

# Pro Bono & Human Rights

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**SOUTH AFRICA**

Unlocking citizenship: Overcoming irregular birth certificates



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## Unlocking citizenship: Overcoming irregular birth certificates

Nearly a decade after the coming into effect of various amendments to the South African Citizenship Act 88 of 1995 (Citizenship Act), which included a new ground of citizenship through the insertion of section 4(3) the Department of Home Affairs (Department) continues to impose arbitrary requirements that create unnecessary barriers to deserving applicants seeking to enforce their right to citizenship under section 4(3) of the act. This pattern of deprivation not only violates the clear provisions set forth in the Citizenship Act, but also effectively undermines the rule of law by denying individuals their legitimate rights entrenched in our Constitution, 1996. It raises serious concerns about the integrity and fairness of the implementation of the legal framework governing citizenship.

This ongoing practice undermines the clear provisions established in section 4(3) of the Citizenship Act, which states:

*"A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if:*

- (a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and*
- (b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act [51 of 1992]."*

Despite the clearly defined and circumscribed qualifications for citizenship outlined in this provision, the Department has taken to applying arbitrary considerations, leading to unjust rejections of citizenship applications. According to section 4(3) of the Citizenship Act, an individual qualifies for South African citizenship if they meet three key straightforward criteria: they must be born in South Africa to parents who are neither citizens nor permanent residents; their birth must be registered in accordance with the Births and Deaths Registration Act 51 of 1992 (Births and Deaths Registration Act); and they must have resided in South Africa from birth until reaching the age of 18.

In *Joseph Emmanuel Jose and Another v The Minister of Home Affairs & Others* (169/2020) [2020] ZASCA 152 (25 November 2020), the court found that, where an application in terms of section 4(3) of the Citizenship Act meets all the requirements of that subsection, there is no room for the exercise of a discretion by the Minister of Home Affairs (Minister) or Department and the Minister is obliged to grant the applicant citizenship.

### Background of the current case

Our client, John\*, was born to parents who are Zimbabwean nationals. His father came to South Africa in 1995 and his mother arrived shortly thereafter. His parents met in South Africa and entered into a customary marriage in 2000. At the time of John's birth, both his parents were in possession of fraudulent South African identity documents (ID). John's mother used her ID to register his birth and, as a result, John was issued with a birth certificate with a South African identity number.

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### Amnesty period

In 2009, Cabinet approved the Dispensation for Zimbabwe Project (DZP), allowing Zimbabwean nationals to surrender all fraudulent documentation in exchange for protection from deportation and criminal charges. The individual would then be provided with a DZP permit, which allowed Zimbabweans who were already living in the country to work, conduct business and study legally. John's parents participated in this process and surrendered their South African IDs. However, only his mother received the DZP permit – she currently holds a Zimbabwean Exemption Permit.

Unfortunately, the DZP only addressed the status of adults who were in possession of fraudulent documentation, neglecting to consider the circumstances of children born and registered under those same fraudulent documents, nor did it make provision for the surrendering and regularisation of these children's birth certificates or other documentation obtained fraudulently by their parents while they were children. As a result, although their parents' documentation status was regularised, their children's documents were not – and these children remained saddled with fraudulently obtained birth certificates that usually contain a South African identity number. This is exactly what happened to our client John. The only identification he ever possessed was the irregular birth certificate issued to him at birth.

### Application for citizenship

At the age of majority, John became aware that he could not use his birth certificate when he tried to register for his Grade 12 examinations. Following legal advice, he sought to regularise his status by applying for citizenship under section 4(3) of the Citizenship Act as he met the objective criteria, i.e.:

- he was born in South Africa;
- his birth was registered in accordance with the Births and Deaths Registration Act;
- his parents were not South African citizens, nor were they admitted into South Africa as permanent residents; and
- he has lived in South Africa from birth until the age of 18.

He did this using the fraudulently obtained birth certificate issued to him at birth (the only documentation he had). Despite meeting the criteria stipulated in section 4(3), his application was rejected based on the erroneous reasoning that he had had obtained a **South African ID book through misrepresentation**.



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### Challenging the Department's decision

The reason relied on by the decision-maker in John's application reflects a fundamental misapplication of law and fact and reliance on irrelevant considerations, culminating in an unlawful rejection of his citizenship application. It appears that in making the decision, reliance was placed on the fact that John was issued an identity number at birth. However, it is crucial to recognise that John was a child when his mother registered his birth using her fraudulent ID, and he could have no understanding of what was happening at the time. He was therefore never consciously or willingly involved in the obtaining of the irregular birth certificate. Nor was he in a position to rectify his documentation at the time. As an adult, John has taken all necessary steps to ensure his legal status in the country is regularised, including surrendering his irregular birth certificate and applying for a handwritten unabridged birth certificate, typically issued to children born to foreign nationals. Importantly, John was never issued an ID book, making the Department's decision factually incorrect.

John made multiple inquiries to the Department seeking clarification on how and why the Department reached this decision, but received no response. The failure to provide reasons, which John was entitled to under section 5(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), compelled John to institute judicial review proceedings to challenge the decision made by the Department/Minister.

John thus relied on section 5(3) of PAJA, which states that if an administrator fails to provide adequate reasons, it must, and in the absence of proof to the contrary, it will be presumed in judicial review proceedings that the administrative action was taken without good reason.

In addition, we believe the bare decision provided by the Department also constituted an error of law. Our courts have already provided guidance on the application of section 4(3) of the Citizenship Act, confirming that where an applicant meets the requirements of section 4(3) and makes the necessary application, no discretion exists, and citizenship must be granted. John had made full disclosure of all the facts explaining why his birth certificate included an identity number in his application for section 4(3) citizenship. These facts were seemingly ignored by the relevant official determining his application.

Furthermore, it seems unreasonable for the Department to deprive John of citizenship based on the acts of his parents, particularly considering that the Department had previously granted amnesty to people who were in possession of fraudulent documents. Given that John's parents participated in the amnesty process and were



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absolved from their actions, it is irrational that more than 10 years later, the very circumstances for which the Department provided amnesty were now being used as a basis to prevent John from obtaining citizenship. This inconsistency undermines not only the principles of justice and fairness, but also the rights of children, who should not bear the consequences of their parents' unlawful pasts, especially when those parents have already been granted forgiveness by the same authority.

### The court's ruling

In an unopposed hearing on 23 January 2025, the Pretoria High Court issued an order setting aside the decision made by the Minister/Department and granting John citizenship.

While it is generally preferred for such matters to be resolved in open court with both parties present, the court's decision on the day of the hearing was particularly significant. The judge unequivocally affirmed the applicant's entitlement to citizenship, underscoring the fundamental principle that individuals should not be arbitrarily deprived of their rights.

This ruling holds immense importance not only for John, but also for many other children whose parents were granted amnesty under the Zimbabwean amnesty dispensation. It highlights the need to safeguard the right to citizenship from administrative overreach and arbitrary decision-making. In the context of a democratic society, the right to citizenship is essential for individuals to fully participate in civic life and access the benefits that come with it.

By acknowledging and affirming this right, the court has set an important precedent that challenges unfair practices, advocating against bureaucratic barriers that unjustly block a person's legal entitlements. It is essential that these unnecessary hurdles be removed to ensure that the path to citizenship is both fair and accessible for everyone who is rightfully entitled to it.

In conclusion, the publication of this alert aims to inform and support others who may face similar challenges regarding citizenship applications being unjustly rejected on comparable grounds. By sharing John's experience, we hope to empower those affected by such decisions to take proactive steps toward resolving their situations. Specifically, individuals facing similar issues should consider regularising their birth registration as a foundational step in addressing any discrepancies in their documentation. If this does not lead to a positive outcome, pursuing legal recourse through the courts may be a necessary avenue to protect their rights. Ultimately, by raising awareness of these challenges and providing practical advice, we aim to foster understanding and promote fair treatment for all applicants navigating the complexities of citizenship and identity in our legal system.

*\*name changed for anonymity*

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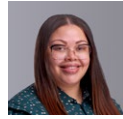
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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