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CASE NOTE

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Is the automatic loss of South African citizenship for those acquiring other citizenships constitutional? *Democratic Alliance v Minister of Home Affairs*

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1. Introduction

For an increasing number of people, global mobility is a feature of their lives. Employment opportunities may arise in countries far removed from one's place of birth; one may meet a significant other and seek to re-locate. For some, new citizenships may be acquired for instrumental reasons: ease of movement, as Covid-19 national restrictions have demonstrated, often requires not only applying for permission to reside indefinitely in another country but also naturalisation; for others, it may reflect a deeper significance, representing a stronger connection to a polity to which one wishes to belong and to participate politically. What acquisition of a new citizenship does not *ipso facto* mean is that an individual wishes to lose the citizenship of their country of origin, to which they may retain intense and deep ties.

The legal consequences of the acquisition of foreign citizenship were the subject of *Democratic Alliance v Minister of Home Affairs*,[1] a 2021 case in the High Court of South Africa (Gauteng division, Pretoria). The Democratic Alliance unsuccessfully challenged the constitutionality of s 6 of the Citizenship Act 68 of 1995. This provision stipulates that adult citizens automatically (*de lege*) lose their South African citizenship when they 'freely and voluntarily' acquire another citizenship (except through marriage) without first applying for and obtaining a ministerial certificate authorising

[1] *Democratic Alliance v Minister of Home Affairs* (48418/2018) [2021] ZAGPPHC 500 (6 August 2021) ('*Democratic Alliance*'). The case went on appeal: permission to appeal was initially refused by Kollapen J on 14 September 2021 but was granted by the Supreme Court of Appeal on 1 December 2021. At the time of writing, the appeal in SCA 067/22 had not yet been heard.

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its retention. The applicants argued this policy is irrational and that it violates several fundamental rights, including the right not to be deprived of South African citizenship and other rights that are constitutionally guaranteed to citizens, particularly political participation rights, the right to enter the Republic and remain therein, and the freedom to choose an occupation.

This note critically appraises Kollapen J's judgment, highlighting its potential detrimental effect for South Africa's constitutional development. Part 2 offers an overview of the case and some of the key components of its reasoning. Parts 3–5 consider three topics. First, *irrationality*: it is argued that the judgment fails to identity a plausible, explicit, rational basis for the automatic loss of citizenship stipulated by s 6 of the Act. The judge alludes to an implicit rationale reflecting an outdated and erroneous perception as to what is signified by the voluntary acquisition of another citizenship. Importantly, such a rationale is inconsistent with the legislation's and indeed the government's general acceptance of multiple citizenships. Furthermore, this note critiques the judgment's failure to consider the complete absence of legislative criteria to guide the exercise of ministerial discretion for those applying to retain their South African citizenship; indeed, that fact alone should render the provision unconstitutional due to its vagueness, a critical aspect of the rule of law. Second, violation of *applicable constitutional rights*: drawing on a purposive understanding of the relevant right and a consideration of international law, it is contended that the judgment errs in failing to find that the automatic, *de lege*, loss of citizenship constitutes a *de facto* deprivation thereof and hence an infringement of the constitutional right to citizenship. It is suggested also that the judgment fails to give due regard to the detrimental effects that loss of South African citizenship has on the enjoyment of other, citizenship-contingent constitutional rights. Lastly, this note critically appraises the judgment's *limitation of rights* analysis: it is argued that the judgment's reasoning effectively allows for circumvention of the strong justification requirement in s 36(1) (the limitations clause) that applies whenever the Constitution of the Republic of South Africa, 1996 contains a broad empowering provision; indeed, were this interpretive approach to be adopted in other constitutional contexts, it would severely undermine the protection afforded by fundamental rights.

2. Overview

The case was brought on behalf of South African citizens who had discovered, to their great heartbreak,[2] that they had lost their South African citizenship. Section 6 of the Act states:

1. Subject to the provisions of subsection 2, a South African citizen shall cease to be a South African citizen if-
   a. he or she whilst not being a minor by some voluntary and formal act other than marriage acquires the citizenship or nationality of a country other than the Republic; or

[2] See, for instance, an immigration attorney referencing 'distressed South Africans' in S de Saude Darbandi 'Judgment on citizenship a blow for thousands of South Africans abroad' (18 August 2021) *Business Live* <https://www.businesslive.co.za/bd/opinion/2021-08-18-judgment-on-citizenship-a-blow-for-thousands-of-south-africans-abroad/>.

b. he or she in terms of the laws of any other country also has the citizenship or nationality of that country, and serves in the armed forces of such country while that country is at war with the Republic.

2. Any person referred to in subsection (1) may, prior to his or her loss of South African citizenship in terms of this section, apply to the Minister to retain his or her South African citizenship, and the Minister may, if he or she deems it fit, order such retention.
3. Any person who obtained South African citizenship by naturalisation in terms of this Act shall cease to be a South African citizen if he or she engages, under the flag of another country, in a war that the Republic does not support.

According to the impugned provision, a South African citizen automatically (*de lege*) loses their citizenship upon acquisition (other than by way of marriage) of the citizenship or nationality of another country, unless they had first sought and obtained permission from the Minister of Home Affairs to retain their South African citizenship. The provision provides no criteria on the basis of which this ministerial discretion should be exercised.

The Democratic Alliance, which brought the challenge, is the largest opposition party in South Africa. That fact suggests there was (also) a political context to the challenge: it is plausible that the Democratic Alliance considered it politically advantageous to bring such a challenge. Whatever the motivations, however, the determination of the important legal questions that arose must be undertaken on the basis of applicable legal principles. The constitutional challenge focussed on two main grounds: First, that *de lege* loss of citizenship of s 6(1)(a) of the Act violates the principle of legality due to its irrationality and arbitrariness. Second, that it unjustifiably infringes several constitutional rights.

Kollapen J found against the applicants on both counts, relying on a distinction between the notions of 'loss' and 'deprivation' of citizenship. He drew that distinction based on two constitutional provisions. Section 3(3) of the Constitution stipulates that 'National legislation must provide for the acquisition, loss and restoration of citizenship'. Section 20 states that 'no citizen may be deprived of citizenship'.

According to the judgment, 'deprivation' within its constitutional meaning pertains to a prohibition on rendering a South African citizen stateless. Loss of citizenship, in contradistinction, was contemplated as 'part of the constitutional design'.[3] Consequently, Kollapen J found that, given the citizens affected by the operation of s 6(1)(a) are ipso facto not rendered stateless, s 20 is not infringed, even at a prima facie level. He further rejected the claim that other rights are unjustifiably violated by *de lege* loss of citizenship, holding that even where such rights are prima facie infringed, that is a consequence necessarily attendant upon the legislature's prerogative contemplated by the constitutional empowering provision to legislate for the 'loss' of citizenship. Finally, he reasoned that, even if he were wrong in this respect and rights were infringed, such a limitation would be justifiable given the constitution permitted the legislature to provide for the loss of citizenship.

The ensuing sections of this note critique Kollapen J's reasoning on all these counts.

[3] *Democratic Alliance* (note 1 above) para 28.

3. The rule of law challenges: Rationality and vagueness

3.1 Rationality

The constitutional principle of legality requires that all law must be capable of being rationally justified. At the embryonic stages of South Africa's post-1994 constitutional order, Justice Ackermann stated:

> We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally.[4]

This statement echoed Etienne Mureinik's description of the transition to constitutional democracy in South Africa as entailing a shift from a 'culture of authority' to a 'culture of justification'.[5] These ideas have developed into a legal doctrine requiring all exercises of public power to be rational. The doctrine, Sachs J explains in *Matatiele Municipality v President of the Republic of South Africa,* flows from the rule of law: 'Fundamental to the rule of law is the notion that government acts in a rational rather than an arbitrary manner'.[6]

In *United Democratic Movement v President of the Republic of South Africa,* the Constitutional Court formulates the test as follows: 'Our Constitution requires legislation to be rationally related to a legitimate government purpose' – if not, it is invalid'.[7] The test is usually understood to impose a relatively minimal requirement: an identification of a legitimate government purpose and a link between the adopted means and that purpose.[8]

Why then did Kollapen J find s 6(1)(a) to be rational? This provision regulates the circumstances under which South African citizenship is lost when an individual naturalises in another country. Given that determining who is a citizen 'is a precondition of the political community […] and who qualifies or not for such status and when such status no longer endures goes to the heart of the democratic society',[9] then setting criteria for retention of South African citizenship, he held, is a legitimate purpose and the means deployed in s 6(1)(a) are thus rational.

The problem, however, is that the burden of proving the rationality of the provision is not met simply by making general comments about the status of citizenship and its being fundamental in defining the political community; nor is it met by referencing the power of the state to make law relating to the loss of citizenship. The mere power contemplated in the Constitution to legislate for the loss of citizenship does not *ipso facto* justify any specific provision. Ultimately, a clear rationale must be articulated as to why an individual adult citizen who acquires the citizenship of

[4] *S v Makwanyane* (1995) (3) SA 991 para 84.
[5] E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31, 32.
[6] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2006) (5) SA 47 (CC) para 100.
[7] *United Democratic Movement v President of the Republic of South Africa* (2003) (1) SA 495 (CC), para 55.
[8] For complexities relating to the test, see M Bishop 'Rationality is dead! Long live rationality! Saving Rationality basis review' (2010) 25 *Southern African Public Law* 312; and A Price 'The content and justification of rationality review' (2010) 25 *Southern African Public Law* 346.
[9] *Democratic Alliance* (note 1 above) para 52.

another political community must by operation of law lose their South African citizenship: what is the legitimate government purpose which justifies such a blanket policy?

Kollapen J claimed that states have an interest in regulating their citizenship, given the significance of the status and the link between citizenship and the work of the government – in that holding South African citizenship is a precondition, in many instances, for holding certain public offices. This, he argued:

> in turn requires a connection between citizen and country […] [w]hen such a person through a voluntary act acquires the citizenship of another country and does not avail himself or herself of the right to approach the Minister to seek permission to retain their South African citizenship, it can hardly be said that the loss of citizenship that follows is irrational.[10]

That a meaningful connection exists between the citizenry and political office hardly offers an explanation as to why the South African state may legitimately *automatically* strip its citizens of their citizenship merely because they have acquired another citizenship. Indeed, the underlying implication here is concerning: that the continued loyalty to South Africa of those acquiring other citizenships is viewed with suspicion, with their act of omission (failing to avail themselves of the possibility to seek ministerial permission for the retention of their citizenship) being construed to be an intentional severance of ties. Indeed, the court record indicates that the government's sole justification for the provision lay in the fact that it argued the loss of citizenship in these instances was voluntary and the failure to apply to the Minister in terms of s 6(2) amounted to a clear intention to reject one's ties to South Africa.[11]

It is hard to reconcile this approach with both the scheme of the Act and the facts. Section 7 of the Act provides for the voluntary renunciation of citizenship, on condition that, following such renunciation, a former South African citizen will not remain stateless. It is suggested that s 7 renders s 6(1) superfluous if the latter provision's substantive aim is to enable citizens to give up their citizenship voluntarily. A consistent reading of both provisions should arguably lead one to assume that those *not* availing themselves of the right to renounce their citizenship as per s 7 do not wish to do so.

That the argument presented by the government – that people who acquire another citizenship without informing the Minister intend voluntarily to lose their South African citizenship – has no legs to stand on was strengthened by an online survey, conducted and presented by the applicants, which revealed that 87 per cent of surveyed South Africans affected by the operation of s 6(1) were not aware of its existence and, as a result, had not applied for the retention of their citizenship; conversely, only 3 per cent of those surveyed intended to lose their citizenship.[12] Indeed, the case arose because many individuals were deeply upset about having had their

[10] Ibid para 51.

[11] See First and Second Respondent's Answering Affidavit (on file with authors) ibid paras 6–10 and further replies, for instance, in para 15.

[12] See Replying Affidavit (on file with authors) ibid para 37. One referee suggested that reliance on survey evidence demonstrates a weakness in the case; however, absent a database of South Africans affected by s 6(1) of the Act and detailed empirical research, it is not clear what other evidence could have been provided to ascertain whether those failing to apply to retain their South African citizenship did so knowingly.

citizenship taken away. In his affidavit, one such individual, Mr Plaatjes, strongly contested the fact that his assumption of UK citizenship in any way evidenced a desire to give up his South African citizenship.[13] Whereas one effect of the judgment may be increased awareness of the legislative scheme, it can nevertheless be expected that many individuals will still fail to make such an application due to ignorance or simply as an oversight.

Without an assumption of voluntary renunciation, it is hard to find a convincing rationale for s 6(1)(a). Indeed, rationales underlying restrictions on holding multiple citizenships – as is alluded to in Kollapen J's judgment – had traditionally concerned the supposedly mutually exclusive nature of loyalty to one's country and the possibility of conflicting allegiances.[14] Historically, such assumptions have been applied in disreputable ways to question, for instance, the allegiance of a minority community – which may have, for example, an ancestral homeland – to the political community in which they currently live. It is increasingly recognised that loyalty to one political political community in no way precludes loyalty to another. Indeed, the singling out in s 6(1)(b) of a rare exception, where a citizen participates in a war waged against the Republic, as a separate ground for loss of citizenship indicates that multiple loyalties should not generally be presumed to be in conflict.

For context, s 6 of the Act replicates s 15 ('Loss of South African Citizenship generally') of the South African Citizenship Act 44 of 1949 (notwithstanding having repealed it in its entirety). Then, having multiple citizenships was a far rarer phenomenon, with countries conforming to the stipulation in the Preamble to the 1930 Hague Convention that 'every person should have a nationality and should have one nationality only'.[15] Ever since, a clear global trajectory points towards increasing tolerance of multiple citizenships:[16] today, most countries enable their citizens to acquire another citizenship without having to forgo theirs, thereby embracing multiple identities and connections rather than forcing a choice.[17]

Globalisation has no doubt affected perceptions of national citizenship. Increased ease of communication enables external citizens to remain connected, aware of, and attached to the political community of their country of origin. For many, emigration does not mean disengagement. Indeed, the rationale underlying the 2009 *Richter v Minister of Home Affairs*[18] judgment concerning the right to vote from abroad is that political rights entrusted to South African citizens are not territorially bound:

[13] See Supporting Affidavit (on file with authors) ibid para 28.

[14] See P Spiro *At Home in Two Countries: The Past and Future of Dual Citizenship* (2016) ch 4 ('Turning the corner on dual citizenship') 56.

[15] Convention on Certain Questions relating to the Conflict of Nationality Law (13 April 1930, the Hague) 179 LNTS 89.

[16] See Y Harpaz & P Mateos 'Strategic citizenship: negotiating membership in the age of dual nationality' (2019) 45 *Journal of Ethnic and Migration Studies* 843 (outlining a 'sweeping legitimisation of dual citizenship', described as a '*post-exclusive turn* in citizenship').

[17] See for example Maastricht University 'Charting dual citizenship acceptance around the world 1960-2020' <https://macimide.maastrichtuniversity.nl/dual-cit-database/> (presenting an increase from 40 per cent to 76 per cent between 1960 and 2020 in the number of countries accepting dual citizenship). For country-by-country data, see Globalcit 'Citizenship Law Dataset – Modes of Acquisition of Citizenship' <https://globalcit.eu/modes-acquisition-citizenship/>. The fact that there remain countries that restrict the acquisition of multiple nationalities does not render the legislative arrangements immune from scrutiny on the basis of South African constitutional principles.

[18] *Richter v Minister of Home Affairs* (2009) (3) SA 615 (CC).

rather, citizens may retain their ties, interest, and ability to participate in the political community of South Africa even if the centre of their life is presently elsewhere.

Whether desirable or not, citizenship retains its significance as a vanguard of two critical components of dignity, equal self-worth, and security: the right to fully participate politically in the state's affairs, and the right to enter the territory of a state and to remain there. Given this (legal) reality, the fact that a South African citizen seeks to continue to enjoy such rights – through the acquisition of their country of residence's citizenship – does not manifest disloyalty to South Africa. That South Africans legally retain other citizenships acquired at birth or through marriage further undermines the validity of concerns regarding bifurcated loyalties of those naturalising elsewhere.

The conclusion that *de lege* loss of citizenship upon the acquisition of another citizenship pursuant to s 6(1)(a) lacks any legitimate government purpose is strengthened by contrasting it with the aforementioned context-specific loss of citizenship in s 6(1)(b): where a citizen takes up arms against South Africa in the name of another country of citizenship, South Africa may indeed have a legitimate interest in stripping them of their South African citizenship. The stipulation, however, of this concrete instance for loss of citizenship serves to undermine the potency of the general arrangement. Oddly, both s 6(1)(a) and s 6(1)(b) allow for an application to retain citizenship under equally undefined criteria, creating a false equivalence between a South African who has benignly acquired another citizenship and one who fights against South Africa.

3.2 Vagueness

The constitutional requirement of adherence to the rule of law is understood to extend beyond a rationality standard. In *Dawood v Minister of Home Affairs,*[19] a case concerning overbroad discretion pertaining to the issuance of temporary residence permits, the Constitutional Court held that:

> It is an important principle of the rule of law that rules be stated in a clear and accessible manner […] Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.[20]

In *Dawood*, a fundamental right was infringed that made the limitation thereof on the basis of a broad discretion even more flagrant. Nevertheless, the requirement for law to be clear and accessible extends beyond the Bill of Rights context – as has been held in several judgments (including *Dawood).*[21] Unlimited discretion may thus be attacked constitutionally, not simply because it involves an unjustifiable limitation of rights, but also because it undermines the rule of law and individuals' ability to regulate their behaviour according to clear legal rules.

[19] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC).
[20] Ibid para 47.
[21] See for instance *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3 para 108; *Kruger v President of the Republic of South Africa* [2008] ZACC 17 para 67.

Section 6(2) of the Act, the provision regulating retention of citizenship, is unconstitutional too for failing to conform to this facet of what the rule of law requires. Kollapen J held that the provision 'sets out in the clearest terms what the circumstances are that would result in the loss of citizenship and the mechanisms open to seek its retention'.[22] In contrast, in our view, it is hard to conceive of a vaguer criterion for the exercise of executive power than the stipulation that, upon request, the minister will order retention if 'he or she deems it fit'. Ministerial discretion is virtually unconstrained, lacking any guidelines concerning its exercise, and potentially rendering judicial review pursuant to s 25 of the Act ineffective.[23] By failing to set out criteria on the basis of which this discretion is exercised, the provision breaches the constitutional requirements flowing from the rule of law (a foundational value rooted in section 1 of the Constitution).

The provision's vagueness is not saved by its 2012 implementing regulations, including the retention of South African citizenship form in Annexure 3: neither list criteria that the Minister could be expected to apply to determine retention applications. The BI-1664 'Retention of South African Citizenship' form requires an applicant to state their 'reasons for wanting to retain South African citizenship', without indicating which reasons are applicable and how those will be assessed, or setting out a timeframe for assessment, leaving them in limbo until and unless it is concluded.[24] Unconstrained discretion of this kind is objectionable simply for failing to meet the basic conditions of legality: it is even more unacceptable where fundamental rights are infringed, a matter to which the analysis now turns.

4. Infringement of constitutional rights

This section considers various missteps made by Kollapen J in the first stage of his rights analysis, namely, whether any right was *prima facie* infringed by s 6(1). Part 5 will engage with Kollapen J's limitations analysis.

4.1 Does de lege loss of citizenship amount to a deprivation of citizenship?

Section 20 of the Constitution stipulates that 'no citizen may be deprived of citizenship'. Any infringement of a citizen's right not to be deprived of their citizenship must trigger a s 36 limitation of rights analysis. Yet for Kollapen J, s 20 was not applicable in instances of loss of citizenship, given the instruction in s 3 that '[n]ational legislation must provide for the acquisition, loss and restoration of citizenship'. On this basis, he concluded, 'loss' and 'deprivation' are to be treated constitutionally as 'separate concepts'. Drawing on Iain Currie and Johan de Waal,[25] he observed (at para 26) that a s 20 deprivation is 'at its core a right against statelessness',

[22] *Democratic Alliance* (note 1 above) para 55.
[23] See also I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 445.
[24] Absent time limits for consideration of applications, the 'in limbo' situation that South Africans had found themselves in was exacerbated by the Covid-19 pandemic: between March 2020- June 2021, retention applications have not been considered. See <https://www.da.org.za/2021/06/da-welcomes-home-affairs-reopening-applications-for-retention-and-renunciation-of-citizenship>.
[25] Currie & de Waal (note 23 above) 444.

whereas s 6(1)(a) of the Act applies only to those who have acquired the citizenship of another country. Since s 6(1)(a) raises no risk of statelessness, there is no deprivation; therefore, s 20 of the Constitution is not applicable.

In interpreting s 20, the general interpretive principles outlined in the Constitution and by the Constitutional Court should be drawn on. With the constitutional text as a starting point, courts must adopt a purposive interpretation that draws on textual, historical, and social contexts.[26] Sections 39(1)(b) and (c) of the Constitution respectively require international law to be considered and permit the consideration of foreign law. In *S v Zuma,*[27] the Court held that constitutional interpretation should be generous and in favour of rights.[28]

That the term 'deprivation' is used in s 20, whereas the term 'loss' is used in s 3 does not determine the relationship between them. The key question is what constitutes a deprivation of citizenship and how that is related to the loss thereof. The *Cambridge English Dictionary* defines the verb to 'deprive' as to 'take something away from someone'. 'Loss' is more passive in nature: to 'no longer have something or have less of something'. Arguably, the text suggests that s 20 prohibits the active 'taking away' of citizenship unless it can be justified pursuant to a s 36(1) analysis, whereas s 3 permits the passive 'loss' of citizenship that results from a legally justifiable act of deprivation: in other words, the loss which s 3 sanctions should only result from a *justified* deprivation.

There is nothing in s 20 to suggest that it only applies in cases where the deprivation of citizenship results in statelessness. Whereas the detrimental effects of a deprivation of citizenship differ, *inter alia*, based on whether it leads to statelessness (which is a particularly egregious form of deprivation), the literal meaning of this provision is that 'no citizen' may be deprived of their citizenship: hence, any form of deprivation of citizenship under any circumstances constitutes a prima facie infringement of s 20, requiring justification. Jonathan Klaaren, for instance, recognises that 'in evaluating the constitutionality of SACA's Chapter 3, which provides for loss, one will be using [...] s 20 (reinforcing s 3(3)), and courts will employ a higher intensity of review than elsewhere in SACA'.[29] Hence, for him, loss is, a justified deprivation.[30]

This interpretive approach is further borne out by a purposive analysis of the constitutional provisions in light of South African history, when there was widespread denationalisation of Black people. Importantly, notwithstanding their sham nature, when apartheid-era governments deprived black South Africans of their citizenship, they did not regard themselves as rendering such persons stateless, as they nominally became citizens of the homeland or Bantustan states.[31] Nevertheless, the act of stripping them of their South African citizenship was intolerable. Moreover, many freedom

[26] *S v Makwanyane* [1995] ZACC 3 paras 9–10.
[27] *S v Zuma* [1995] ZACC 1.
[28] Ibid paras 14 and 15. These statements were confirmed in *Makwanyane* (note 26 above) para 9.
[29] J Klaaren 'Citizenship' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2006) 60–12.
[30] Klaaren (ibid) nevertheless (unfortunately) does not subject the dual citizenship provisions to detailed engagement, suggesting that '[l]egislation is on surer footing where the loss of citizenship is directed to dual citizens'.
[31] For a brief overview, see T Woker & S Clarke 'Human rights in the homelands' (1990) 1 *South African Human Rights Yearbook* 152, 152–3.

fighters who opposed the apartheid regime had been forced into exile and acquired the citizenship of other countries: for that regime, stripping such individuals of their South African citizenship was a convenient manner of denationalising those who were opposing it. Given this historical context, the constitutional right was framed in unequivocal terms and with no qualification:[32] citizenship was recognised as having great importance and was not capable of being stripped away without a serious constitutional justification that passes the requirements of the limitations clause. Whereas s 20 places a strong constitutional value on South African citizenship, Kollapen J's interpretive approach implies that, absent rendering individuals stateless, ordinary legislation may provide widely for the loss of citizenship without infringing any constitutional rights. The very point of the provision is, however, to prohibit the state from stripping South Africans of their citizenship *without justification*, not least given the impact such a stripping has on their other constitutional rights.

The judgment is also at odds with the prevailing interpretations of the terms 'loss' and 'deprivation' of citizenship in international law, consideration of which is absent from the judgment despite being required by s 39(1)(b) of the Constitution. Article 15 of the Universal Declaration of Human Rights[33] enunciates the right of every person to 'a nationality' and prohibits 'arbitrary deprivation' of nationality; it does not explicitly refer to the loss of nationality. In contradistinction, the 1961 Convention on the Reduction of Statelessness[34] uses both terms; an expert meeting convened by United Nations High Commissioner for Refugees (UNHCR) to interpret this treaty[35] concluded that, despite the fact that the 1961 Convention uses the expression 'loss of nationality' to describe automatic withdrawal of nationality by operation of law (*de lege*) and the term 'deprivation' to describe situations where withdrawal is initiated by state authorities, 'deprivation' must be interpreted to include arbitrary *de lege* loss of nationality.[36]

It is contended, *pace* Rainer Bauböck and Vesco Paskalev, that a normative distinction must be drawn between involuntary and voluntary loss of citizenship:[37] whenever the state acts to terminate one's citizenship status without the explicit consent of the individual concerned, the resulting loss of citizenship status must be regarded as involuntary and therefore as a 'deprivation'.[38] As noted above, s 7 of the Act enables

[32] Compare s 20 of the Interim Constitution, which stipulates that 'no citizen shall without justification be deprived of his or her citizenship' - Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The Interim Constitution has been repealed and replaced by the Constitution of the Republic of South Africa Act 108 of 1996.

[33] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).

[34] Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December) 1975 UNTS 989.

[35] UNHCR 'Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality, Summary Conclusions' Tunis, 31 October–1 November 2013 <https://www.refworld.org/docid/533a754b4.html>.

[36] See also UNHCR 'Guidelines No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness' (May 2020) para 9 (noting that 'the prohibition of arbitrary deprivation of nationality encompasses both loss and deprivation of nationality'). See also L van Waas & S Jaghai, 'All citizens are created equal, but some are more equal than others' (2018) 65 *Netherlands International Law Review* 413, 416 (noting that broader human rights norms prohibiting arbitrary deprivation of nationality do not distinguish between the modalities of the withdrawal of citizenship).

[37] See R Bauböck & V Paskalev 'Citizenship deprivation: A normative analysis' CEPS Paper in Liberty and Security in Europe No 82 (March 2015) 1.

[38] R Birnie & R Bauböck 'Introduction: Expulsion and citizenship in the 21st century' (2020) 24 *Citizenship Studies* 265, 266.

South African citizens who wish voluntarily to renounce their citizenship to do so; whereas, it is contended, those who lose their citizenship automatically by operation of law must be presumed to have lost it involuntarily. That s 6(1)(a) refers to the 'voluntary' acquisition of another citizenship should not be conflated with the ensuing, *involuntary* loss of South African citizenship.

Kollapen J's narrow construction of s 20 as applying only when deprivation leads to statelessness renders the provision inapplicable to all cases concerning the withdrawal of citizenship including, incidentally, withdrawal pursuant to s 8(2) of the Act, entitled 'deprivation of citizenship': that provision authorises the minister to strip a South African citizen who is also a citizen of another country of their South African citizenship if the Minister deems it to be 'in the public interest' – a vague stipulation. By contrast, if this paper's interpretation is adopted, then all provisions of the Act that strip South Africans of their citizenship other than pursuant to their expressed will (through renunciation) must be constitutionally justified.

4.2 Infringement of other constitutional rights

Section 3(2) of the Constitution states that '[a]ll citizens are (a) equally entitled to the rights, privileges and benefits of citizenship'. The Constitution stipulates three citizenship-contingent rights: full participation in the political community (s 19), the right to enter and remain in the Republic (s 21), and the right to choose their trade, occupation or profession freely (s 22). Having found that the *de lege* loss of citizenship does not infringe s 20, Kollapen J considered the separate claim that the loss of citizenship infringes these other rights.

Kollapen J notes that citizens and non-citizens do not enjoy the same constitutional rights. However, for him, the effects of the loss of citizenship arise from a change of status: since one now lacks South African citizenship, one can no longer claim the rights that flow from it. If a person ceases to be a citizen, then they simply cease to enjoy such rights: it is 'not a limitation of their rights as citizens because they are no longer citizens nor is it a limitation of their rights as non-citizens as they do not enjoy such rights as non-citizens'.[39] The fact that a former citizen is no longer entitled to vote or exercise other citizenship-contingent rights thus arises as a result of the loss of status and is not a continuing violation of their constitutional rights.

This reasoning is extremely puzzling as well as troubling. Consider the right to vote. When a person acquires another citizenship in the circumstances contemplated by s 6(1)(a), then by operation of law they lose their South African citizenship and thus the right to vote. Even if s 20 does not apply to the loss of citizenship, as Kollapen J held, it is vital to appraise the effect of the loss of citizenship on the enjoyment of other constitutional rights. By stripping a South African of their citizenship, s 6 of the Act prima facie infringes their right to vote. To hold otherwise is to do violence to the very purposes underlying the Constitution, interpreted in light of South Africa's history.

[39] *Democratic Alliance* (note 1 above) para 64.

The judge's reasoning also leads to an odd outcome: it suggests that if rights are attendant on holding a status, then those rights are not infringed when that status is taken away. If the government can strip individuals of their rights simply through changing their legal status without such rights being deemed to be infringed, and if such a change of status is not constitutionally offensive, that creates perverse incentives. Imagine a ruling party has electoral reasons to believe that South Africans abroad are unlikely to support it, yet pursuant to the *Richter* judgment,[40] they can exercise their right to vote from abroad. According to Kollapen J's reasoning, the easiest route to taking away their voting rights is by stripping them of their citizenship by operation of the law – for instance, by amending the Act so that it authorises the denationalisation of long-term external citizens (following the approach adopted by the 1949 Act), or by rejecting wholesale applications for the retention of citizenship absent reviewing criteria.

A more troubling general consequence of Kollapen J's approach is to delink statutory provisions relating to citizenship from their effect on the exercise of fundamental rights. This serves to devalue the nature and importance of citizenship: if citizenship is indeed the gateway to certain rights (as per para 66 of the judgment), then the loss of citizenship must be appraised in light of other rights in the Bill of Rights. Alternatively, s 20 of the Constitution could be interpreted expansively, assessing the effect of any form of deprivation of citizenship on the enjoyment of other rights. Yet, Kollapen J opted both to construe this right narrowly and to refuse to consider the implications that stripping individuals of citizenship has on the enjoyment of other rights.

It stands to reason that the loss of one citizenship is not compensated for by the acquisition of another citizenship: this is because each citizenship serves, within its respective political community, as a marker of legal status, rights and belonging. In the South African constitutional order, the loss of citizenship entails the loss of tangible rights that can be exercised by external citizens, irrespective of the duration of their absence from the Republic, such as the right to vote (per *Richter*) as well as rights that can only be exercised by external citizens (such as the entitlement to diplomatic protection and consular assistance).[41] By being involuntarily stripped of their citizenship, a citizen loses parts of their identity and sense of belonging, becoming at once a 'foreigner', detrimentally affecting their dignity. Last but not least, loss of citizenship entails loss of a critical enabling right, to be entitled to enter South Africa in all circumstances. At the start of the Covid-19 pandemic, entry was temporarily restricted to citizens;[42] indeed, South Africa was hardly unique in adopting restrictive entry policies that privileged its nationals.[43] Even in ordinary times, non-citizens are subject to immigration control. Given the adverse effects the loss of South African

[40] *Richter* (note 18 above).
[41] *Kaunda v President of the Republic of South Africa*, 2005 (4) SA 235 (CC).
[42] *Compare* International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 art 12(4), which stipulates: 'No one shall be arbitrarily deprived of the right to enter his own country'. The Human Rights Committee in *Stewart v. Canada* (CCPR/C/58/D/538/1993) interpreted art 12(4) as 'embrac[ing], at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien.'
[43] <https://public.tableau.com/app/profile/nccr.on.the.move/viz/Covid-19outbreak_15843550159920/Lists>.

citizenship has on the enjoyment of fundamental rights, in our view, a limitations analysis pursuant to s 36(1) must be undertaken.

5. Limitation of rights

Given Kollapen J's finding that no constitutional rights are infringed by s 6(1) of the Act, there was, strictly speaking, no need for him to conduct a s 36 analysis. Nevertheless, the judgment engaged with the limitation of rights analysis, focussing on the relatively under-discussed s 36(2), which stipulates: 'except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights'.

The section appears to prohibit the limitation of rights except in two circumstances: those that can be justified in terms of s 36(1), and those that can be justified by any other provision of the Constitution. Kollapen J interpreted the second proviso as permitting limitation of rights where 'the Constitution itself permit such a limitation',[44] referencing the *Azanian People's Organisation v President of the Republic of South Africa* (which concerned a limitation on the right of access to courts contemplated by the Interim Constitution's amnesty provisions).[45] On his interpretation, given s 3 of the Constitution envisages national legislation regulating the loss of citizenship, a s 36(1) analysis is not required: the limitation is justified in terms of s 36(2).

If adopted elsewhere, this interpretive approach would be detrimental to the purpose of ensuring legislation does not unjustifiably infringe the rights in the Bill of Rights. Section 36(1)'s *raison d'etre* is to require a strong justification for the limitation of rights. An expansive interpretation of s 36(2) undermines that constitutional purpose of ensuring strong protection for fundamental rights.[46] At its most extreme, Kollapen J's approach could immunise all statutory laws from constitutional scrutiny in terms of the Bill of Rights. After all, s 44(1) of the Constitution, for instance, confers on the National Assembly the power to pass any laws on any matter. If a broad permissive provision in the Constitution alone is sufficient to override the need to conduct a s 36(1) enquiry, then all statutory law would be exempt pursuant to s 36(2). That would be an absurd outcome inconsistent with the Constitution's constitutional supremacy clause (s 2), its application clause (s 8), the jurisdiction of the Constitutional Court (s 167(5)), and the consistent approach adopted by the courts.

Given that it is unlikely that Kollapen J would desire this outcome, his proposition could be modified to suggest that in all circumstances where specific legislation is contemplated (or mandated) in the Constitution, there is no need to pass the s 36(1) test. That approach, however, is still far too permissive, as the following examples demonstrate. Section 199(2) of the Constitution provides that 'the security services must be structured and regulated by national legislation'. Security services are often authorised to infringe rights; surely it would be wrong to deduce that all laws regulating the operation of the security services are exempt from s 36(1) scrutiny. Similarly,

[44] *Democratic Alliance* (note 1 above) para 73.
[45] *Azanian People's Organisation v President of the Republic of South Africa* [1996] ZACC 16 (*AZAPO*).
[46] See also S Woolman & H Botha 'Limitations' in S Woolman et al (note 29 above) 133 who suggest that, in circumstances where s 36(1) does not apply, some 'other justificatory test is warranted'.

s 205 stipulates that national legislation 'must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces'. That the operation of the police affects fundamental rights is hardly contentious; to argue that all legislation regulating the police is immune from Bill of Rights scrutiny would be unacceptable.

It is therefore submitted that, a constitutional provision that permits or even requires national legislation in a certain area of life cannot be immunised from s 36(1) scrutiny. Instead of interpreting empowering constitutional provisions as permission to act beyond the bounds of the Bill of Rights, they should be read harmoniously with it, namely, to require any national legislation contemplated by the Constitution not to infringe rights or, if it does so, to be justified pursuant to s 36(1).

That view is indeed consistent with the holding of the Constitutional Court in *S v Rens*,[47] which dealt with a challenge to the requirement in s 316(1)(b) of the Criminal Procedure Act 51 of 1977 that an individual convicted of a crime must first apply for leave to appeal if they wish to appeal their conviction or sentence. The challenge was made in terms of the right to a fair trial in the Interim Constitution, which included the right to appeal to a higher court.[48] The state sought to justify the existing leave to appeal requirements on the basis of s 102(11) of the Constitution, which dealt with appeals to Appellate Courts, providing that:

> [a]ppeals to the Appellate Division and the Constitutional Court shall be regulated by law, including the rules of such courts, which may provide that leave of the court from which the appeal is brought, or to which the appeal is noted, shall be required as a condition for such an appeal.

The state contended that this qualifies the fundamental right to appeal in the Bill of Rights.

Writing for a unanimous Court, Justice Madala found that s 102(11) needed to be construed narrowly and consistently with s 25(3)(h) of the Bill of Rights:

> it is not to be assumed that provisions in the same constitution are contradictory and the two provisions should, if possible, be construed in such a way as to harmonise with one another. Section 102(11) does not mention specific criteria which have to be complied with for the purpose of a leave to appeal procedure, and, in my view, it should not be construed as authorising procedures that would be inconsistent with Section 25(3)(h).[49]

This holding recognises that provisions in other parts of the Constitution should be construed in a manner that is consistent with the rights in the Bill of Rights. Section 3 of the Constitution is a broad provision requiring national legislation to provide for the acquisition, loss, and restoration of citizenship. As in *Rens*, however, it does not mention specific criteria governing the loss of citizenship; therefore, it should be construed harmoniously, to ensure any applicable criteria should comply with the Bill of Rights (and the limitations clause therein). On this interpretation of

[47] S v Rens [1995] ZACC 15.
[48] Interim Constitution s 25(3)(h).
[49] *Rens* (note 47 above) para 17.

s 36(2), broad empowering constitutional provisions would not provide an unlimited power to the legislature and executive to exceed the bounds of the Bill of Rights; instead, any specific legislation passed would need to be consistent with the Bill of Rights and the s 36(1) limitations enquiry. In this context, this note has shown just how such a harmonisation should be understood: namely, that any involuntary loss of citizenship would be understood as a deprivation requiring justification. Hence, any provision stipulating *de lege* loss of citizenship must be justifiable in terms of s 36(1) in relation both to s 20 and other citizenship-contingent constitutional rights.

Kollapen J's analogy to *AZAPO* was erroneous: that case concerned a challenge to the *entire constitutional settlement*, addressing the precondition for the Interim Constitution itself. Moreover, the Epilogue of the Interim Constitution specifically contemplated amnesty in respect of 'acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past'.[50] Despite that specific mention of amnesty, the Constitutional Court clearly recognised how amnesty violates rights,[51] leading it to engage in a detailed analysis (and justification) of whether the legislative scheme[52] in question fell within the scope of that which was contemplated in the Epilogue. By contrast, Kollapen J rooted his analysis in a very general empowering provision, failing at all to indicate the limits of legislative power or the justification for its exercise.

In order to ensure the purposes of the Bill of Rights are met, one must conclude that s 36(2) permits legislation to be exempt from s 36(1) scrutiny only in very rare occasions. A broad empowering or even mandatory provision should not obviate the need to conduct a s 36(1) analysis. Section 36(2) should apply only where the Constitution directly and clearly anticipated a specific limitation on fundamental right(s); and even then, robust justifications will be necessary as to why any rights infringements fall within the scope of the limitation contemplated by the other constitutional provision.

6. Conclusion

In the South African constitutional framework, citizenship is both of great significance in its own right and is the conduit to the exercise of substantive fundamental rights – political rights, the right to enter and remain in the country, and the right to choose a trade, occupation or profession. Regrettably, the *Democratic Alliance* judgment missed an opportunity to develop a deeper jurisprudence in South Africa on citizenship rights. This note has shown that s 6(1) and 6(2) of the Act do not cross the minimum threshold of legality both for failing to present a plausible rationale as well as by conferring an unconstrained discretion on the Minister. An alternative interpretation of the right to citizenship has been offered, according to which the automatic *de lege* loss of citizenship pursuant to s 6(1) of the Act amounts to a deprivation thereof and is unconstitutional; therefore, in our view, the constitutional challenge should have succeeded. This note has also sought to explain why the

[50] National Unity and Reconciliation section of Interim Constitution Act 200 of 1993.
[51] *AZAPO* (note 45 above) para 9.
[52] Promotion of National Unity and Reconciliation Act 34 of 1995.

approach adopted towards the ensuing limitation of rights is dangerous for future constitutional jurisprudence. Irrespective of what happens at the appeal stage, the missteps in this judgment merit attention given they traverse foundational questions of legality, fundamental rights, and the limitation thereof. It is hoped that, by exposing them, this note has laid foundations for a more robust citizenship and rights jurisprudence.

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