

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: GQEBERHA]**

CASE NO. 1986/2021

In the matter between:

U[...] J[...]

1st Applicant

V[...] G[...]

2nd Applicant

and

MINISTER OF HOME AFFAIRS

1st Respondent

MS MBEBE NO

2nd Respondent

JUDGMENT

JOLWANA J:

Introduction.

[1] This matter concerns the amendment of an abridged birth certificate of a minor child (the child) to include the details of the child's biological father. Put differently, it is about the amendment of the birth registration records of the child at the Department of Home Affairs to reflect the second applicant as the father of the child. Both applicants are the biological parents of the child who, for all intents and purposes, live together basically as husband and wife even though they are not

married. The first applicant, the mother of the child is a South African citizen. The second applicant, the father of the child is a citizen of Bulgaria who came to South Africa on a VISA. However, that VISA expired and that made his presence in South Africa illegal. The first respondent is cited *nomino officio* as the Minister responsible for the Department of Home Affairs. The second respondent is also cited *nomino officio* as the head of the office of the local Department of Home Affairs in Gqeberha in which this matter was attended to by various officials. For convenience, at various times in this judgment reference to the respondents shall also mean the officials who attended to the applicants, depending on the context.

The facts.

[2] At some point after the birth of the child the applicants attempted to register the second applicant as the father of the child at the Department of Home Affairs. However, the respondents refused to make the necessary entries in the records of the Department of Home Affairs to reflect the fact that the second applicant is the biological father of the child and to issue to them an unabridged birth certificate of the child. The reason given for such refusal was that the second applicant was no longer legally in the country. Furthermore, as he was not a South African citizen, the results of a paternity test were required to prove that he is in fact the biological father of the minor child. The applicants further allege that they were told that a court order declaring the second applicant as the father of the child would be required in addition to the proof of paternity, which also made these proceedings necessary. Section 11 of the Births and Deaths Registration Act 51 of 1992 as amended (the Registration Act)¹ provides for the amendment of the birth registration details of a child in

¹ Section 11 reads:

“(1) Any parent of a child born out of wedlock whose parents married each other after the registration of his or her birth may, if such child is a minor, or such child himself or herself may, if he or she is of age, apply in the prescribed manner to the Director-General to amend the registration of his or her birth as if his or her

circumstances where a father wishes to acknowledge himself as the father of a child born out of wedlock subject to the submission of conclusive proof of paternity.

[3] The applicants launched these proceedings apparently following the guidance of the respondents. The respondents opposed the application on the basis of the second applicant's illegal presence in the country. However, at the eleventh hour, the respondents filed their main heads of argument and attached thereto a draft order containing some indication on the basis of which they wanted the matter settled. On the day of the hearing the respondents made a 180 degree turn conceding essentially all the relief sought by the applicants. This concession was made not even at the door step of the court but right inside the court during the hearing of the matter. Despite that full concession on the main relief, applicants' counsel persisted with a constitutional challenge on Regulation 12(2)(c) raised pertinently in the papers. I deal with the details of the constitutional challenge and its gravamen later in this judgment.

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- parents were married to each other at the time of his or her birth, and thereupon the Director-General shall, if satisfied that the applicant is competent to make the application, that the alleged parents of the child are in fact his or her parents and that they legally married each other, amend the registration of birth in the prescribed manner as if such child's parents were legally married to each other at the time of his or her birth.
- (2) If the parents of a child born out of wedlock marry each other before notice of his or her birth is given, notice of such bill shall be given and the birth registered as if the parents were married to each other at the time of his or her birth.
- (3) ...
- (4) A person who wishes to acknowledge himself to be the father of a child born out of wedlock, may, in the prescribed manner, with the consent of the mother of the child apply to the child, apply to the Director-General, who shall amend the registration of the birth of such child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child.
- (4A) An amendment of the particulars of a person who has acknowledged himself as a father of a child as contemplated in subsection (4) and section 10(1)(b) of the Act shall be supported by the prescribed conclusive proof of that person being the father of the child.
- (5) Where the mother of a child has not given her consent to the amendment of the registration of the birth of her child in terms of subsection (4) the father of such a child shall apply to the High Court of competent jurisdiction for a declaratory order which confirms his or her paternity of the child and dispenses with the requirement of consent of the mother contemplated in subsection (4).
- (6) When the court considers the application contemplated in subsection (5) the provisions of section 26 (b) of the Children's Act shall apply.

The issues.

[4] It was submitted on behalf of the applicants that even though the matter has largely been settled, albeit, belatedly, it was not just necessary for the constitutional issue pertinently raised by the applicants in the papers to be determined but also very important as it was a matter of some significant general public interest. I then directed that supplementary heads should be filed dealing specifically with the issues pertaining to the constitutional challenge. These are whether this Court should still pronounce on the constitutionality of Regulation 12(2)(c) of the Registration Act despite the respondents having conceded the main relief sought by the applicants. If the answer is in the affirmative, the merits of the constitutional challenge will have to be determined. If not, that will be the end of that issue. The second issue was whether the court should exercise its discretion and award costs against the respondents on a punitive scale.

The parties' contentions.

[5] The central theme of the respondents' argument is that their concession on the main relief brought to an end the legal basis for this Court to consider the papers and pronounce or even comment on the constitutionality of Regulation 12(2)(c). A pronouncement on the constitutionality of any legislation including regulations is a very serious matter. It may have serious implications for the separation of powers doctrine because of the implicated issues of ripeness and mootness. Therefore, once the jurisdictional factors for such a pronouncement are no longer in existence, with the matter having been fully disposed of in the sense that a full concession was made on the relief sought, so contended the respondents, it would offend the

doctrine of separation of powers for the court to make a pronouncement on the constitutional issue raised in the circumstances.

[6] There have indeed been a number of judicial pronouncements on the implicated principles all the way to the Constitutional Court over the course of time even though on varying factual circumstances. For example, in *Aurecon*² the court said:

“Given that this matter is disposed of on the basis that the City was out of time and failed to make out a proper case for condonation in terms of s 9 of PAJA, it is not necessary to venture into the arguable point of law raised, namely the prior involvement of a prospective tenderer. Although the applicant and CESA implored this court to pronounce on the proper meaning of ‘involved with’ as contained in 27(4) of the SCM Regulations and clause 95 of the SCMP, the general principle as set out by this court in *National Coalition* is that this court does not pronounce on issues which are moot (which essentially would equate to providing an advisory opinion).”

[7] In their supplementary heads of argument the respondents contend that the court should eschew making any determination on the constitutional challenge of the Regulation. The respondents made two submissions in the main. The first one is that of mootness and the second one is the issue of ripeness. The applicants have, in their heads of argument, dealt with these issues under the rubric of justiciability. Justiciability in this sense is, by and large, part of the court’s application and observance of the doctrine of separation of powers raised by the respondents.

[8] Not so long ago the Constitutional Court explained the approach to these interlocking principles and emphasized the courts’ obligation to exercise restraint where necessary without shirking their responsibility to intervene in deserving cases. In *Mwelase*³, in the words of Cameron J, in the context of a consideration of the need

² *City of Cape Town v Aurecon SA (PTY) Ltd* 2017 (4) SA 223 (CC) at 214 para 54.

³ *Mwelase and Others v Director-General: Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) at 622 para 48.

for the judicial arm of the state to provide an effective relief, the court expressed itself as follows:

“In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in *Black Sash 1*, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the inefficiency of governmental delivery.”

[9] The respondents’ contention on Regulation 12 (2) (c), as I understand it, is simply this. Because during the hearing of this application they conceded that the Regulation was inapplicable, the issue of the constitutional challenge was therefore not ripe for adjudication. The respondents do not explain and have not filed any affidavit to explain their earlier stance: before the application was launched; after the papers were filed and when they filed a rather comprehensive answering affidavit insisting that the Regulation made it impossible for them to enter the details of the father in the registration records of the child. They just, literally out of the blue, attached to their very late heads of argument, a draft order containing what appeared to be a half-hearted caving in, only to make a full concession on the main relief during the hearing. They had, throughout, been contending vociferously that this Regulation prevented them from registering the second applicant as the father of the minor child on the basis of his illegal status in the country.

[10] One would have thought that this sudden change of tack and their preparedness to now enter the child’s father’s details called for an explanation. This is especially the case because it goes against everything the respondents, under oath in their answering affidavit, said to this Court. With that explanation not having been given, it

is impossible to appreciate what informed this sudden change and it makes it even difficult to resist the temptation to conclude that the sudden change of mind was in bad faith, designed to cripple and disable the court from enquiring into the constitutionality of the Regulation. This, in circumstances in which as the applicants submitted, the insistence on compliance with the Regulation caused considerable distress to them and which, it was argued, continues to bedevil those children born in similar circumstances as the child in this matter.

[11] The respondents cannot plead ignorance about which Regulation or subregulation is applicable and in which circumstances. The Regulations are theirs and theirs alone and the first respondent's predecessor must be presumed to have known what he intended when he issued them and the first respondent, likewise when he enforces them. I find the sentiments expressed by Cameron J in *Kirkland*⁴ in the context of a PAJA review apposite. He expressed himself as follows:

“...PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to thread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty; to whom courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.”

[12] The constitutional rights of minor children are specifically provided for in the Children's Act 38 of 2005. Most relevant for the purposes of this discussion is section 6 (2) thereof which provides as follows:

⁴ MEC for Health, Province of the Eastern Cape NO and Another v Kirkland Investments (Pty) LTD 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) para 82

“(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 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 the ground of health status or disability of the child or a family member of the child.”

[13] Axiomatically, some of the rights enacted in some detail in the Children’s Act have been taken directly from the Constitution. The Legislature, in passing the Children’s Act with such a huge amount of detail and attention concerning the rights of minor children, sought to leave nothing to chance in ensuring that children’s rights are always respected, protected, promoted and fulfilled. This it did by passing a comprehensive piece of legislation dedicated to ensuring that the interests of a minor child will, without exception, be always considered as paramount in any situation where a child is affected or is concerned.

[14] To the extent that the respondents contend, as they do in their supplementary heads of argument, that they have agreed that the child concerned could have the details of his father entered into the records of the department – despite the fact that his father is illegally in the country, the issue of the constitutionality of the Regulation is not ripe for adjudication and is in fact moot, I disagree. I disagree for a number of reasons. First, the issue became ripe when the respondents joined issue contending very strongly that this child could not have the details of his father entered in his birth certificate only because his father was illegally in the country. And Regulation 12(2) (c) did not allow them to enter into the registration details of the child, his father’s

details. On these facts nothing has changed. The illegal status of the child's father has not changed, the very issue at the core of their refusal to amend the birth registration details of the child.

[15] Second, the respondents not only maintained this stance on numerous occasions that the applicants visited their offices but also filed a notice to oppose the application when the applicants instituted these proceedings. The respondents further filed a comprehensive answering affidavit contending that Regulation 12(2)(c) was applicable and prevented them from making the necessary amendments. Even in the main heads of argument the respondents never conceded that Regulation 12(2)(c) was in fact unconstitutional. They merely conceded that the applicable Regulation was Regulation 14 and not Regulation 12. It is not without significance that it is the respondents themselves that raised Regulation 12(2)(c) as the reason for their refusal to come to the assistance of the minor child, not the applicants. Therefore, the question of the constitutionality of Regulation 12 was not conceded and even in the supplementary heads of argument no such concession has been made. I therefore do not see how this Court entertaining the matter of the constitutionality of Regulation 12(2)(c) can be said to be not ripe or to be moot.

[16] The argument seems to be that because the respondents have changed their minds about the applicability of Regulation 12(2)(c) which, ironically, was raised by them, the issue is not ripe. Therefore, so goes the argument, as I understand it, as they have given the applicants the relief they sought all along, the matter should die a natural death and the court should not pronounce on the issue. That, in my view, cannot be so. It cannot be so amongst many other reasons also because as can be gleaned from the respondents' answering affidavit, every day in all the Department of Home Affairs offices throughout the country, those seeking the registration of their

details in the birth records of their children are turned away if they are fathers who happen to be illegal foreigners. The question that must follow logically is whether the respondents' contention on ripeness or mootness in this matter is sustainable. I fail to see how the constitutional challenge can be said to be moot or not ripe, absent a concession on the unconstitutionality of the Regulation and an intention by the respondents to immediately suspend the Regulation until it is otherwise amended. There is not even an explanation for their change of heart. Rights of citizens cannot, in my view, be subject to the whims or attitudes of the attending officials in government offices. It cannot be gainsaid that courts must act when rights of citizens, especially the rights of children are allegedly being undermined or somehow trampled upon.

[17] It is indeed so that the child concerned in these proceedings should, by now, have the details of his father entered into his birth records because of the respondents' concession and the court order that was consequently issued in that regard. That is, assuming that the respondents have timeously complied with the said court order. However, the court cannot ignore the fact that there may be literally thousands of other children who are treated no differently from this child at the respondents' offices country wide even as we speak. Should this Court in such circumstances not investigate and pronounce on the constitutionality of the Regulation which is at the core of how this child's rights to dignity were allegedly trampled upon? I do not think so. I am fortified in this approach by the sentiments expressed by Yacoob J in *Lawyers for Human Rights*⁵ in which, writing for the majority, he said:

⁵ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) at 136 para 18.

“The issue is always whether a person or organisation acts genuinely in the public interests. A distinction must, however, be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought. It is ordinarily not in the public interest for proceedings to be brought in the abstract. But this is not an invariable principle. There may be circumstances in which it will be in the public interest to bring proceedings even if there is no live case. The factors set out by O’Regan J do help to determine this question. The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the rights said to be infringed, as well as the consequence of the infringement of the rights are also important considerations in the analysis.”

[18] The respondents made a half-hearted concession at the time their main heads of argument were filed, which was very late and not in compliance with the rules. They even attached to their heads of argument a draft order in terms of which they wanted the matter disposed off on the basis that this Regulation was not applicable in this matter. However, the fact of the matter is that even before the proceedings were instituted, it was the position of the respondents that this Regulation was in fact applicable. Even after the application was launched, the respondents decided to oppose the application insisting that the Regulation was applicable and ought to be complied with. They went on to file a comprehensive answering affidavit in which they contended very strongly that it was applicable and must be complied with. Therefore, these proceedings became necessary also because of the respondents’ stance about which they were clearly prepared to file an answering affidavit explaining themselves. The application became fully opposed and was set down in the opposed motion court for no reason other than the respondents’ insistence that the applicants must comply with Regulation 12(2)(c) by submitting the documents provided for therein.

[19] I emphasize this issue also to make the point that the Department of Home Affairs must be assumed to have consistent rules and policies throughout the country and deal with people in similar circumstances as the applicants consistent with this stance nationwide. That said, it must be therefore that the enquiry into the constitutionality of this Regulation is a matter of public importance and affects not just the applicants and their child. Therefore, the issue of mootness raised by the respondents is difficult to understand. This is especially so in this matter in which the issue has been comprehensively canvassed in the papers and the heads of argument. After all, the first respondent is the National Minister of the Department of Home Affairs and his vacillation on such an important issue affecting the rights of minor children is a huge cause for concern. Besides the issue of the rights of the affected minor children, even the parents of the children must be attended to both professionally and competently by government officials and mixed signals are totally unhelpful and utterly confusing. Their own rights to dignity and to an efficient public service are implicated and are not without significance.

[20] When courts do become aware of possible unconstitutional conduct that undermines constitutional rights, it must follow that they are required to act and deal with any unconstitutionality decisively where the issues have been fully canvassed in the papers. This is more so in a country like ours in which the majority of the people are both poor and uneducated which indeed is a double whammy for such people, so to speak. If courts do not act on allegations of unconstitutional conduct that is properly brought to their attention, they risk being spectators even in cases of wanton abuse and negation of constitutional rights. In doing so they would be shirking their constitutional obligations on the basis of some ill-conceived and lofty technical argument on mootness or ripeness, a luxury that courts cannot afford. The

consequences of this may very well be that the Constitution itself and indeed the rights contained therein could become illusory and meaningless for those entitled to constitutional protection. I am of the firm view that for the courts to look away when they become aware of constitutional violations, taking comfort in some vague technical argument on mootness is not in keeping with the courts' duty as the ultimate arbiters on constitutional rights. After all, courts are the last bastion of protection for ordinary people when their rights are being rendered nugatory, even if unwittingly by government officials.

[21] I do not understand our law to be that even when a matter may truly be said to be moot, that is always a bar to judicial scrutiny and indeed pronouncement. In *Mukhandiva*⁶, writing a unanimous judgment of the Constitutional Court, Moseneke DCJ aptly expressed some of the considerations applicable to the issues of mootness in the following terms:

“The fact that a matter may be moot in relation to the parties before the court is not an absolute bar to the court considering it. The court retains discretion, and in exercising that discretion it must act according to what is required by the interests of justice. And what is required for the exercise of this discretion is that any order made by the court has practical effect either on the parties or others. Other relevant factors that could be considered include: the nature and extent of the practical effect the order may have; the importance of the issue; and the fullness of the argument advanced. Another compelling factor could be the public importance of an otherwise moot issue.”

[22] It is indeed so that this case was brought to protect the interests of the child concerned. However, its determination would have a wider effect and will affect many other children in his or similar circumstances. It will also bring clarity and certainty to the respondents themselves on how they should deal with children born of fathers who may be illegal foreigners. Anecdotal evidence suggests that there

⁶ Director-General: Department of Home Affairs and Another v Mukhandiva 2014 (3) BCLR 306 (CC) para 40.

may be millions of illegal foreigners in this country. Surely once they are in the country and intermingle as they surely do with local citizens, naturally millions of children are possibly born yearly around the country. The rights concerned are those of the minor children. Neither the Constitution nor the Children's Act distinguish between children on the basis of citizenship of their parents as far as I am aware when they provide for the protection of the rights of children. I, therefore, am of the view that this matter is justiciable, it being neither moot nor not ripe in these circumstances. Its determination will not offend any of the principles of the separation of powers and judicial restraint as adequately explained in numerous cases by the Constitutional Court.

Is Regulation 12(2)(c) constitutional?

[23] The above conclusion brings me to the actual determination of the constitutionality of Regulation 12(2)(c). Regulation 12(2)(c) has been a major bone of contention in this matter from the onset and the parties remain poles apart on its constitutionality. It reads thus:

“12 (1) A notice of a 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 applicable⁷.

(2) The person who acknowledges that he is the father of the child born out of wedlock must:

(a) enter his particulars and sign on Part D of Form DHA-24 illustrated in Annexure 1A or on Part D of Form DHA-24/LRB illustrated in Annexure 1B, as the case may be, at the offices of the Department and in the presence of an official of the Department as contemplated in section 10 (1) (b) of the Act,⁸

⁷ Regulation 12(1) was declared unconstitutional in *Naki v Director-General of Home Affairs and Another* [2018] 3 All SA 802 (ECG). It is reflected herein for completeness and ease of reading.

⁸ Section 10 has since been declared unconstitutional by the Constitutional Court in *Centre for Child Law v Director-General: Department of Home Affairs and Others* 2022 (2) SA 131 (CC).

(b) submit an affidavit on Form DHA-288/C illustrated in Annexure 2D in which he:

(i) states his relationship to the mother; and

(ii) acknowledges paternity of the child; and

(c) have his fingerprints verified online against the national population register: Provided that in the event of the father being a non-South African citizen, he must submit a certified copy of his valid passport and visa or permit, permanent resident's, identity document or refugee identity document."

[24] The applicants contend that the effect of Regulation 12(2)(c) is that a father who is a foreigner may not be identified as the father of the child born outside of the bonds of marriage on the child's birth certificate, unless that father is legally in South Africa. In this case the child concerned is a South African citizen. The applicants' contention is that the child is being discriminated against and deserves protection from this Court which is the upper guardian of all minor children. There is a wide range of such children who may be in difficult circumstances, not of their own making. The applicants' heads of argument mention as examples, children whose fathers may not be in South Africa at the time of their birth or may not be willing to home to this country, fathers who may be illegal foreigners as well as those who may be undocumented foreign nationals. At the centre of the discrimination is in the first place, the fact that the child is born of unmarried parents and the obvious difficulties associated with that and secondly the father being a foreigner or worse an illegal foreigner. For these reasons the child is prejudiced and discriminated against, irrationally on the basis of Regulation 12(2)(c) because of the circumstances of her or his birth.

[25] There cannot be any cogent justification for such discrimination and none was advanced. This is hardly surprising. If there was a proper basis for the discrimination on the basis of the illegality of this child's father's presence in this

country, it escapes me why the respondents have agreed to the amendment of the child's registration records. After all, the father is still illegally in the country. It baffles me how the respondents, especially the Minister, can consent to this child's father's details being entered into the birth registration records of this child and still argue that Regulation 12(2)(c) is valid and should remain extant. This would have the inevitable consequence of its continued enforcement by hapless officials of the Department, a situation of total chaos, confusion and inconsistent application of the Regulation. This surely should not be countenanced.

[26] This Regulation indeed is clearly unconstitutional and irrational in my view. For instance, the second applicant got into this country on a valid VISA which later expired. On the respondents' submissions, the event of the expiry of a VISA must determine if the child who is born should be allowed to have a birth certificate with full details of his or her father. This defies all sense of logic. In this case the father was not able to renew his VISA for reasons that obviously had nothing to do with the child. As a result, his continued stay in this country became illegal. None of that has anything to do with the child and his right to have the identity of his father officially recognised, not for the father but most importantly, for the child. The identity of his father is intertwined with his own identity both of which are interlinked with his cultural identity. Therefore, the rights of the child to dignity was imperilled by the Regulation and its resolute enforcement by the respondents.

[27] Some of the more tangible effects of the respondents' refusal to amend the birth certificate in respect of this particular child, it was submitted, include the following: The father of the child is a Bulgarian citizen and therefore according to Bulgarian law, the child is entitled to Bulgarian citizenship. However, the Bulgarian Embassy will not process the registration of the child as a Bulgarian citizen without a full birth

certificate reflecting his father's names in it. Bulgarian citizenship would entitle the child to VISA free travel to European Union member states. That would open other opportunities to the child which all citizens of the European Union member states enjoy including educational opportunities, and financial assistance to which being a citizen of a European Union member state would entitle him. No argument was advanced to gainsay these submissions save for the dismissive submission that they are irrelevant. These are in addition to all the other rights that are enshrined in our Constitution which find expression in quite some detail in the Children's Act.

[28] The irrationality of this Regulation becomes more pronounced if regard is had to the fact that recognising, protecting, respecting and fulfilling the rights of the affected children does not in any way curtail the respondents' ability to deal with the fact of the illegality of the presence of their fathers in this country. For instance the respondents are entitled to deport the second applicant in the normal course or deal with him in any way they decide within the framework of the law as they should with any other illegal foreigner. Therefore, the entry of his details in the child's birth certificate does not limit any of that. In fact, it only prejudices the child and does so unjustifiably and irrationally, without serving any useful purpose.

[29] In circumstances such as these, the courts' intervention is required and not intervening, not only for this child but also for the many others who may be in the same or similar circumstances would amount to the betrayal of the children's rights which are constitutionally guaranteed. This Court must do what it is enjoined to do to prevent the derogation of the affected children's rights and in doing so, it must ensure that children's rights are always protected and treated as paramount. In *De*

*Lille*⁹ the court expressed the following apt sentiments when it comes to the courts' constitutional obligation to intervene where rights of people are adversely affected:

“This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme-not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.”

Some of the international instruments on children's rights.

[30] I also find it strange that it was the first respondent, the Minister who decided to pass a far reaching Regulation such as this. A Regulation that unlawfully interferes with the constitutional rights of the children without any parliamentary consideration and the parliamentary debate as well as the public participation processes applicable to the consideration of parliamentary legislation. One would have expected it to be Parliament that deals with the issue of children born in these circumstances. There are some international instruments dealing with the rights of children which cannot be ignored by our country in any domestic instruments that are passed. These include Article 3 (1) of the United Nations Convention on the Rights of the Child. It reads:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

⁹ Speaker of the National Assembly v De Lille [1999] All SA 241 (A) at para 14.

[31] The United Nations Committee on the Rights of the Child issued General Comment no 14 of 2013 in which it defined the content of the rights contained in the Article 3 (1) as follows:

“The rights of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general.”

[32] Even coming closer to home, I find it telling that section 11 of the Registration Act does not discriminate between children born of parents who are foreigners some of whom may be illegal foreigners where such parents are not married. In the Registration Act all children born of unmarried parents are treated similarly with no provision dedicated to children who may be born of illegal foreigners. Section 11(4) is very clear and is worth repeating. It reads:

“(4) a person who wishes to acknowledge himself to be the father of a child born out of wedlock may, in the prescribed manner, with the consent of the mother of the child, apply to the Director-General, who shall amend the registration of the birth of such a child by recording such acknowledgement and by entering the prescribed particulars of such person in the registration of the birth of such child.”

[33] This provision makes no distinction between local and foreign fathers or those that are legally in the country and those that are not. The legislature, in its wisdom, uses the words “any person”. This must be because the focus is more on the interests of the children and less about who the father is or what his circumstances are. It merely provides similarly for all children born of unmarried parents. It surely cannot be that a discriminatory provision can lawfully be made in a Regulation in circumstances where the Legislature elected not to discriminate between children and elected to treat them the same as children.

Conclusion.

[34] I have therefore come to the ineluctable conclusion that the applicants must succeed in their application on the constitutional challenge of Regulation 12(2)(c). It follows that Regulation 12(2)(c) must be declared unconstitutional to the extent that it imposes discriminatory conditions in the recordal of fathers who are unmarried and who may be illegal foreigners in the children's registration of births or who may not be present in this country or even be willing to come to this country.

The issue of costs.

[35] The last issue that I must deal with is the issue of the scale of costs that must be awarded to the applicants with the respondents having conceded costs on a party and party scale. This is where some of the history of this matter becomes even more relevant and at the risk of being repetitious, it is worth re-encapsulating. As pointed out earlier the respondents started by delaying in filing a simple notice to oppose. They only did so once the matter was enrolled in the unopposed motion court roll more than a month later thus necessitating the matter being removed from the roll. It has not been explained in the answering affidavit why the respondents delayed in filing their notice to oppose within the time frames provided for in the rules. The answering affidavit itself was filed more than two months after the issuing and service of the papers. This was also more than a month after the filing of the notice to oppose the application. None of this is explained in the answering. One would have thought that non-compliance with the rules called for an explanation and a condonation application, that being a trite rule of practice.

[36] The filing of the answering affidavit happened long after the respondents had already been furnished with the proof of paternity of the child with the respondents

still steadfastly refusing to register the details of the second applicant as the father of the child in their official records. This, despite the paternity of the child being no longer in issue or uncertain. There were several visits in August 2021 by the applicants to the Department of Home Affairs in all of which they were turned away unassisted. It would appear that behind the respondents' refusal was their determination to insist on a court order whose obtaining in this application they eventually opposed. It is not clear why there was even this misguided insistence on a court order in circumstances in which the respondents knew that they were against it being obtained. This was clearly a misapplication of section 11(5) which makes reference to a court order. This, however, is only in circumstances where the mother of the child did not consent to the details of the father being entered. In this case the insistence on a court order being required is confusing, after proof of paternity having been furnished to them and the mother consenting, they had no other reason for their refusal to make the entries. If they did have a legally justifiable reason for the refusal, they would not have conceded to the granting of the relief as they did on the eleventh hour. This is especially so if they believed that the illegal presence of the second applicant in the country constituted a bar to the entering of the details of the second applicant as the father of the minor child being made in their records.

[37] It must be emphasized that the first respondent is responsible for the Births and Deaths Registration Act and the Regulations. The respondents should, therefore, know what they themselves require and should be able to give proper guidance to the people that need it for a seamless issuing of documents in deserving cases. This would alleviate to some extent, the notoriously long queues that the Department of Home Affairs is known for. For them to force people such as the applicants to approach court only to then admit that they were wrong from the onset in refusing to

enter the second applicant as the child's father is troubling. The concession made in court during the hearing on what they should have always known all along is also something that deserves an appropriate opprobrium from this Court by way of an appropriate costs order.

The results.

[38] In the result the following order shall issue:

1. It is declared that Regulation 12(2)(c) of the Births and Deaths Registrations Act, 2014 is unconstitutional and therefore invalid in so far as the child's unmarried father may not be in South Africa or may not be in South Africa legally.
2. The respondents are ordered to pay costs of this application on a scale as between attorney and client including the costs occasioned by the employment of two counsel.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

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Instructed by : ANNALI ERASMUS INC.

GQEBERHA

Counsel for the Respondent: S. J. CUBUNGU

Instructed by : STATE ATTORNEY

GQEBERHA

Date heard : 20 October 2022

Delivered on : 10 January 2023