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ADVOCATES' MIGRATION BRIEF SERIES / 03

LITIGATION IN RESPECT OF UNDOCUMENTED CHILDREN

by Lilla Crouse SC
Edited by James Chapman and Lee Anne de la Hunt

ADVOCATES' MIGRATION BRIEF SERIES

The Advocates' Migration Brief Series addresses recent judicial decisions relating to people on the move.

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Published by SIHMA
August 2021

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As senior litigator at Legal Aid South Africa's Impact Litigation Unit she successfully challenged discriminatory laws and practices in a number of fora, including the Constitutional Court and the Life Esidemeni Arbitration.

Her clients include the most vulnerable, undocumented children at risk of statelessness. In this edition of the Advocate's Migration Brief Working Paper Series Adv Crouse SC shares her experience in litigating three cases on behalf of undocumented children.

EDITORS

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ABSTRACT

In this article I will briefly discuss three cases in which I had the privilege of acting as counsel to seek relief for undocumented children. In each matter, the execution of court orders was unreasonably delayed, which in turn led or is leading to hardship. In each matter it was necessary to seek contempt orders. The factual situations are by no means unique and each lawyer involved in *pro bono* or public interest work would have encountered similar situations in South Africa. I include the orders we sought and the mistakes we made, so that someone else can stand on our shoulders and do better in the interest of the most vulnerable persons of our society. The purpose of this article is just to tell the three stories.

1. SOME LAW

Each of the cases pertains to undocumented children within the borders of South Africa. It is accepted that being undocumented could lead to statelessness, but even if this does not happen it nevertheless leads to an infringement of constitutional rights and resultant hardship. Before dealing with the three cases, I briefly discuss the relevant legislation.

The Constitution

In the matters under discussion, at the very least the following principles or rights as set out in the Constitution of the Republic of South Africa, 1996 had been infringed: Section 3(2) & section 20: equal entitlement to rights, privileges and benefits of citizenship and the right not to be deprived of citizenship; Section 9: right to equality; Section 10: right to dignity; Section 28(1)(a): Right to a name and nationality from birth; Section 28(2): The right that a child's best interest is paramount in each matter; Section 29: The right to education.

The Children's Act

A good place to start when considering children's best interest is found in the preamble to the Children's Act 38 of 2005, which reads as follows:

> "WHEREAS the Constitution establishes a society based on democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person; AND WHEREAS every child has the rights set out in section 28 of the Constitution; AND WHEREAS the State must

"IN TERMS [...] OF THE SOUTH AFRICAN CITIZENSHIP ACT [...] EVERY CHILD BORN OF A SOUTH AFRICAN CITIZEN IS A SOUTH AFRICAN CITIZEN BY BIRTH. IT DOES NOT MATTER WHETHER IT IS THAT CHILD'S MOTHER OR HIS/HER FATHER WHO IS THE SOUTH AFRICAN CITIZEN, AND/OR WHETHER THE CHILD IS BORN IN OR OUTSIDE SOUTH AFRICA" (PAG. 10)

respect, protect, promote and fulfil those rights; AND WHEREAS protection of children's rights leads to a corresponding improvement in the lives of other sections of the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities; AND WHEREAS the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance; AND WHEREAS the need to extend particular care to the child has been stated in the Geneva Declaration on the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognised in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children; AND WHEREAS it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding."

The standards and principles set out in especially sections 6 to 10[1] of the Children's Act are applicable to all decisions or matters

[1] "Section 6 General principles
(1) The general principles set out in this section guide- (a) the implementation of all legislation applicable to children, including this Act; and (b) all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general.

(2) All proceedings, actions or decisions in a matter concerning a child must(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation; (b) respect the child's inherent dignity; (c) treat the child fairly and equitably;(d) protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child; (e)recognise a child's need for development and to engage in play and other recreational activities appropriate to the child's age; and (f) recognise a child's disability and create an enabling environment to respond to the special needs that the child has. (3) If it is in the best interests of the child, the child's family must be given the opportunity to express their views in any matter concerning the child. (4) In any matter concerning a child-(a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and (b) a delay in any action or decision to be taken must be avoided as far as possible.
(5) A child, having regard to his or her age, maturity and stage of development, and a person who has parental responsibilities and rights in respect of that child, where appropriate, must be informed of any action or decision taken in a matter concerning the child which significantly affects the child.

Section 7 Best interests of child standard

(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely- (a) the nature of the personal relationship between-(i)the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances;

(b) the attitude of the parents, or any specific parent, towards-(i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-

(i) both or either of the parents; or

(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;

(f) the need for the child-(i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition;

(g) the child's-(i)age, maturity and stage of development; (ii)gender; (iii) background; and (iv) any other relevant characteristics of the child;

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(i) any disability that a child may have;

(j) any chronic illness from which a child may suffer;

(k) the need for a child to be brought up within a stable family environment

concerning children.
South Africa is bound by international law inclusive of customary international law.[2]

The Citizenship Act

In terms of section 2(1)(b) of the South African Citizenship Act 88 of 1995 (Citizenship Act), every child born of a South African citizen is a South African citizen by birth. It does not matter

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and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm that may be caused by-
(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or
(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.
(2) In this section 'parent' includes any person who has parental responsibilities and rights in respect of a child.
Section 8 Application:
(1) The rights which a child has in terms of this Act supplement the rights which a child has in terms of the Bill of Rights.
(2) All organs of state in any sphere of government and all officials, employees and representatives of an organ of state must respect, protect and promote the rights of children contained in this Act.
(3) A provision of this Act binds both natural or juristic persons, to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
Section 9 Best interests of child paramount
In all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied."

[2] While SA is not signatory to the Convention on statelessness, SA is bound by customary international law which protects the right to a nationality and ensures basic human rights regardless of nationality. Relevant international instruments could include: and by the other international instruments, such as *United Nations Convention on the Rights of the Child* (1989); *The African Charter on the Rights and Welfare of the Child* (1990); UNHCR *Guidelines on the Protection and Care of Refugee Children* (1994); UNCRC Committee's General Comments, especially the General Comment No 6 (2005); The UN Guidelines on the Alternative Care of Children (2009); the 1954 Convention on the Status of Stateless Persons; Universal Declaration of Human Rights; 1961 Convention on the Reduction of Statelessness.

whether it is that child's mother or his/her father who is the South African citizen, and/or whether the child is born in or outside South Africa.[3] This subsection is relevant to the third case study. Based on a previous reading of the legislation, some officials wrongly interpret the current legislation to mean that only a child born of a South African mother can acquire South African citizenship.

Section 2(2) of the Citizen Act states that any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if (a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and (b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992). This sub-section is relevant to the first and second case studies.
In the first and second case studies, the DHA's argument has been that, even though it is not certain whether the children had the right to nationality of another country, the children had to prove that they in fact had no such right. The argument was that someone should take the children to the country of origin of their parents and investigate their claim to nationality, before this sub-section could be used.

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[3] It was not relevant to my cases, but may I just state, in case it may be relevant to a matter handled by a colleague, please consider that in terms of sub-section 2(1)(a) of the Citizenship Act, everyone who was a citizen prior to the South African Citizenship Amendment Act 17 of 2010 remains a citizen. The said Amendment Act came into operation on 1 January 2013. Prior to 1 January 2013, someone born in South Africa was entitled to South African citizenship in accordance with how the then section 2(1)(b) read, subject to how sub-section 2(2)&(3) of the Act then read. Thus a child born prior to 1 January 2013 to a permanent resident is a citizen by birth.

The Identification Act

The Identification Act 68 of 1997 (the ID Act) applies to all South African citizens as well as others that are lawfully in South Africa.[4]

In terms of the ID Act, the Director General of the DHA must establish and maintain a population register[5] and allocate identification numbers.[6]

Section 8 of the *ID Act* determines *inter alia* that the identity number, surname, full forenames, gender, date of birth and the place or country of birth must be included in the population register. The DHA may request any person to furnish proof of the correctness of any these particulars which have been furnished in respect of such person in any document in terms of this Act; and investigate or cause to be investigated any matter in respect of which particulars are required to be recorded in the population register.[7]

Births and Deaths Registration Act

The Births and Deaths Registration Act 51 of 1992 (*Registration Act*) applies to all South African Citizens and persons who are temporarily or permanently living in South Africa.[8] Section 9 of the Registration Act states that if a child is born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed

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[4] Section 3 reads: "*This Act shall apply to all persons who are South African citizens and persons who are lawfully and permanently resident in the Republic.*"

[5] Section 5 of the ID Act.

[6] Section 7 of the ID Act.

[7] Section 12 of the ID Act.

[8] Section 2 of Registration Act: "*The provisions of this Act shall apply to all South African citizens, whether in the Republic or outside the Republic, including persons who are not South African citizens but who sojourn permanently or temporarily in the Republic, for whatever purpose.*"

persons,[9] shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4. The DHA may require, as contemplated in section 9(1A) that biometrics of the person whose notice of birth is given, and that of his or her parents, be provided. *Biometrics* is defined in section 1 and does not refer to DNA.

Section 9(2) of the Registration Act determines that, subject to the provisions of section 10, the notice of birth shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double-barrelled surname.

In terms of section 9(3A) of the Registration Act, where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth.

In terms of section 10 of the Registration Act, notice of birth of a child born out of wedlock shall be given under the surname of the mother; or under the father's surname at the joint request of the mother and of the person who, in the presence of the person to whom the notice of birth was given, acknowledges

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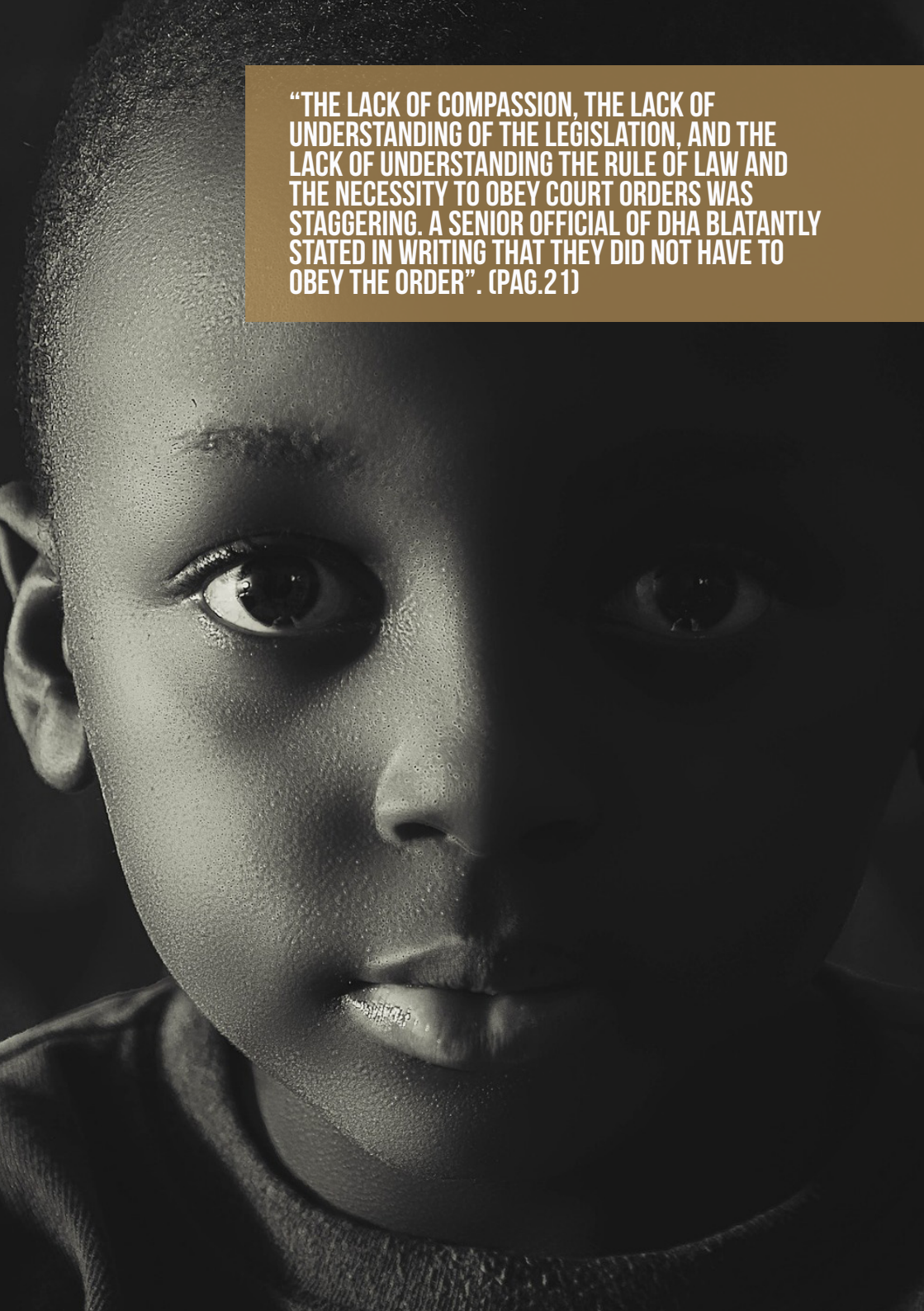
[9] There is no definition of "prescribed persons". The definition states that "prescribed" means "*prescribed by regulation*". Regulation 3(2) of the Regulations made under the Registration Act states: " *Where both parents of a child whose birth is sought to be registered in terms of sub-regulation (1) are deceased, the notice of birth must be made by the next-of-kin or legal guardian of the child*. However, section 12(2) of the Registration Act reads: "*The notice of birth of an orphaned child which does not list any of the persons contemplated in terms of section 9 (1), shall be given by a social worker, after conclusion of an enquiry in respect of such child concerned in terms of the Children's Act*. It is therefore our calculated guess that prescribed persons mean next-of-kin, legal guardian and if they are not available then a social worker.



"THE LACK OF COMPASSION, THE LACK OF UNDERSTANDING OF THE LEGISLATION, AND THE LACK OF UNDERSTANDING THE RULE OF LAW AND THE NECESSITY TO OBEY COURT ORDERS WAS STAGGERING. A SENIOR OFFICIAL OF DHA BLATANTLY STATED IN WRITING THAT THEY DID NOT HAVE TO OBEY THE ORDER". (PAG.21)

himself in writing to be the father of the child. Section 10 has been declared to be inconsistent with our Constitution by three judges in the Eastern Cape to the extent that it does not allow unmarried fathers to give notice of the births of their children under the father's surname in the absence of the mothers of such children. The Constitutional Court has not yet considered this declaration.[10]

In terms of GNR.128 of 26 February 2014: Regulations on the Registration of Births and Deaths, 2014 (*Government Gazette* No. 37373) (regulations under Registration Act), the Minister made regulations to be complied with if a child is to be registered late. This has caused much hardship as the Department insisted that both parents had to be present at the registration of the birth of the child. Mothers illegally in the country are less than eager to accompany the father to any official state buildings. At times, mothers abandoned the children with the father or the father's family or in other instances there was just not documentation available as some rural mothers had not been registered themselves.

However, in the matter of *Naki*[11], sub-regulations (3)(f)[12], (3)(i)[13], and (5)[14] to each of regulations 3, 4 and 5, as well as Regulation

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[10] *Centre for Child Law v Director- General:Department of Home Affairs and Others* 2020 (6) SA 199 (ECG)

[11] *N and others v Director General of Home Affairs and another* [2018] 3 All SA 802 ECG.

[12] Sub-regulation (3)(f) to Regulations 3, 4 and 5 reads: "*a certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen*."

[13] Sub-regulation (3)(i) to Regulations 3, 4 and 5 reads: "*where applicable, a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian; and*"

[14] Sub-regulation (5) to Regulations 3,4 and 5 reads: "*A notice of birth which does not meet the requirements of sub-regulations (3) and (4), shall not be accepted*."

12(1)[15] were declared unconstitutional.

In order to cure the defects, the Court in Naki ruled[16] that in the sub-regulations declared invalid the following remedy shall apply:

> "It shall be read in:(i) before the word "a" at the commencement of sub-regulation (3)(f) to Regulations 3, 4 and 5 the words "where it is available,";(ii) immediately after the word "applicable" in sub-regulation (3)(i) to Regulations 3, 4 and 5 the words "and available";(iii) immediately after the word "by" to sub-regulation (1) of Regulation 12 the words "either" and immediately after the word "mother" in that sub-regulation the words "or father"."

The overall effect of this judgment is that: Where the documents referred to in sub-regulations (3)(f), (3)(i) and (5) to Regulations 3, 4, and 5 are not available, birth registration must be finalised without it and that a father of a child born out of wedlock can also register the birth of his child.

The officials at DHA rely on a general circular stating that DNA testing may be required to prove paternity. They interpret this to mean that in each case where one of the parents is not a South African citizen, they may not register the child without DNA testing. In the case of the children in Case Study 3, they were also informed that only a certain laboratory many hours away may be used. For parents that barely have sufficient money for food,

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[15] Regulation 12(1) reads: "*A notice of birth of a child born out of wedlock shall be made by the mother of the child on Form DHA-24 illustrated in Annexure 1A or Form DHA-24/LRB illustrated in Annexure 1A, whichever [is] applicable.*"

[16] *N and others v Director General of Home Affairs and another* [2018] 3 All SA 802 ECG at [39].

to find money for travel and accommodation for three people and for laboratory fees is totally unrealistic. Some organisations embarked upon crowd funding campaigns to assist herein.

2. CASE STUDY 1

My first encounter with the hardship of being undocumented was baby A. She was born in 2013 in a South African hospital to an 11-year-old mother who was illegally in South Africa. A's mother indicated to staff that she was raped in a neighbouring country. She had been with her mother (A's grandmother), who was documented, but she was a foreigner. The grandmother's details were not sufficiently recorded to identify her. Neither her mother nor her grandmother wanted baby A. They left her in the hospital and disappeared.

A baby haven took custody of A after a children's court order. She was fetched from hospital 10 days after her birth by a husband and wife team who had just arrived in South Africa as volunteer workers on volunteers' visas. Both of them had been volunteering in South Africa before on separate occasions and long prior to their marriage. They collected A and three other babies from the hospital and took them to the haven. I will hereinafter refer to them as the adoptive parents. Seeing A, they said it was love at first sight and they have been caring for her ever since, first in the haven and later as her foster parents.

When she was about two years old they wanted to adopt A, but it was impossible to facilitate an adoption as A was not documented other than a hand-written birth certificate. The Central Authority[17] that had to facilitate foreign adoptions refused to get involved unless one of the parties was a South

[17] Chapter 16 of the Children's Act deals with inter country adoptions in terms of the Hague Convention on Inter-country Adoption to which South Africa is a party. The Director-General of the Department of Social Development is the South African Central Authority for inter country adoptions.

African citizen. The adoptive parents published advertisements in the neighbouring country's newspapers to call on the family of A's mother to respond. Nothing happened. They also advertised to call on A's father to respond. The latter course was suggested by some social worker, but logic dictates that no rapist will come forward to say it is his child and he did not.

A had no proof of her citizenship other than that her mother was an illegal immigrant in South Africa. The hospital noted the country where A's mother was raped and the nationality of A's grandmother.

The adoptive parents sought legal assistance to get A documented. The Children's Court was unable to assist and sent them to Legal Aid South Africa. They were referred to me. At first, I was apprehensive- not trusting the word of persons saying they want to adopt a South African child. I worried about human trafficking. I wanted to see them in their home environment. I met with their own biological children. I sought testimonial and academic records. I found them to be amazing people, who deeply cared for A.

As in any case, a good place to start is with a letter of demand. Through my attorney, I wrote a letter of demand to the local office of the DHA, setting out the law and explaining why this child must be documented. They were unwilling to place their official stamp on the letter as proof of receipt thereof, and even more unwilling to read and consider it.

The next step was to obtain an order compelling them to document her.

In February 2016 we obtained the following order:

> 1. That the minor child, A …is declared to be a South African citizen by birth, as contemplated in section 2(2) of the South African Citizenship Act 88 of 1995, as amended.
> 2. That the Respondents are ordered to give effect to the above declaratory order by ensuring:
>
> 2.1. that the particulars of birth of the minor child, A are included in the population register of South Africa, and
>
> 2.2. that the Applicants are furnished with an amended birth certificate pertaining to A containing a valid identification number.
>
> 3. That in the event of the Respondents not being able to comply, within 15 days of this order, with the orders set out in paragraph 2 above, they are directed to deliver an affidavit to this Court, after service thereof on the Applicants' attorneys, setting out such further information needed and/or what steps are been taken by the Department to comply with the order.
> 4. The First Respondent shall, within five days of this order, furnish the Applicants' attorneys with the name and contact details of the functionary in the Department of Home Affairs who is tasked with complying with the orders set out in paragraphs 2 and 3 above.

In my naivety at the time, I thought that we had then been successful in getting A documented. I was wrong. After the order, nothing happened. My attorney and the adoptive parents were engaging the DHA through written correspondence and emails and telephone calls for about a year, before I was briefed again.

We were compelled to bring an application for contempt of court.

The lack of compassion, the lack of understanding the law, and the lack of understanding the rule of law and the necessity to obey court orders was staggering. A DHA's senior official blatantly stated in writing that they did not have to obey the order. Also shocking was that in 2017 the officials were unaware that section 2 of the Citizenship Act had been amended in 2010 and the amendment had already come into effect in 2013. They referred to outdated legislation in their court papers.

Anyone involved in a contempt application against a state department would be able to tell that it is near impossible to get personal service on the Minister or the Director General. A court is unlikely to give a contempt order without personal service on the current incumbent of that office. As a result, we also brought contempt proceedings against the officials who were aware of the order but who refused to execute it.[18]

After having spent a lot of money on trying to get personal service and still being unsuccessful, the service on the DHA employees at least brought some attention to the matter and the application for contempt was opposed. Belatedly, the DHA brought an application to rescind the first order.

The rescission and contempt applications were heard together. Both were dismissed with the DHA to pay the costs of both

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[18] *Pheko and others v Ekurhuleni City* 2015 (5) SA 600 (CC) at par 47 which states "*When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute*." (footnotes and references omitted)

applications. But the exercise of seeking contempt yielded getting a South African ID number for A.

A is currently a healthy, happy and intelligent primary school child who is well integrated into her adopted family and society. The family as a whole is still stuck in South Africa as there are still challenges to get her legally adopted.

3. CASE STUDY 2

The second matter I want to refer to are two orphaned siblings B and C, whose mother arrived in South Africa from a war-torn country together with B who was then a toddler. B was born when her mother was 14 years old and there were also allegations of her mother being raped. The mother was in search of her only sibling who she thought had fled to South Africa. No one could provide any information on B's father, but it is certain that he did not travel with them to South Africa. B's mother applied for asylum in terms of the Refugees Act 130 of 1998 ("Refugees Act") and was issued with a section 22 asylum seeker permit. B was registered as a dependant.

While B's mother lived in South Africa, she became romantically involved with another refugee from yet another country. C was born within the first year of their relationship. C was issued with a handwritten birth certificate. His father's particulars were not entered on the certificate. Within four years after C's birth, both his father and mother passed away as a result of having AIDS. It was difficult to find foster parents for the children where they could be fostered together, as this was at a time of extreme and wide spread violence against foreigners and their foster parents were threatened. B and C were put in a place of safety.

B's mother's application for asylum had lapsed upon her death and B was by then illegally in South Africa. A social worker tried to make contact with both parents' families. Their mother's only sister, who was now back in the war-torn country, indicated her unwillingness and incapacity to care for the children. C's father's brother resided in South Africa some 800 km away on a temporary visa. He said that he would take C but was unwilling

to take care of B, and because of some substance dependency, he was considered not a fit and proper person to take care of C. After the first telephonic conversations, both family members did not answer subsequent calls.

Family reunification was found not to be in the children's best interest. After intensive consultations with all of the relevant stakeholders, the representatives from the Department of Social Development decided that it would be in the children's best interest not to separate them, and for them to remain in South Africa. The children also wanted to remain in South Africa and wanted to remain together. They were willing and were looking forward to being placed in a children's home. Much as most other children detest being in a place of safety, B and C were enjoying their time at the place of safety, after the instability they had experienced whilst their mother was terminally ill and after she had died. The children could not be put in a children's home because their lack of formal documentation prohibited such placement.[19] In terms of South Africa's international law obligations, children should not be institutionalised except as a last resort and for the shortest possible duration, but they remained in a place of safety, as there was no other option available to them.

Section 32 of the Refugees Act and regulation 3(5) of the Regulations[20] thereto, allow for an unaccompanied or separated child who appears to qualify for refugee status to submit an asylum application with the intervention of a social worker and order of a Children's Court. My attorney was doubtful at this stage that the children would be able to make out an independent claim to

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[19] Children's Homes only received funding for documented children and therefore refused to accept undocumented children.

[20] Published in General Notice no R366 in GG 21075 of 6 April 2000.

qualify for refugee status in their own names, as contemplated in section 3 of the said Refugees Act, as they bear no knowledge of the political situation in the country from which their mother came.

In order to find a durable solution for them, my attorney filed an application in terms of section 31(2)(b) of the Immigration Act to the Minister of DHA.[21] The Minister did not respond to this application. The application was thus served on the State Attorney as well. Follow-up correspondence yielded no positive result.

The Minister's inaction constituted administrative action as contemplated in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[22] Section 6(3) of PAJA determines that if any person relies on the ground of review in respect of a failure to take a decision, where an administrator has a duty to take a decision and there is no law that prescribes a period within which the administrator is required to take that decision, and the administrator has failed to take that decision, proceedings may be instituted in a court for judicial review for this failure on the ground that there has been an unreasonable delay in taking the

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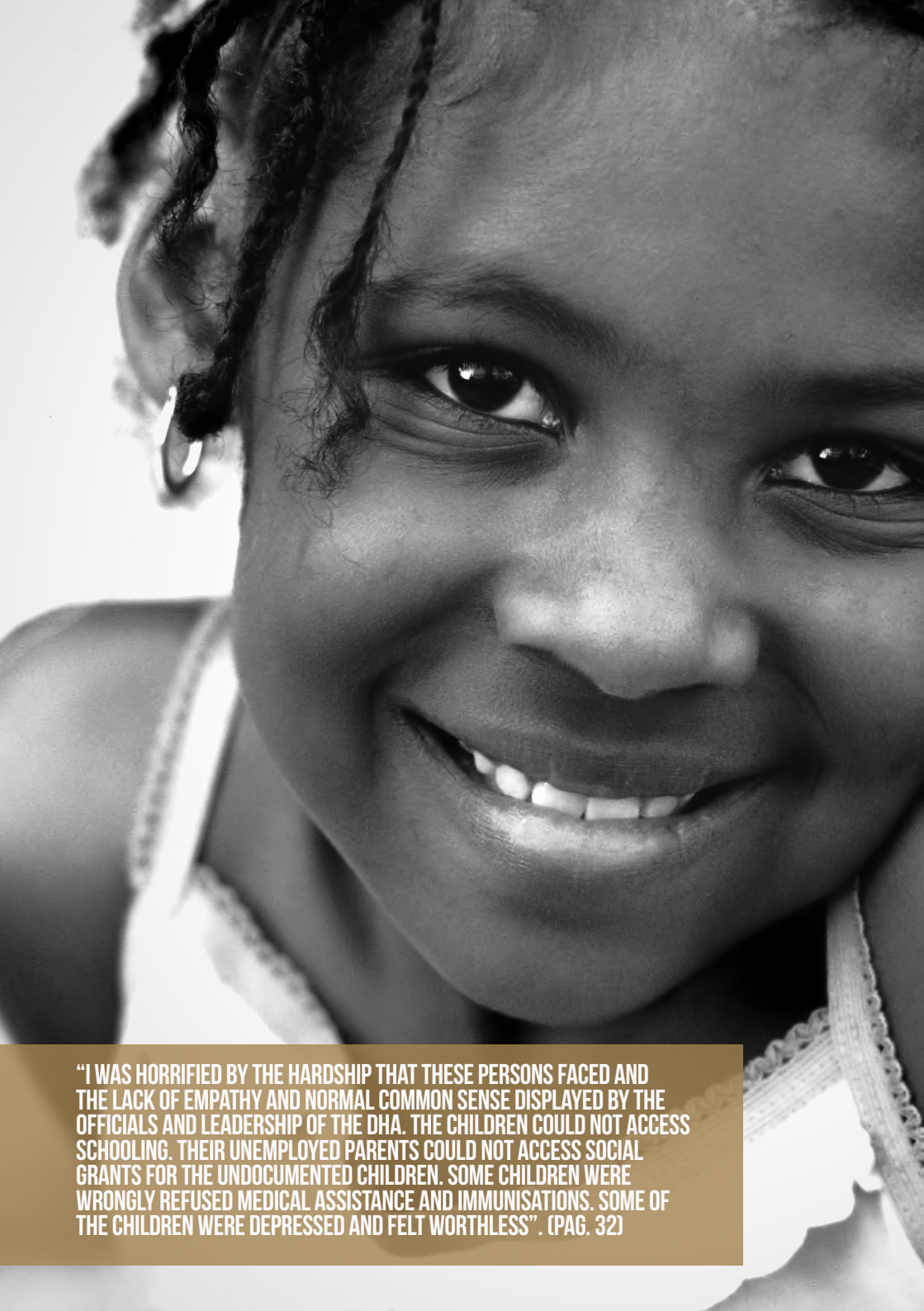
[21] Section 32: "*Upon application, the Minister may under terms and conditions determined by him or her—(a) allow a distinguished visitor and certain members of his or her immediate family and members in his or her employ or of his or her household to be admitted to and sojourn in the Republic, provided that such foreigners do not intend to reside in the Republic permanently; (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may—(i) exclude one or more identified foreigners from such categories; and (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners; (c) for good cause, waive any prescribed requirement or form; and (d) for good cause, withdraw an exemption granted by him or her in terms of this section.*"

[22] "administrative action means any decision taken, or any failure to take a decision by – (a) an organ of State when (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or …."



"I WAS HORRIFIED BY THE HARDSHIP THAT THESE PERSONS FACED AND THE LACK OF EMPATHY AND NORMAL COMMON SENSE DISPLAYED BY THE OFFICIALS AND LEADERSHIP OF THE DHA. THE CHILDREN COULD NOT ACCESS SCHOOLING. THEIR UNEMPLOYED PARENTS COULD NOT ACCESS SOCIAL GRANTS FOR THE UNDOCUMENTED CHILDREN. SOME CHILDREN WERE WRONGLY REFUSED MEDICAL ASSISTANCE AND IMMUNISATIONS. SOME OF THE CHILDREN WERE DEPRESSED AND FELT WORTHLESS". (PAG. 32)

decision.

The Minister's failure constituted an unreasonable delay in light of the situation of these children. The Minister's inaction was also not in the children's best interest, and severely prejudiced them as it impacted on their constitutional rights. It was therefore not rational.

At the time, I stated in the papers that a strong case could be made out that Parliament has failed in its duty to provide effective legislation to deal with stateless children such as B and C. I still hold this view. However, I had to inform the court in the papers that the High Court did not have jurisdiction in terms of section 167(4)(3) of the Constitution to entertain such a case. The High Court as upper guardian of these two children being within its jurisdiction had to find the best durable solution for them under the current legislation. I prepared the founding papers in the name of the children's social worker.

Having learned from baby A's matter, I joined the head of the local office of the DHA as the third respondent and sought to postpone the matter to a certain date for compliance with the order.

I also wanted to ensure that the Department would not again allege, as they tried to do with baby A, that full legal argument had not been presented when the first order was obtained on an uncontested basis, and I frustrated the motion court judge by insisting on presenting full legal argument. At the time there were pupil advocates in the court, who enquired from me why I insisted to present argument when the judge clearly just wanted to give me the order I sought. I replied as I had also stated during argument, that I suspected that the DHA will soon try to get the

order rescinded on the basis that the law was not fully presented before the court. I was proved right after the order was obtained.

The High Court judge made the following order:

> 1. That B & C are declared "unaccompanied minors" for which a durable solution must be found in terms of South Africa's international law obligations.
> 2. That the failure of the Minister to consider and decide upon B's application for exemption as contemplated in section 31(2)(b) of the Immigration Act 12 of 2002, is declared to be inconsistent with the Constitution of South Africa, 1996 and an infringement of her right to lawful administrative action;
> 3. That the Minister is directed:
>
> 3.1. To consider and decide upon B's application for exemption as contemplated in section 31(2)(b) of the Immigration Act 12 of 2002 within one month of the date of this order,
>
> 3.2. To inform the applicant's attorneys and this Honourable Court in writing within five days of the outcome of the said application for exemption, and in the event that the application is unsuccessful to include the reasons in such notification.
>
> 4. That C is declared to be a South African citizen by birth, as contemplated in section 2(2) of the South African Citizenship Act 88 of 1995, as amended.
> 5. That the Respondents are ordered to give effect to the declaratory order in the preceding paragraph by ensuring:
>
> 5.1. that the particulars of birth of the minor child, C are included in the population register of South Africa,

and

5.2. that the Applicant is furnished with an amended birth certificate pertaining to C containing a valid identification number.

6. That in the event of the Respondents not being able to comply with the orders set out in the preceding paragraph, the Third Respondent (head of the local office) is directed to deliver an affidavit to this Court, after service thereof on the Applicant's attorneys, setting out such further information needed and/or what steps are been taken by the Department to comply with the order within one month of the date of this order.

7. Alternatively to paragraphs 4-6 above, and in the event that this Honourable Court finds that C is not a South African citizen by birth, which is denied, then the Applicant seeks an order: [we repeated the relief sought in respect of B for C]

8. That the costs of this Application up to an including the date of this order is to be paid by any Respondent who opposes this application.

9. That this Application is postponed to a date one month and five days from this order, for:

9.1. Compliance by the Minister with the order as set out in paragraph 3 above;

9.2. Compliance by the Head of the local office with the order set out in paragraph 5 above, alternatively by the First Respondent with the order set out in sub-paragraph 7.2 above.

10. The Applicant or any other interested person is entitled to approach this Honourable Court on the same papers, amended if so advised, to obtain further relief in the best interest of B and C and/or to seek a review of the

First Respondent's decision in respect of the section 32(2)(b) exemption applications.

As was to be expected by now, compliance with the order did not take place. On the postponement date we brought contempt proceedings, having duly supplemented our papers and called the local office head to appear in person. He was kept at court for two whole days and I think in the process the importance of court orders and the peril within which he could operate if he ignores them dawned on him. The matter stood down that he could provide the affidavit that was ordered. His defence was that the computer system does not allow for the relief sought and that he was just a pawn in a bigger setting.

Also, as can be expected by now, the Department brought a rescission application, again as in the previous matter alleging *inter alia* that the judge was misled as she was not fully informed about the law. Frustrating the motion court judge paid off, as we could now attach a transcription setting out our full legal argument, and containing the statement that the DHA was going to allege at a future rescission application that we misled the court on the law.

Once again, despite spending unnecessary money, we were unable to get personal service on the Minister and the DG. We sought substituted service at the hearing of the rescission and contempt proceedings and joinder of the head of the DHA's legal department.

Once again, the rescission application was dismissed and so was the contempt application, but the court ordered compliance with the court order, which resulted in C being documented as a South

African Citizen and B being documented as a permanent resident. They were placed together in a children's home and were doing well when I last heard.

4. CASE STUDY 3

The third matter was litigation embarked upon to assist undocumented children that reside in a rural area adjacent to an open border between South Africa and a neighbouring country. Nearly all of these children had South African fathers and undocumented (South African or foreign) mothers or documented mothers who were illegally in South Africa.

At that stage all undocumented children were refused schooling.[23] A local cleric had tried to open a school for all the undocumented children to keep them off the street and to give them an education until the situation could be resolved, but the Dept of Education promptly closed down his school.

I consulted with the parents and the children and was horrified by the hardship that these persons faced and the lack of empathy and normal common sense displayed by the officials and leadership of the DHA. The children could not access schooling. Their unemployed parents could not access social grants for the undocumented children. Some children were wrongly refused medical assistance and immunisations. Being unable to go to school during the day caused the children to be without purpose, not knowing how to keep themselves busy and not understanding why other children (and sometimes their siblings) could go to school but they must stay at home. Some of the children were depressed and felt worthless. Some of the children whose parents

[23] Thankfully this practice has been declared illegal in *Centre for Child Law and Others v Minister of Basic Education and Others* 2020 (3) SA 141 (ECG), but the Department of Education still requires a child to be registered by his/her identification number in order to obtain a Grade 12 certificate. Therefore, although a child can now attend school, being undocumented could still bar the obtaining of a matric certificate and further study.

or caregivers were working away from the home were also without supervision during the day, and this caused them to engage in unhealthy or harmful activities or routines. In turn, having no education makes them unable to properly provide for themselves when they grow up and ultimately harm South Africa as a whole. It may sound like a cliché, but I could feel the despair hanging in the air; it was also reflected in the potholed main road in town and the dilapidated buildings on either side thereof. As the children's right to citizenship was not recognised by the Department, it violated a whole bouquet of their constitutional rights.

We sought the following relief:

> 1. Declaring that any child born to a South African citizen is a South African citizen by birth and that the Department of Home Affairs are obliged to do all things necessary to register such a citizen by birth as a South African citizen, including but not limited to:
>
> 1.1. Accepting an affidavit from the father and/or the mother of such child that he/she is the biological parent of such a child;
>
> 1.2. Unless the Department of Home Affairs pays in advance for the travel and accommodation costs, as well as the costs involved in DNA testing, the Department of Home Affairs will not refuse registration of a citizen by birth on the basis that DNA evidence is not available.
>
> 1.3. Accepting all the necessary documents to register the citizen by birth, despite the fact that one of the biological parents are unavailable to attend the office of the Department of Home Affairs;
>
> 1.4. Accepting the necessary documents to register the citizen by birth, despite the fact that the other biological

parent of the citizen by birth is/was an undocumented person or an illegal immigrant.

2. Declaring that the following persons are citizens by birth as contemplated in section 2(1)(b) of the South African Citizenship Act 88 of 1995, as amended as each of them is the biological child of a South African citizen: (deleted names of the persons)

3. That Second Respondent is ordered to give effect to the above declaratory orders in respect of the Applicants and their children by ensuring:

3.1. That the particulars of the said citizens by birth are included in the population register of South Africa,

3.2. That each of the said citizens by birth are furnished with a birth certificate containing a valid identification number and

3.3. That the 23rd Applicant be issued with an identification document.

4. That in the event of the Second Respondent not being able to comply with the orders as set out in the previous paragraphs within 20 days of this order, the Second Respondent, or such official authorised in writing by him/her, is directed to deliver an affidavit to this court, after service thereof on the applicants' attorneys, setting out such further information needed and/or what steps are being taken by the Department to comply with the said order; and thereafter to deliver as aforesaid such progress reports every further 20 days until the Department has fully complied with the court order.

5. The Second Respondent shall furnish the Applicants' attorneys with the name and contact details of the functionary in the Department of Home Affairs who is tasked with complying with the orders set in the previous

"THE HOPE IS EXPRESSED THAT THESE STORIES MAY ASSIST STAKEHOLDERS IN COMPELLING THE DHA IN A CONSTRUCTIVE MANNER TO FULFIL THEIR OBLIGATION TOWARDS THE VULNERABLE GROUP OF UNDOCUMENTED CHILDREN IN SOUTH AFRICA". (PAG.41)

paragraphs within ten days of this order.

6. That the State Attorney is requested to bring this order to the attention of both Respondents and file an affidavit within five days of this order as to what steps were taken to bring this order to the attention of the Respondents.

7. Any interested party may place this matter on the roll for further hearing on the same papers, duly amplified if necessary, for further relief as may be in the interest of the aforesaid children, such relief may include the bringing of a contempt application.

Immediately after service of this application, the DHA opposed same. I thought that things were going to be different this time. They, however, thereafter neglected to file their answering papers. An attorney appeared for the DHA at the hearing, but he did not have any instructions and informed the duty judge so. The duty judge criticised the Department for the handling of the matter, was unwilling to give a final order without giving the DHA another chance to put a version before the court and issued a rule nisi that the DHA was called to show cause why an order should not be made.

They did not show cause and the rule was confirmed, again with them being represented by an attorney who held no instruction. Despite the DHA being represented in Court at the time of the hearing and the State Attorney being ordered to ensure that the order was served on the Head of the Department and the Minister (which she did), the DHA just ignored the orders.

My attorney engaged the local office heads of the two towns closest to the bordering country. She was also largely ignored.

COVID-19 ensued, which caused some delay in bringing the contempt application, but eventually we proceeded with a contempt application and an application for substituted service. Like before, we joined the two heads of offices as respondents and sought an order that they appear in person at the second hearing. Unlike the previous two cases, the DHA was represented at the time the order was issued, and this time round they did not bring a rescission application. This at least must be one small victory.

After spending much money on getting personal service in a time when personnel do not work at office buildings during COVID, the Pretoria Sheriff camped out at the office of the Head of the Department and obtained personal service, against all odds. We served the papers on other senior managers as well. I am convinced that most of the Department's senior managers were aware that we were asking for the Head of the Department to be imprisoned, even the press reported this.

In addition to the order to secure the documentation, and in an attempt to get the Department to think on their inability to comply with court orders, the following order was issued:[24]

> 1. Mr L.T. MAKHODE (*being the current Director General of DHA*) is called upon to personally provide reasons to this Honourable Court, by way of affidavit to be filed at this Honourable Court and to be served on the Applicants' attorneys and the State Attorney as aforesaid on **31 May 2021** at or before 15h00, to specifically deal with the following aspects:
>
> 1.1. Why the blatant disregard of this Court's orders on

[24] Not the full order

23 April 2019 and 23 March 2021 occurred by dealing with each of the separate orders that the court had made;

1.2. Whether the service of the court order of 23 April 2019 by the state attorney had come to the attention of the Head of the Department and the Minister of Home Affairs. If not, the Head of the Department of Legal Services must provide an explanation, which explanation must be contained in the reasons;

1.3. What mechanisms have been put in place to ensure that indigent persons' constitutional rights are not infringed upon the requirements of DNA tests that they cannot afford prior to issuing birth certificates for their children?

1.4. What mechanisms have been put in place to ensure that children whose one parent is a South African citizen and whose other parent is an undocumented person or absent person are being facilitated?

1.5. What mechanisms are being put in place to ensure that the disregard of court orders will not occur again in future?

1.6. What mechanism has been put in place to ensure that the department allows for the personal service of contempt orders on the Head of the Department and the Minister?

1.7. If any of the Applicants' or their children's documentation as was ordered in the original order has not been provided, the reasons for this and what mechanism the Second Defendant has put in place to ensure compliance.

2. Mr L.T. MAKHODE is specifically ordered to answer each of the questions in the preceding paragraph.

3. The Registrar of this Honourable Court is requested to place the file before the senior judge of the Grahamstown High Court once Mr L T MAKHODE has provided his affidavit for consideration and further questions, if the senior judge consider same necessary as upper guardian of the said children.

4. That the *rule nisi* issued on 23 March 2021 is confirmed to the extent that it is ordered:

4.1. That each of the respondents are hereby found in breach of their constitutional obligations by failing to give effect to the aforesaid *original order*;

4.2. That the applicants may, if so advised, approach this Honourable Court on the same papers:

4.2.1. For further contempt proceedings against any of the respondents in the event of their failing to comply with this order;

4.2.2. To show what constitutional damages, if any, all or any of them have suffered as a result of the respondents' neglect to execute upon the said order.

5. That the second respondent N.O. is ordered to pay the costs of the application on a scale as between attorney and client.

Surprisingly, the Director General's affidavit had been delivered on time on 31 May 2021. But unfortunately, our delight over yet another small victory was short-lived as it did not deal with the issues he was required to deal with as set out specifically in the order. I had hoped to record in this article that the DHA has turned a new leaf and that they are focused to ensure that the rights of vulnerable persons are not trampled upon and that they have systems in place so that no court order will in future just be ignored. But alas, sadly this is not the case and the Head of the

Department saw fit to not comply fully with the specific court order. The affidavit was placed before the most senior judge who ordered the Director General to comply by filing a supplementary affidavit by 20 July 2021. Again, an affidavit was filed, but again the issues were not addressed. So the saga continues.

Thus, unfortunately this third matter is not yet finalised.

5. CONCLUSION

As indicated in my introduction, this is not an academic article. I have not analysed the law in depth. It is just a narrative of three cases to show the challenges vulnerable persons have to overcome to get the DHA to act within the mandate of their enabling legislation. I have shown that even court orders are ignored. Such conduct by an Organ of State is unacceptable, especially if regard is had to section 165(3)-(4)[25] and section 195[26] of our Constitution.

The hope is expressed that these stories may assist stakeholders in compelling the DHA in a constructive manner to fulfil their obligation towards the vulnerable group of undocumented children in South Africa.

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[25] "*(3) No person or organ of state may interfere with the functioning of the courts. (4) Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.*"

[26] "*(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to—

(a) administration in every sphere of government;
(b) organs of state; and
(c) public enterprises ".

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www.ciemi.org

CMS (Center for Migration Studies of New York,) established in 1969 in New York (USA)
Journal: International Migration Review (IMR)
and Journal on Migration and Human Security (JMHS)
www.cmsny.org

SMC (Scalabrini Migration Center,) established in 1987 in Manila (Philippines)
Journal: Asian and Pacific Migration Journal (APMJ)
www.smc.org.ph

CEM (Centro de Estudios Migratorios), established in 1985 in São Paulo (Brazil)
Journal: Travessia
www.missaonspaz.org

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