follows that Mr Khoza meets the first requirement in section 4(3) of the Citizenship Act.

[65] It is common cause that Mr Khoza's parents are not South African citizens and that they have not been admitted to South Africa for permanent residence. This fact is confirmed in the Phadagi report where it is stated that *“I cannot dispute that Tebogo was born in South Africa but parents were illegal in the country...both parents were undocumented.”* It follows that Mr Khoza meets the second requirement in terms of section 4(3) of the Citizenship Act.

[66] It is the evidence of Mr Khoza that he has never lived or known any other country and that he lived his entire life in South Africa. It is further his evidence that his mother passed away when he was 6 (six) years old. According to the evidence before this Court his mother was buried by the municipality and because she was undocumented Mr Khoza was not able to obtain a

death certificate. It is further the evidence of Mr Khoza that because he was born in South Africa and have grown up here, he has significant social links to the community and the culture. He states that he speaks Setswana, IsiZulu, English and some Afrikaans. He states that he does not speak SiSwati. It is common cause that Mr Khoza was taken to the Centre when he was 9 (nine) years old. Mr Khoza was born in 1997 and is currently 25 (twenty five) years 10 (ten) months old and therefore a major. This Court is satisfied that Mr Khoza has proven that he was born in South Africa and that he has lived in South Africa from birth to date of becoming a major. It follows that Mr Khoza meets the third requirement in terms of section 4(3) of the Citizenship Act.

[67] This Court has already found that Mr Khoza's application for the late registration of his birth should succeed and therefore it follows that on compliance with that order the requirement that Mr Khoza's birth has to be registered in terms of the BDRA will be fulfilled.

[68] For reasons stated above, this Court finds that Mr Khoza fulfils the requirements for citizenship in terms of section 4(3) of the Citizenship Act and that citizenship should be conferred upon him in the alternative to section 2(2) of the Citizenship Act.

[69] **Promulgation of regulations in relation to the Citizenship Act**

[70] In the Applicant's application he seeks an order to direct the First Respondent to make regulations in relation to section 2(2) of the Citizenship Act pursuant to section 23 within a time period that the Court deems reasonable and to direct the First Respondent to accept and adjudicate applications in terms of section 2(2) on affidavit pending the promulgation of regulations.

[71] It is submitted that Mr Khoza's concern is however solely to do with section 2(2) of the Citizenship Act.

[72] In the Applicant's Heads of Argument⁹² the Court was referred to three court orders where the Minister was ordered to promulgate regulations. To date hereof the Minister/Department has still not promulgated regulations in relation to section 2(2) of the Citizenship Act. These order are:

72.1 On 03 July 2014, the High Court in DGLR ordered the Minister at paragraph 4(d) to "*make regulations in relation to section 2(2) of the Citizenship Act pursuant to section 23, within a time period that the court deems reasonable.*"⁹³

72.2 On 06 September 2016, the SCA confirmed the previous DLGR order and, regarding the regulations, indicated the Department "*will comply with paragraph 4(d) of the High Court order within 18 months of the date of this order.*"⁹⁴ This made the deadline early March 2018.

72.3 The Department, in response, fruitlessly attempted to rescind the original High Court order.⁹⁵ The High Court dismissed the rescission application and again reiterated the need to follow the order.

[73] The Minister's failure to promulgate regulations to give effect to section 2(2) of the Citizenship Act as required by section 23 of the Citizenship Act as well as his failure to comply with the order of the Supreme Court of Appeal as well as various other orders to this effect amounts to contempt of court.

[74] Section 2(2) of the Citizenship Act is an imperative provision for people like Mr Khoza.

⁹² Applicant's Heads of Argument at para 147 - 148

⁹³ The order handed down by Matojane J *DGLR v Minister of Home Affairs* (Gauteng Division, Pretoria) Unreported Case No: 38429/13

⁹⁴ The order in *Minister of Home Affairs v DGLR* (Supreme Court of Appeal) Appeal case no: 1051/15. This Order was again dealt with in *Ali* at par 12-20 & *Jose* at par 17

⁹⁵ In response to a parliamentary question about whether the Department had complied with the SCA order to promulgate regulations, the Minister answered "no". He further said "On 7 October 2016, the Department instituted a rescission application under Case No: 38429/13, as it contends that the court order herein was erroneously sought and erroneously granted. See: <https://pmg.org.za/committee-questions/8922/>

[75] The Supreme Court of Appeal in *Ali*⁹⁶ in paragraph 20 held that *“It is not in the interest of justice and neither just and equitable to send the respondents from pillar to post simply because the Minister has adopted a supine attitude that the regulations will only be promulgated in due course. This state of affairs cannot be countenanced. The attitude of the Minister’s demonstrates unfairness in the treatment of the respondents and infringes their constitutional rights. The high court was justified in intervening by ordering that an affidavit would suffice.”*

[76] In light of the order of the High Court in DGLR regarding the promulgation of regulations in relation to section 2(2) of the Citizenship Act and the Supreme Court of Appeal’s confirmation of that order, this Court finds it unnecessary to once again order the Minister to make the necessary regulations in this regard. This Court fully supports the above orders. The First Respondent must expedite compliance with the Supreme Court of Appeal’s order to promulgate the necessary regulations. The First Respondent’s lackadaisical approach to comply with the order of the Supreme Court of Appeal infringes on individuals’, like Mr Khoza’s, constitutional rights to citizenship. Mr Khoza has no relationship or connection with any country except South Africa, even though his parents may have such connections.

[77] This Court finds it necessary to make an order to direct the First Respondent to accept applications in terms of section 2(2) of the Citizenship on affidavit pending the promulgation of the said regulations.

D. COSTS

[78] It was submitted by the Applicant that he was forced to bring this matter to court. As a result of the Departments conduct, and how it has responded in its papers. As a result thereof he seeks a punitive costs order against the Department. The Court was referred to *Jose v Minister*

⁹⁶ *Minister of Home Affairs v Ali and Others 2019 (2) SA 396 (SCA) (30 November 2018)* – Court dealt with section 4(3) of the Citizenship Act – it is submitted that the same principles apply to section 2(2) of the Citizenship Act

*of Home Affairs*⁹⁷ in which the Court granted a punitive costs order against the Minister of Home Affairs.

[79] It is clear from the evidence that the Department has shown itself to be inflexible, oppositional and providing little to no basis for its refusal to Mr Khoza's claims. Mr Khoza has done all he can do to comply for a decade and the Department sent him from pillar to post. His infringement continues and he endures prejudice every day that he is not declared a citizen.

[80] The Department's mandate is not to pose as a barrier to recognition of citizenship especially not with frivolous and contrived disputes. Mr Khoza, an orphan with no birth registration, sought only to have his birth registered and declared a citizen of the only country he has lived in and known. In response, the Department has done little to assist him and, where it has provided findings, it distrusts its own official.

[81] The Department's disputes were untenable and were dismissed on the papers.

[82] The Court also considered the fact that instead of years of unnecessary back-and-forth, the Department was quite capable of assisting Mr Khoza in having him recognized as a citizen.

[83] This Court further considered the fact that the Department has at its disposal the full machinery of the state to fully and adequately investigate the matter, which was not done. Instead the Department's opposition to Mr Khoza's application is based on baseless speculation and ambiguous reasoning. Mr Khoza, who for all practical purposes, has little or no recourse was forced to bring this matter to court.

[84] Given the nature of the Department's opposition this Court finds that the employment of two counsel was necessary.

⁹⁷ *Minister of Home Affairs and Others v Jose and Another 2021 (6) SA 369 (SCA)* at para 27 - 30

[85] For reasons, stated above this Court finds that a punitive costs order is justified.

E. ORDER

[86] The Courts finds that the Applicant's application is successful.

An order is granted in the following terms:

1. Directing the First Respondent to register the Applicant's birth in terms of the Births and Deaths Registration Act, 51 of 1992, as amended, within 30 (thirty) days of this order.
2. Declaring the Applicant 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 ("the Citizenship Act).
3. Alternatively, declaring the Applicant to be a South African citizen by naturalisation in terms of section 4(3) of the Citizenship Act.
4. Directing the First Respondent to enter the Applicant into the National Population Register as a citizen, to issue him with an identity number and to amend and re-issue his birth certificate accordingly, within 30 (thirty) days of this order.
5. Directing the First Respondent to accept and adjudicate applications in terms of section 2(2) on affidavit pending the promulgation of regulations.

6. Ordering the Respondents to pay the costs of this application on an attorney and client scale, jointly and severally, the one to pay the other to be absolved, which costs will include the costs consequent upon the employment of 2 (two) Counsel.

SIGNED AT PRETORIA ON THIS 27TH DAY OF FEBRUARY 2023.

BY ORDER



SM MARITZ AJ

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