IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
(BLOEMFONTEIN)

SCA CASE NO:
NGHC CASE NO: 38429/13

In the matter between:

MINISTER OF HOME AFFAIRS	First Appellant Plaintiff/Applicant
DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Appellant
DEPUTY DIRECTOR-GENERAL FOR CIVIC SERVICES	Third Appellant
RONEL KRUGER NO	Fourth Appellant
and	
B G L R	First Respondent
K M R G	Second Respondent

APPELLANTS' HEADS OF ARGUMENT

A INTRODUCTION

1 This is an appeal against a decision of the North Gauteng High Court which granted citizenship by birth to the respondent's minor child in terms of section 2(2) of the South African Citizenship Act, no 88 of 1995 ("the Act")

2 The learned judge erred in granting the minor child citizenship and exceeded his powers when he ordered the Minister to *inter alia*, enter the minor child's name into the national population register, issue her with an

ID number and to make regulations prescribing procedures to be followed for application for citizenship under section 2(2) of the Act.

3 We begin by dealing with the background to this matter, the order granted by the High Court as well as the attacks on the High Court's findings. We briefly deal with the appropriate remedy and lastly, we deal with the question of condonation for the late filing of the record of appeal.

B BACKGROUND

4 This matter arose following an application that was brought at the North Gauteng High Court ("court *a quo*") by KMRG on behalf of her minor daughter, DGLR hereinafter collectively referred to as the respondent").

5 The respondent is a Cuban national who was born on 25 June 1968. She came to South Africa in 2005 on a treaty permit issued at the South African foreign commission in Cuba, which allowed her to work in South Africa as an engineer for 3 years, which period was extended for a further three (3) years.

6 In her founding affidavit, the respondent states that in 2006 she was dismissed from the Cuban treaty program and due to events related to her dismissal she did not return to Cuba. She thereafter became a "permanent emigrant" under Cuban law after an 11 months absence from Cuba and is prohibited from returning to reside in Cuba.

7 The minor child was born in South Africa on 3 September 2008 in Cape Town. The respondent states that the minor child's birth was registered, but since she and the minor child were foreigners, the appellants (the Department) refused to issue the minor child with an identity number because her parents were not citizens or permanent residents of South Africa at the time of the minor's birth. The mother received permanent residence in South Africa in 2011, 3 years after the minor child's birth in the country. From the papers it appears that the minor's father is a Cuban national who is now married to a South African woman and holds a visitor's permit as a spouse of a citizen of South Africa.

8 The respondent made numerous applications on behalf of her child for citizenship by birth to the Department, without success. She also tried to apply for citizenship from the Cuban government and was informed by the Cuban embassy that the minor child will not be able to obtain permanent residence in Cuba due to the fact that the respondent has emigrated to South Africa. The result is that the minor child cannot attain permanent residence (and consequently citizenship) in Cuba. She may also not apply for Cuban nationality as she is considered a foreign child of Cuban nationals.

9 On 24 December 2012 the fourth appellant, while acting in her professional capacity as the employee of the Department, refused the respondent's application for the minor child to be registered on the National Population Register as a South African citizen on the basis that

the Department did not view the minor child as stateless since she (the minor child) qualifies to be issued with a permit for permanent residence through the respondent and once the permit has been issued to the minor child, the respondent can apply for a certificate of Naturalisation of the minor child.

10 The respondent brought the application on the basis that the minor child qualifies as a South African citizen by birth in terms of section 2(2) of the Act. The order that the respondent sought was for the court to[1]:

10.1 review and set aside the decision of the Minister not to register the minor child as a South African citizen

10.2 review and set aside the decision of Ronel Kruger of 24 December 2012 which refused her application to register the minor child as a South African citizen;

10.3 Declare the minor child to be a South African citizen in terms of section 2(2) of the South African Citizenship Act 88 of 1995 ("the Act");

10.4 She also sought an order directing the Minister to enter the minor child into the National Population Register as a citizen and to issue her with a citizen identity number;

[1] Notice of motion

10.5 She further sought an order directing the Minister to amend and re-issue the minor child's birth certificate; and

10.6 An order directing the Minister to make regulations in relation to section 2(2) of the Act pursuant to section 23 within a time period that the court deems reasonable.

11 The Department did not oppose the matter, in that it did not file an answering affidavit at the High Court. The Department also did not furnish a record of its decision refusing to grant the minor child South African citizenship with the result that on the date of the hearing, the Judge granted the respondent default judgment and gave her the order that she sought for.

12 In the high court the Judge made the order in the following terms:

12.1 The Minister's decision not to register the minor child as a South African citizen was declared unlawful and was reviewed and set aside;

12.2 The minor child was declared to be a South African by birth in terms of section 2(2) of the South African Citizenship Act 88 of 1995 as amended;

12.3 The Minister was ordered to:

12.3.1 Enter the minor child into the National Population Register as a citizen;

12.3.2 Issue her with a citizen identity number and amend and re-issue her with a birth certificate; and

12.3.3 Make Regulations in relation of section 2(2) of the Citizenship Act pursuant with section 23, within a time period that the court deems reasonable.

13 The Department applied for and was granted leave to appeal to the Supreme Court of Appeal (SCA). It filed the Notice of Appeal in this court and belatedly filed the record of appeal, for which it seeks condonation.

14 The grounds upon which the appellants attack the decision of the court *a quo* are the following[2]:

14.1 the court *a quo* ought to have dismissed the application on the basis that no case has been made out both on the facts and the law by properly applying the law and the legal principles on conferment of citizenship, the Constitution of the Republic of South Africa and international law on statelessness,

14.2 the judge erred in law and in fact by making an order declaring that the minor child is a South African citizen by birth in terms of section 2(2) of the South African Citizenship Act.

[2] Appellants' notice of application for leave to appeal

14.3 the Learned Judge ought to have at the very least remitted the matter back to the appellants to make a decision on whether or not the minor child qualifies in terms of the laws of the Republic of South Africa and international law to be a South African citizen.

14.4 The respondent did not in her founding papers demonstrate exceptional circumstances as required by section 8 of Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for the Court to substitute the decision of the decision-maker ("the Department") with one of its own.

14.5 The judge erred by making an order that the Minister should enter the minor child into the national population register as a citizen, and that the minor child be given a citizenship and a South African identification number and to amend and re-issue the minor child's birth certificate.

14.6 The judge erred by making an order that the respondents should make regulations in relation to section 2(2) of the Citizenship Act within a time period that the Court deems reasonable.

14.7 The judge has by declaring the minor child a citizen of South Africa and by requiring the respondents to issue regulations interfered with the separation of powers principle enshrined in the Constitution.

Respondent's failure to make out a case for citizenship

15 The respondent brought the application in the court *a quo* on the basis of section 25 of the Citizenship Act (which allows the high court to review any decision made by the Minister under the Act) as well as section 6 of PAJA.

16 Sections 2(1) of the South African Citizenship Act (No. 88 of 1995) ("the Act") provides as follows:

1) Any person-

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

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

shall be a South African citizen by birth.

17 From the papers that were filed in the court a quo it papers that at the time of the child's birth both her parents were Cuban nationals. In terms of section 2(1) of the Act for the minor child to acquire South African citizenship by birth, one of her parents should have been a South African citizen. Therefore the minor child does not qualify for South African citizenship under section 2(1) of the Act. The court *a quo* did not decide on this section.

Error in making an order declaring that the minor child is a South African citizen by birth in terms of section 2(2) of the Citizenship Act

18 In terms of section 2(2) of the Act:

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

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

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

19 In terms of section 2(2) of the Act **both** of the abovementioned conditions must be met in order for the minor child to be eligible for South African citizenship by birth.

20 From reading section 2(2) of the Act, and in order to answer this question, the following two questions have to be answered in the affirmative:

20.1 Whether the minor child does not have citizenship or nationality of any other country, or whether she has no right to such citizenship or nationality; and

20.2 whether her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992).

21 We will deal with each of these questions in turn.

Whether the minor child does not have the citizenship or nationality of any other country, or whether she has no right to such citizenship or nationality

22 We submit that this question should be answered in the negative. Strictly speaking, the minor child would have had citizenship of her parents, i.e. Cuban. However **Annexure "DR6"**, a letter from the Cuban embassy to the respondent confirmed that the minor child will not be able to obtain permanent residence in Cuba due to the fact that the respondent has emigrated to South Africa. The result is that the minor cannot attain permanent residence and may not apply for Cuban nationality as she is considered a foreign child of Cuban nationals. From this it may appear that the minor child does not have citizenship of another country.

23 However, the enquiry in terms of section 2(2)(a) of the Act does not end there, the minor child should alternatively have no right to such citizenship or nationality of any other country. To this we submit that the minor child does have a right to South African nationality in terms of the Immigration Act, because she qualifies (and was confirmed by the email from the fourth appellant dated 24 December 2012) for permanent residence and thereafter her mother could apply for her naturalisation.

24 We submit that the court a quo erred in not finding that the minor child qualifies for South African nationality.

Whether the minor's birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992

25 Section 9 of the Births and Deaths Registration Act provides as follows:

(1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after

the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.

(1A) The Director-General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner.

(2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.

(3) .....

(3A) 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.

(4) No registration of birth shall be done of a person who dies before notice of his or her birth has been given in terms of subsection (1).

(5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.

(6) No person's birth shall be registered unless a forename and a surname have been assigned to him or her.

(7) The Director-General may on application in the prescribed manner issue a prescribed birth certificate from the population register.

(8) An original birth certificate issued in terms of subsection (7) shall in all courts of law be on the face of it evidence of the particulars set forth therein.

26 The respondent tried to register her daughter's birth within 30 days from the date of birth (3 September 2008). She was issued with an unabridged birth certificate dated 23 September 2008 **(Annexure "DR3")** but it does not have an ID number because she does not qualify for citizenship by birth in terms of the Act. We submit that this was not registration of the

minor child's birth in accordance with the Births and Deaths Registration Act.

27 This condition too was never fulfilled. It is for this reason that the Department submits that the minor child does not qualify for citizenship under section 2(2) of the Act. The court *a quo* erred in not finding, on the facts and the law that the respondent did not make out a case for the order that she sought.

28 The argument that was pursued by the respondent in the court of first instance was that if she (the minor child) is refused South African citizenship then she will become stateless and that the Minister has a duty to protect her child against statelessness.

29 We submit that statelessness does not even feature in this matter as the minor child qualifies for South African nationality under the Immigration Act. Therefore the court a quo erred that the Department's decision had an effect of rendering the minor child stateless.

The Nature Of Statelessness

30 Before we look at international law and how it deals with statelessness, our Constitutions does not promote statelessness and section 28(1)(a) of the Constitution provides as follows:

28(1)(a) "Every child has the right to a name and nationality from birth"

31 Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child. Section 28(3) defines a child as a person under the age of 18 years.

32 Section 10 of the Children's Act No 38 of 2005 provides that *"in all matters concerning the care, protection and well-being of the child, the standard that the child's best interest is of paramount importance must be applied"*.

33 Section 20 of our Constitution provides that *"no citizen may be deprived of citizenship"*.

Statelessness and international law

34 A stateless person is someone who is "not considered as a national by any state under the operation of its law" In other words, a stateless person has no citizenship or nationality[3].

35 The term the right to a nationality is protected under international law. The Universal Declaration of Human Rights provides a general right to nationality under article 15. The international human rights treaties—including the Convention on the Rights of the Child ("the CRC") and the International Covenant on Civil and Political Rights (ICCPR)—as well as the Convention on the Reduction of Statelessness, provide particular norms with respect to the right to nationality for children. In addition,

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[3] Forced Migration Review, Issue 32, April 2009 "No legal identity. Few rights. Hidden from society. Forgotten. STATELESS, page 1

human rights instruments in Africa, the Arab region, Europe and the Americas give additional guidance at the regional level.

36 The CRC is exceptionally important when it comes to the particular protection of children's right to nationality—not least because nearly every country has ratified it.

37 Children's "right to acquire a nationality" is guaranteed under article 7 of the Convention, which also obliges party states to implement this right "*in particular where the child would otherwise be stateless.*" Although the Committee on the Rights of the Child has not clarified precisely what the right to acquire a nationality means in practical terms, it has stressed that states have an obligation to take every appropriate measure to ensure that no children are left stateless. The committee has also stressed that states parties to the CRC must implement children's right to a nationality in such a way that the best interests of the child are observed. This is in line with the provisions of section 28 of our Constitution.

38 At the very least, the right to acquire a nationality under the CRC should be understood to mean that children have a right to nationality in their country of birth if they do not acquire another nationality from birth—in other words, if they would otherwise be stateless. In fact, this particular principle is recognized in regional systems as well as in the Convention on the Reduction of Statelessness. Since the late 1940s experts have

acknowledged that this measure is key to eventually eliminating statelessness[4].

39 For the reasons mentioned above, we submit that the minor child is not stateless. According to the Departments' rejection letter of 24 December 2014 it informed the mother that the child is not stateless because in terms of the Immigration Act the child qualifies to be issued with a Permanent Residence Permit through the mother and that once the permit has been issued to the child the mother can apply for a certificate of Naturalisation for the child".

Immigration Act (no 13 of 2002)

40 In his reasons, the judge *a quo* stated that it is not in the best interests of the child that he should remain stateless, with no recognized citizenship or immigration status in South Africa. The suggestion by the fourth appellant that the minor child can apply for permanent residence and naturalization is also not in the best interests of the minor child as her status will depend on that of her mother, unlike citizenship by birth which she was acquired independent of her mother[5].

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[4] Forced Migration Review, Issue 32, April 2009 "No legal identity. Few rights. Hidden from society. Forgotten. STATELESS, page 6

[5] Para 12 of the High Court judgment

41 The judge also[6] stated that since there are no regulations that prescribe the procedure to be followed for citizenship under section 2[2] *(sic)* of the Act, it makes it impossible for applicants to achieve the purpose of the Act, particularly because in this case the mother had tried on 5 occasions to comply with the Department's suggestion, with no result. He ordered the Minister to make regulation under section 23 of the Act which are *"necessary or expedient to prescribe in order that the purpose of the Act be achieved or that the Act may be effectively administered"* (para 14).

The judge erred in not considering the option provided for in the Immigration Act

42 The judge's main opposition to the Department's advice to be issued with a Permanent Residence Permit through the mother, once the permit has been issued to the child the mother and thereafter to apply for a certificate of Naturalisation for the child, was that to apply for permanent residence and naturalization is also it was not in the best interest of the minor child as her status will depend on that of her mother, unlike citizenship by birth which she was acquired independent of her mother.

43 We submit that the Judge *a quo* was misdirected in his finding, because section 2(2) of the Citizenship Act states that a child who does not have citizenship of any other country, will have citizenship of her parents. The

[6] Para 13 of the High Court judgment

minor's status too in this instance is dependent on the citizenship of the parents. The distinction however between section 2(2) of the Act and the position under the Immigration Act is that in the former case citizenship is definitive and the parent of the minor child does not have to make a further application (for naturalisation) (as is the case under the Immigration Act).

44 The respondent also argued that she is opposed to the alternative provided in terms of the Immigration Act because the rights of naturalised persons are weaker than those who have citizenship by birth[7].

The respondent was incorrect that the rights of a permanent resident are weaker than those of citizens and the court erred in not considering the provisions of section 2(3) of the Act

45 Section 2(3) of the Act provides as follows:

Any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth, if-

(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 is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992).

46 A naturalised person has similar rights to and is able to do everything that the citizen can do Should the respondent still insist on

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[7] Paras 80 – 81 of the founding affidavit

getting the minor child citizenship by birth then she can, upon her becoming a major, apply for her to be granted citizenship by birth.

47 The court a quo erred in not even considering the provisions of section 2(3) of the Act and concurring with the respondent (incorrectly) that naturalised persons have weaker rights than citizens.

The judge ought to have remitted the matter back to the appellant; Failure to show exceptional circumstances

48 Instead of remitting the matter back to the Department for reconsideration, the court a quo substituted the decision of the Department with that of its own and granted the minor child citizenship by birth in contravention of section 2(2) of the Act[8]

49 In ***Gauteng Gambling Board v Silver Star Development Ltd & others***[9] para 28, the court held as follows:

[28] "The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is 'exceptional': s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. Hefer AP said in Commissioner, Competition Commission v

[8] High Court judgment and order

[9] 2005 (2) SA 67 (SCA)

General Council of the Bar of South Africa and Others 2002 (6) SA 606 (SCA)……."

50 The court held that the phrase *'in exceptional cases'* was not concerned with whether the administrative decision 'was a conspicuously bad one but with whether there are unusual circumstances which make it appropriate to grant the exceptional remedy in item (aa) or (bb) rather than the usual remedy of remittal.' The court concluded that exceptionality was concerned with the choice of remedy, not the quality of the administrator's decision in the abstract. The SCA's decision was recently endorsed by the SCA in ***Trustees, Simcha Trust v De Jong And Others***[10].

51 We submit that the judge had limited the powers to substitute the decision of the Minister with that of his own because section 25 of the South African citizenship Act provides that the High Court has jurisdiction to review any decision made by the Minister under the Act and that the court may confirm, vary or set aside the decision of the Minister. Therefore under section 25 of the Act, the judge does not have the power to substitute the decision of the Minister with that of his own.

52 We further submit that the judge's power to substitute the decision of the Minister with that of his was limited by the provisions of section 8 of PAJA, which requires the respondents to show exceptional circumstances which would have warranted that decision. We submit that none were shown.

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[10] 2015 (4) SA 229 (SCA)

53 According to section 8 of PAJA the court could only have substituted the decision of the Department with that of its own if this was an exceptional case. According to the Gauteng Gambling Board case "*a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary*"[11].This matter was not one of those cases.

54 We therefore submit that the judge acted *ultra vires* when he substituted the order of the Minister with that of his own. At the very least he should have remitted the matter to the Minister for reconsideration.

Order the Minister to enter the minor child into the national population register as a citizen, and that the minor child be given a citizenship and a South African identification

55 The court *a quo* erred in ordering the Minister to enter the minor child into the national population register as a citizen, to give her citizenship and a South African identification and to amend and re-issue the minor child's birth certificate.

56 The court ***in Gauteng Gambling Board***[12] held as follows:

[29] An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant

[11] 2005 (2) SA 67 (SCA), para 28

[12] 2015 (4) SA 229 (SCA) para 29

information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. See Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) D Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at paras [47] - [50], and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [46] - [49]. That is why remittal is almost always the prudent and proper course. (Emphasis added)

57 The court a *quo* does not have the *"composition, experience, and access to sources of relevant information and expertise to make the right decision"*. Therefore the court a quo should have recognised these limitations.

58 As stated above, the respondent does not qualify for citizenship under section 2(2) the Act. The court does not have the necessary tools to assess if the minor child qualifies to be granted citizenship by birth. Therefore the court a quo erred and exceeded its powers when it substituted the Department's decision with that of its own. For this reason also, the order should be set aside.

Ordering the Minister to make regulations in relation to section 2(2) of the Citizenship Act

59 The judge also ordered the Minister to make Regulations in relation of section 2(2) of the Citizenship Act pursuant with section 23, within a time period that the court deems reasonable.

60 Section 23 of the Act provides as follows:

23 Regulations

The Minister may make regulations not inconsistent with this Act, with regard to-

(a) the form of an application, declaration, certificate or other document under this Act;

(b) .....

(c) the persons before whom declarations of renunciation or resumption of South African citizenship may be made;

(d) the issuing of certificates of acknowledgment of South African citizenship to persons born elsewhere than in the Republic;

(e) the fees to be charged for the issuing of any certificate or approval under this Act in consultation with the Minister of Finance; and

(f) generally, all matters which in terms of this Act are required or permitted to be prescribed or which he or she considers necessary or expedient to prescribe in order that the purposes of this Act may be achieved or that this Act may be effectively administered.

61 Section 23 of the Act consists of a closed list of instances that the Minister can make regulations for. Nowhere in section 23 is the Minister authorised to make regulations relating to section 2(2) or 2(3) of the Act. Therefore the court *a quo* erred in ordering the Minister to make the regulations that he is, in terms of the Act, not authorised to make.

62 In Glenister v President of the Republic of South Africa[13], Langa CJ stated that 'the doctrine of separation of powers is part of our constitutional design.

63 We submit that the judge failed to respect the separation of powers doctrine when he ordered the Minister to make regulations in terms of section 23 of the Act, which he is not entitled to do. For these reasons also, we submit that the order of the high court should be set aside.

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[13] 2011 (3) SA 347 (CC)

AN APPROPRIATE REMEDY

64 For the reasons given, we submit that the High Court ought to have dismissed the application in its entirety because the respondent does not qualify for citizenship by birth under section 2(2) of the Act. It should, at the very least have remitted the matter back to the Minister for reconsideration. It should not have substituted the Minister's decision with that of its own and it certainly should not have ordered the Minister to make regulations relating to conduct in terms of section 2(2) of the Act.

65 We submit that this court ought to grant the appeal and set aside the decision of the court *a quo*.

CONDONATION

66 The appellants have applied for condonation for the late filing of record of appeal in the court a quo. It was not filed timeosuly. It also took time to finalise the index as the respondent delayed in confirming it. It could then not be filed with this court without an application for condonation, because it was out of time.[14]

67 The delays are regrettable, the records of appeal should have been filed timeously and that once it was clear that the transcribed records were not filed timeously, an application for condonation ought to have been brought

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[14] Founding affidavit in condonation application p 6-7 para 9

promptly. However, this should not preclude this Court from determining the merits of the appeal. This is so for the following reasons.

67.1 First, the defaults that have occurred have been on the part of the appellant's legal representatives, not the appellants themselves.

67.2 Second, this is not ordinary litigation that may have a narrow effect between two parties. Rather, it is a matter of considerable public interest and importance – whatever its outcome.

67.2.1 It relates to the allegations of statelessness and relates to the duties that the Department was ordered to undertake, including granting citizenship to the minor child and entering her into the National Population Register as a citizen, which have an effect of granting citizenship to the minor child in contravention of the Citizenship Act;

67.2.2 If the argument of statelessness that was raised by the mother in the court *a quo* is left unchallenged, the Department will be faced with the flooding of the gates of litigation whereby numerous parents of children who do not qualify as citizens of this country will approach the courts to also grant their children citizenship contrary to the provisions of the Citizenship Act. This would render the Citizenship Act nugatory.

67.2.3 Moreover, the legal principles articulated by the High Court in its judgment do not only affect the present parties. The Minister was ordered to make Regulations in terms of section in relation to section 2(2) of the Citizenship Act, pursuant to section 23 within a time period that the court *a quo* deemed reasonable. Rather, if the High Court judgment is left standing, it will have a severe effect on the duties of the Minister to make regulations dealing with statelessness, which is not even the question that the court *a quo* should have concerned itself with.

67.3 Third, the appeal bears excellent prospects of success for the following reasons:

67.3.1 First, in terms of separation of powers, the Judge is not allowed to order the minor to be declared a South African citizen by birth. This was what the judge in the court *a quo* did without any law allowing her to do so;

67.3.2 Second, the Judge in the court *a quo* did not have the power to substitute the order of the Minister and substitute it with that of her own. In fact, the Judge ought to have remitted the matter back to the Minister to make a decision on whether or not the minor child qualifies in

terms of the laws of the Republic of South Africa and international law to be a South African citizen;

67.3.3 Third, this appeal raises a question of whether the Judge is competent to make an order that the Minister should enter the minor child into the national population register as a South African citizen;

Furthermore, the question for consideration is whether in terms of separation of powers, the Judge is allowed to order the Minister to make regulations in relation to section 2(2) of the Citizenship Act, on issues that the Judge should not even have concerned herself with, i.e. statelessness.

67.3.4 Fourth, there would be no material prejudice caused to the respondent by granting condonation because the matter could still be allocated for hearing early in 2016.

68 Moreover, the respondent's conduct has not suggested that they see any urgency in the appeal as its attorneys took their time in furnishing the signed confirmatory affidavit from the respondent and left the appellants to finalise the index on their own as they failed to provide the relevant input, which would have speeded up finalisation of the index for this honourable court.

69 We therefore submit that an appropriate case has been made out for condonation to be granted. This court has a discretion regarding whether to grant condonation, to be exercised judicially upon a consideration of all the facts, and "*in essence it is a matter of fairness to both sides*":

> *"Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would serve only to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."*[15]

1 This court adopted a similar approach in *Modiri*:

> *"The first [condonation application] resulted from the late filing of his notice of appeal and the second [condonation application] from his late filing of his heads of argument. Both applications were opposed by the media respondents on the basis that the reasons advanced by the appellant's attorney for his failure to comply with the rules of this court, were largely unsatisfactory. I agree with this argument. I also find some of the explanations disturbingly inadequate. Yet, I do not believe that they were so unacceptable that it would justify the refusal of condonation without regard to the merits of the appeal. In the end, the outcome of the condonation applications therefore turned on the appellant's prospects of success. Since the appeal should, in my view, be upheld in part, it follows that that condonation applications should also succeed. However, because the media respondents were not unreasonable to oppose these*

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[15] Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A) at 532 (emphasis added)

applications, in the light of the unacceptable explanations, I believe they are entitled to their costs of opposition."[16]

PRAYER

70 We ask for an order in the following terms:

70.1 The late filing of the appellants' notice of appeal is condoned.

70.2 The appeal is upheld.

70.3 The High Court's orders are set aside and replaced with an order that the application is dismissed.

WILLIAM MOKHARI SC

BUHLE LEKOKOTLA

Appellant's Counsel

Sandton Chambers

Johannesburg

14 January 2016

[16] Modiri v Minister of Safety and Security and Others 2011 (6) SA 370 (SCA) at para 29 (emphasis added)