REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO. 38 OF 2010/11

"Right to nationality denied"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE TO REGISTER THE BIRTH OF A CHILD AND THE NATURALISATION OF THE MOTHER BY THE NORTHERN CAPE DEPARTMENT OF HOME AFFAIRS

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Executive Summary

(i) The Public Protector conducted an investigation into the alleged failure by the Department of Home Affairs in the Northern Cape (the Department) to register the birth of a child and to naturalise its mother, Ms Mpho S Mahanetsa, (the Complainant) a 21 year old from Lesotho who had allegedly been in the Republic of South Africa (RSA) since 1998.

(a) It was reported that the Complainant does not know the whereabouts of her mother, nor any other relatives since she was abandoned in RSA by her uncle.

(b) It was also reported that the Complainant had given birth to a girl child in October 2008. It was further reported that both the Complainant and her child are ill and did not have access to any government services due to the fact that they did not have any form of identity documentation.

(c) It was alleged that in 2008 the Complainant approached the Department's mobile clinic in an attempt to have the birth of her child registered but the Department failed to assist her to date of reporting the matter to the Public Protector.

(d) The Complainant and her child were unable to obtain access to sufficient medical care, as well as social assistance in the form of a child support grant because neither she, nor the child had any form of identification

(ii) The Public Protector found that:

(a) The decision by the Department of Home Affairs to refuse the registration of the birth of the Complainant's child in terms of the Births and Deaths Registration Act, 1992 (Births Act) is in violation of section 28 of the Constitution and accordingly constitutes maladministration as a result of the fact that-

(aa) No action was taken to investigate and verify the status and citizenship of the child in terms of regulation 6 of the Regulations issued in terms of

the Births and Deaths Registration Act, 1992: Registration of Births (the Regulations); and

(bb) It was not taken into account that the person who acknowledged himself to be the father of the child was a South African citizen, or that the child did not have citizenship or nationality of any other country, or had no right to such citizenship or nationality in terms of the South African Citizenship Act, 1995 (Citizenship Act).

(cc) It violates section 28(1) of the Constitution and accordingly, constitutes maladministration.

(b) The view by the Department of Home Affairs that the Complainant should be deported to Lesotho, will have the effect that the minor child, who apparently qualifies for South African citizenship, would also have to be deported to a country where she has no right or nationality.

(c) Any decision to deport the Complainant to Lesotho would adversely affect the child's right to a name and nationality from birth and to family care or parental care as provided by section 28(c) of the Constitution as well as the international standards for the protection and promotion of the rights of children, and would therefore be unfair and unreasonable.

(d) The protection of the constitutional rights of the Complainant's child must serve as grounds for the consideration of a certificate of naturalisation to the Complainant in terms of section 5 of the Citizenship Act.

(e) The Complainant and her child were severely prejudiced as they could not have access to medical care as well as social assistance in the form of a child support grant because neither she, nor the child had any form of identification.

(iii) The remedial action to be taken by the Department in terms of section 182(1)(c) of the Constitution is as follows:

(a) The Department must issue an apology to the Complainant;

(b) The Department must take the necessary steps to assist the Complainant in making an application for a late registration of birth of her child within 30 days from the date of this report;

(c) The Immigration Unit must assist the Complainant in making an application for the Certificate of Naturalisation within 30 days from the date of this report;

(d) The Director General of the Department of Home Affairs must consider both applications as soon as the applications are received and issue the necessary certificates or submit the matters to the Minister of Home Affairs for consideration where required; and

(e) The Director General of the Department of Home Affairs must report to the Public Protector on the action taken with regard to the implementation of this report within 60 days from date of the report.

(iv) In addition:

(a) The Department must, in consultation with the Department of Health and other stakeholders and in view of the impact of the *Prevention and Combating of Trafficking in Persons Bill* and *the South Africa Citizenship Amendment Bill* formulate a policy and a Service Level Agreement that would assist in the early identification of similar matters.

(b) The Policy and the Service Level Agreement once adopted must be communicated to all relevant units responsible for deliveries of births and those dealing with registration of births, as well as hospitals, including the level 1 Hospitals in the Northern Cape, and particularly those in rural areas where the Department does not have fully functional offices.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF FAILURE TO REGISTER THE BIRTH OF A CHILD AND THE NATURALISATION OF THE MOTHER BY THE NORTHERN CAPE DEPARTMENT OF HOME AFFAIRS

1. INTRODUCTION

1.1 The report is submitted to the Minister of Home Affairs, the Member of the Executive Council responsible for Health in the Northern Cape Province, and the Director General of the Department of Home Affairs, in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

1.2 A copy is provided to Ms M S Mahanetsa (the Complainant) in terms of section 8(3) of the Public Protector Act.

1.3 The report relates to an investigation by the Public Protector into the alleged failure by the Provincial Offices of the Department of Home Affairs in the Northern Cape (the Department) to register the birth of a child and her alleged inability to have access to basic government services.

2. THE COMPLAINT

2.1 On 15 December 2009 during an outreach initiative by the Public Protector in Windsorton which is a rural area situated about 60km North of Kimberley, the Complainant approached the Public Protector for assistance regarding the problems she had been encountering in trying to obtain assistance from various government departments for her ailing child.

2.2 The Complainant was born in Lesotho and was brought to the Republic of South Africa by a relative in 1998, who thereafter abandoned her. She was then raised by an old lady that she was not related to.

2.3 She advised that in October 2008, she gave birth to a baby girl whose father is a South African citizen.

2.4 It was also reported that both the Complainant and her child were ill and that her child was in need of medical assistance at the time.

2.5 She furthermore informed that she does not have an identity document, and that her child does not have a birth certificate.

2.6 The Complainant alleged that in 2008 she approached the Department's Civic Services' mobile clinic for the registration of her child's birth, but without success. She also informed that she had been to the Department of Social Services for assistance with social grants and also had been to the Department of Health but could not get any proper assistance from the Departments of Home Affairs and Social Services. Only the Department of Health (clinic) assisted from time to time by providing some treatment and milk for the child.

2.7 Due to the alleged prejudice suffered by the Complainant and her child, a complaint was lodged with the Public Protector.

3. JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution and its additional operational requirements are governed by the Public Protector Act. It was established to strengthen constitutional democracy.

3.2 In terms of section 182(1) of the Constitution the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. Following an investigation, the Public Protector can report on that conduct and take appropriate remedial action.

3.3 The complaint accordingly falls within the jurisdiction of the Public Protector.

4. THE INVESTIGATION

The investigation was conducted in terms of section 6 and 7 of the Public Protector Act and comprised the following:

4.1 Key sources of information

4.1.1 Letter of Complaint

4.1.1.1 The Complainant approached the Public Protector during the Public Protector's visit to Windsorton and advised that she had been trying to get medical assistance for her child. She reported to the Public Protector that she and her child had no form of identification and as such could not have access to government services. She is originally from Lesotho but that had stayed in the Republic of South Africa (RSA) for most of her life.

4.1.1.2 She further reported that she was in dire need of assistance for her child as she was struggling to get proper medication for her child. She alleged that she had approached the local clinic but was not assisted.

4.1.1.3 The Complainant is said to have approached the Department's mobile clinic when they visited her area, in an attempt to have the birth of her child registered but the Department failed to assist her to date of reporting the matter to the Public Protector.

4.1.2 Written Correspondence

Written correspondence was exchanged between the Public Protector and the Department, as a result of which, the said Department was requested to conduct an internal investigation, including interviewing the Complainant on the matter in order to give the Public Protector accurate feedback.

4.1.3 Consultative Meetings

4.1.3.1 On 15 December 2009 a consultative meeting was held with the Complainant and the nursing sister in charge of the local clinic in Windsorton and it was discovered that the clinic had done all it could to assist the Complainant. This included referring the child to Barkly West Hospital.

4.1.3.2 Subsequently a first consultative meeting was held on 6 January 2010 with the Department's Immigration Unit (Kimberley) which revealed the following:

(a) The Complainant had entered the RSA illegally and initially thought that, though her child was born in the RSA, she could not acquire South African citizenship because her mother had not entered the country legally; and

(b) That the Complainant could not acquire South African citizenship in any way and would have to be deported to her country of origin.

4.1.3.3 On 18 January 2011 a second consultative meeting was held with, the Civic Services and the Immigration Units of the Department. The purpose of the meeting was to discuss the Public Protector's understanding of the legal position which, according to research done, reflected that the Complainant's child qualified for South African citizenship as a result of the nationality of the farther or the fact that the child would otherwise be "stateless".

4.1.3.4 Following the discussions on the matter, the Civic Services Unit indicated that the birth of the said child could be registered either after acceptance of paternity in writing by the father of the child, or her birth could be registered as a foreign birth.

4.1.3.5 The Immigration Unit indicated that the issue regarding the naturalisation of the mother of the child i.e. the Complainant, should be elevated to the

National office of the Department as the local unit could not pronounce on the issue, as the authority to deal with such matters lies with the National office.

4.1.3.6 It was concluded that the Complainant should be located and that the Civic Services Unit should obtain acceptance of paternity from the child's father and thereafter complete an application for the late registration of birth.

4.1.3.7 A visit was conducted by the official from the Public Protector's office but the Complainant was not available at her known place of residence, however the father of the child concerned was available and he accepted paternity of the child.

4.2 Summary of the investigation process and evidence

4.2.1 During the investigation the following allegations by the Complainant were interrogated:

4.2.1.1 That she and her child were not South African citizens as she came to the RSA at a very tender age and was abandoned by her relative and that she had no relative(s) in the country and was raised by another lady.

4.2.1.2 That she gave birth to a girl child in 2008 from a South African male citizen with whom she is still living at his mother's place of residence.

4.2.1.3 That she and her child were both in need of medical treatment and that her child in particular was not receiving adequate medical attention from the local clinic.

4.2.1.4 That they both had no form of identification whatsoever.

4.2.1.5 That she had approached the Department to have her child's birth registered but was not assisted.

4.2.1.6 That she is not receiving any social grant for her ill child, or for herself.

4.2.2 Information gathered during a consultative meeting with officials from the Department was considered and it appeared that the Complainant had indeed entered the RSA illegally and that her child's birth was not registered.

4.2.3 The information obtained during the investigation revealed that the Complainant and her child were in need of medical attention and further that they had no form of identification and as such they could not access any government services, though the local clinic was providing basic medical care to the child, i.e. the child was referred for regular tests for Tuberculosis and also provided with formula milk on a regular basis.

4.3 Evaluation of the evidence

4.3.1 In view of the evidence gathered it is clear that the Complainant and her child had suffered prejudice and further that there are legislative provisions that brings relief to the Complainant and her child but that it were not invoked.

4.3.2 On the strength of the relevant legislative provisions, the Public Protector is of a considered opinion that the registration of the birth of the child in question could be carried out in terms of section 10 of the Births and Deaths Registration Act, 1992 (the Births Act). The Public Protector views this as possible in that the father of the child has in principle accepted paternity and has also provided officials from the Department with the required written confirmation thereof.

4.3.3 It is further noted that the provisions of section 3(b)(i) of the South African Citizenship Act, 1995 (Citizenship Act) apply to the matter in question because the child concerned does not have a right to Lesotho citizenship because Lesotho law dictates citizenship through the location of one's birth -*jus soli*- and not through the citizenship of one's parents -*jus sanguinis*- as is the case in South African law. In terms of the law, a child born in South Africa,

who does not have a right to nationality of another country, qualifies for South African citizenship. In terms of the SA Citizenship Act, a child born in South Africa and of which one of the parents was a South African citizen or South African Permanent Residence holder at the time of the child's birth shall be a South African citizen by birth in the case of births from 06 October 1995 when the Act came into operation

5. REGULATORY FRAMEWORK

5.1 The Constitution, 1996

5.1.1 Chapter 1 of the Constitution provides in section 3(2)(1)(a) that:

"3(2) All citizens are-

(a) equally entitled to the rights, privileges and benefits of citizenship;..."

5.1.2 Section 28(1)(a) of Act 108 of 1996 provides that:

" 28(1) Every child has the right –

(a) to a name and a nationality from birth;..."

5.2 Births and Deaths Registration Act, 1992

5.2.1 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.

5.2.2 Section 9 Notice of Birth states that:

" 9 Notice of birth

"9(1) In the case of any child born alive, any one of his or her parents..., shall within 30 days after the birth give notice thereof in the prescribed

manner to any person contemplated in section 4..."

" 9(5) The person to whom notice of birth was given in terms of subsection (1) shall furnish the person who gave that notice a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine."

5.2.3 Section 10 states as follows:

" 10 Notice of birth of a child born out of wedlock

(1) Notice of birth of child born out of wedlock shall be given-
(a) under the surname of the mother; or
(b) 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 himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself upon the notice of birth."

5.3 Regulation 6 of the Regulations issued in terms of the Births and Deaths Registration Act, 1992: Registration of Births.

5.3.1 Where notice of birth is given to a regional representative or a district representative, the birth shall be registered in terms of section 5 (2) if the information of the parents in the notice corresponds with that of the parents in the population register. (Regulation 6(1))

5.3.2 Where notice of birth is given to a regional representative or a district representative, and **the information of the parents is not included in the population register,** the birth shall be registered in terms of section 5(3) and a handwritten birth certificate may be issued to the informant in the place of a written acknowledgement of receipt referred to in regulation 5(4) .(Regulation 6(2)

5.3.3 The Director General shall, on receipt of a notice of birth referred to in regulation 5(6)(b), determine the citizen of the person in accordance with the provisions of the South African Citizenship Act, 1995 (the Citizenship Act), and if the person is a South African citizen, register the birth in terms of section 5(2) and issue a birth certificate to the informant. (Regulation 6(4))

5.3.4 A notice of birth of a person of **one year and older** shall be accompanied by all available documentary proof of his or her identity and status and if possible, an affidavit by an adult family member at least 10 years older than the person concerned confirming his or her identity and status, as well as the reasons for the late notice in writing: provided that in the absence of conclusive documentary proof, the Director General shall, subject to the provisions of section 7, verify the information by careful questioning of the deponent of the affidavit and also the person whose birth is being given notice of, if the latter is 14 years or older.(Regulation 6(7))

5.3.5 The Director General may register such birth if satisfied that the person referred to in sub-regulation (7) is a South African citizen, a South African permanent residence holder, or non- South African referred to in section 5(3) of the Act, as the case may be: provided that if he or she is in doubt- about the status of the person concerned or convinced that the person is not a person referred to above, he or she shall refer the matter to an immigration officer to investigate and deal with in terms of the provisions of the Aliens Control Act, 1991.(Regulation 6(8))

5.4 South African Citizenship Act, 1995

5.4.1 Section 2 Citizenship by birth

"2. (1) Any person-

(a) who immediately prior to the date of commencement of this Act, was a South African citizen by birth; or

(b) who is born in the Republic on or after the date of commencement of this Act; or

(c) who is by virtue of section 3(1)(b) a South African citizen, and one of his or her parents or his or her mother if he or she was born out of wedlock, was at the time of such person's birth-

(i) in the service of the Government of the Republic ; or

(ii) the representative or the employee or an association of persons resident or established in the republic; or

(iii) In the service of an international organisation of which the government of the Republic was the member,

shall, subject to the provisions of subsections (2) and (3), be a South African citizen by birth.

(2) No person shall be a South African citizen by virtue of subsection (1) (b) if, at the time of his or her birth, one of his or her parents was not a South African citizen.

(3) virtue of provisions of subsection (2) shall be a South African citizen by birth, if-

(a) He or she is adopted by a South African citizen; or

(b) (i) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality;..."

6. CONCLUSION

6.1 The South African law dictates citizenship exclusively through the citizenship of one's parents (known as *jus sanguinis)* and not by the location of one's birth (*jus*

soli) when determining the nationality of someone born inside of the RSA. In terms of the Citizenship Act, a child born in South Africa and of which one of the parents was a South African citizen or South African Permanent Residence holder at the time of the child's birth shall be a South African citizen by birth in the case of births from 6 October 1995 when the Act came into operation.

6.2 Regardless of the citizenship of either or both of his or her parents, a child born in South Africa and who has no claim to another citizenship (stateless) may also acquire South African citizenship by birth. This can happen because different countries have different citizenship laws and a child may be born in a country that follows *jus sanguinis* and whose parents are citizens from of a country that follows *jus soli.*[1]

6.3 Those countries whose citizenship laws are based on *jus soli* (with an exception for the children of diplomats or other representatives of foreign states) include Chad, Lesotho, and Tanzania. In these countries the principle applies that a person's nationality at birth is determined by the place of birth.[2] In the matter at hand the Complainant's child will not be regarded as a Lesotho citizen because Lesotho citizenship was not passed through the mother.

6.4 It follows that the Complainant's child might in terms of section 2 of the Citizenship Act qualify for South African citizenship based on either the nationality of her father, or because the child is not entitled to citizenship of any other country.

6.5 If it is established that the Complainant's child would qualify for South African citizenship, her status would undoubtedly have an influence on the Complainant's position, being the parent. The protection of the rights of children in South African law are enshrined in legislation, as well as confirmed in case law. The Constitution guarantees fundamental rights to all individuals in the Bill of Rights. Section 28(1)(c) of the Constitution deals specifically with the rights of

1 PASSOP Policy Paper Submission on South African Citizenship Amendment Bill. Also acknowledging the contribution of Ms Carina du Ttoit of the Child law Centre of UP and their willingness to consider assistance to the PP and or the Complainant.

2 The Citizenship Order, 1970 and The Constitution of Lesotho, chap. IV, sec. 38

children, and provides that ***"Every child has the right –to a name and nationality from birth; to family care or parental care, ... to basic nutrition, shelter, basic healthcare services and social services"***. South Africa is under a constitutional duty to respect, promote, protect and fulfil the rights contained in this Bill of Rights.

6.6 Human rights belong to all human beings, regardless of citizenship. Non-citizens in countries are therefore equally entitled, without being unfairly discriminated against, to the rights outlined in the Universal Declaration of Human Rights and other agreements that have been signed and ratified by South Africa.[3] International instruments such as the ***Convention on the Rights of a Child*** (CRC) and the ***African Charter on the Rights and Welfare of the Child*** **(ACRWC)** set most crucial international standards concerning children. This includes the principle that the best interests of the child are to be the primary consideration in all actions concerning children and that state parties must provide to the maximum extent possible for the survival, protection and development of the child.

6.7 Regulation 6 of the Regulations requires the Director General of the Department to take action where a notice of birth is filed in circumstances where he/ she has doubt about the status and citizenship of the child, to verify such status and citizenship.

7. FINDINGS

7.1 The decision by the Department of Home Affairs to refuse the registration of the birth of the complainant's child in terms of the Births and Deaths Registration Act, 1992 is procedurally and substantively flawed as-

3 'Unaccompanied Minor Refugees And The Protection Of Their Socio-Economic Rights Under Human Rights Law' By Sarah Jean Swart Prepared under the supervision of Mr EY Benneh at the Faculty of Law, University of Ghana, Legon, 3 November 2008

7.1.1 No action was taken to investigate and verify the status and citizenship of the child in terms of Regulation 6 of the Regulations issued in terms of the Births and Deaths Registration Act, 1992: Registration of Births;

7.1.2 It was not taken into account that the person who acknowledged himself to be the father of the child was a South African citizen, or that the child did not have citizenship or nationality of any other country, or had no right to such citizenship or nationality in terms of the Citizenship Act; and

7.1.3 It violates section 28 (1) of the Constitution and accordingly, constitutes maladministration.

7.2 The view by the Department that the Complainant should be deported to Lesotho, will have the effect that the minor child, who apparently qualifies for South African citizenship, would also have to be deported to a country where she has no right or nationality.

7.2.1 Any decision to deport the Complainant to Lesotho would therefore adversely affect the child's right to a name and nationality from birth and to family care or parental care as provided by section 28(1)(c) of the Constitution, as well as the international standards for the protection and promotion of the rights of children. Such action would be in violation of these rights and standards and would therefore be unfair and unreasonable.

7.3 The protection of the constitutional rights of the Complainant's child must serve as grounds for the consideration of a certificate of naturalisation to the Complainant in terms of section 5 of the Citizenship Act.

7.4 The Complainant and her child were severely prejudiced by the Department's disregard for the rights of the child, as they could not have access to medical care as well as social assistance in the form of a child support grant because neither she, nor the child had any form of identification.

8. REMEDIAL ACTION

8.1 Remedial Action

In terms of the provisions of section 182(1)(c) of the Constitution and section 6(4)(c)(ii) of the Public Protector Act, the remedial action to be taken by the Department is as follows:

8.1.1 The Department must offer an apology to the Complainant;

8.1.2 The Department must take the necessary steps to assist the Complainant in making an application for a late registration of birth of her child;

8.1.3 The Department must take the necessary steps to assist the Complainant in making an application for the Certificate of Naturalisation as referred to in section 5 of the Citizenship Act.

8.1.4 The Director General of the Department must deal with these applications as matters of priority and in accordance with the procedures, rights, principles and standards as required by law and emphasised in this report.

8.2 In addition-

8.2.1 The Department must, in consultation with the Department of Health and other stakeholders and in view of the impact of the *Prevention and Combating of Trafficking in Persons Bill* and the *South Africa Citizenship Amendment Bill* formulate a policy and a Service Level Agreement that would assist in the early identification of similar matters.

8.2.2 The Policy and the Service Level Agreement once adopted must be communicated to all relevant units responsible for deliveries of births and those dealing with registration of births, as well as hospitals, including the level 1

Hospitals in the Northern Cape, and particularly those in rural areas where the Department does not have fully functional offices.

9. MONITORING

9.1 The Director General of the Department has been briefed on the report and has requested the necessary documentation to assist the Complainant and the minor child, which are annexed to this report.

9.2 The Director General must acknowledge receipt and confirm the intended action in compliance with the report within 10 days of the receipt thereof.

9.3 The Director General must take action in response to the report within 30 days of the date of the report.

9.4 The Director General of the Department must submit a report indicating action taken with regard to implementation of this report within 60 days of the date of the report.

9.5 The Public Protector will monitor the implementation process on an ongoing basis.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 31/04/2011

Assisted by: Mr B G Sithole, Provincial Representative and Mr T C Moroka, Northern Cape Province

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