IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO.: 6700/22

In the matter between:

TEBOGO KHOZA Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL:
DEPARTMENT OF HOME AFFAIRS Second Respondent

APPLICANT'S HEADS OF ARGUMENT

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"Citizenship is the gateway through which a number of rights in the Constitution can be accessed." [1]

INTRODUCTION

1. This application arises as result of the continued and obstinate refusal by the Department of Home Affairs ("**the Department**") to recognise the citizenship of an orphan born in South Africa, who has no ties to other countries, and register his name in the national population register.

2. Despite being engaged by the applicant (**Tebogo Khoza**) since 2013, the Department has had Tebogo running in circles, providing unnecessary barriers and doing nothing to aid him, despite his ongoing prejudice and vulnerability. Indeed, its only active stance is opposing his attempts to vindicate his constitutional rights and, even in its opposing papers, weaving a web of conspiracy and suspicion toward an orphaned man who merely wants access to rights denied him since birth.

3. Further, this is an application to have the first respondent ("**the Minister**") promulgate regulations in terms of section 2(2) of the South African Citizenship Act ("**Citizenship Act**")[2] to facilitate a proper procedure for similarly situated persons to Tebogo. It is of concern that, *inter alia*, the Supreme Court of Appeal,

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1 Khampepe J in *Chisuse and Others v Director-General, Department of Home Affairs and Another* (10) BCLR 1173 (CC) at par 24.

2 Act 88 of 1995, as amended.

in 2016, had already ordered the Minister to promulgate such regulations within 18 months – and nothing has been done, except the Department using resources to attempt to rescind the order.

4. This cannot stand and the Department's opposition to Mr Khoza's request must fail, with punitive costs against the Department.

5. Citizenship, after all, is not a reward, but a right. It is precisely because it is a gateway to other rights that has cast it as a central point of contention throughout South Africa's history. As Khampepe J put it:

> *"Citizenship is not just a legal status. It goes to the core of a person's identity, their sense of belonging in a community and... to their security of person. Deprivation of, or interference with, a person's citizenship status affects their private and family life, their choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement."*[3]

6. Barring this gateway perpetuates conduct our constitutional dispensation was meant to have done away with decades ago. Yet, that is precisely what the Department has done to Tebogo. He comes to this court because it is the only way to get that gateway opened to realise his other rights.

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[3] *Chisuse* at par 28.

OVERVIEW AND THE CENTRAL ISSUES

7. Tebogo was born in South Africa in 1997, but his birth was never registered by his parents. He applied to the Department of Home Affairs ("**the Department**") for birth registration when he was sixteen, which began a drawn-out process that, to this day, has never resolved. As a result of the Department's continued refusal and despite attempts by his legal representatives since 2016 to resolve the issue, Tebogo continues to be a stateless person.[4]

8. Through no fault of his own, Tebogo has been deprived of birth registration and citizenship since birth, which the new constitutional dispensation centralises and strongly protects against deprivation, as outlined in the Constitution of the Republic of South Africa, 1996 ("**the Constitution**").[5]

9. This has resulted in continued prejudice, as Tebogo cannot study, work legally, get married, obtain a driver's licence, open a bank account, or access any formal social assistance. He is a biological father who cannot put his name on his children's birth certificates. As he has no citizenship or ties to other countries, he also cannot be deported. He is trapped in a legal limbo, continuing to endure unnecessary prejudice despite his concerted efforts to resolve it with the

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4 Art 1 of The United Nations *Convention Relating to the Status of Stateless Persons* (1954) states: "*the term "stateless person" means a person who is not considered as a national by any State under the operation of its law*." It should be noted that South Africa is not currently a signatory to this Convention.

5 Sections 3 and 20 of the Constitution. See the discussion in *Chisuse* at paras 29 – 34.

Department, who have maintained an obstinate and suspicious attitude toward him via their officials and in its papers.

10. The Department, via the second respondent, opposes the application, but, as will be shown, its opposition is baseless, incoherent and does not overcome the *Plascon-Evans* rule to dispute the facts put up by Mr Khoza. For purposes of brevity, the respondents will collectively be referred to as “the Department”.

11. In addition, the Department’s position regarding Mr Khoza warrants a punitive costs order, since Mr Khoza was forced to bring this application to realise his rights, despite all attempts to comply with the Department. It is the Department that brings the parties to court, not the applicant, who only wants to live freely in South Africa, with access to rights so many others enjoy. These rights are being blockaded by the Department for no proper reason.

12. These Heads will deal with the following:

    12.1. Mr Khoza’s evidence;

    12.2. Why the Department’s disputes should be dismissed on the papers;

    12.3. The law regarding citizenship;

    12.4. Why Mr Khoza meets the requirements for citizenship;

    12.5. The appropriate remedy; and

    12.6. Why costs should be awarded on a punitive scale;

TEBOGO'S EVIDENCE

13. Since the Department disputes almost *every* aspect of Mr Khoza's founding affidavit, what follows cannot be said to be "common cause" facts. It is therefore a summary of Mr Khoza's evidence.

The background facts

14. Tebogo's evidence is that he was born in South Africa on 17 April 1997[6] and has lived in South Africa his entire life.[7]

15. In 2006, after his mother passed away,[8] his grandmother brought him to the Thabang Youth Centre ("**the Centre**"), in Limpopo on 12 December 2006.[9] During 2007, he was placed in the Centre's care, which is confirmed by various Children's Court orders.[10] Because his mother was undocumented, he has struggled to find out where his mother is buried and neither he nor the Centre were able to obtain a copy of her death certificate.[11]

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6 Record 003-5, Founding Affidavit ("**FA**") at par 1.

7 Record 003-9, FA at par 13.

8 Record 003-10, FA at par 17.

9 Record 003-9, FA at par 14. A copy of the Centre's register recording his arrival can be found at FA Annexure "TK4".

10 Record 003-9, FA at par 10. What court orders were able to be obtained can be found at FA Annexure "TK3".

11 Record 003-10, FA at par 17.

16. In 2013, when he was sixteen, Tebogo applied at his local Home Affairs office for birth registration and an identity document. Represented by the Centre's manager, Cecil White ("**Mr White**"), Tebogo was interviewed for his late registration of birth by the Centre's in-house social worker. The Control Immigration Officer in Lephalale, Ndanduleni Phadagi ("**Mr Phadagi**"), along with other officials interviewed Mr Khoza and Mr White.[12]

17. Following this, Mr Phadagi then interviewed Tebogo's only living relatives: Mr Khoza's grandmother and aunt in Mpumalanga.[13] This led to Mr Phadagi issuing a report, dated 2 April 2015 ("**the Phadagi Report**").[14]

18. Remarkably, the Department even disputes the findings of this report – that is, a report drafted by <u>one of its own officials</u>.

19. It is necessary to briefly summarise what Mr Phadagi found:

    19.1. Both Tebogo's parents were foreigners.

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

[12] Record 003-11, FA at par 18 – o19.

[13] Record 003-11, FA at par 20.

[14] Record 003-26, The report can be found as annexure "A" to Annexure "TK1", and at Annexure "TK7".

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

19.4. Mr Phadagi could not dispute Mr Khoza was born in South Africa nor that his parents did not register him at birth.

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

19.6. Mr Phadagi states: "*I cannot remove him as he don't [sic] know where to go*."[15]

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

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

20. Mr White then met with Mr Phadagi to find a way forward.[16] They reached an agreement that Mr Khoza would not be arrested or deported if Mr White accompanied him to Eswatini border. Mr Khoza was also issued an "Order to illegal foreigner to depart from the Republic" to produce at the border.[17]

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[15] Record 003-53, FA Annexure "TK7", second last line on the page.

[16] Record 003-12, FA at par 21. Mr White's confirmatory can be found at Annexure "TK8".

[17] Record 003-12, FA at par 22. The Order can be found at Annexure "TK9".

21. However, 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, issuing a letter confirming this.[18]

22. At the next meeting with Mr Phadagi, he confirmed that Mr Khoza was a stateless person. He advised Mr Khoza and the Centre contact one Moses Malakate at Home Affairs, in Pretoria, as well as Lawyers for Human Rights ("**LHR**"), Mr Khoza's current legal representatives.[19]

23. Two months went by with no response from the Department.

24. On 9 September 2015, the Centre emailed Mr Malakate, with the facts of the matter and relevant documents. Twelve days later, Mr Malakate replied, indicating Mr Phadagi had not contacting him (Mr Malakate). Mr Malakate advised that since the Centre had dealt with Mr Phadagi, they should communicate directly with Mr Phadagi.[20] The Department was giving Mr Khoza the run-around.

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[18] Record 003-12, FA at paras 23 – 24. The letter from an official, Mr Dlamini, is reproduced at "TK10".

[19] Record 003-12, FA at par 25.

[20] Record 003-13, FA at par 27. Mr Malakate's email can be found at Annexure "TK11".

25. A Thabazimbi magistrate issued a letter from his office requesting assistance from Mr Phadagi.[21]

26. On 9 December 2015, a meeting was held in Lephalale by Mr Phadagi and other officials. They determined that Mr Khoza did not have a claim to citizenship and Mr Khoza was back to not having his birth registered. Mr Khoza was already, by this time, eighteen.[22]

27. On 23 June 2016, Mr Khoza's legal representatives attempted to contact Mr Phadagi to resolve his statelessness. Mr Phadagi did not respond.[23] Mr White then went in-person to deliver a copy of this letter directly to Mr Phadagi.[24]

28. 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.[25]

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[21] Record 003-13, FA at par 28. The only copy of the letter was given to Mr Phadagi and thus it cannot be reproduced.

[22] Record 003-13, FA at par 29.

[23] Record 003-13, FA at par 30. LHR's letter can be found at Annexure "TK12".

[24] Record 003-13, FA at par 30. Mr Phadagi signed an acknowledgment of receipt, which can be found at Annexure "TK13".

[25] Record 003-14, FA at par 31. LHR's letter can be found at Annexure "TK14".

The prejudice the Department has caused

29. It has been almost a decade since Tebogo began applying for his citizenship with the Department.

30. The Department has: (i) refused to register his birth and recognise his citizenship, (ii) refused to aid him in obtaining details or provide a proper procedure to follow, (iii) failed to correspond for months at a time. The Department either does not or cannot dispute this.[26]

31. As a result of the Department's actions – and lack thereof – Mr Khoza cannot study, work legally, get married, get a driver's licence, open a bank account, or access any formal social assistance.[27]

32. A lack of documentation puts his employment under strain. The Centre also no longer provides him with accommodation.[28]

33. His 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

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[26] The Department's disputes will be dealt with later. Importantly, that the Department cannot provide a procedure is clear since the Minister has not, despite numerous court orders, promulgated such regulations. See below in these Heads at paragraphs 146 – 150.

[27] Record 003-14, FA at par 35.

[28] Record 003-15, FA at par 38.

ties to help him. That he was orphaned then abandoned at a young age is not his fault.[29]

34. 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, first, refused entry then, secondly, received no assistance from its embassy.

35. He 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.[30] He cannot even be registered as a father to his biological child nor marry his child's mother.[31] He is thus also at risk of being separated from his family.

36. With no other recourse, as a result of the Department's persistent refusal and lack of communication and procedure, he is forced to come to court.

THE DEPARTMENT'S DISPUTES SHOULD BE DISMISSED ON THE PAPERS

37. The Department disputes virtually every aspect of Mr Khoza's founding affidavit.

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[29] Record 003-40, FA at par 40.

[30] Record 003-16, FA at par 44.

[31] Record 003-15 FA at paras 42 – 43.

38. As this is an application, the applicable framework for determining disputes of facts must be done with regard to the *Plascon-Evans* 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, raises 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."*[32]

39. While usually bare or bald denials are insufficient to constitute a proper dispute, the SCA in *Wightman* noted instances where such denials nevertheless rise to the level of being real, genuine and bona fide dispute in itself. This is because "*there is no other way open to the disputing party and nothing more can therefore be expected of him*."[33]

40. 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*."[34] These two legs will be important going forward.

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32 Harms DP (Farlam, Ponnan, Maya And Cachalia JJA Concurring) in *National Director of Public Prosecutions v Zuma* 2009 (4) BCLR 393 (SCA) at par 26. Brackets removed.

33 Heher JA (Mpati DP, Cameron, Ponnan JJA And Mhlantla AJA concurring) *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at par 13.

34 *Wightman* at par 13. Emphasis supplied.

41. 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*."[35]

42. As will be shown, the Department's denials consist of (i) bare or ambiguous denials, (ii) knowledge possessed by Mr Khoza that the Department lays no basis for disputing the accuracy thereof; (iii) knowledge the Department should have, but does not provide; and (iv) denials that are uncreditworthy or clearly untenable.

Tebogo's birthday

43. From the outset, the Department takes issue with even Mr Khoza's birthday[36] and does so twice.[37]

    43.1. The Department notes that his legal representatives indicate his date of birth on 28 March 1996.[38]

    43.2. However, in his reply, Mr Khoza notes it was a bona fide mistake by his

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35 *Wightman* at par 13.

36 Record 006-12, Answering Affidavit ("**AA**") at par 22. It should be noted that the second respondent's numbering is confusing, since the affidavit is numbered paragraphs 1 – 6, followed by 4.1. – 4.4., followed again by a "new" paragraph 1. Nothing turns on the numbering prior to the "new" paragraph 1, located at Record 006-5. The numbering will follow as set out from the "new" paragraph 1.

37 Record 006-14, AA at par 27.3.

38 Record 003-22, Letter to the Minister, FA Annexure "TK1" at par 3.

attorney in a single correspondence, which his attorney confirms.[39] All other relevant documents indicate his birthday being 17 April 1997.

43.3. The Department's dispute is therefore untenable. The court is justified in rejecting it merely on the papers.

Tebogo was born in South Africa

44. The Department also takes issue with Mr Khoza's claim that he was born in South Africa.

44.1. It asserts, via the second respondent, that "*It is of outmost* [sic] *importance and the interests of proper adjudication of justice that we acquire a detailed timeline of the Applicant's life dating from time of supposed date of birth to date*."[40] The Department is unsatisfied because "*he merely [outlines] details of life from the time he personally made efforts of having his birth registered*."[41]

44.2. The Department notes:

"*there is no evidence produced indicating any trace attesting to the circumstances surrounding [Mr Khoza's] birth in the Republic, precisely where*

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39 Record 007-3, Replying Affidavit ("**RA**") at par 12. The confirmatory affidavit from his legal representative is at Record 007-11.

40 Record 006-12, AA at par 23.1.

41 Record 006-12, AA at par 23.2.

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. [sic]"[42]

44.3. The Department highlights the Births and Deaths Registration Act[43] and lists various routes that ought to have been followed at Mr Khoza's birth, by parents or other competent persons, so that proper documentation could have been acquired detailing his birth.[44]

45. It is unknown how Mr Khoza, a person orphaned from a young age, can change history, not least the conduct of those adults who were supposed to act in his interests weeks after his birth. It is also unknown how Mr Khoza is expected to provide a detailed timeline of his life since his birth. Tebogo was an orphaned child who relied on the assistance of adults. To expect that level of detail is absurd. This is clearly far-fetched and the court is justified in rejecting this denial merely on the papers.

Tebogo does not have documentation

46. The entire basis of Mr Khoza's application is, *inter alia*, to register his birth. It is precisely *because* he has no documentation that he came to the Department and

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42 Record 006-13, AA at par 25.2.

43 Act 51 of 1992.

44 Record 006-13, AA at par 25.1.

now to court. The Department rephrases Mr Khoza's factual basis for late registration of his birth in the form of a condemnation.[45]

47. The Department itself notes that this is an "*application to this honorable* [sic] *court for late registration of birth*."[46] The Department says this "*requires a thorough and concise chain of events, to account and prove adequately thereof, that Applicant was born in the Republic*."[47]

47.1. Mr Khoza has reiterated that he has no documentation of his birth.[48] Mr Phadagi's report further confirms that he was born in South Africa.[49]

47.2. Remarkably, the Department asserts:

> "*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.*"[50]

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45 Record 007-5, RA at paras 23 – 26. As Mr Khoza states at RA at par 24: "*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*."

46 Record 006-15, AA at par 27.6. Emphasis supplied.

47 Record 006-15, AA at par 27.6. It does not indicate the legal basis for such an arduous process by an applicant. How can it when it has no regulations?

48 Record 003-6 FA at par 6, 003-14 FA at par 35, 003-15 FA at par 40 and 003-17 FA at para 50, and Record 006-13, AA at par 24.

49 See above in these Heads beginning at paragraph 54.

50 Record 006-14, AA at par 27.2.

47.3. Mr Phadagi is a Home Affairs official. Tebogo is being condemned for relying on the Department's own official.

47.4. How Mr Khoza, who came to the Department *because he has no documentation* and no parents, is supposed to provide a "thorough" chain of events to account for his birth is unknown. The proposition in itself is an absurdity.

47.5. This is compounded by the fact that seeking assistance from the Department is fruitless since the Department itself disputes its own officials' findings.

47.6. The Department's denial is therefore, at best, merely a dressed-up bald denial. It 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.

47.7. The Department further raises no basis to dispute the findings of its own official.

47.8. Whatever information there is lies within the purview of Mr Khoza as the averring party and the findings of the Departmental official, Mr Phadagi. The Department lays no basis for disputing the veracity or accuracy

thereof.[51] The court is again justified in rejecting this dispute merely on the papers.

48. The Department's obstinate denial of Mr Khoza's birth is further compounded by a remarkable assertion in its papers. Given Mr Khoza's evidence that he arrived at the Centre when he was nine, the Department admits: "*the Applicant was in the country from the time he was nine ... years old*." However, in the same paragraph, the Department asserts: "*he does not disclose to the court where he was from the time of his birth until the age of nine*."[52]

49. As above, how Mr Khoza – or any orphan – is supposed to provide such information is unknown.

    49.1. It should be noted the Department is here disputing the paragraph in Mr Khoza's founding affidavit[53] where he avers the following:

        49.1.1. His currently residing at Thaba Tholo, a game farm outside of Thabazlmbi, Limpopo;

        49.1.2. That he lived at the Centre from nine;

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51 See above in these Heads at paragraph 39 regarding the two-leg consideration raised in *Wightman*.

52 Record 006-15, AA at par 28.1.

53 Record 003-9, FA at par 14.

49.1.3. That he was brought to the centre on 12 December 2006, where he stayed until he turned 18; and

49.1.4. The Centre is a child and youth care centre located near Thabazimbi.

49.2. It is unclear *which* fact is being denied and *on what* basis. Further, that he was at the Centre since he was nine is admitted by the Department.

49.3. This is at best a bald denial and at worst raising fictitious disputes of facts. The court is again justified in rejecting it merely on the papers.

50. Further, in his reply, Mr Khoza notes that, after filing his founding affidavit, the Centre came across a report by a social worker in 2014 ("**2014 report**").[54] 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.[55]

51. This now constitutes two reports by two officials outlining Mr Khoza's life, which, due to unfortunate circumstances, cannot be any *more* detailed. The

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54 Record 007-5, RA at par 18. The report can be found at Record 007-13, Annexure "TKR2". The Centre, via its current manager, confirms it found this report at Record 007-15, Annexure "TKR3".

55 The 2014 report lists his mother as Irene Mkhabela and father with possible surname of Khoza to explain Mr Khoza's surname, at Record 007-13. However, the Phadagi Report lists Mr Khoza's mother as Martha Nthane and his father as Armando Tibane, at Record 003-26.

Department's denial, which, as noted above is unclear, is demonstrative of its unrelenting opposition to Mr Khoza rather than it raising a proper dispute.

As a child, Tebogo needed care and protection

52. The Department absurdly disputes that when he was a child brought to the Centre that he was a child who needed care and protection.

    52.1. The Department admits that he was brought to the Centre when he was nine. However, it then says "*he was brought to the Centre through consent from his granny. The Applicant was <u>not brought to the Centre as a child who needs care and protection as the Applicant alleges</u>*."[56]

    52.2. 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.[57]

    52.3. After asserting that "*The Applicant was not brought to the Centre as a child who needs care and protection as the Applicant alleges*"[58], the Department then says: "*There is no evidence of abandonment, rather*

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56 Record 006-15, AA at par 29.1. Emphasis supplied.

57 Record 006-15, AA at paras 29.2 – 29.4.

58 Record 006-15, AA at par 29.1.

evidence indicates a situation of a maternal orphan in need of care and protection."[59] This assertion is contradictory and confusing.

52.4. All that Tebogo alleges in his founding affidavit is that he was a child in need of care and protection, as per Children's Court orders that were annexed. As before, it is unclear what exactly the Department is disputing. Does the Department dispute that an orphaned child, like Tebogo, is in need of care and protection? It seems so.

52.5. The Department does not even deal with the Children's Court orders Mr Khoza annexed.[60]

52.6. The Department notes the obligations on the Centre's in-house social workers that were allegedly not performed. It then, for some reason, reiterates Phadagi's findings. What this has to do with Mr Khoza's conduct and why his evidence is being disputed here is again unclear. This dispute is ambiguous and far-fetched. The court is justified in rejecting the Department's dispute merely on the papers.

Tebogo does not know where his mother is buried

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

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59 Record 006-16, AA at par 29.6.

60 Record 003-34, FA Annexure "TK3".

54. After outlining, again, the obligation on officials and institutions, the Department claims "*For all information about her (sic)*[61] *mother's funeral and burial, the Applicant can simply contact the local social workers*."

54.1. Aside from being irrelevant, it is unknown how this is a dispute.

54.2. Mr Khoza's evidence is that he does not know where his mother is buried.[62] The Department claiming he *should* contact social workers does not negate this fact.

54.3. The Department also ignores the rest of the paragraph which details how those who cared for his mother during her illness made arrangements and yet were unable to locate a death certificate. The Centre itself was unable to do so. They were not supine.

54.4. The Department's so-called dispute is of no moment and dresses up a step already attempted as a failure. The Department's dispute seems to raise a fictitious dispute of fact and is untenable. The court is justified in rejecting the Department's dispute merely on the papers.

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61 It appears that the deponent meant "him" in reference to Mr Khoza.

62 Record 003-10, FA at par 17.

The findings of the Phadagi report

55. As previously noted, the Department disputes the findings of its own official.[63] The basis of the dispute is non-existent.

56. The Department itself refers to Mr Phadagi as being "*appointed in terms of section 33 Immigration Act 13 2002, as amended, to conduct late registration of births and other related duties; [and he] was actively involved in [Mr Khoza's] case*."[64] Mr Phadagi was thus the relevant Departmental official handling the matter.

57. How Mr Khoza should be "put to the proof" in motion proceedings, as the Department asserts, for the findings of an appointed official is unknown.

58. The Department again blames Tebogo for failings 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 relied on. [Mr Khoza] needs a road to health card or birth registration documents to confirm that he was indeed born in South Africa."*[65]

59. The Department demonstrates no basic comprehension of the rules of evidence. The testimony of a witness stands as evidence, even where there are no documents available. It is nonsensical to claim that Mr Khoza, who is seeking

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63 See above in these Heads at paragraphs 44.2 - 46.8.

64 Record 006-17, AA at par 29.8.

65 Record 006-18, AA at par 33.

late birth registration, should have birth registration documents. Mr Khoza explains why there are no documents, as best as he can. That is precisely why Mr Khoza had gone to the Department and why Mr Phadagi was appointed in the first place.

60. It is not Mr Khoza's fault that Mr Phadagi's findings were, in the Department's misguided opinion, not substantiated. They are Mr Phadagi's findings as per the report and Mr Khoza has no reason to not rely them to substantiate his evidence.

61. The Department lays no basis for disputing the veracity of its own official's findings. It is a bald and uncreditworthy denial. The court is justified in rejecting the Department's dispute merely on the papers.

Mr Phadagi's report is not contradictory

62. In a further condemnation of its own official, 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 paragraph wants to arrest and deport [Mr Khoza]*."[66]

63. This interpretation of Mr Phagadi's actions is intentionally misconstrued and misleading. For purposes of clarity, here is the entire paragraph from the Phadagi report that outlines his findings:

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[66] Record 006-18, AA at par 34. Emphasis supplied.

> "*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 621126S168085 is legal guardian for Tebogo Khoza*."[67]

64. The words "arrest" and "deport" do not appear in this final paragraph and do not appear at all in the Phagadi report.[68]

65. While Mr Phadagi did issue an "Order to illegal foreigner to depart from republic",[69] which carries punitive consequences, Mr Khoza explains that that order was only issued to facilitate Mr Khoza's approach to the Eswatini border and to hand to the officials at the border.[70] No more, no less.

66. The Department manufactures a fictitious dispute of fact and is creating confusion out of thin air. Mr Khoza's version is congruent and the court is justified in rejecting the Department's dispute merely on the papers.

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67 Record 003-32, FA Annexure "TK2".

68 Record 003-32. The closest phrase is "arrested person" when Mr Phadagi describes his duties in the first paragraph, in Annexure "TK2".

69 Record 003-57, FA Annexure "TK9".

70 Record 003-12, FA at par 22.

Tebogo's family having different surnames does not undermine his case

67. 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 in his founding affidavit.[71]

68. In response, the Department denies this fact. It claims that 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*".[72]

69. It is not open to the Department to dispute this collateral issue. Mr Khoza's version must be taken as evidence of this fact.

70. In any event, considering Mr Khoza's original evidence, this dispute is nonsensical. Mr Khoza details what he was told by the Eswatini border officials. That is a fact. Whether the border officials are reasonable in their beliefs of what surnames are Emaswati is irrelevant.

71. The Department does not deal with Mr Dlamini, the official, confirming Eswatini's denial of Mr Khoza's entry. The Department does not deal with Mr Khoza's

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71 Record 003-12, FA at par 24. The letter from the Eswatini border official, Mr Dlamini, can be found at FA Record 003-58, Annexure "TK10".

72 Record 006-18, AA at par 35.

genuine attempt to follow the Department's own official's recommendation. What his surname has to do with the evidence in this paragraph is unknown.

72. Further, in his reply, Mr Khoza confirms this is just the name he has known his whole life.[73]

73. This nonsensical dispute is unclear, irrelevant, unnecessary and lays no foundation for denying Mr Khoza's version of events, where he attempted compliance with the Department's own official instructions. The court is justified in rejecting the Department's dispute merely on the papers.

The Department admits Mr Khoza was given the run-around

74. As noted above, Tebogo attempted to resolve his situation with the Department after being denied entry into Eswatini.[74]

75. The Department, in its papers, admits:[75]

    75.1. Mr Khoza's long struggle following the denial of entry into Eswatini;

    75.2. that the Department did not communicate promptly or at all at times;

    75.3. the Department directed him to other officials who merely redirected him in a circle back to Mr Phadagi;

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[73] Record 007-8, RA at par 39.

[74] See the summary above in these Heads at paragraphs 22 – 28.

[75] Record 006-19, AA at par 36.

75.4. the Department did not respond to Mr Khoza's attorneys; and

75.5. Mr Khoza's personal but fruitless attempts, via his attorneys, to contact the Eswatini embassy.

The Department baldly denies almost half the Founding Affidavit in a single paragraph

76. The Department disputes an entire thirty paragraphs in one response, forgoing specificity about Mr Khoza's particular evidence.

77. It reallocates specific denials to sub-paragraphs without reference to which paragraphs in the founding affidavit it is referring to, undermining the ability of Mr Khoza to properly respond.

78. These thirty paragraphs consist of:

78.1. Mr Khoza's evidence of the fact that Emaswati citizenship passes through the patrilineal line;

78.2. The various, particular prejudices he suffers as a result of his statelessness;

78.3. His career outlooks;

78.4. Concerns about his family;

78.5. His genuine attempts to comply with the Department;

78.6. His social links to the community;

78.7. His entitlement to be registered;

78.8. The need for regulations; and

78.9. The relief he seeks.

79. As the SCA in *Wightman* notes:

> "*There is ... a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter*."[76]

80. The Department's answering affidavit does not reflect its disputes fully and accurately. The court should therefore, following *Wightman*, take a robust view of the matter and reject these denials from the Department.

81. However, these Heads will attempt to clarify the Department's disputes herein to assist the court.

Emaswati lineage

82. 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.[77]

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[76] *Wightman* at par 13. Emphasis supplied.

[77] Record 006-19, AA at par 37.1.

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

> *"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."*[78]

84. It is notable that, forgoing its previous attitude, the Department seems to accept Mr Phadagi's findings that it previously dismissed[79] – no doubt because it is yet another way to create a dispute.

85. Mr Khoza states conclusively 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.[80] The Department lays no foundation for disputing this.

86. The Department asserts that Mr Khoza, the stateless applicant, ought to conduct some kind of investigation. Yet, such investigations are the purview of the Department and its officials. For example, the Department says in its own papers that Mr Phadagi was "*appointed in terms of section 33 Immigration Act 13 2002, as amended, to conduct late registration of births and other related duties; was actively involved in [Mr Khoza's] case*."[81]

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78 Record 006-19, AA at par 37.2.

79 See above in these Heads at paragraphs 54 – 60.

80 Record 003-14, FA at par 33 which Mr Khoza reiterates at Record 007-3, RA at par 9.

81 Record 006-17, AA at par 29.8. Emphasis supplied.

87. After admitting the efforts already endured by Mr Khoza in his attempts to comply, the Department now asserts that *he* must conduct an investigation. The Department is eschewing its duties by forcing a vulnerable applicant, with little resources, to conduct an "investigation", already supposed to have been done by the Department itself.

88. There is also no guarantee the Department will accept any findings of a lay investigation. It, after all, will (at times) not accept the findings of its own official's investigation.

89. This lack of procedure speaks to Mr Khoza's prayer that the Minister promulgate regulations to avoid such haphazard and inconsistent responses from the Department, maintaining vulnerable applicants' continued prejudice.

90. The Department's "dispute" is nonsensical and the court is justified in dismissing the disopute on the papers.

Burden of proof: Tebogo's evidence is all that can be obtained

91. Strangely, the Department (again) 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.*"[82] What Mr Khoza deposed to is in fact evidence.

[82] Record 006-19, AA at par 37.3.

91.1. First, this ignores that Mr Khoza has provided as much evidence as he can, given his traumatic and tragic history as a young orphan.

91.2. Second, it ignores the findings of others, including Mr Phadagi.

91.3. Third, Mr Khoza, in his replying affidavit, has annexed a slightly more up-to-date report.[83]

92. The Department asserts *"[Mr Khoza's] application to this honorable court for late registration of birth requires a thorough and concise chain of events, to account and prove adequately thereof, that [he] was born in the Republic*."[84] The legal basis for "thorough and concise chain of events" is not provided. Indeed, there is no legal basis for such an assertion.

93. Further, this is a near impossible hurdle for Mr Khoza, let alone almost anyone else, to overcome. It is unknown what constitutes "thorough and concise" and "adequate" proof. Mr Khoza is a person orphaned and abandoned at a young age, with no one to provide him with details. 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 unclear what more Mr Khoza could do, if even the Department's own official and qualified social workers could not meet this unknown threshold.

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83 Record 007-13, RA Annexure "TKR2".

84 Record 006-19, AA at par 37.4.

94. Importantly, 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 obtain evidence and establish the facts as to whether an individual would otherwise be stateless.[85]

94.1. Tebogo's evidence is substantively unchallenged.

94.2. The Department apparently disputes this evidence, but does so in a way that, as has been shown, warrants being dismissed on the papers.

94.3. Unlike Tebogo, the Department had "*at its disposal the full machinery of the state; if those allegations could have been disputed, one imagines they would have been*."[86]

94.4. The Department cannot be supine in discharging its own evidentiary burden, assuming it has any grounds to justify its claims, in matters of statelessness and act only to fruitlessly discredit the stateless person's evidence.

94.5. Yet, that is precisely what the Department has done here by creating fictitious standards of proof like a "thorough and concise chain of events"

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

86 *Minister Of Home Affairs and Others v Jose and Another* 2021 (6) SA 369 (SCA) at par 19.

and “adequate” proof, shifting goalposts in a haze of arbitrariness that would make it impossible for any stateless person, like Tebogo, to meet.

94.6. It is not for the Department to require Tebogo to prove his birth and citizenship beyond any doubt. The Department must use its resources to find information that is relevant to the claimant. If that investigation does not uncover anything of substance, as is the case here, then the claimants version must be accepted.

95. Mr Khoza has been operating in the dark, since there are no clear procedural guidelines to follow and everything has been done on an ad hoc basis, in attempts to comply with various demands by the Department. This despite the Department being ordered, in the past, to promulgate regulations under section 2(2) of the Act, to avoid precisely this scenario.[87]

96. Remarkably the Department says that: *“[The Department] cannot merely grant provisional rights without thorough investigations and proof thereof that circumstances indeed warrant right to South African citizenship*.”[88]

96.1. On the one hand, this is correct. Yet, on the other hand, it is unclear what is meant by “thorough investigations”.

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87 This is dealt with below in these Heads at paragraphs 146 – 150.

88 Record 006-20, AA at par 37.7.

96.2. Mr Phadagi, in the opening of his report, himself states that one of his duties is "*to investigate*"[89].

96.3. Officials have been involved in Mr Khoza's case for years. Whatever flawed investigations there might be is a failing on the Department, not Mr Khoza, who is a vulnerable applicant coming *to* the Department to assist him, as is its mandate.

97. The Department's disputes therefore warrant being dismissed on the papers.

98. It should be noted that, at no point, does the Department ever dispute Mr Khoza's willingness to comply and actual compliance when asked to do so by the Department.

99. Mr Khoza is only in court because it is the Department that refuses to engage constructively – or at all – with Mr Khoza's very reasonable request.

WHAT THE LAW SAYS ABOUT CITIZENSHIP

100. The law is clear: children born in South Africa have the right to be recognised as citizens irrespective of parents' citizenship or immigration status, if they meet the requirements set out in the Citizenship Act. Importantly, citizenship in this context is not something that is granted. Citizenship vests in a person, like Tebogo, and the Department has a constitutional duty to recognize and give effect to that right.

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89 Record 03-32, FA Annexure "TK2".

The Constitution

101. Section 3 of the Constitution says:

> *"(1) There is a common South African citizenship.*
>
> *(2) All citizens are –*
>
> *(a) equally entitled to the rights, privileges and benefits of citizenship; and*
>
> *(b) equally subject to the duties and responsibilities of citizenship.*
>
> *(3) National legislation must provide for the acquisition, loss and restoration of citizenship."*

102. Section 20 of the Constitution says: "*No citizen may be deprived of citizenship*."

103. The relevant national legislation stipulated in section 3(3) of the Constitution is the Births and Deaths Registration Act and the Citizenship Act, both dealt with below.

104. Section 28(1)(a) of the Constitution guarantees every child's right to a name and a nationality from birth, of which Mr Khoza been has been deprived since birth.

105. Section 38 of the Constitution allows Mr Khoza the right to approach this honourable Court for a declaration of his rights, when such rights in terms of the Bill of Rights have been infringed. Specifically, the rights so infringed are his rights to citizenship, birth registration, dignity and equality.

The Births and Deaths Registration Act

106. Section 2 of the Births and Deaths Registration Act ("**BDRA**")[90] notes that the BDRA applies to all South African citizens including “persons who are not South African citizens but who sojourn permanently or temporarily in the Republic.”

107. 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.

108. Section 12 of the BDRA deals with notice of birth of an abandoned child, putting obligations on social workers to conduct an enquiry then provide such a notice. It appears this was not done in Mr Khoza’s case, as the Department admits, yet for which Mr Khoza is blamed.

109. The regulations of the BDRA also regulate how people can register their births: children older than one year born of South African citizens (Regulation 5); children born of parents who are non-South African citizens (Regulation 8); and abandoned or orphaned children (Regulation 9).

110. Mr Khoza was born in South Africa, which is confirmed by the Department’s own official, Mr Phadagi. The BDRA stipulates that all children born alive in South

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[90] Act 51 of 1992.

Africa be registered irrespective of their parents' nationality or immigration status.[91]

111. Mr Khoza has attempted a late registration of birth with the Department, which, naturally has found no success.

112. However, should he succeed in this court, his first prayer would fulfil this.

The Citizenship Act

113. In terms of the Citizenship Act there are three ways to acquire citizenship:

113.1. By birth (section 2);

113.2. By descent – a child being adopted (section 3); and

113.3. By naturalisation, which is for adults to become citizens – (sections 4 and 5).

114. Section 2(1) of the Citizenship Act stipulates a person is a South African citizen by birth if:

114.1. The person was a citizen by birth prior to the commencement of the Citizenship Act; or

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[91] *N and Others v Director General: Department of Home Affairs and Another* [2018] 3 All SA 802 (ECG) at paras 29 - 32. See also the full bench decision, cited as *Centre for Child Law v Director-General: Department of Home Affairs and others* 2020 (8) BCLR 1015 (ECG) at par 4.

114.2. one the person's parents, at the time of his birth, was a South African citizen.

115. Section 2(2) of the Citizenship Act provides:

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

(a) he or she does not have 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." (Emphasis supplied.)

116. Section 23 of the Citizenship Act gives the Minister the power to make regulations in order that the purpose of section 2(2) of the Citizenship Act may be achieved.

117. Section 4(3) of the Citizenship Act provides for naturalisation upon becoming a major:

"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 51of 1992)."

118. Section 25 of the Citizenship Act allows this Court special statutory review powers to consider the merits of Mr Khoza's case. The court is able to substitute any decision of the Minister in terms of that Act.

TEBOGO MEETS THE REQUIREMENTS FOR CITIZENSHIP BY BIRTH

119. 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.

120. Tebogo 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.

121. As will be shown, Mr Khoza then meets the remaining two legs of section 2(2) of the Citizenship Act and should therefore be declared a South African citizen. Importantly, there exists no discretion in reaching this conclusion.

Tebogo has no ties to other countries

122. Tebogo does not have citizenship or nationality in any other country and has no right to such citizenship or nationality.

123. The Department appears to dispute this by denying that Mr Khoza has thoroughly explained his every movement and location. As already shown, this is not a proper denial and all possible evidence has been provided.

124. Mr Phadagi's own report confirms it cannot be disputed that Mr Khoza was born in South Africa and knows no other country.

125. As has already been shown, the Department's claims that Mr Khoza ought to conduct some kind of lay investigation – which they may not even accept – to trace his paternal lineage, which may or may not lead to citizenship in Eswatini, is baseless.

126. Further, this is a misreading of the law.

    126.1. It is common cause that, at this juncture, Mr Khoza <u>has no right to citizenship or nationality of another country</u>.

    126.2. That the Department thinks there is some *potential* that Mr Khoza <u>might</u> have citizenship if he "investigates" – despite Mr Khoza himself going to the border officials and LHR attempting to liaise with the Eswatini embassy – does not negate this fact and is speculative at best. The Department's speculation is in any event irrelevant.

    126.3. 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

Tebogo with that information over the last eight years of his trials and tribulations with the Department.

126.4. Otherwise its denial is baseless and no foundation has been laid to dispute Mr Khoza's evidence or the findings of its own official.

126.5. Mr Khoza's rights continue to be violated for no good reason.

127. The Department has failed to demonstrate how or why Mr Khoza does not meet the first leg of section 2(2) of the Citizenship Act.

Tebogo's birth will be registered upon success

128. If successful in this matter, Mr Khoza would have his birth registered in South Africa, in accordance with the BRDA.

129. Courts have made such orders before, as they are empowered to do.[92]

130. Thus, this court would be able to provide the second leg of section 2(2) of the Citizenship Act.

Tebogo has met both legs of section 2(2) of the Citizenship Act

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92 *Chisuse* at par 92, order 4; the order in *DGLR v Minister of Home Affairs* (Gauteng Division, Pretoria) Unreported Case No: 38429/13; the order in *Minister of Home Affairs v DGLR* (Supreme Court of Appeal) Appeal case no.: 1051/15 confirming the previous court order.

131. Having met both legs, Mr Khoza would fit squarely within the four corners of section 2(2) of the Citizenship Act and is entitled as a matter of law to have his citizenship recognised.

132. There is no discretion conferred on the Minister in terms of section 2(2) of the Citizenship Act. Section 2(2) of the Citizenship Act says such a person "shall be a South African citizen" provided such a person meets the requirements.

TEBOGO MEETS THE REQUIREMENTS FOR CITIZENSHIP BY NATURALISATION

133. Section 4(3) of the Citizenship Act provides that Mr Khoza qualifies to apply to the Minister for recognition of his citizenship if he meets four requirements, namely if:(i) he was born in South Africa (ii) he was born of parents who are not South African citizens and who have not been admitted to South African for permanent residence (iii) he has lived in South Africa since birth until becoming an adult, and (iv) his birth is registered.

134. Note that satisfying the four requirements means that Mr Khoza is entitled to have his citizenship recognized.[93] The Minister has no discretion to refuse a request for recognition of citizenship.[94]

Tebogo has lived in South Africa his entire life

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[93] *Jose* at par 22 and 25.

[94] *Jose* at 25

135. Tebogo's evidence is that he has never lived or known any other country. Mr Phadagi's report confirms this. As is clear, Mr Khoza has no documentation and thus cannot even apply for a passport. Indeed, when attempting, with an official document, to enter Eswatini, he could not even cross the border.

136. The SCA has noted in regard to the Minister failing to provide the right to apply in terms of section 4(3) of the Citizenship Act: "*It is an affront to deny ... respondents the right to apply for citizenship in a country where they were born, have lived in and which is the only country they have ever known.*"[95]

137. Such refusal of Mr Khoza is an affront to him, given that he was born in South Africa, has lived here his whole life and knows no other place.

138. Mr Khoza meets the third requirement of section 4(3) of the Citizenship Act.

Tebogo is entitled to have his birth registered

139. We have established that Tebogo is entitled to have his birth registered. Following the granting of prayer 1 of his notice of motion, Mr Khoza would fit squarely within the four corners of section 4(3) of the Citizenship Act.

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95 *Minister of Home Affairs v Ali* (1289/17) [2018] ZASCA 169 par 24.

APPROPRIATE REMEDY

Tebogo's birth must be registered, and his citizenship recognised

140. On Tebogo's evidence, he fits squarely within the applicable legal framework to be recognised as a citizen.

141. In the alternative, he fits within the framework to apply to the Minister for naturalisation. This, albeit, only prolongs Tebogo's plight.

142. This is not a radical remedy. Courts have declared parties in such matters citizens before and have ordered the Director-General (the second respondent) to register parties' births.[96]

143. Mr Khoza, as has been shown, fulfils the requirements for citizenship in terms of both section 2(2) and 4(3) of the Citizenship Act. The appropriate remedy, in terms thereof, would be:

    143.1. To order the Director-General to register Mr Khoza's birth.

    143.2. To declare Mr Khoza a citizen of the Republic of South Africa; and

144. This entire matter has shown the Department's unfounded, unrelenting opposition to Mr Khoza's claim. There is a high chance, therefore, regardless of

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[96] *Chisuse* at par 92, orders 3 and 4; the order in *DGLR v Minister of Home Affairs* (Gauteng Division, Pretoria) Unreported Case No: 38429/13; the order in *Minister of Home Affairs v DGLR* (Supreme Court of Appeal) Appeal case no.: 1051/15 confirming the previous court order.

the threat of a legality review, and in the absence of regulations Mr Khoza will be back to square one. This cannot stand.

The Minister must promulgate regulations in relation to the Citizenship Act

145. It is of concern that both provisions through which Mr Khoza seeks to obtain citizenship, that is 2(2) and 4(3) of the Citizenship Act, have been the focus of court orders where the Department has been ordered to promulgate regulations and has, thus far, not done so.

146. Mr Khoza's concern is however solely to do with section 2(2) of the Citizenship Act.

147. Despite three court orders to do so, going as far back as 2014, the Department has still not promulgated regulations in relation to section 2(2) of the Citizenship Act. These have also been attached to punitive costs orders.

147.1. On 03 July 2014, the High Court in *DGLR* ordered that 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.*"[97]

147.2. On 06 September 2016, the SCA confirmed the previous *DLGR* order and, regarding the regulations, indicated the Department "*will comply*

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

with paragraph 4(d) of the High Court order within 18 months of the date of this order."[98] This made the deadline early March 2018.

147.3. The Department, in response, fruitlessly attempted to rescind the original High Court order.[99] The High Court apparently dismissed the rescission application and again reiterated the need to follow the order.[100]

148. The Department is therefore in contempt of various orders.

149. Thus, in response to various court orders, including from the Supreme Court of Appeal, the Department instead either did not act or used its resources to have the order rescinded.

150. Section 2(2) of the Citizenship Act is an imperative provision for people like Tebogo. It is imperative that officials and applicants are on the same page, in order to expedite the process, alleviating unnecessary prejudice that people like Mr Khoza continue to endure.

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98 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, and *Jose* at par 17.

99 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-question/8922/

100 Scalabrini Centre of Cape Town *Written Comments On The Draft Amendment Regulations On The South African Citizenship Act, 1995* (30 August 2020) at par 14. Available at: http://citizenshiprightsafrica.org/wp-content/uploads/2020/08/ScalabriniCentreOrs_Comments-draft-citizenship-regulations_31Aug2020.pdf

151. Thus, an appropriate remedy is – again – to order the Minister to promulgate regulations in relation to section 2(2) of the Citizenship Act. The Department's continued refusal is a slight against the courts and this cannot stand. It will be vulnerable people like Mr Khoza who will endure the brunt of inaction, not the Department.

COSTS SHOULD BE GRANTED ON A PUNITIVE SCALE

152. 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 to comply for almost 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. Meanwhile the Department blames him for others' conduct even before his birth, blames him when he follows its own officials' guidance, blames him for not having information that not even social workers or Department officials can obtain, and blames him for not conducting investigations the Department itself ought to have done.

153. With no recourse, Mr Khoza was forced to bring this matter to court. As result of the Department's conduct, and how it has responded in its papers, he seeks a punitive costs.[101]

[101] A punitive cost order in this case is not far-fetched. The SCA had granted punitive costs against the Minister of Home Affairs in *Jose* at par 27 – 33.

154. The principles governing punitive costs was recently summarised by Molahlehi J in the case of *Maribatsi*[102]:

> *"The consideration behind punitive costs is to punish a litigant who is in the wrong due to the manner in which he or she approached litigation or to deter would-be inflexible and unreasonable litigants from engaging in such inappropriate conduct in the future."*[103]

155. Molahlehi J stated further that:[104]

> *"It has generally been said in several of the cases that the Court will issue a cost award on attorney and client scale as a matter of showing its displeasure against a litigant's objectionable conduct. Erasmus Superior Court Practice, explains that the awarding of costs on attorney and client scale is not, as has been suggested by the authorities, limited to the concept of the court showing its disapproval of the conduct of the offending party. In other words the ground for awarding these costs is not limited to punishing the offending party but includes ensuring that the successful party will not be out of pocket in respect of the expenses caused to him or her by the approach to litigation by the losing party. In this respect the learned authors had the following to say:*
>
> > *"In some of the cases it has been said that the court makes an order of attorney and client costs in order to mark its disapproval of the conduct of the losing party. This terminology suggests that an award of attorney and client simply as punishment does not, however, supply a complete explanation of the grounds on which the practice rests; something more underlies it than the mere punishment of the losing party. On the other hand, the order cannot be justified merely as a form of compensation for damages suffered. The true explanation of awards of attorney and client costs not expressly authorised by statute is that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considered it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs*

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[102] 2021 (6) SA 470 (GJ). See also *Suzman Ltd v Pather And Sons* 1957 (4) SA 690 (N).

[103] *Maribatsi* at par 12.

[104] *Maribatsi* at par 13.

> *that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation."*

156. Indeed, there is precedent for granting punitive costs against the Minister and Director-General of Home Affairs in a case like the present. In *Jose,* the SCA said the following:[105]

> *"The judgment of the Constitutional Court* [in Chisuse] *was delivered on 22 July 2020. By that stage the appellants had already filed heads of argument. Understandably, they then persisted with the point. But that ought to have changed with the delivery of the Constitutional Court's judgment. Even assuming that they were not immediately aware of the judgment, from the time that the respondents filed their heads of argument on 3 August 2020 they were on notice. The DHA, however, continued as if nothing had changed and took no steps to limit the incurring of further costs. Plainly, it was obliged to have reconsidered its position, which it failed to do. To borrow from Madibeng Local Municipality v Public Investment Corporation Ltd, the conduct of the DHA was 'beyond the pale'. Plasket AJA added:*
>
> > *'As an organ of state, it is required to act ethically, and has failed dismally to do so in this matter. Litigation, said Harms DP in Cadac (Pty) Ltd v Weber-Stephen Products Co and Others, is not a game; organs of state should act as role models of propriety; and they may not behave in an unconscionable manner.'*
>
> *In that, the DHA failed."*

157. What was true in *Jose,* and *Chisuse,* remains true for Mr Khoza. The Department's mandate is not to pose as a barrier to recognition of citizenship, especially not with frivolous and contrived disputes.

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[105] *Jose* at par 31

158. 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.

159. In *Maribatsi*, the court noted:

> *"In determining whether the behaviour of a litigant is objectionable, the Court will have regard to the nature of the litigant's conduct... costs are ordinarily ordered on the party and party scale. The Court will in the exercise of its discretion and in exceptional circumstances, award costs on a punitive scale."*[106]

160. In its papers, the Department's disputes were untenable and deserving of being dismissed on the papers. Offering nothing but baseless speculation, irrelevant hypotheticals and ambiguous reasoning, the Department's response to Mr Khoza's evidence is wanting and disrespectful of both this court and Mr Khoza. It offers the court no assistance in reaching a decision and the papers are drafted in such a way that it was difficult for Mr Khoza to know how to respond.

161. Indeed, as in *Jose,* the Department had *"at its disposal the full machinery of the state; if those allegations could have been disputed, one imagines they would have been. Certainly, the response is not such as to raise a real, genuine or bona fide dispute of fact. A real, genuine and bona fide dispute of fact can only be*

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[106] *Maribatsi* at par 14. Emphasis supplied.

said to arise where the party who purports to raise the dispute has seriously and unambiguously addressed the fact said to be disputed."[107]

162. The Department cannot be allowed to treat people like Mr Khoza in this way, let alone opposing parties in litigation, who only want their rights recognised as the Constitution guarantees. This was the case in *Chisuse* and *Jose* and the Department's conduct was rightfully admonished in both instances by the Constitutional Court and the SCA respectively.

163. Instead of years of unnecessary back-and-forth, the Department was quite capable of assisting Mr Khoza in having him recognized as a citizen. At no point does the Department point to an instance of Mr Khoza's refusing to comply. It is the Department's conduct that brings the parties to court.

164. Thus, costs should be on a punitive scale.

165. Given the nature of the Department's opposition, for example in contriving disputes, a substantial amount of work was needed to clarify and navigate the complexities in this matter. But for the attitude adopted by the Department, what would otherwise have been a fairly straightforward motion has now become fantastical factual labyrinth. On this basis, we submit that the employment of two counsel was necessary and costs should extend to two counsel.

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[107] *Jose* at par 19

CONCLUSION

166. Mr Khoza wants to become a recognised citizen of the only country has known, where has built a life, a career and a family. He has spent years attempting to become a citizen, engaging with a Department that has increasingly done little to assist him.

167. The Constitution grants rights to South African citizens that Mr Khoza does not have access to, through no fault of his own. Becoming a citizen would allow him these rights and the ability to flourish. He should not be made to endure continued prejudice as a result of a Department that, for no good reason, has been a barrier instead of bridge to constitutional rights.

168. The Department is not wrong that there is a paucity of information available to Mr Khoza, but this has been explained: he was orphaned at a young age and has little information to provide.

169. After being assisted in obtaining more information by Department officials and social workers, Mr Khoza has done all he can to alleviate the suspicious attitude of the Department. In the face of this, the Department thinks he should have tried harder, dismisses the findings of its own official and speculates broadly about historical conduct over which he has no control.

170. It is time for Mr Khoza’s prejudice to come to an end. He has endured this his entire life, for reasons beyond his control.

171. The court is therefore asked to make an order in the following terms:

171.1. Directing the First Respondent to register Mr Khoza's birth in terms of the Births and Deaths Registration Act, as amended, within 30 days of the order.

171.2. Declaring Mr Khoza to be a South African citizen by birth in terms of section 2(2) of the South African Citizenship Act, as amended.

171.3. Alternatively, declaring Mr Khoza to be a South African citizen by naturalisation in terms of section 4(3) of the Citizenship Act.

171.4. 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 the order.

171.5. Directing 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.

171.6. Directing the First Respondent to accept and adjudicate applications in terms of section 2(2) on affidavit pending the promulgation of regulations.

171.7. Ordering the Respondents to pay the costs of this application on an attorney and client scale, such costs to include those consequent upon the employment of two counsel.

Jatheen Bhima

Tauriq Moosa

Chambers, Sandton and Cape Town

20 July 2022

LIST OF AUTHORITIES

INTERNATIONAL CONVENTIONS

The United Nations, *Convention Relating to the Status of Stateless Persons* (1954).

The United Nations, *International Covenant on Civil and Political Rights* (1966).

CONSTITUTION

Constitution of the Republic of South Africa, 1996.

STATUTES

Births and Deaths Registration Act 51 of 1992.

South African Citizenship Act 88 of 1995.

DOMESTIC CASE LAW

Centre for Child Law v Director-General: Department of Home Affairs and others 2020 (8) BCLR 1015 (ECG)

Chisuse and Others v Director-General, Department of Home Affairs and Another [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC).

DGLR v Minister of Home Affairs (Gauteng Division, Pretoria) Unreported Case No: 38429/13.

Maribatsi v Minister of Police and Another 2021 (6) SA 470 (GJ).

MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).

Minister of Home Affairs v Ali (1289/17) [2018] ZASCA 169.

Minister of Home Affairs v DGLR (Supreme Court of Appeal) Appeal Case No.: 1051/15.

Minister Of Home Affairs and Others v Jose and Another 2021 (6) SA 369 (SCA).

N and Others v Director General: Department of Home Affairs and Another [2018] 3 All SA 802 (ECG)

National Director of Public Prosecutions v Zuma (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA).

Suzman Ltd v Pather And Sons 1957 (4) SA 690 (N).

Wightman t/a J W Construction v Headfour (Pty) Ltd and Another (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008).

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Zhao v Netherland CCPR/C/130/D/2918/2016.