

Part IV. Citizenship and the Administration of Justice

Chapter 1. Rules Concerning Nationality and Relevance of Nationality

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§1. GENERAL

447. In many ways, the quest for equal citizenship framed the South African struggle against apartheid and for the right to vote for all. As section 1 of the Constitution states, South Africa is ‘one, sovereign, democratic state’. The principle of equal citizenship is entrenched and underlined in section 3 which provides for a ‘common South African citizenship’. It goes on to provide that ‘[a]ll citizens are equally entitled to the rights, privileges, and benefits of citizenship’ as well as ‘equally subject to the duties and responsibilities of citizenship’. These provisions have both historical and contemporary significance as they react against and reject the fundamentally unequal forms of citizenship of the apartheid state and the ‘denationalization’ of citizens it undertook (see General Introduction).

§2. CONSTITUTIONAL PROVISIONS ON NATIONALITY

448. Section 3(3) of the Constitution provides that an Act of Parliament must regulate the acquisition, loss and restoration of citizenship. This is the South African Citizenship Act 88 of 1995. Apart rejecting and remedying the denationalization of black citizens, the 1995 Act was largely a consolidation of prior law and has been amended several times. Its provisions on acquisition, loss, and restoration of citizenship are discussed in the following section.

449. The Bill of Rights underscores the importance of citizenship by reserving certain rights for South African citizens. These are some subsections of section 21 (entry, residence and the right to a passport) and section 22 (trade, occupation and profession). Section 20 grants protection against deprivation of citizenship. Moreover, only citizens are accorded the section 19 political rights while, in another form

of promotion of citizenship, sections 47(1), 106(1) and 158(1) of the Constitution provide that only South African citizens may stand for Parliament, provincial legislatures and for municipal councils. Most other rights are granted to 'everyone' and are thus available to citizens.

450. The Constitution does distinguish elsewhere between citizens and foreign nationals, granting different levels of protection to each category. For instance, in the event that South Africa finds itself in a state of armed conflict with another state it may be necessary to detain citizens and foreign nationals. Only South African citizens benefit from the safeguards of section 37(6) and (7) with respect to detention in consequence of an international armed conflict. The Constitution does not leave such foreign nationals without any protection, however. The state must comply with the standards binding on the Republic under international humanitarian law in respect of the detention of such persons (section 37(8)). In another example outside of the Bill of Rights, section 174(1) regulates the appointment of judicial officers and states '[a]ny appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.' The potential of foreign nationals to be appointed to the High Court or to the Magistrates' Court is thus entrenched.

§3. CONSTITUTIONALLY-MANDATED STATUTORY PROVISIONS ON NATIONALITY: ACQUISITION, LOSS AND RESTORATION

451. While there are numerous pieces of legislation that distinguish between citizens and foreign nationals, this section focuses only on the legislation required by section 3(3) of the Constitution.

I. Acquisition of citizenship

452. Sections 2–5 of the 1995 Act provide for the acquisition of South African citizenship in the categories of birth, descent, and naturalization. Citizenship by birth is granted, *inter alia*, in section 2 by virtue of birth in or outside the national territory to at least one citizen parent. Citizenship by descent, section 3, might be more accurately stated as citizenship by adoption since the sole set of persons considered as citizens by descent are those adopted in terms of the provisions of the Children's Act by a South African citizen. Naturalization is based on a continuous period of lawful residence of five years. Further, a child who has been born in the Republic to parents who are not South African citizens nor permanent residents may apply for naturalization upon becoming a major if she has lived in the Republic (section 4).

II. Loss of Citizenship

453. Chapter 3 of the Act deals with the loss of South African citizenship. The Act draws a distinction among the voluntary renunciation of South African citizenship, the loss of citizenship, and the deprivation of citizenship. The statutory distinction between the latter two concepts follows the direction of the Constitution. A South African who intends to accept the nationality of another country or who also has a non-South African nationality may renounce his or her South African citizenship. In this case, the Minister of Home Affairs should give effect to that wish.⁹⁴¹ According to statute, South African citizens may lose their citizenship under four sets of circumstances. First, a citizen will lose nationality if that citizen acquires the citizenship of another country and does not apply for retaining her citizenship.⁹⁴² Second, a citizen may lose her citizenship if she serves in the armed forces of a country at war with South Africa.⁹⁴³ Third, applicable only to naturalized citizens, someone who engages, under the flag of another country, in a war that the Republic does not support, will lose citizenship.⁹⁴⁴ Finally, there are instances of legislatively approved deprivation of citizenship. The Minister may deprive naturalized citizens of their citizenship if they obtained it illegally.⁹⁴⁵ Further, South African citizens with another nationality may be deprived of their citizenship if they are sentenced to more than twelve months' imprisonment for any offence which, if it was committed outside the Republic, would also have constituted an offence in the Republic, or if the Minister is satisfied that it is in the public interest that such a person shall cease to be a South African citizen.⁹⁴⁶ The Minister may also order that the minor children of persons who lose or are deprived of their citizenship shall cease to be South African citizens.⁹⁴⁷

III. Restoration of Citizenship

454. Restoration of nationality might be considered as a special form of naturalization and thus of acquisition. Restoration in the South African Act is accomplished through section 13, entitled resumption of South African citizenship. In addition to providing for minors, section 13 largely caters for persons who have lost their citizenship through operation of law and apply to regain their nationality.

IV. A Citizen's Entitlement to Request Diplomatic Protection

455. Interpreting section 3 of the Constitution, the Constitutional Court has articulated an extra-territorial state duty of diplomatic protection of nationals.

941. Citizenship Act, 88 of 1995, s. 7.

942. *Ibid.*, s. 6(1)(a) & (2). This provision has not been tested against the Constitution.

943. *Ibid.*, s. 6(1)(b).

944. *Ibid.*, s. 6(3).

945. *Ibid.*, s. 8.

946. *Ibid.*, s. 8(2).

947. *Ibid.*, s. 10.

holding that South African citizens are constitutionally entitled to request the government of South Africa for protection under international law against wrongful acts of a foreign state. In the case where this duty was first announced, *Kaunda v. President of the Republic of South Africa*,⁹⁴⁸ a number of South African citizens were in detention in Zimbabwe on charges related to weapons possession and immigration violations. These citizens had allegedly been involved in a planned but aborted coup in Equatorial Guinea. They sought an order from the Constitutional Court compelling the South African government to take urgent steps, including diplomatic representations on their behalf to the Zimbabwean and Equatorial Guinean governments. The Court used other provisions of the Constitution to buttress its conclusion, including the language of section 7(1): ‘This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.’⁹⁴⁹ While the duty exists, the particular application in this case was dismissed, with the Court effectively accepting that the Executive was properly fulfilling its duty.

456. A later case decided by the Constitutional Court, *Von Abo v. Government of the Republic of South Africa & Others*, was an attempted confirmation of a lower court decision applying *Kaunda* and granting relief to a South African citizen deprived of property in Zimbabwe.⁹⁵⁰ Here, the Court treated only the issue of jurisdiction of a confirming order and found such jurisdiction. The crisp issue thus did not turn on citizenship and was whether ‘the failure to provide diplomatic protection by the President constitutes “conduct” as envisaged in section 172(2)(a) of the Constitution’.⁹⁵¹ Nonetheless, *Von Abo* clarified and consolidated the South African availability of diplomatic protection.⁹⁵²

948. 2005 (4) SA 235.

949. *Kaunda and Others v. President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC), para. 37.

950. *Von Abo v. President of the Republic of South Africa* (CCT 67/08) [2009] ZACC 15; 2009 (10) BCLR 1052 (CC); 2009 (5) SA 345 (CC).

951. *Ibid.*, para. 23.

952. In its law on diplomatic protection of citizens and particularly its willingness to forge some type of right to judicial review here, the Court may well be forging ahead even of the fast-developing international law and practice in this area of state responsibility towards its nationals.

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