**CASE NOTE**

# THE SOUTH AFRICAN CONSTITUTIONAL COURT DECIDES AGAINST STATELESSNESS AND IN FAVOUR OF CHILDREN: *CHISUSE V DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS* [2020] ZACC 20

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The 2020 case *Chisuse v Director-General, Department of Home Affairs*[1] ('*Chisuse*') of the Constitutional Court of South Africa ('Constitutional Court') comes at a crucial moment in South Africa's post-apartheid trajectory, where the circle of citizenship is 'shrinking'.[2] The Constitutional Court decided in favour of four of the five foreign-born applicants — all children with one citizen parent — who had sought an order to be registered as citizens by the relevant government department, the Department of Home Affairs ('DHA').[3] The applicants argued that the DHA's interpretation of the amended citizenship law violated their constitutional rights.[4] Not deciding the matter on a constitutional basis, the Constitutional Court creatively and authoritatively interpreted the statutory regime in favour of the applicants.[5] An example of the Court's important national role in upholding a human rights-based vision of South African citizenship against persistent and potentially growing bureaucratic opposition, *Chisuse* also displays an interpretive approach both mindful of the risks of child statelessness and

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1 *Chisuse v Director-General, Department of Home Affairs* [2020] 6 SA 14 (Constitutional Court) ('*Chisuse*').

2 Christine Hobden, 'Shrinking South Africa: Hidden Agendas in South African Citizenship Practice' (2020) 47(2) *Politikon* 159, 159.

3 *Chisuse* (n 1) 5–6 [7], 40 [92].

4 ibid 11 [22].

5 ibid 29–36 [64]–[78].

supportive of the place of civil birth registration in the global provision of legal identity for all.[6]

Although it was not the formal basis of the decision, the right to citizenship — guaranteed under s 20 of the *Constitution of the Republic of South Africa 1996* ('*Constitution*')[7] — was at the heart of the case. Of particular concern was the interaction of this right with two laws comprising part of South Africa's citizenship regime: the *South African Citizenship Act 88 of 1995* ('*1995 Citizenship Act*')[8] and its amendment in terms of the *South African Citizenship Amendment Act 17 of 2010* ('*Amendment Act*').[9] The Constitutional Court closely examined the constitutionality of the *Amendment Act* because it had been implemented by the DHA in a manner which reversed prior policy and thus deprived some children with at least one citizen parent of a pathway to the legal benefit of citizenship. Limiting the operation of the presumption against retrospectivity (a common legal interpretive technique), the Constitutional Court confirmed the lower court's order granting citizenship to those applicants who had provided the required evidence.[10]

## I BACKGROUND

The applicants applied to be declared South African citizens because the DHA would not allow them to register as or be declared citizens of South Africa.[11] Each of the applicants had one parent who was a South African citizen at the time of their birth. However, all applicants were born outside of South Africa prior to the enactment of the *Amendment Act*. All applicants were African: the first was born in Lilongwe, Malawi; the second was born in Lesotho; the third and fifth were born in Bulawayo, Zimbabwe; and the fourth was born in Accra, Ghana.[12] The Gauteng Division of the High Court of South Africa ('High Court') was asked to declare two sub-provisions of s 2 of the *Amendment Act* unconstitutional: firstly, s 2(1)(a), to the extent that it failed to recognise citizenship as acquired by descent prior to 1 January 2013; and secondly, s 2(1)(b), because the DHA had interpreted its savings effect to only apply prospectively to persons born after 1 January 2013.[13] Section 2(1) provides 'any person'

> (a) who immediately prior to the date of commencement of the [*Amendment Act*], 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,

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6 See Bronwen Manby, '"Legal Identity for All" and Statelessness: Opportunity and Threat at the Junction of Public and Private International Law' (2020) 2(2) *Statelessness & Citizenship Review* 248.

7 *Constitution of the Republic of South Africa*, s 20 ('*Constitution*').

8 *South African Citizenship Act 88 1995*, 364 Government Gazette (South Africa) ('*1995 Citizenship Act*').

9 ibid amended by *South African Citizenship Amendment Act 17 2010*, 546 Government Gazette (South Africa) ('*Amendment Act*').

10 *Chisuse* (n 1) 33–35 [71]–[74], 37 [81].

11 ibid 6 [9].

12 ibid 6 [7].

13 *Chisuse v Director-General: Department of Home Affairs* (High Court of South Africa, Gauteng Division, Pretoria, Constantinides J, 22 May 2019) ('*Chisuse High Court*').

shall be a South African citizen by birth.[14]

In the High Court, the applicants sought the constitutional remedies of reading in the words 'or by descent' to s 2(1)(a) and the words 'or was' to s 2(1)(b). Siding with the applicants, the High Court declared the statutory provisions unconstitutional and ordered such a reading-in on 20 September 2019.[15] As is usual, this order was then subject to a confirmation hearing at the Constitutional Court, held on 13 February 2019, with judgment issued more than a year thereafter on 22 July 2020.

The High Court decided the matter without hearing submissions from the respondent bureaucracy. While contrary to ideal practice, the High Court did so since the delay — already at two years in front of the High Court and part of a seven-year history of negotiations between the public interest law organisation Lawyers for Human Rights and the DHA[16] — was mounting and the DHA had not even filed papers. Simply failing to represent itself in judicial matters is a relatively common practice for the DHA.[17] In view of the respondent's absence, the High Court properly articulated the DHA's view on the statute on its behalf.[18] In deciding in favour of the applicants and in ordering a proactive remedy, the High Court demonstrated how far the South African first-instance courts have come since the years immediately after the advent of constitutional democracy, when decisions in favour of non-citizens were few and far between.[19] In the next stage of the litigation, the Constitutional Court granted the DHA condonation to make submissions in its proceedings.[20]

## II THE RELEVANT STATUTORY FRAMEWORK

At issue in *Chisuse* were two legislative subcategories of two broader categories of persons born to a South African parent outside of the country: persons seeking recognition as citizens by descent and persons seeking recognition as citizens by birth. The first subcategory is made up of those who seek citizenship by descent by (1) being born to a South African parent outside of the country and (2) registering their birth in terms of s 3 of the *1995 Citizenship Act*. The second subcategory included those seeking citizenship by birth by (1) being born to a South African parent outside of the country but (2) without registering their birth in terms of s 3 of the *1995 Citizenship Act*.[21] On the statutory reading effectively

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14 *Amendment Act* (n 9) ss 2(1)(a)–(b).

15 *Chisuse High Court* (n 13).

16 Lawyers for Human Rights, 'Constitutional Court Settles 7-Year Battle over Citizenship' (Press Statement, 23 July 2020) <https://www.lhr.org.za/lhr-news/press-statement-constitutional-court-settles-7-year-battle-over-citizenship/>.

17 Christine Hobden, 'The Case of Chisuse and Others Versus Department of Home Affairs (CC:155/19)', *European University Institute Global Citizenship Observatory* (Web Page, 14 April 2020) <https://globalcit.eu/the-case-of-chisuse-and-others-versus-department-of-home-affairs-cc155-19/> ('The Case of Chisuse'); Estelle Ellis, 'Citizenship Case Reveals Chaos at Home Affairs as It Battles 8,000 Lawsuits', *Daily Maverick* (Web Page, 14 February 2020) <https://www.dailymaverick.co.za/article/2020-02-14-citizenship-case-reveals-chaos-at-home-affairs-as-it-battles-8000-lawsuits/>.

18 *Chisuse High Court* (n 13).

19 See Jonathan Klaaren, 'So Far Not So Good: An Analysis of Immigration Decisions under the Interim Constitution' (1996) 12(4) *South African Journal on Human Rights* 605.

20 *Chisuse* (n 1) 8–9 [15]–[17].

21 ibid 11 [21].

adopted by the DHA, the rights available to persons in these two subcategories prior to the amendment of the *1995 Citizenship Act* were extinguished and were not revived. A superficial use of the interpretive presumption against statutory retrospectivity could be used to justify the DHA's legal position.[22]

The Constitutional Court did not choose to travel the interpretive route of the DHA. Instead, by developing and employing a conceptually inclusive view of citizenship, the Constitutional Court traversed the relevant history of the statutory regime in order to more comprehensively understand the manner in which South African citizenship is and has been acquired through descent or birth.[23] Enacted in 1949, early in the apartheid era, the citizenship legislation immediately preceding the current Act provided citizenship through four mechanisms: birth, descent, naturalisation and registration.[24] Limiting itself to the first two, the Constitutional Court noted how citizenship by birth could only be acquired by two groups and how citizenship by descent was acquired through two different categories.[25] In 1991, the ground of marital status — which had been relevant to both citizenship by descent and by birth — was removed as a requirement for one to be eligible for acquisition of citizenship 'so that anyone who was born to at least one South African parent after 1949 would be entitled to citizenship'.[26]

Thus, at odds with the DHA's restrictive orientation to the *Constitution*, an inclusive view of citizenship was central to the Court's understanding of the rights at issue in *Chisuse*. The citizenship scheme of the *Constitution* is found in part in its ss 3 and 20.[27] The former states that there is a common South African citizenship wherein all citizens are entitled to the rights, privileges and benefits of citizenship and are equally subjected to the duties and responsibilities of citizenship.[28] The latter provides that no citizen may be deprived of citizenship.[29]

The Constitutional Court rooted its constitutional vision in history. *Chisuse*'s first paragraph recalls that '[t]he 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"'.[30] The Constitutional Court then reaffirmed that the new South Africa granted and guaranteed its rights to 'all who live in it'.[31] Khampepe J reiterated that citizenship and equality of citizenship is important in South Africa and there should be no arbitrary distinctions: '[citizenship] 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'.[32] In this sense, it stands to reason that depriving one of

22 ibid 33 [71].

23 ibid 15–22 [35]–[45].

24 For legal historical accounts of South African citizenship prior to 1949, see Jonathan Klaaren, *From Prohibited Immigrants to Citizens: The Origins of Citizenship and Nationality in South Africa* (UCT Press, 1st edn, 2017); see also Jonathan Klaaren, 'Historical Overview of Migration Regulation in South Africa' in Fatima Khan (ed), *Immigration Law in South Africa* (Juta, 1st edn, 2018).

25 *Chisuse* (n 1) 15–17 [36]–[38].

26 ibid 18 [39].

27 *Constitution* (n 7) ss 3, 20.

28 ibid s 3.

29 ibid s 20.

30 *Chisuse* (n 1) 3 [1], citing Jonathan Klaaren, 'Constitutional Citizenship in South Africa' (2010) 8(1) *International Journal of Constitutional Law* 94, 95.

31 *Constitution* (n 7) preamble, cited in *Chisuse* (n 1) [24].

32 *Chisuse* (n 1) 13 [28].

citizenship adversely impacts their private and family life, their development and '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'.[33] A second theme beyond the significant and particular history of citizenship in South Africa appears to have driven the decision: the possible rights violations that would result if the situation faced by the applicants was not cured.

Aware of the wide range of possible interpretations of the law, Khampepe J parted ways with the High Court and reached the conclusion that the impugned ss 2(1)(a) and (b) of the *Amendment Act* are not constitutionally invalid in that they do not deprive the applicants of any citizenship.[34] Instead, she persuasively reasoned that there is a manner of interpreting the legislation to include within the citizenship scheme persons born prior to the commencement of the *Amendment Act*.[35] Khampepe J noted the existence of special statutory provisions for avoiding statelessness and leveraged those provisions, arguing that it would be

> 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 [*1995 Citizenship Act*].[36]

As Christine Hobden has noted:

> [t]he applicants [were] thus bizarrely currently unable to access South African citizenship despite the fact that under previous legislation they had a vested right to acquire it, and if born under the current legislation they would automatically acquire it.[37]

Additionally, Khampepe J dealt with the specific interpretive difficulty, that statutes are generally presumed not to have retrospective effect: '[t]he 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'.[38]

## III CONCLUSION

Shrinking citizenship is of great concern for those facing the prospect of reduction in citizenship statuses, not from two to one but from some to none — ie to the status of statelessness. Research in South Africa has only recently begun to pay increased attention to the problem of childhood statelessness, itself only seeing sustained interest at the global level for just over a decade.[39] The DHA does not keep official statistics on statelessness, not mentioning the topic in its annual reports through 2015.[40] In 2017, one of the leading NGOs addressing the issue

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33 ibid.

34 ibid 37 [82].

35 ibid 29–36 [64]–[78].

36 ibid 30 [66].

37 Hobden, 'The Case of Chisuse' (n 17).

38 *Chisuse* (n 1) 34 [73].

39 Jacqueline Bhabha (ed), *Children Without a State: A Global Human Rights Challenge* (MIT Press 2011).

40 Liesl Muller, 'Childhood Statelessness: Realising the Child's Rights to a Nationality in South Africa' (LLM Research Report, University of the Witwatersrand, 2018) 26.

provided legal assistance to 92 children (half born in South Africa) with problems of statelessness or at risk of statelessness.[41]

Following a wider human rights definition, rather than the narrower UNHCR approach, South African legislation is mostly in line with international legal standards on the prevention and reduction of statelessness, including for children.[42] However, the implementation of those laws leaves much to be desired due to the DHA's tendency to support restrictive interpretations of the provisions in its regulations and policies.[43]

*Chisuse* clarifies the principle of the statutory interpretive presumption against retrospectivity and its application to legislation in a complex regulatory framework, which could also be interpreted to extinguish existing citizenship rights. When read in its fullness, the historical approach adopted by the Constitutional Court led to a persuasive decision, handing success to public interest litigants acting on behalf of those faced with a degree of statelessness. Especially when seen in the context of a shrinking bureaucratic regard for citizenship applicants, the Constitutional Court continues to place itself at the centre of the rights-regarding movement within South African citizenship law.[44] The decision confirms the trend in childhood statelessness cases wherein the lower courts have found against the DHA,[45] including that of a child born to two Cuban parents where Cuba refused to extend citizenship to the child (instructing the DHA to issue citizenship to the child); a child born to refugees and reaching the age of 18 (holding that the DHA's delay in formulating guidelines for applications was not a sufficient basis to deny children the opportunity for naturalisation); and children with an unmarried South African father and a foreign national mother (ruling that the children should be properly registered so that they could access South African citizenship).[46]

41 ibid 27.

42 ibid.

43 Muller (n 40).

44 See, eg, *Khosa v Minister of Social Development* [2004] 6 SA 505 (Constitutional Court).

45 Fatima Khan, 'Exploring Childhood Statelessness in South Africa' [2020] 23 *Potchefstroom Electronic Law Journal* 1.

46 See, eg, *Minister of Home Affairs v Ali* [2019] 2 SA 396 (Supreme Court of Appeal). See also Jo Venko, '*Mulowayi v Minister of Home Affairs* [2019] ZACC 1 (29 January 2019)' (2020) 2(1) *Statelessness & Citizenship Review* 179.