CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 155/19

In the matter between:

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

and

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

Neutral citation:	*Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20
Coram:	Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Khampepe J (unanimous)
Heard on:	13 February 2020

Decided on: 22 July 2020

Summary: South African Citizenship Act 88 of 1995 as amended by South African Citizenship Amendment Act 17 of 2010 — constitutionality of section 2(1)(a) and (b) — order of constitutional invalidity not confirmed

Citizenship — citizenship by birth — purposive interpretation — constitutionally compliant interpretation

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of the High Court declaring section 2(1)(a) of the South African Citizenship Act 88 of 1995, as amended by the South African Citizenship Amendment Act 17 of 2010, constitutionally invalid is not confirmed.
2. The order of the High Court declaring section 2(1)(b) of the South African Citizenship Act 88 of 1995, as amended by the South African Citizenship Amendment Act 17 of 2010, constitutionally invalid is not confirmed.
3. The following persons are declared South African citizens:
    a. Yamikani Vusi Chisuse;
    b. Martin Ambrose Hoffman;
    c. Emma Angelique Dullaart; and
    d. Amanda Tilma.
4. The first respondent, the Director-General of the Department of Home Affairs, is directed to register the births of the persons outlined in paragraph 3 of this Order, enter their details into the population register, assign them

South African identity numbers and cause identity documents and birth certificates to be issued to them.

5. The respondents must pay the costs of the applicants in this Court, including the costs of two counsel.

JUDGMENT

KHAMPEPE J (Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] Citizenship in South Africa has, since its inception in the early twentieth century, been a deeply fraught political, social and ideological tool used to define access to membership of the South African polity. The systematic act of stripping millions of black South Africans of their citizenship was one of the most pernicious policies of the apartheid regime, which left many as "foreigners in the land of [their] birth".[1] The advent of the constitutional dispensation established South African citizenship as a constitutional precept based on equality.[2]

[2] This matter comes before this Court in confirmation proceedings in terms of section 167(5) of the Constitution. The question in this matter is whether this Court should confirm the declaration of the High Court of South Africa, Gauteng Division, Pretoria (High Court) that section 2(1) of the amended South African Citizenship Act[3] is

[1] Klaaren "Constitutional Citizenship in South Africa" (2010) 8 *International Journal of Constitutional Law* 94 at 95.

[2] Section 3 of the Constitution.

[3] 88 of 1995, as amended by the South African Citizenship Amendment Act 17 of 2010 (amended Citizenship Act).

constitutionally invalid. The High Court's order declared section 2(1)(a) and (b) of the amended Citizenship Act unconstitutional and invalid. The order included a remedy of reading-in two additions to section 2(1) of the amended Citizenship Act. These additions are underlined below:

> "(1) Any person—
>
> (a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010 [i.e. 1 January 2013], was a South African citizen by birth or by descent; or
>
> (b) who is born or was born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen,
>
> shall be a South African citizen by birth."

[3] The phrases read into the section above seek to address two alleged constitutional infringements. The first is that the legislation in question automatically deprives those persons who were citizens "by descent" under section 3 of the pre-amendment South African Citizenship Act[4] (1995 Citizenship Act) of citizenship. That section stated:

> "(1) Any person—
>
> (a) who, immediately prior to the date of commencement of this Act, was a South African citizen by descent; or
>
> (b) who is born outside the Republic on or after the date of commencement of this Act, and—
>
> (i) one of whose parents was, at time of his or her birth, a South African citizen and whose birth is registered in terms of the provisions of section 13 of the Births and Deaths Registration Act, 51 of 1992 (Births and Deaths Registration Act); or
>
> . . .
>
> shall . . . be a South African citizen by descent."

[4] 88 of 1995.

[4] In addition, section 13 of the Births and Deaths Registration Act[5] provides that:

> "If a child of a father or a mother who is a South African citizen is born outside the Republic, notice of birth may be given to the head of a South African diplomatic or consular mission, or a regional representative in the Republic."

[5] By not including a provision which retains the citizenship of those who acquired citizenship by descent in terms of previous legislation, the applicants contend that section 2(1) of the amended Citizenship Act has the effect of stripping those individuals of their South African citizenship.

[6] The second alleged constitutional infringement is that the amended legislation deprives of citizenship those persons who, according to the applicants, had a "vested right to citizenship by descent". These persons fulfilled the requirements set out in section 3 of the 1995 Citizenship Act, but – for reasons out of their control – they could not register their birth to a South African parent in terms of the relevant legislation.[6] The first and third to fifth applicants in this matter fall within this category.[7]

Parties

[7] The first applicant is Yamikani Vusi Chisuse. He was born on 9 October 1989 in Lilongwe, Malawi. The second applicant is Elizabeth Mafusi Nthunya. She was born in Lesotho on 21 September 1982. The third applicant is Martin Ambrose Hoffman. He was born on 8 March 1970 in Bulawayo, Zimbabwe. The fourth applicant is Heinrich Dullaart, acting in his capacity as legal guardian of Emma Angelique Dullaart, his granddaughter,

[5] 51 of 1992.

[6] In terms of the legislation which governed citizenship prior to 2013, a person who was born outside of South Africa to a South African parent was required to register their birth before they were entitled to South African citizenship.

[7] The second applicant did not provide sufficient details or factual support in the High Court relating to her entitlement to acquire South African citizenship. This Court therefore makes no determination about the citizenship of the second applicant.

on whose behalf he is part of these proceedings. Emma was born on 25 December 2006 in Accra, Ghana. The fifth applicant is Amanda Tilma. She was born in Bulawayo, Zimbabwe, on 26 February 1969. The applicants each provided evidence before the High Court that one of their parents was a South African citizen at the time of their birth. The High Court accepted the applicants' submissions in this regard, with the exception of those of the second applicant.

[8] The first respondent is the Director-General of the Department of Home Affairs, the functionary responsible for registering births, entering people into the population register and assigning identity numbers. The second respondent is the Minister of Home Affairs, the member of the Executive responsible for the administration of the relevant statutes in these proceedings.

Litigation history

[9] The applicants filed an application before the High Court in October 2016. In their application, the applicants requested that an order be made to the effect that, amongst others—

a) section 2(1)(a) of the amended Citizenship Act be declared unconstitutional and invalid to the extent that it fails to recognise citizenship acquired by descent prior to the date of commencement of the South African Citizenship Amendment Act 17 of 2010 (2010 Amendment), 1 January 2013, and that the defect be remedied by reading the words "or by descent" into section 2(1)(a);

b) section 2(1)(b) of the amended Citizenship Act be declared unconstitutional and invalid to the extent that it only applies prospectively to persons born after 1 January 2013 and that the defect be remedied by reading the words "or was" into section 2(1)(b);

c) the applicants be declared South African citizens; and

d) the first respondent be directed to register the births of the applicants, to enter their details into the population register, to assign them South African identity numbers, and to cause birth certificates to be issued to them.

[10] The respondents failed to file an answering affidavit in the High Court. When the matter went before the High Court on 9 May 2017, the High Court postponed the application *sine die*[8] and ordered the respondents to serve and file an answering affidavit within twenty days from the issuance of the order. The respondents again failed to submit the affidavit required by the High Court's order.

[11] Two years later, the application was finally set down on the unopposed motion roll by the applicants' attorneys and heard on 22 May 2019.

[12] On the day of the hearing, the respondents appeared and requested a further postponement to allow them to file an affidavit. This request was made without an application for postponement or condonation being filed. After considering this Court's case law,[9] the High Court reasoned that the respondents had not provided any reasonable grounds for their delay and that a further postponement would not be in the interests of justice.[10] The application was, therefore, heard unopposed.

[13] The High Court accepted the applicants' submissions in relation to the constitutional invalidity of section 2(1)(a) and (b). The High Court also accepted the factual circumstances and evidence entitling all the applicants, bar the second applicant, to the

[8] This is a Latin term which means that the matter was postponed without a set date for a future hearing.

[9] See *Shilubana v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as amicus curiae)* [2007] ZACC 14; 2007 (5) SA 620 (CC); 2007 (9) BCLR 919 (CC) at paras 9-12; *Lekolwane v The Minister of Justice and Constitutional Development* [2006] ZACC 19; 2006 JDR 0897 (CC); 2007 (3) BCLR 280 (CC) at para 17; and *National Police Service Union v Minister of Safety and Security* [2000] ZACC 15; 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) at paras 1-2 and 4-6.

[10] *Chisuse v Director-General: Department of Home Affairs*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 77944/16 (20 September 2019) at 10-2.

consequential relief they sought. In relation to the second applicant, the High Court found that insufficient details had been provided for her to be granted consequential relief, and her matter was postponed *sine die*.

[14] In the event, the High Court declared section 2(1)(a) and (b) of the amended Citizenship Act constitutionally invalid. It further granted the consequential relief sought by the applicants, with the exception of the second applicant, declaring them citizens and directing the Director-General of the Department of Home Affairs to register their births, enter their details into the population register, assign them South African identity numbers and issue them South African identity documents and/or identity cards as well as birth certificates.

Condonation

[15] As a preliminary step, it is necessary to decide the issue of condonation. The respondents attempted to bring evidence in this Court disputing the factual claims made by the applicants and confirmed by the High Court. In particular, the respondents requested condonation to file this factual material before us. It is my view that this request is procedurally defective. It is not clear who the respondents sought condonation from. Their non-compliance was with the High Court's procedure and the High Court is *functus*.[11] Properly construed, the respondents are, in effect, merely attempting to raise factual evidence in these proceedings for the first time.

[16] The respondents then attempted to rely on *Corruption Watch*[12] to support their contention that they could submit an affidavit which should have been provided in the High Court. Their reliance on that case, however, is wholly misplaced. In

[11] This refers to the Latin term of "*functus officio*", which means that the court has performed its duty and now lacks any power to reexamine the issue.

[12] *Corruption Watch NPC v President of the Republic of South Africa* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) (*Corruption Watch*).

Corruption Watch, the respondent sought condonation for the late filing of the affidavit in the High Court and averred that the High Court had improperly exercised its discretion in not granting condonation in that Court.[13] The respondents' conduct in this case is clearly distinguishable. In this matter, the respondents failed to produce any affidavit in the High Court after two years of repeated attempts to secure their involvement at great cost to the applicants and on scarce judicial resources. As this Court, per Cameron J, noted in *Kirland*:

> "Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."[14]

[17] I cannot conceive of any reason why it would be in the interests of justice to allow the new factual material or to interfere with the factual findings of the High Court, especially considering the respondents' brazenly incompetent conduct. It is clear that the Judge applied her mind to the factual evidence before the High Court and reached the conclusion that four of the five applicants in the High Court had proven their claims. The factual claims have been decided upon definitively by the High Court. The respondents cannot attempt to challenge them at this stage. The respondents have made their bed and must now lie in it.

[13] Id at paras 61-6.

[14] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*) at para 82.

Confirmation proceedings

[18] This Court, in *Mphahlele*[15] and *Strategic Liquor Services*,[16] has noted that, while there is no express constitutional provision requiring Judges to furnish reasons for their decisions, the proffering of reasons is a vital component in the appeal process. The same reasoning applies to confirmation proceedings. It is a foundational principle of the constitutional review function of our courts that legislation may only be invalidated by the Judiciary when it is concluded that the impugned legislation is inconsistent with the Constitution.[17] As this extensive authority is not only bestowed as a power, but also as an obligation on our courts, it is incumbent that, in reaching the conclusion that a provision of democratically-enacted legislation is inconsistent with the Constitution, a court plainly articulates the reasons why that legislation is inconsistent. This duty to provide reasons is a vital strut to the Judiciary's legitimacy in our constitutional democracy, which is based on a culture of justification.

[19] In this matter, the High Court provided sparse reasons for its findings of constitutional invalidity – in effect, it merely approved the draft order provided by the applicants. This seems to have been a consequence of the respondents' dereliction of their responsibility during the proceedings in the High Court. Regardless, it is still incumbent on a court, operating within our constitutional dispensation, which embeds the separation of powers principle, to provide full reasons before declaring legislation to be invalid.

[20] Without the benefit of a reasoned judgment from the High Court, this Court is placed in an invidious position. In effect, we are called upon to decide whether to confirm an order of constitutional invalidity without recourse to the underlying reasoning which

[15] *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 12.

[16] *Strategic Liquor Services v Mvumbi N.O.* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC) at para 17.

[17] Section 172(1)(a) of the Constitution.

informed that finding. This is unfortunate and we must hope that failure to provide reasons when legislation is declared invalid does not become a regular practice by lower courts.

Constitutional challenge

[21] There are two categories of persons who the applicants allege are affected by the 2010 Amendment: first, those who had acquired citizenship "by descent" (as defined in the 1995 Citizenship Act)[18] by being born to a South African parent outside of the country and who had registered their births prior to 1 January 2013 (category 1) and, secondly, those who, like the applicants, were born to a South African parent outside of the country but who had not, prior to 1 January 2013, registered their births in accordance with section 3 of the 1995 Citizenship Act (category 2).

[22] Essentially, the challenge the applicants raise against the impugned provisions in the amended Citizenship Act is that they amount to a wholesale deprivation of citizenship rights overnight. The applicants' concern is that the impugned provisions do not allow for either category of persons born before 1 January 2013 to retain or obtain citizenship following the 2010 Amendment.

[23] There are various rights to and surrounding citizenship set out in the Constitution, which should frame the interpretative exercise and be considered before an analysis of the impugned citizenship legislation can occur. The central issue raised in the hearing concerned whether it is possible to interpret the impugned section of the amended Citizenship Act in a constitutionally compliant manner so as to avoid the possible constitutional concerns which may arise if a different interpretation is adopted. If, bearing in mind the constitutional rights which could be affected by the impugned provisions, it is impossible to find a reasonable interpretation of the section as currently worded which does

[18] Section 3 of the 1995 Citizenship Act; outlined above at para [3].

not infringe any of these rights, then, to the extent necessary, we will have to cure the section to avoid a conflict with any constitutional rights.

Citizenship in a constitutional South Africa

[24] Citizenship is the gateway through which a number of rights in the Constitution can be accessed. It enables a person to enjoy freedom of movement, freedom of trade, and political representation. However, caution must be exercised not to overemphasise the importance of citizenship. While it is true that certain rights in our Constitution adhere to South African citizens alone, this Court has repeatedly affirmed that arbitrary and irrational distinctions between citizens and non-citizens are inconsistent with the Constitution.[19] It bears reiterating that the Preamble to the Constitution states that "South Africa belongs to all who live in it" and the rights in the Bill of Rights are afforded to everyone, unless expressly stated otherwise.

[25] Broadly, the concept of citizenship is understood as the membership of a political community in which those who form part of the community enjoy the rights, and assume the duties, of that membership. Throughout history, in both South Africa and globally, membership of this community has been defined according to identity, including, amongst other things, gender, race, religion, age and national origin.

[26] Citizenship in South Africa, in particular, has a controversial history. Many black Africans were denied their citizenship through unfair and discriminatory colonial and apartheid laws. Under the Black Land Act,[20] Population Registration Act[21] and

[19] See *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at paras 53-7; and *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* [1997] ZACC 16; 1998 (1) SA 745 (CC); 1997 (12) BCLR 1655 (CC) at paras 15-25, 31 and 43.

[20] 27 of 1913.

[21] 30 of 1950.

Bantu Homeland Citizenship Act,[22] black African people were segregated to the detriment of their enjoyment of full citizenship.

[27] The denial of full citizenship to the largely black African majority of the population constituted an assault on the dignity and equality of many people living in South Africa. This denial was particularly egregious because it was based on a person's race. Sol Plaatje described it aptly:

> "For to crown all our calamities, South Africa has by law ceased to be the home of any of her native children whose skins are dyed with a pigment that does not conform with the regulation hue."[23]

[28] Citizenship and equality of citizenship is therefore a matter of considerable importance in South Africa, particularly bearing in mind the abhorrent history of citizenship deprivation suffered by many in South Africa over the last hundred and more years. 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, where xenophobia is a lived reality, 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.

[29] In recognition of this, the first Constitutional Principle, outlined in the interim Constitution, directed that the new South African Constitution must establish a "sovereign state, *a common South African citizenship* and a democratic system of government committed to achieving equality between men and women and people of all races".[24]

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[22] 26 of 1970.

[23] Plaatje *Native Life in South Africa* (Picador Africa, Johannesburg 2007) at 68.

[24] Constitutional Principle I, Schedule 4 of the interim Constitution.

[30] The Constitution was designed to ensure a radical and transformative departure from the past. Common citizenship is placed as a founding provision in section 3 and citizenship is protected in section 20 of the Bill of Rights. This illustrates the commitment under our constitutional dispensation to ensuring that egregious and irrational deprivation of citizenship does not occur again in South Africa.

[31] Section 3 of the Constitution states:

> "(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."

[32] Section 20 of the Constitution states in categorical terms that "no citizen may be deprived of citizenship".

[33] Unlike some other constitutional jurisdictions, the Constitution delegates the authority for defining citizenship to national legislation.[25] Of course, national legislation defining citizenship must be consistent with the Constitution.

[34] It is from this point of departure, which recognises the fundamental importance of citizenship under the Constitution, bearing in mind our country's history, and recognising the possible violations of the Constitution[26] that would occur if the applicants are correct

[25] Section 3(3) of the Constitution. Mauritius, Mozambique, Namibia, Zambia, and Zimbabwe are examples of jurisdictions with constitutions that contain detailed rules regarding citizenship. See Klaaren and Rutinwa "Towards the Harmonization of Immigration and Refugee Law in SADC" (2004) 1 *Southern African Migration Project 1* at 14.

[26] Possible constitutional violations in this context include infringements of the rights to equality, dignity and citizenship as well as potential inconsistencies with the principles of rationality and the rule of law.

that section 2(1)(a) and (b) deprived persons of citizenship overnight, that we must approach our assessment of the impugned provisions.

History of South African citizenship legislation

[35] South African citizenship legislation has generally provided for at least three pathways through which citizenship can be acquired: birth, descent and naturalisation. Only the former two are relevant for present purposes. Citizenship by birth has typically been determined by where an individual is born. Citizenship by descent or parenthood is typically acquired from a parent. Although the difference between these two pathways may seem straightforward, in practice, the distinction between the two obscures. It is therefore necessary to place citizenship by birth and citizenship by descent in historical context, with reference to how these concepts have been understood under the various citizenship statutes in South Africa. In this regard, a detailed exposition of these categories of citizenship under previous citizenship legislation follows.

1949 Citizenship Act

[36] The 1949 Citizenship Act[27] provided for the acquisition of citizenship in four ways: birth, descent, registration and naturalisation. Again, it is only necessary for us to consider the first two.

[37] Citizenship by birth could be acquired by two groups. First, it could be acquired by any person who was born in South Africa and South-West Africa (modern-day Namibia) prior to the commencement of the 1949 Citizenship Act, subject to certain exceptions.[28]

[27] South African Citizenship Act 44 of 1949 (1949 Citizenship Act).

[28] Section 2 of the 1949 Citizenship Act stated:

> "(1) Every person born in the Union prior to the date of commencement of this Act who was or is, in terms of subsection (3) of this section or section thirteen, deemed to have been, a Union national immediately prior to that date, shall be a South African citizen.
>
> (2) Every person born in South-West Africa on or after the date of commencement of the British Nationality in the Union and Naturalization and Status of Aliens Act, 1926 (Act

Secondly, citizenship by birth could be acquired by any person born in South Africa after the commencement of the 1949 Citizenship Act, provided that their father was lawfully resident in South Africa and was not, amongst other things, in the diplomatic service of a foreign country.[29]

[38] Under the 1949 Citizenship Act, two categories of people were eligible for citizenship by descent. First, subject to some exceptions, citizenship by descent was available to any person born outside of South Africa prior to the date of the commencement of the 1949 Citizenship Act to a father who was a British subject and who was born in South Africa.[30] The second group eligible for citizenship by descent included any person,

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No. 1 of 1926), but prior to the date of commencement of this Act and who was, immediately prior to the date of commencement of this Act, domiciled in the Union or South-West Africa, shall be a South African citizen.

(3) Any person born in the Union prior to the date of commencement of this Act who would but for the provisions of section one of the Naturalization and Status of Aliens Amendment Act, 1942 (Act 35 of 1942), have been a Union national immediately prior to the date of commencement of this Act, shall, for the purposes of sub-section (1), be deemed to have been a Union national on that date."

[29] Section 3 of the 1949 Citizenship Act stated:

"(1) Every person born in the Union on or after the date of commencement of this Act who is not a prohibited immigrant under any law relating to immigration shall, subject to the provisions of sub-section (2), be a South African citizen.

(2) No person shall be a South African citizen by virtue of sub-section (1) if, at the time of his birth—

(a) his father enjoyed diplomatic immunity in the Union and was not a South African citizen; or

(b) his father was an enemy alien and the birth occurred at a place under occupation by the enemy and his mother was not a South African citizen; or

(c) his father was an enemy alien without the right of permanent residence in the Union and was interned or detained in custody in the Union and his mother was not a South African citizen; or

(d) his father was a prohibited immigrant under the law then in force in the Union."

[30] Section 5 of the 1949 Citizenship Act stated:

"(1) A person born outside the Union prior to the date of commencement of this Act, other than a person referred to in sub-section (2) of section two, shall be a South African citizen if his father was at the time of his birth a British subject under the law then in force in the Union, and he fulfils anyone of the following conditions, that is to say, if either—

(a) his father was born in the Union; or

subject to some exceptions, born outside of South Africa, after the commencement of the 1949 Citizenship Act, to a South African citizen or resident father and whose birth had been registered within one year of their birth.[31]

(b) his father was, at the time of the birth, a person to whom a naturalization certificate had been granted in the Union; or

(c) his father had acquired British nationality by reason of the annexation of the territories of the South African Republic and the Republic of the Orange Free State; or

(d) his father was, at the time of the birth, in the service of the Government of the Union; or

(e) his father was, at the time of the birth, domiciled in the Union or South-West Africa.

(2) A person who, immediately prior to the date of commencement of this Act, was a Union national by virtue of the provisions of paragraph (d) of section one of the Union Nationality and Flags Act, 1927 (Act No. 40 of 1927), but whose father was not, at the time of such person's birth, a British subject under the law then in force in the Union, shall be a South African citizen if he would have been such a citizen by virtue of the provisions of sub-section (1) of this section if his father had, at the time of the birth, been a British subject under the law then in force in the Union.

(3) A person other than a person referred to in sub-section (1) or (2), who immediately prior to the date of commencement of this Act, was a Union national by virtue of the provisions of paragraph (d) of section one of the Union Nationality and Flags Act, 1927, and who—

(a) had at any time prior to the date of commencement of this Act, been lawfully admitted to the Union or South-West Africa for permanent residence therein; or

(b) is the holder of a valid South African passport; or

(c) is the minor child of a person referred to in paragraph (b), shall be a South African citizen.

(4) No person who, immediately prior to the date of commencement of this Act, was neither a Union national nor a British subject under the law then in force in the Union, shall be a South African citizen by virtue of the provisions of this section.

(5) No person who, immediately prior to the date of commencement of this Act, was a British subject by naturalization under the law then in force in the Union shall, unless he is a South African citizen by virtue of the provisions of sub-section (2) or (3), be a South African citizen by virtue of the provisions of this section."

[31] Section 6 of the 1949 Citizenship Act, unamended, stated:

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

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

(i) his father was a South African citizen by birth, registration or naturalization; or

(ii) his father was a South African citizen by descent and was born in South-West Africa; or

[39] In this regard, the 1949 Citizenship Act delineated various pathways to acquire citizenship by both birth and descent. In doing so, the 1949 Citizenship Act differentiated on the basis of the marital status of a person's parents at the time of their birth.[32] In 1991, the 1949 Citizenship Act was amended to remove marital status as a consideration for eligibility for the acquisition of citizenship so that anyone who was born to at least one South African parent after 1949 would be entitled to citizenship.[33]

Restoration and Extension of South African Citizenship Act

[40] The next major change in South African citizenship legislation was the Restoration and Extension of South African Citizenship Act.[34] The purpose of the

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(iii) his father was, at the time of the birth, in the service of the Government of the Union; or

(iv) his father was, at the time of the birth, ordinarily resident in the Union; and

(b) his birth is, within one year thereof or such longer period as the Minister may in the special circumstances of the case approve, registered at a Union consulate or such other place as may be prescribed.

(2) Notwithstanding the provisions of sub-section (1), no person who, after the date of commencement of this Act, is born in any Commonwealth country and whose father is not in the service of the Government of the Union or of a person of association of persons resident or established in the Union, or not ordinarily resident in the Union shall, if under the law of that country he becomes a citizen of that country at birth, be a South African citizen.

[32] If a child was born outside of South Africa and their parents were married, then the child was entitled to South African citizenship only if their father was South African. If a child was born outside of South Africa and the child's parents were unmarried, then the child was entitled to South African citizenship only if their mother was a South African citizen.

[33] Section 6 of the 1949 Citizenship Act (as amended by the South African Citizenship Amendment Act 64 of 1961; the Matters Concerning Admission to and Residence in the Republic Amendment Act 53 of 1986 and the South African Citizenship Amendment Act 70 of 1991) stated:

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

(a) . . .

(i) his father was, at the time of the birth, a South African citizen and the birth is registered in terms of the provisions of section 17A of the Births, Marriages and Deaths Registration Act, 1963 (Act No. 81 of 1963); or

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

[34] 196 of 1993 (Restoration Act).

Restoration Act was to re-establish the South African citizenship of citizens of the Bantustan states of Transkei, Bophuthatswana, Venda and Ciskei with effect from 1 January 1994. These persons had been crudely stripped of their South African citizenship as part of the apartheid policy of separate development, which was designed to relegate the black African population to segregated and under-developed tracts of land.

[41] In terms of the Restoration Act, every person who had been stripped of their South African citizenship in terms of TBVC legislation became a South African citizen.[35] That person would be entitled to be a citizen by either birth or descent, whichever was applicable in their circumstances, in terms of the 1949 Citizenship Act. In this regard, the Restoration Act aimed to erase the racist indignities of the apartheid era by bringing all South Africans under the auspices of the 1949 Citizenship Act.

[42] The advent of the interim Constitution brought about the next major overhaul to the citizenship regime through the enactment of the 1995 Citizenship Act, to which I will turn next.

1995 Citizenship Act

[43] In terms of the 1995 Citizenship Act, citizenship by birth was acquired in the following ways. First, any person who, immediately prior to the commencement of the 1995 Citizenship Act was a citizen by birth, remained a citizen by birth under the new legislation.[36] Secondly, any person born in South Africa on or after the commencement of

[35] The TBVC legislation comprised the Status of Transkei Act 100 of 1976, Status of Bophuthatswana Act 89 of 1977, Status of Venda Act 107 of 1979 and Status of Ciskei Act 110 of 1981.

[36] Section 2(1)(a) of the 1995 Citizenship Act states:

> "(1) Any person—
>
> (a) who immediately prior to the date of commencement of this Act, was a South African citizen by birth;
>
> . . .
>
> shall, subject to the provisions of subsections (2) and (3), be a South African citizen by birth".

the 1995 Citizenship Act, became a citizen by birth, unless one of their parents was in the diplomatic service of a foreign country or was not lawfully a permanent resident, and the other parent was not a South African citizen.[37] Thirdly, certain categories of individuals who would qualify for citizenship by descent would be citizens by birth if they were born outside of South Africa while one of their parents was involved in certain forms of government service.[38] Fourthly, citizenship by birth could be acquired if a person, born in

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[37] Section 2(1)(b) of the 1995 Citizenship Act states:

> "(1) Any person—
>
> . . .
>
> (b) who is born in the Republic on or after the date of commencement of this Act; or
>
> . . .
>
> shall, subject to the provisions of subsections (2) and (3), be a South African citizen by birth."

Subsections (2) and (3) state:

> "(2) No person shall be a South African citizen by virtue of subsection (l)(b) if, at the time of his or her birth, one of his or her parents—
>
> (a) was a person enjoying diplomatic immunity in the Republic in terms of any law relating to diplomatic privileges, or was a career representative of the government of another country, or was a person employed in the embassy or legation of such a government or in the office of such a career representative, or was a member of the household or an employee of any such person; or
>
> (b) had not been lawfully admitted to the Republic for permanent residence therein,
>
> and his or her other parent was not a South African citizen.
>
> (3) No person who, after having ceased to be a South African citizen, at any time thereafter acquires South African citizenship by naturalisation in the Republic, shall be a South African citizen by birth."

[38] Section 2(1)(c) of the 1995 Citizenship Act states:

> "(1) Any person—
>
> . . .
>
> (c) who is by virtue of section 3(1)(b) a South African citizen, and one of his or her parents or his or her mother if he or she was born out of wedlock was at the time of such person's birth—
>
> (i) in the service of the Government of the Republic; or
>
> (ii) the representative or the employee of a person or an association of persons resident or established in the Republic; or
>
> (iii) in the service of an international organisation of which the Government of the Republic was then a member,
>
> shall, subject to the provisions of subsections (2) and (3), be a South African citizen by birth."

South Africa but who did not qualify as a citizen by birth, was subsequently adopted by a South African citizen in terms of the Child Care Act.[39] Fifthly, if a person was born in South Africa but was not entitled to any other citizenship or nationality, they were a citizen by birth if their birth was subsequently registered.[40]

[44] A person could acquire citizenship by descent in the following ways. First, if they were a citizen by descent immediately prior to the commencement of the 1995 Citizenship Act, they would remain so.[41] Secondly, a person could acquire citizenship by descent if they were born outside of South Africa and one of their parents was a South African citizen and their birth was registered.[42] Thirdly, if a person was born

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[39] 74 of 1983. Section 2(4) of the 1995 Citizenship Act states that—

> "[a]ny person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (2), shall be a South African citizen by birth, if—
>
> (a) he or she is adopted by a South African citizen in accordance with the Child Care Act, 1983 (Act No. 74 of 1983); or
>
> (b) (i) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and
>
> (ii) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992)".

[40] Id. This was intended to ensure that no person born in South Africa would be considered stateless.

[41] Section 3(1)(a) of the 1995 Citizenship Act states that "[a]ny person . . . who, immediately prior to the date of commencement of this Act, was a South African citizen by descent . . . shall, subject to the provisions of subsection (2), be a South African citizen by descent".

[42] Section 3(1)(b)(i). Section 3(1)(b) of the 1995 Citizenship Act states:

> "(1) Any person—
>
> . . .
>
> (b) who is born outside the Republic on or after the date of commencement of this Act, and—
>
> (i) one of whose parents was, at the time of his or her birth, a South African citizen and whose birth is registered in terms of the provisions of section 13 of the Births and Deaths Registration Act;
>
> (ii) to whose responsible parent a certificate of the resumption of previous South African citizenship has, in terms of section 13(3), been issued, and who has entered the Republic for permanent residence therein before becoming a major, and whose birth is within one year after the date of issue of such certificate, or such longer period as the Minister in the special circumstances of the case may approve, registered in the Republic in the prescribed manner; or

outside of South Africa and one of their parents had resumed South African citizenship and they had entered South Africa to reside in the country permanently, that person would be a citizen by descent.[43] Fourthly, a person would acquire citizenship by descent if they were born outside of South Africa and they had subsequently been adopted by a South African citizen in terms of the Child Care Act and their birth was registered.[44]

[45] Having sketched out in detail the different pathways for acquiring citizenship in terms of the applicable citizenship legislation, I now turn my attention to the impugned provisions of the amended Citizenship Act.

Proper approach to interpretation

[46] In adjudicating the confirmation proceedings before us, the first step must be to interpret the impugned section to ascertain its meaning and, once that meaning has been established, to determine whether it is inconsistent with the Constitution.

[47] In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question.[45] Poetry and philosophical discourses may point to the malleability of words and the nebulousness of meaning,[46] but, in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on

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> (iii) who is adopted in terms of the provisions of the Child Care Act, 1983 (Act No. 74 of 1983), by a South African citizen and whose birth is registered . . .
>
> shall, subject to the provisions of subsection (2), be a South African citizen by descent."

[43] Id at section 3(1)(b)(ii).

[44] Id at section 3(1)(b)(iii).

[45] See *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (4) SA 374 (CC); 2019 (2) BCLR 214 (CC) at para 37; *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 70; and *Commissioner, South African Revenue Service v Executor, Frith's Estate* [2000] ZASCA 94; 2001 (2) SA 261 (SCA) at para 2 of Plewman JA's judgment.

[46] As TS Elliot has eloquently stated, "[w]ords strain, crack and sometimes break, . . . slip, slide, perish, [d]ecay with imprecision . . .". Elliot *Burnt Notion (No. 1 of Four Quarters)* at Part V.

the interpretative exercise, unless this interpretation would result in an absurdity.[47] As this Court has previously noted in *Cool Ideas*, this principle has three broad riders, namely:

> "(a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provision must be properly contextualised; and
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[48]

[48] Judges must hesitate "to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation".[49]

[49] Strengthening this interpretive exercise is the obligation enshrined in section 39(2) of the Constitution, which requires courts when interpreting legislation to give effect to the "spirit, purport and objects of the Bill of Rights". This requires that—

> "judicial officers [must] read legislation, where possible, in ways which give effect to [the Constitution's] fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."[50]

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[47] See *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*) at para 28; *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 37; and *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 543. See further Bishop and Brickhill, "'In The Beginning Was The Word': The Role of Text in the Interpretation of Statutes" (2012) 129 *SALJ* 681 at 697-8.

[48] *Cool Ideas* id at para 28.

[49] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

[50] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai*) at para 22.

[50] The command of section 39(2) has been articulated in various judgments of this Court. In *Bato Star*,[51] Ngcobo J stated as follows:

> "The Constitution is now the supreme law in our country. It is therefore the starting point in interpreting any legislation. Indeed, every court 'must promote the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. That is the command of section 39(2). Implicit in this command are two propositions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation. This flows from the fact that the Bill of Rights 'is a cornerstone of [our constitutional] democracy'. It 'affirms the democratic values of human dignity, equality and freedom'."[52]

[51] It is now axiomatic that the interpretation of legislation must follow a purposive approach.[53] This purposive approach was described in *Bato Star* as follows:

> "Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."[54]

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[51] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*).

[52] Id at para 72. See also *Van Vuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC) at para 47; *Chagi v Special Investigating Unit* [2008] ZACC 22; 2009 (2) SA 1 (CC); 2009 (3) BCLR 227 (CC) at para 14; and *Daniels v Campbell N.O.* [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 43-5 of Ngcobo J's concurring judgment and paras 81-3 of Moseneke J's dissenting judgment.

[53] *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (*Bertie Van Zyl*) at para 21.

[54] *Bato Star* above n 51 at para 89 quoting Schreiner JA's dissent in *Jaga v Dönges, N.O.; Bhana v Dönges, N.O.* 1950 (4) SA 653 (A) at 662.

[52] The purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute.[55] This means that if no reasonable interpretation may be given to the statute at hand, then courts are required to declare the statute unconstitutional and invalid.[56] It is now settled that this approach to interpretation is a unitary exercise.[57]

[53] In *De Beer N.O.*,[58] this Court articulated the proper approach when deciding between competing constructions of legislation:

> "This Court has accepted the well-recognised principle of constitutional construction that where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained."[59]

[54] However, in seeking a constitutional interpretation in accordance with their obligations under section 39(2) of the Constitution, courts must not lose sight of the fact that the construction given to legislation must still be reasonable. Strained readings of texts, no matter how well-intentioned, can lead to dissonance. As Moseneke J noted in *Abahlali Basemjondolo Movement SA*:

> "The rule of law is a founding value of our constitutional democracy. Its content has been expanded in a long line of cases. It requires that the law must, on its face, be clear and ascertainable. To read in one qualification to achieve constitutional conformity is very

[55] *Bertie Van Zyl* above n 53 at para 22.

[56] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4.

[57] See *Endumeni* above n 49 at para 19.

[58] *De Beer N.O. v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC).

[59] Id at para 24.

> different from reading in six. Indeed, reading in so many qualifications inevitably strains the text. This is all the more so when the legislation in issue affects vulnerable people in relation to so vital an aspect of their lives as their security of tenure. It will be impossible for people in the position of the applicants, even if advised by their lawyers, to be clear on how this provision will operate. The same will indeed apply to others affected by the law, such as owners, and to the bureaucrats charged with applying it.
>
> There can be no doubt that the over-expansive interpretation of section 16 is not only strained but also offends the rule of law requirement that the law must be clear and ascertainable. In any event, separation of power considerations require that courts should not embark on an interpretative exercise which would in effect re-write the text under consideration. Such an exercise amounts to usurping the legislative function through interpretation."[60]

[55] The function of a court is to arrive at an "interpretation that achieves the most appropriate balance between the parties, that fits most comfortably into the constitutional and statutory framework, and that requires the least intrusive addition to the text".[61] If the only interpretation that achieves the best balance between the constitutional and statutory framework would inflict violence on the text, then the court, where appropriate, should declare the relevant provisions inconsistent with the Constitution. Doing so is vital to our conception of the rule of law, as noted above, which dictates that laws be "clear and ascertainable" to the public. As this Court noted in *Hyundai*:

> "There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained.
>
> . . .

[60] *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) at paras 124-5.

[61] *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC) at para 50.

> It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance."[62]

[56] One final point. Even before the adoption of the Constitution, our courts refused to construe statutory provisions in a manner that rendered them useless, if the language was reasonably capable of a sensible and effective meaning. In *Schlohs*, De Wet CJ formulated the principle in these terms:

> "[W]hen the words of a statute are reasonably capable of an interpretation which would not render the law useless and destitute of all effect, they should be given such interpretation."[63]

[57] This principle was based on an earlier decision of the Appellate Division in *Jacobson and Levy* where it was observed that—

> "if the language of the statute is not clear and would be nugatory if taken literally, but the object and intention are clear, then the statute must not be reduced to a nullity merely because the language used is somewhat obscure."[64]

[58] Presently, this principle is captured fully by the provisions of section 39(2) of the Constitution, which oblige every court, where reasonably possible, to interpret every statute in a manner that makes it consonant with the Constitution. A claim for invalidity must fail if the impugned statute is reasonably capable of a meaning that is constitutionally compliant.

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[62] *Hyundai* above n 50 at paras 24 and 26.

[63] *Ex Parte The Minister of Justice: In re Rex v Schlohs* 1943 AD 80 at 83.

[64] *Ex Parte The Minister of Justice: In re Rex v Jacobson & Levy* 1931 AD 466 at 477.

[59] Despite our duty to interpret legislation in accordance with the injunction under section 39(2), courts must not fall into the trap of attempting to divine sense out of nonsense. If a reasonable interpretation in line with the Constitution cannot be arrived at, then a court must conclude, and declare, that the impugned provisions are unconstitutional and have recourse to the remedies that flow from this finding.

The proper interpretation of section 2(1)(a)

[60] The 2010 Amendment set about redefining the categories for the acquisition of citizenship. This was done by providing new definitions for citizenship by birth and citizenship by descent.[65] Citizenship by descent previously referred to the ways in which the child of a South African parent who was born outside of the country could acquire South African citizenship. Now it only relates to the ways in which adopted children can acquire the citizenship of their South African parent. It is useful to set out part of the relevant provisions from the amended Citizenship Act below:

> "2. Citizenship by birth
>
> (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.
>
> . . .
>
> 3. Citizenship by descent
>
> Any person who is adopted in terms of the provisions of the Children's Act by a South African citizen and whose birth is registered in accordance with the

[65] Citizenship can also still be acquired by naturalisation, through section 4 of the amended Citizenship Act, but this form of acquiring citizenship is not relevant for our purposes.

> provisions of the Births and Deaths Registration Act, 1992 (Act 51 of 1992), shall be a South African citizen by descent."

[61] The first question is, therefore, who was a South African citizen by birth immediately prior to the date of the commencement of the 2010 Amendment (in other words, at 31 December 2012)? In terms of section 2(1)(a) of the amended Citizenship Act, all those who fell within this definition on 31 December 2012 would remain citizens by birth in terms of the amended Citizenship Act.

[62] As described above, five categories of individuals constituted citizens by birth in terms of the 1995 Citizenship Act and thus those five categories of individuals would also qualify as citizens by birth in terms of the amended Citizenship Act.

[63] The applicants contend that the only logical meaning of the section is that it acts as a saving provision for those who acquired citizenship by birth to the exclusion of those who acquired citizenship differently. The respondents held the same view in their written submissions, but then, at the hearing, noted that there was a reading of section 2(1)(a) that would include those who had previously acquired citizenship by descent. However, they did not offer a basis for that interpretation.

[64] On a close reading of the statutes, the only categories of individuals who were citizens *by descent* in terms of previous legislation and who would fall within the meaning of citizen *by birth* in terms of the amended Citizenship Act would be the third category of individuals set out above. These are individuals who would have qualified for citizenship by descent in terms of section 3(1)(b) of the 1995 Citizenship Act, as they they were born outside of South Africa to a South African parent but, because their South African parent was involved in certain forms of government service, they were considered citizens by birth in terms of section 2(1)(c) of the 1995 Citizenship Act.

[65] Although the respondents conceded in the hearing that a preferable interpretation would be one where those who were citizens by descent in terms of the 1995 Citizenship Act would also fall within this retention section, it is evident that, with reference to the language of section 2(1)(a) of the amended Citizenship Act, this reading is unsustainable. The Legislature was deliberate in its wording of the section; it retained citizenship for those who were citizens by birth on 31 December 2012. Apart from the narrow category of citizens by descent who were also citizens by birth in terms of section 2(1)(c) of the 1995 Citizenship Act described in the preceding paragraph, citizens by descent generally would not have been considered to be citizens by birth as at 31 December 2012.

[66] This creates an anomaly. As has been stated, following the 2010 Amendment, the meaning of "citizen by descent" has been drastically modified to apply to those who have been adopted in terms of the Children's Act[66] by a South African citizen.[67] The 2010 Amendment therefore appears to remove the previous concept of citizenship by descent altogether. However, the Legislature provides that citizenship by birth may be acquired by a child born in South Africa who would otherwise be stateless, if they meet certain conditions,[68] as well as by a child who was born in South Africa to non-South African parents with permanent residence status, if they meet certain conditions.[69] It seems incongruous and irrational that the Legislature would provide for citizenship by birth for children of foreign nationals while not providing for those who had previously been born to South African parents, albeit outside of South Africa; namely, those who had acquired citizenship by descent under the predecessor legislation. Recourse must therefore be had to section 2(1)(b) of the amended Citizenship Act to determine whether those who had acquired citizenship by descent in terms of previous legislation fall

[66] 38 of 2005.

[67] Section 3 of the amended Citizenship Act.

[68] Section 2(2) of the amended Citizenship Act.

[69] Section 2(3) of the amended Citizenship Act.

within its auspices. The alternative, of course, being that the amendment may be found to be unconstitutional for being irrational, amounting to arbitrary differentiation and, overnight, depriving persons of their citizenship.

The proper interpretation of section 2(1)(b)

[67] The next enquiry concerns the interpretation of the phrase "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".

[68] As a preliminary observation, the purpose and context of the 2010 Amendment indicates an intention to provide for more expansive and generous methods of acquiring citizenship. This is evident from the legislative attempt to collapse the distinction that existed between being born either inside or outside South Africa. In addition, unlike previous citizenship statutes that required those born outside of South Africa to a South African parent to register their birth to access citizenship, birth registration is no longer a requirement under section 2(1)(b) of the amended Citizenship Act. The interpretative tension is therefore whether the section should be read to apply prospectively – only to those who were born after the commencement of the 2010 Amendment (as the applicants contend) – or whether it should be read to also apply retrospectively to those who were born prior to its commencement. This is where I proceed to next.

[69] I have already set out the constitutional approach to interpretation. In this regard, it is instructive to first have recourse to the ordinary meaning of the words. The phrase in issue is "any person who is born". This was interpreted by the applicants in their pleadings to refer only to those born after the commencement of the 2010 Amendment, on the basis that "is born" refers to a present or future event in exclusion of one which has already occurred. It was on this interpretation that the High Court declared the section

unconstitutional, presumably because it arbitrarily excluded those born before the commencement of the 2010 Amendment. The fundamental question is whether the words "is born" can be interpreted to apply to those born before the commencement of the 2010 Amendment and whether this would amount to both a reasonable interpretation of the section and a constitutionally compliant one.

[70] The word "is" would generally be used to refer to the present tense and the word "was" in relation to the past tense.[70] The term "is born", however, can also correctly be used to describe a state of existence. Thus, the phrase "who is born in or outside of South Africa [to a South African parent]" is stative: it is used to connote the condition or status of a person and does not indicate a tense. It describes a state of being, in the same way that references to a person who "is married", "is South African" or "is adopted [by a South African parent]" similarly connote states of existence.[71] In this form, the word "is" is used to link the person (subject) with the complement, "born in or outside of South Africa [to a South African parent]", to identify an existing condition.[72] It is evident that this interpretation, applying also to those born before the commencement of the 2010 Amendment, is grammatically sound and would be the interpretation that is most in line with section 39(2) in that it does not arbitrarily deprive persons of their citizenship

[70] The words "will be" are generally used to connote the future tense. For example, "she was hungry, she is hungry, she will be hungry".

[71] Although a person "who is married" or "who is adopted" may also be referred to as a "married person" or an "adopted person" and the same cannot be said for "who is born", this is merely because to say a "born person" is superfluous: a person is, by definition, born. It does not, however, detract from the fact that the phrase "who is born" acts to further describe the status of the person. The equivalent to the former examples in a similar context to the current one would be to say that "a person who is born in South Africa" may equally be called "a South African-born person".

[72] See the dictionary meaning of the word "be" in the South African Concise Oxford Dictionary (Oxford University Press, Cape Town 2002) at 95 which states: "Be (when connecting a subject and complement) having the specified state, nature or role."

See also a description of linking verbs at https://grammar.yourdictionary.com/parts-of-speech/verbs/linking-verbs.html which describes these types of verbs as those which "show a relationship between the subject and the sentence complement [which] connect or link the subject with more information-words that further identify or describe the subject [or which] identify a relationship or existing condition." It further states that "the most common true linking verbs are forms of 'to be'."

overnight. In this regard, whilst "any person who was, is or will be born" may be the more comprehensive form of the phrase, "any person who is born" similarly includes all persons born yesterday, today and tomorrow.[73] This is not only a reasonable construction of the text, but also a constitutionally compliant one, in contrast to that which gives the word "is" a narrow interpretation.[74]

[71] A potential difficulty in favouring the above interpretation is that it is a canon of interpretation that statutes are presumed not to have retrospective effect unless clearly stated.[75] This Court in *Veldman*[76] clarified that this presumption sought to protect against retrospective interpretations of statutes that had the effect of destroying or curtailing rights which had already been acquired:

> "That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed'."[77]

[72] In the current matter, however, an interpretation that says that section 2(1)(b) only operates in favour of those born after its commencement is the one which is at variance

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[73] Consider the phrase "any person who is born in South Africa is blessed". An ordinary reading of that phrase would include anyone born in South Africa either before or after the statement was made.

[74] Note that if we were to accept the narrow interpretation of the phrase "is born", we would have to amend the impugned provision to read "was, is and will be born" if we wanted to use that interpretation and cover past, present and future births. An attempt to choose a narrow meaning of the word "is" and to interpret it so that it extends to the future without adding the words "will be", but not to the past without the word "was", is arbitrary and incongruous. It is also grammatically inaccurate. This is why, in previous versions of the Act, the Legislature had to expressly include the words "on or after commencement of the Act" to limit the full (past, present and future) meaning of the stative phrase "is born" to apply only to the present and future as it sought to do.

[75] *Adampol (Pty) Ltd v Administrator, Transvaal* [1989] ZASCA 59; 1989 (3) SA 800 (A) (*Adampol*) at 805E-807F.

[76] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC).

[77] Id at para 26.

with the Constitution. It is this narrow, prospective-only interpretation that strips citizenship rights from a great number of people in the most unfair and unjustified manner. It is that interpretation which would render the operation of the 2010 Amendment retrospective by wiping out citizenship that existed under the previous Acts without replacing it with another form of citizenship, and by taking away citizenship rights without retaining those previously-acquired rights. Under the 1949 Citizenship Act and the 1995 Citizenship Act, children of South African citizens who were born outside the Republic were citizens by descent. Unless sections 2(1)(b) and 3[78] are read as also applying to those born before the 2010 Amendment, these people would have lost their citizenship.

[73] Consequently, an interpretation that favours a prospective-only operation in this instance effectively abolishes existing rights. The principle underlying the presumption against retrospectivity is that vested rights which were acquired under existing laws may not be taken away by a new law.[79] This is fundamental to the values of fairness and justice.[80]

[74] However, the interpretation that favours the application of section 2(1)(b) to persons born before the 2010 Amendment came into force, is not at odds with the presumption against retrospectivity. This is because this interpretation does not take away vested rights.

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[78] Section 3 is the new "citizenship by descent" clause and refers to "any person who is adopted . . .". This new section not only applies to children adopted under the Children's Act but also retains the citizenship of persons who had acquired citizenship by descent in terms of section 3(1)(b)(iii) of the 1995 Citizenship Act, namely those born out of South Africa but adopted by South African parents in terms of the Child Care Act. This is because, first, the words "is adopted" in the new section 3 must be read in a similar manner to "is born" in section 2 – generously, to apply both retrospectively and prospectively – and, secondly, the section must be read in accordance with section 314 of the Children's Act which provides that "[a]nything done in terms of a law repealed in terms of section 313 which can be done in terms of a provision of [the Children's Act] must be regarded as having been done in terms of that provision of [the Children's Act]." The Child Care Act was repealed by section 313, read with schedule 4, of the Children's Act and is therefore one of the repealed laws referred to in section 314. Children adopted by South African parents would, therefore, not be deprived of their citizenship following the 2010 Amendment.

[79] *Nkabinde v Judicial Service Commission* [2016] ZASCA 12; 2016 (4) SA 1 (SCA) at paras 62, 65 and 67, referring with approval to the American position, as it was, in *Corpus Juris Secundum* (1953), vol 82, section 412 (this position is currently outlined in *Corpus Juris Secundum* (2009), vol 82, section 585) and to this Court in *Veldman* above n 76 at paras 26 and 34.

[80] *Veldman* above n 76 at para 26.

On the contrary, when so pursued, this interpretation preserves those rights. A statute does not have a retrospective effect merely because it looks to the past.[81] It does so only if the statute abolishes existing rights or amends them. As a result, in the current matter, the presumption against retrospectivity when interpreting statutes does not arise.

[75] Favouring an interpretation where section 2(1)(b) applies to those born both before and after its commencement is further buttressed by the force of our section 39(2) obligation, which should disincline us to adopt the applicants' interpretation and arrive at a conclusion that the section only has prospective application.

[76] Moreover, a finding that the section only applies prospectively would have the effect of excluding not only the vast majority of those who had acquired citizenship by descent, but also those who, like the applicants in this matter, are excluded from the ambit of the section merely by the date of their birth. This interpretation would not only rub against the section 20 right which protects against the deprivation of citizenship, but also against the rule of law and section 9 which prohibit irrational distinctions between groups of individuals. This interpretation would also expose some individuals to the risks of statelessness. Further, it would be contrary to the spirit and purpose of the legislation, which seeks to widen the pathways to South African citizenship rather than narrow them.

[77] While a court may favour an interpretation that promotes rights rather than one that limits them, this interpretation must remain faithful to the text. The avoidance of interpretations which unduly strain legislative texts is a vital characterisation of the rule of law, which demands that law should generally be clear and ascertainable and respects the primary legislative role conferred on the Legislature. However, this is not one of those cases where a constitutionally compliant interpretation unduly stretches the ordinary

[81] See *Minister of Home Affairs v Ali* [2018] ZASCA 169; 2019 (2) SA 396 (SCA) at paras 14 and 21; *Nkabinde* above n 79 at para 62; and *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at para 83.

meaning of the words. The phrase "who is born" is capable of bearing a meaning that applies both to those born before and after the commencement of the 2010 Amendment.

[78] Therefore, when construed in their proper context, the words "any person who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen" mean a person who is a child of a South African citizen, regardless of when that person is born or whether that person is born inside or outside the Republic. The words give us a description of a person who is entitled to citizenship by birth under section 2(1)(b). What qualifies the person concerned for citizenship is the fact that at least one of their parents is a South African citizen and their citizenship accrues at the time of their birth.

Confirmation

[79] In light of the conclusion I have reached above regarding the interpretation of section 2(1)(b), it is evident that the first and third to fifth applicants, and those similarly placed, would now fall within the ambit of this section, as they were all born to a South African parent. On the interpretation outlined above, the first and the third to fifth applicants would thus be considered citizens by birth in terms of section 2(1)(b) of the amended Citizenship Act.

[80] Further, this reading of the section would accommodate all categories of citizens who acquired their citizenship through either birth or descent in terms of the 1995 Citizenship Act. Those who were citizens by birth in terms of the 1995 Citizenship Act, as set out above, would retain their citizenship rights under section 2(1)(a) of the amended Citizenship Act. They may also obtain citizenship by birth through section 2(1)(b) of the amended Citizenship Act if they were born to at least one South African parent.

[81] Four of the five classes of individuals who were citizens by descent in terms of the 1995 Citizenship Act, as set out above, would have been born to at least one South African parent outside of South Africa. They would thus be considered to be citizens by birth in terms of section 2(1)(b) of the amended Citizenship Act. With regard to the last category of citizens by descent (those who were born outside of South Africa and subsequently adopted in terms of the Child Care Act), they would be considered citizens by descent in terms of section 3 of the amended Citizenship Act.[82]

[82] Section 2 of the 2010 Amendment may thus be read in a manner that does not fall into any of the unconstitutional dangers advanced by the applicants. As a result, since section 2(1)(a) and (b) can be read in a constitutionally compliant manner, the confirmation of the orders of invalidity by the High Court must be declined.

[83] Although the confirmation of the orders of invalidity must fail, the interpretation given to section 2(1)(b) means that the first and third to fifth applicants are citizens of South Africa by birth under section 2(1)(b). They each successfully established before the High Court that they were children of South African citizens in that at least one of their parents was a South African at the time of their birth. In this regard, the declaratory order of the High Court must be upheld.

Consequential relief and separation of powers

[84] It bears repeating that the Department of Home Affairs has consistently failed to recognise the applicants' citizenship and give effect to the rights emanating from it, without providing adequate reasons for this denial in a manner consistent with the High Court's and this Court's orders and procedural requirements. Furthermore, at the hearing, the respondents conceded to an interpretation of the amended Citizenship Act that would

[82] See above n 78. Section 3 is the new "citizenship by descent" clause and refers to "any person who is adopted . . ." This section captures the group of persons who would have acquired citizenship by descent under the 1995 Citizenship Act as well as those adopted by South African parents after the 2010 Amendment.

recognise the applicants as citizens, but continued to oppose the applicants' submissions on the basis of factual evidence which is inadmissible before this Court. In view of these considerations, it is evident that there is a reasonable apprehension that the respondents may continue to hinder the applicants' quest for citizenship. It is, therefore, in the interests of justice that the applicants should not be further impeded in the enjoyment of their rights by the respondents' conduct.

[85] Of course, the separation of powers principle must be considered. However, the separation of powers principle does not mean that there may not be cases in which this Court may be required *ipso facto* to give directions to the Executive. This principle was established in *Mohamed*.[83] This Court insisted that, after a violation of the Bill of Rights, any order addressed to the relevant organs of State to do whatever they could to remedy the wrong done or to ameliorate the consequences of the violation would be appropriate:

> "To stigmatise such an order as a breach of the separation of state power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights."[84]

[86] In *Fose*, Ackermann J expanded on the nature of appropriate relief in constitutional matters:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is

[83] *Mohamed v President of the Republic of South Africa (Society for the Abolition of the Death Penalty in South Africa intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).

[84] Id at para 71.

> necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights."[85]

[87] More recently, in *Mwelase*, Cameron J emphasised that "[t]he vulnerability of those who suffer most from [government] failures underscores how important it is for courts to craft effective, just and equitable remedies".[86]

[88] These authorities must also find application in determining the appropriate relief in a case dealing with citizenship. The reason for this is that citizenship does not depend on a discretionary decision; rather, it constitutes a question of law. The amended Citizenship Act does not require the Department of Home Affairs to consider any public interest when deciding whether or not to recognise a person's citizenship. Instead, if the requisite conditions to acquire citizenship are satisfied, the Department of Home Affairs is required to recognise this citizenship and proceed with the concomitant administrative procedures, without any further consideration.

[89] The High Court considered the evidence of citizenship brought by the applicants and, save in respect of the second applicant, found that the requirements had been met; namely, that the first and third to fifth applicants were, indeed, born to a South African parent outside of the Republic.

[90] In the circumstances, I believe there are sufficient grounds to confirm the High Court's order, which directs the Director-General of the Department of Home Affairs to issue the necessary documents recognising the first and the third to fifth applicants' citizenship as soon as possible. The applicants have already suffered greatly by the dilatory

[85] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 19.

[86] *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC) at para 49.

conduct of the respondents and there is no reason why they should continue to be at their mercy.

Costs

[91] The ordinary rule is that costs follow the result and in this regard, the applicants have been unsuccessful in confirming the order of constitutional invalidity from the High Court. But clearly this case encompassed more than confirming the High Court's order – it was about vindicating the citizenship rights of the applicants who have been dragged from the proverbial pillar to post by the government's intransigence, indifference and inefficiency. The applicants have been successful in vindicating these rights and they are entitled to their costs for the significant and prolonged litigation it has required to arrive at this result.

Order

[92] In this regard, I make the following order:

1. The order of the High Court declaring section 2(1)(a) of the South African Citizenship Act 88 of 1995, as amended by the South African Citizenship Amendment Act 17 of 2010, constitutionally invalid is not confirmed.
2. The order of the High Court declaring section 2(1)(b) of the South African Citizenship Act 88 of 1995, as amended by the South African Citizenship Amendment Act 17 of 2010, constitutionally invalid is not confirmed.
3. The following persons are declared South African citizens:
    a. Yamikani Vusi Chisuse;
    b. Martin Ambrose Hoffman;
    c. Emma Angelique Dullaart; and
    d. Amanda Tilma.
4. The first respondent, the Director-General of the Department of Home Affairs, is directed to register the births of the persons outlined in paragraph 3

of this Order, enter their details into the population register, assign them South African identity numbers and cause identity documents and birth certificates to be issued to them.

5. The respondents must pay the costs of the applicants in this Court, including the costs of two counsel.

For the Applicants:	I Goodman and J Mitchell instructed by Lawyers for Human Rights
For the Respondents:	S Mangolele SC, S Masina, F Khunou and L Mboweni instructed by the State Attorney, Pretoria