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# THE INVISIBLE CHILDREN – PROTECTING THE RIGHT TO BIRTH REGISTRATION IN SOUTH AFRICA

## SUMMARY

Birth registration is fundamentally important for the protection of the rights of children. It is the key that unlocks their fundamental rights. Children without birth certificates can be regarded as “invisible”. Given the importance of birth registration, the United Nations Children’s Fund set a target to achieve universal birth registration (*i.e.*, birth registration for all children) by 2030. This target flows from the adoption of the Sustainable Development Goals (SDGs) by the United Nations General Assembly in 2015. The SDGs includes a dedicated target in goal 16 to provide a legal identity for all, including birth registration, by 2030. South Africa’s birth registration rate has remained stagnant at 88.6 per cent from 2011 to 2016. (This figure will be reviewed when the Census 2022 data becomes available.) Although South Africa’s birth registration rate is higher compared to some other countries in Africa, it still falls short of the UNICEF target of universal birth registration. This article centres around the overarching question as to whether the legislative framework for birth registration in South Africa is optimal for achieving the UNICEF target of universal birth registration by 2030. It starts off with an investigation of the causes of low birth-registration rates and the concomitant classes of children who are vulnerable to low birth-registration rates. Next, the importance of birth registration and the devastating consequences of failure to obtain a birth certificate are considered. This is followed by a review of the relevant provisions of international human rights instruments and the *Constitution of the Republic of South Africa*, 1996. Next, the legal framework, particularly the *Births and Deaths Registration Act* 51 of 1992 and its regulations are critically analysed, with a view to identifying inadequacies in legislation, improper implementation of legislation, and failure to remove limitations and barriers to birth registration. Finally, recommendations are made for law and policy reforms to remedy these shortfalls.

## 1. INTRODUCTION

The African Committee of Experts on the Rights and Welfare of the Child (hereinafter, the African Committee) defines birth registration as “the act of recording the birth of a child by an administrative authority”.<sup>1</sup> The importance



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1 African Committee 2014:par. 44.

of birth registration can hardly be over-emphasised. It establishes the legal existence of a child and serves as a key that unlocks other fundamental rights for the child from early childhood.<sup>2</sup> A child without a birth certificate can be regarded as “invisible”.<sup>3</sup> It is not surprising, then, that the United Nations Children’s Fund (UNICEF) set a target to achieve universal birth registration (*i.e.*, birth registration for every child) by 2030.<sup>4</sup> This target flows from the adoption of the Sustainable Development Goals by the United Nations General Assembly in September 2015. The Sustainable Development Goals includes a dedicated target under goal 16 to provide a legal identity for all, including birth registration, by 2030.<sup>5</sup>

South Africa’s birth-registration rate has remained reasonably stagnant for the past decade. In 2017, the average birth-registration rate was 89 per cent compared to 85 per cent in 2012.<sup>6</sup> Statistics South Africa (Stats SA) reported in 2021 that the overall completeness of birth registration (*i.e.*, the number of registered births as a percentage of the actual number of births) remained 88.6 per cent from 2011 to 2016. This figure will be reviewed when the Census 2022 data becomes available.<sup>7</sup> Although the birth-registration rate in South Africa is higher compared to some other countries in the African region,<sup>8</sup> it still falls short of the target set by UNICEF to achieve universal birth registration by 2030.<sup>9</sup>

This article centres around the overarching question as to whether the legislative and policy framework for birth registration in South Africa is optimal for achieving the UNICEF target of universal birth registration by 2030. Part 2 of this article considers the causes of low birth-registration rates and the concomitant classes of children vulnerable to low birth-registration rates. Part 3 addresses the importance of birth registration and the consequences of failure to obtain a birth certificate. Part 4 considers the human rights perspective, viewing both international and regional human rights instruments and the *Constitution of the Republic of South Africa*, 1996 (hereinafter, the *Constitution*). Part 5 examines the legal framework, specifically the *Births and Deaths Registration Act* 51 of 1992 (hereinafter, the *BDRA*) and its regulations. Part 6 considers possible solutions to the identified problems and makes recommendations for law and policy reform.

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2 African Committee 2014:par. 44; Fokala & Chenwi 2013:365.

3 *Centre for Child Law v Director-General, Department of Home Affairs* 2020 6 SA 199 (ECG):par. 4.

4 UNICEF 2019a:6.

5 United Nations General Assembly 2015:goal 16.9.

6 World Bank 2017.

7 Stats SA 2021b:4.

8 UNICEF 2020a:23.

9 UNICEF 2019a:6.

## 2. CLASSES OF CHILDREN VULNERABLE TO LOW BIRTH-REGISTRATION RATES

Identifying the classes of children that are vulnerable to low birth-registration rates may shed some light on the causes of these low birth-registration rates, and the interventions that need to be put in place to address this problem. Rugunanan J in *Centre for Child Law v Director-General, Department of Home Affairs*<sup>10</sup> (hereinafter, *Centre for Child Law 2020*) highlights the “disproportionate severity of such consequences for children from indigent families”.<sup>11</sup>

In 2014, shortly after the commencement of the *Births and Deaths Registration Amendment Act 18 of 2010* (hereinafter, the *Amendment Act*)<sup>12</sup> and the promulgation of the amended regulations,<sup>13</sup> Proudlock and Martin reviewed the *BDRA* and its regulations.<sup>14</sup> I will illustrate in this section that the authors’ comments and recommendations are just as relevant 8 years later and are supported by more recent data.

Proudlock and Martin list five groups of children who find it more difficult than others to access birth certificates. The first group identified by them is children living in rural areas. These children are more vulnerable to low or late birth-registration rates, due to various factors, including poorer Department of Home Affairs (hereinafter, DHA) service delivery in low-population rural areas, higher levels of poverty, and higher transport costs associated with longer travel distances to DHA offices. Late birth registrations (*i.e.*, birth registration after 30 days) require extra supporting documentation,<sup>15</sup> which may require multiple trips to DHA offices. As a result of this, the birth-registration process is often not completed. Moreover, children in rural areas are more likely than their urban-born counterparts to be born at home rather than in state healthcare facilities. These children’s parents will not be able to produce the prescribed document from the health facility to prove the child’s birth.<sup>16</sup> Although some DHA offices accept alternative forms of proof, this is not practised consistently, and parents and primary caregivers are often sent away if they cannot produce the required proof-of-birth form.<sup>17</sup>

The second group of vulnerable children identified by Proudlock and Martin is children whose parents are not in possession of official identity documents.<sup>18</sup> As a result, they cannot register the birth of their children, as

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10 *Centre for Child Law v Director-General, Department of Home Affairs 2020 6 SA 199 (ECG).*

11 *Centre for Child Law 2020*: par. 4.

12 The *Amendment Act* came into operation on 1 March 2014.

13 *Regulations on the Registration on Births and Deaths, 2014* (GN R128 Government Gazette 2014(37373)) (the *2014 Regulations*).

14 Proudlock & Martin 2014.

15 See 5.4.2 and 5.4.3 below.

16 See 5.4 below.

17 Proudlock & Martin 2014:15. See also 5.4 below.

18 Proudlock & Martin 2014:15.

parents are required to produce certified copies of their identity documents, in order to give notice of the birth of their children.<sup>19</sup>

Children in the care of extended family members are a third group of children vulnerable to low birth-registration rates identified by Proudlock and Martin.<sup>20</sup> They quote figures based on the 2011 General Household Survey to support their statement that a significant number of children do not live with their biological parents.<sup>21</sup> More recent data supports this statement. In 2019, 21.3 per cent of all children did not live with their biological parents; they were in the care of extended family members such as grandparents.<sup>22</sup> Many factors contribute to this state of affairs, including labour migration, poverty, housing and educational opportunities, as well as low marriage and cohabitation rates.<sup>23</sup>

Proudlock and Martin argue that the law technically allows extended family members or next of kin to register the birth of a child.<sup>24</sup> However, they concede that the law was clearer on this issue prior to the amendment of the *BDRA* in 2010.<sup>25</sup> The authors highlight the problems experienced by extended family members attempting to register a birth. Extended family members must supply a certified copy of the mother's identity document, which could be difficult if the mother has disappeared, cannot be contacted, or is not in possession of an identity document. Further, some DHA officials do not allow extended family members to register the birth of a child.<sup>26</sup> As pointed out by Proudlock and Martin, a narrow interpretation of the *Amendment Act* and 2014 *Regulations* could result in a situation where family members will only be allowed to register the birth of a child if the child's biological parents are deceased. This will undoubtedly aggravate the challenges experienced by extended family members.<sup>27</sup>

The fourth group of vulnerable children identified by Proudlock and Martin is orphaned children.<sup>28</sup> Once again, the data quoted by the authors is supported by the latest data from Stats SA. According to the 2019 General Household Survey, 2.4 per cent of children (472 800) have lost both their parents, 9 per cent of children (1.77 million) have lost their father, and 3.1 per cent of children (610 700) have lost their mother.<sup>29</sup> These children often do not have any official documents or become separated from their documents,

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19 See 5.4 below.

20 Proudlock & Martin 2014:16.

21 Proudlock & Martin 2014:16 and fn. 38.

22 Stats SA 2020b:10-11.

23 Hall 2020:156.

24 Proudlock & Martin 2014:16. In this regard, they refer to sec. 9(1) of the *BDRA*, read with reg. 3(2) of the 2014 *Regulations*.

25 The *Amendment Act* came into operation on 1 March 2014. See also Proudlock & Martin 2014:16.

26 Proudlock & Martin 2014:16.

27 Proudlock & Martin 2014:17. See further 4.1.3 below.

28 Proudlock & Martin 2014:17.

29 Stats SA 2020b:10. See also Hall 2020:156, who highlights that South Africa's population was estimated at 57.7 million people in 2018, of whom 19.7 million (34 per cent) were children under 18 years of age.

necessitating multiple trips to acquire the relevant documents and go through the late birth-registration process. If the child's mother has died without an identity document, the process is even more challenging.<sup>30</sup>

The last group of vulnerable children identified by Proudlock and Martin is what the authors term "children of migrant parents".<sup>31</sup> Increasing numbers of migrants from countries such as Somalia, the Democratic Republic of Congo, and Zimbabwe are crossing South African borders.<sup>32</sup> Proudlock and Martin single out children of refugees and asylum seekers under the category of "children of migrant parents",<sup>33</sup> but it should be noted that refugees and asylum seekers are not the only classes of migrants in South Africa. South Africa's migrant population also includes victims of trafficking, smuggled migrants, as well as unaccompanied and separated minors.<sup>34</sup> Increasing numbers of children cross South African borders without their parents, relatives, or caregivers, or are abandoned by parents or relatives once they reach South Africa.<sup>35</sup> According to the latest data available from UNICEF, South Africa has the largest child migrant population in Africa: 642 000 child migrants currently live in South Africa.<sup>36</sup>

Since this article deals with birth registration, its focus is on a specific subcategory of child migrants, namely children born of migrant parents in South Africa. This focus should in no way be viewed as trivialising the plight of the other categories of child migrants. On the contrary, many of the challenges discussed in this instance also relate to older undocumented children. Children born in South Africa to migrant parents who are not yet in possession of lawful permits for residence in the country<sup>37</sup> all experience birth-registration challenges.<sup>38</sup> Only four of the Refugee Reception Centres in South Africa are currently operational.<sup>39</sup> Coupled with the requirement that asylum-seeker visas must be renewed every few months, this causes delays in the processing of asylum claims that often last several years. Refusals of asylum applications and the growing backlog in the appeal process for refused applications further exacerbate the problem. The result is that a large number of asylum seekers, who are not in possession of lawful documents, or whose lawful documents have lapsed, are unable to register the births of their children.<sup>40</sup>

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30 Proudlock & Martin 2014:17.

31 Proudlock & Martin 2014:17.

32 Schreier 2011:3.

33 Proudlock & Martin 2014:17. In South Africa, a refugee is a person who has been granted refugee status by the DHA, and an asylum seeker is a person who has lodged an application for asylum with the DHA, which has not been finalised (Schreier 2011:4 fn. 3).

34 UNICEF 2020b:2.

35 UNICEF 2019b:1.

36 UNICEF 2019b:1.

37 These include an asylum seeker visa (issued in terms of sec. 22 of the *Refugees Act 130/1998*), and a formal recognition of refugee status (issued in terms of sec. 24 of the *Refugees Act 130/1998*).

38 Proudlock & Martin 2014:17.

39 UCT Refugee Rights Unit 2021:7-8.

40 Proudlock & Martin 2014:17. See further 5.4 below.

Until recently,<sup>41</sup> children born of unmarried fathers were another group of children vulnerable to low birth registration.<sup>42</sup> Apart from the difficulties experienced by unmarried fathers attempting to register the births of their children in their own names in terms of sec. 10 of the *BDRA* in circumstances where the consent of the mother could not be obtained,<sup>43</sup> there is the problem of undocumented mothers who are unable to register the births of their children, and finally the difficulties arising from the requirement that parents who are not South African citizens must produce a certified copy of a valid passport or visa to register the birth of their child.<sup>44</sup> The challenges faced by the latter group of children were highlighted in *Naki v Director General: Department of Home Affairs*.<sup>45</sup> This case involved NN, born of an unmarried South African father and a Congolese mother. Following NN's birth, the DHA refused to register her birth because her mother was not in possession of a valid visa or permit (her visa had expired shortly before NN's birth). This happened even though NN was a South African citizen in terms of sec. 2(1) (b) of the *Citizenship Act* 88 of 1995.<sup>46</sup> The Eastern Cape Division of the High Court dismissed the application to declare secs. 9 and 10 of the *BDRA* to be unconstitutional. However, the court declared certain sub-regulations of the 2014 *Regulations* to be unconstitutional and made a reading-in order to cure the defects in the provisions.<sup>47</sup>

This decision was taken on appeal to the full bench in the same court in *Centre for Child Law* 2020. In this decision, the court declared sec. 10 of the *BDRA* to be unconstitutional to the extent that it does not allow unmarried fathers to register the birth of their children under the father's surname in the absence of the mother of the children. The court made a reading-in order to cure the defects, which was suspended for 24 months to allow the legislature to amend the *Act*.<sup>48</sup>

In *Centre for Child Law v Director-General: Department of Home Affairs*<sup>49</sup> (hereinafter, *Centre for Child Law* 2022) the Constitutional Court, per Victor AJ (Mogoeng CJ dissenting) confirmed the order of invalidity of the full bench of the Eastern Cape Division of the High Court.<sup>50</sup> This decision will be dealt with in more detail in Part 5 of this article.

The following key problems can be distilled from this discussion of the classes of children vulnerable to low birth-registration rates: poverty, long

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41 See the continuing challenges highlighted in 6.3 below.

42 *Centre for Child Law* 2020:par. 3.

43 This may be the case, for example, if the mother is unavailable or, if she is available, consent could not be obtained for whatever reason. The mother may also have disappeared and left the child with the father, making it impossible for him to obtain her consent (see *Centre for Child Law* 2022:par. 5).

44 *Centre for Child Law* 2022:par. 5.

45 *Naki v Director General: Department of Home Affairs* [2018] 3 All SA 802 (ECG).

46 *Citizenship Act* 88/1995:paras. 1-4.

47 *Citizenship Act* 88/1995:par. 39.

48 *Citizenship Act* 88/1995:par. 23.

49 *Centre for Child Law v Director-General: Department of Home Affairs* 2022 2 SA 131 (CC).

50 *Centre for Child Law* 2022:par.89.

travel distances to DHA offices, poor service delivery in DHA offices, home births, incorrect interpretation of the law and regulations by DHA officials, the fact that the children's parents are not in possession of identity documents, and challenges experienced by migrant parents to obtain lawful permits to reside in the country.

### 3. THE CONSEQUENCES OF FAILURE TO OBTAIN A BIRTH CERTIFICATE

It is appropriate to start this discussion with the following quote from Mosikatsana, which places the importance of birth registration in perspective:<sup>51</sup>

The child's right to a name and nationality, and the right to have his or her name and other basic family information registered, comprise a child's right to a legal identity. The child's right to a legal identity also should be viewed as an extension of the child's right to human dignity, which is articulated in section 10 of the Constitution and is a non-derogable right.

Birth registration establishes the legal existence of a child and acts as a key that unlocks other fundamental rights for the child.<sup>52</sup> A child without a birth certificate is at risk of being denied access to healthcare services, education, social grants, protection services, and alternative care.<sup>53</sup> Indeed, a child who is not registered at birth is at risk of being "shut out of society – denied the right to an official identity".<sup>54</sup>

Every person in South Africa has the right to have access to healthcare services, and no person may be refused emergency medical treatment.<sup>55</sup> Refugees are entitled to the same basic healthcare services as South African citizens.<sup>56</sup> This right is interpreted to include asylum seekers.<sup>57</sup> The *National Health Act* 61 of 2003 confirms that all persons are entitled to free primary healthcare services. Moreover, pregnant and breastfeeding women and children below the age of six years are entitled to free healthcare services.<sup>58</sup> Although there is no provision in any of the legislation discussed in this instance that requires users to produce birth certificates or identity documents, it is reported that some health facilities require South African identity documents, birth certificates, or refugee permits.<sup>59</sup> The phrase "medical xenophobia" is often used to describe the negative attitudes and practices of healthcare workers towards migrants based on their status as non-South African.<sup>60</sup>

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51 Mosikatsana 1998:370.

52 African Committee 2014:par. 44.

53 Boniface 2021:132; Mkhwanazi *et al.* 2018:74; Proudlock & Martin 2014:18; Scalabrini Centre 2018.

54 UNICEF 2002:1. See also Fokala & Chenwi 2013:364.

55 *Constitution of the Republic of South Africa* 108/1996:secs. 27(1) and (3).

56 *Refugees Act*:sec. 27(g).

57 Scalabrini Centre 2019.

58 *National Health Act* 61/2003:sec. 4(3).

59 Human Rights Watch 2009:2, 7 *et seq.*

60 Crush & Tawodzera 2014:655.

While this highlights the vulnerability of undocumented migrants, particularly children who are not in possession of birth certificates, it should be stressed that an insistence on birth certificates will also adversely affect children who are South African citizens.

The *Constitution* affords every person in South Africa the right to basic education, including adult basic education.<sup>61</sup> This provision is unqualified, unconditional, and applies to every person, regardless of whether they can produce a birth certificate or are in the country legally.<sup>62</sup> The *South African Schools Act* 84 of 1996 requires public schools to “admit learners and serve their educational needs without unfairly discriminating in any way”.<sup>63</sup>

The *Admission Policy for Ordinary Public Schools* (1998) requires an official birth certificate for admission of a learner to a public school. A learner who is not in possession of a birth certificate may be admitted conditionally until a copy of the birth certificate can be obtained from the DHA. This must be done within three months of the conditional admission.<sup>64</sup> This policy also applies to learners who are not South African citizens and whose parents are in possession of a permit for temporary or permanent residence issued by the DHA.<sup>65</sup> Persons classified as “illegal aliens” must show evidence that they have applied to the DHA to legalise their stay in the country when they apply for admission for their children.<sup>66</sup> In practice, parents are, therefore, requested to submit birth certificates in the case of South African children, and either permanent residence or refugee permits and their children’s birth certificates, or asylum-seeker permits in the case of migrant children.<sup>67</sup>

The constitutionality of clauses 15 and 21 of the *Admission Policy* came under scrutiny in *Centre for Child Law v Minister of Basic Education (Section 27 and another as amici curiae)*.<sup>68</sup> In this case, a full bench of the Eastern Cape Division of the High Court declared these clauses to be unconstitutional, as they unjustifiably infringe children’s rights under secs. 9(1), 10, 28(2), and 29(1)(a) of the *Constitution*.<sup>69</sup> The court directed the respondents to admit all children who are not in possession of an official birth certificate into public schools in the Eastern Cape province. Where a learner is unable to provide a birth certificate, the principal of the school must accept alternative proof of identity such as an affidavit or sworn statement by the parent, caregiver, or guardian in which the child is identified.<sup>70</sup>

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61 *Constitution of the Republic of South Africa* 1996:sec. 29(1)(a).

62 *Centre for Child Law v Minister of Basic Education (Section 27 and another as amici curiae)* [2020] 1 All SA 711 (ECG):par. 71.

63 *South African Schools Act* 84/1996:sec. 5.

64 *Admission Policy for Ordinary Public Schools* (GN 2432 Government Gazette 1998(19377)) (*Admission Policy*):cl. 15.

65 *Admission Policy*:cl. 19.

66 *Admission Policy*:cl. 21.

67 Proudlock & Martin 2014:20.

68 *Centre for Child Law v Minister of Basic Education (Section 27 and another as amici curiae)* 2020.

69 *Constitution of the Republic of South Africa* 108/1996:par. 101.

70 *Constitution of the Republic of South Africa* 108/1996:par. 135.



Following this decision, a circular was issued by the Department of Basic Education (hereinafter, DBE),<sup>71</sup> advising all South African schools to follow the order of the High Court pending the revision of the *Admission Policy*.<sup>72</sup> A *Draft Admission Policy for Ordinary Public Schools*, which embodies the order of the High Court, was published for comment in 2021.<sup>73</sup> This circular and draft policy are welcomed, and it is hoped that they will bring an end to the admission challenges experienced by undocumented learners.

All children lawfully resident in South Africa, including children who are South African citizens and children in the care of refugees or permanent residents, are entitled to the child support grant (CSG), foster child grant (FCG), care dependency grant (CDG), and social relief of distress grant (SRD).<sup>74</sup> For a successful application for a social grant, the caregiver (and his or her spouse, if married) must produce an identity document and, in respect of the child, a birth certificate.<sup>75</sup> Regulation 11(1) contains a proviso that, if no valid proof is available, a sworn statement or affidavit may be accepted. Proudlock and Martin state that, since the introduction of this proviso, approximately 11 184 children have been assisted to obtain a CSG in the absence of a birth certificate or ID for their caregivers.<sup>76</sup> However, it should be noted that this number is very small compared to the number of eligible children who are excluded from accessing the CSG. In 2014, an estimated 1.8 million eligible children were excluded from the grant.<sup>77</sup> Access to identity documents and birth certificates continues to be cited as one of the underlying barriers to accessing the CSG, particularly in respect of children younger than a year, orphans and refugees.<sup>78</sup>

When a child is brought before the children's court in terms of the *Children's Act* 38 of 2005, that court will not make an order that a child is in need of care and protection, or an order placing the child in alternative care until the social worker submits the birth certificate of the child. Given the scarcity of social workers and the cumbersome application process, particularly for late birth registrations,<sup>79</sup> this requirement can significantly delay the process of dealing with children in need of care and protection.<sup>80</sup> Some courts insist on unabridged (full) birth certificates, which could cause difficulty for children born before March 2013 (the date on which the DHA started issuing only

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71 Circular 1 of 2020.

72 DBE 2020.

73 *National Education Policy Act 27/1996: Call for Comments on the Admission Policy for Ordinary Public Schools* (GN 38 Government Gazette 2021(44139)).

74 *Social Assistance Act 13/2004*:secs. 5(1)(c), 6, 7, and 8, read with regs. 6(1)(g), 7(1)(a), 8(c), and 9(1)(b) of the *Regulations relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance, 2008* (GN R898 Government Gazette 2008(31356)) (2008 *Regulations*).

75 2008 *Regulations*:reg. 11(1).

76 Proudlock & Martin 2014:19.

77 DSD, SASSA & UNICEF 2016:5.

78 Delany & Jehoma 2016:61; Proudlock & Martin 2014:19.

79 See 5.4.2 and 5.4.3 below.

80 Proudlock & Martin 2014:20.

unabridged birth certificates).<sup>81</sup> Most of the children born before that date are only in possession of an abridged birth certificate. Unabridged birth certificates must be obtained from the DHA at a cost of R75 and can take up to 8 weeks to be processed.<sup>82</sup>

The registration of the births of abandoned children also poses challenges. Since the commencement of the Amendment Act on 1 March 2014, the *BDRA* requires the first-time registration of the birth of an abandoned child to be done by a social worker after an enquiry in terms of the *Children's Act*.<sup>83</sup> Therefore, if there is no family or legal guardian available, the responsibility to register the birth falls on the social worker. This process is onerous and time-consuming, as will be illustrated below.<sup>84</sup> It is also reported that the DHA sometimes imposes this process in respect of applications by extended family members to register the birth of orphaned children, even though this is not required in terms of the *BDRA*.<sup>85</sup>

Another devastating consequence of the failure to register a child's birth is that no citizenship rights can be acquired by the child concerned.<sup>86</sup> The *Citizenship Act* 88 of 1995 provides that "any person who is born outside the Republic, one of his parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth".<sup>87</sup> However, birth registration and citizenship are closely linked in South Africa. Only those children who were registered at birth and included in South Africa's population register can acquire citizenship.<sup>88</sup> The link between the lack of a birth certificate and the inability to acquire and exercise the rights linked to citizenship is, therefore, clear.

Failure to register a child's birth is also a key cause of statelessness.<sup>89</sup> A stateless child is defined as a child who is not considered a national by any state under the operation of its laws; in other words, a person without nationality or citizenship.<sup>90</sup> Apart from the consequences of failure to register a child's birth discussed in this Part, statelessness may have other devastating consequences for children, including abuses such as early marriages, forced recruitment into the military, labour exploitation, lack of recognition

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81 See 5.3 below.

82 Proudlock & Martin 2014:21.

83 *BDRA*:sec. 12(1).

84 See 5.1.4 below.

85 Proudlock & Martin 2014:22.

86 *Naki v Director General: Department of Home Affairs*:par. 5.

87 *Citizenship Act*:sec. 2(1)(b).

88 Khan 2020:22.

89 Fokala & Chenwi 2013:360; Khan 2020:13; Van Waas 2007:447.

90 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya* Com/002/2009 (22 March 2011) (the *Nubian case*):par. 44. See further Fokala & Chenwi 2013:359. The international regime for stateless persons can be found in the United Nations Convention Relating to the Status of Stateless Persons (1954) and the United Nations Convention on the Reduction of Statelessness (1961). South Africa is not a signatory to any of these conventions.

in the country of residence, limited freedom of movement, and the harmful psychological impact on stateless children.<sup>91</sup>

Finally, children without birth certificates are not entered into the National Population Register (NPR) administered by the DHA.<sup>92</sup> Numerous public service institutions rely on the official birth-registration figures contained in the NPR for planning purposes. Unregistered children are, therefore, more likely to remain undetected in terms of the delivery of care and protection services.<sup>93</sup>

## 4. HUMAN RIGHTS PERSPECTIVE

### 4.1 International and regional human rights instruments

In international human rights law, the right to birth registration is linked to the right to acquire a nationality. The right to be registered immediately after birth and to have a name, and the right to acquire a nationality are protected by the International Covenant on Civil and Political Rights (1966) (ICCPR).<sup>94</sup> The United Nations Convention on the Rights and Welfare of the Child (1989) (UNCRC) also recognises a child's fundamental right to be registered immediately after birth. It further entrenches the child's right to a name from birth, and to acquire a nationality.<sup>95</sup> An obligation is placed on state parties to ensure the implementation of these rights through their domestic laws, particularly when the child would otherwise be stateless.<sup>96</sup>

The UN Committee on the Rights of the Child prescribes that birth registration should be accessible to all without discrimination of any kind and should be free of charge. An effective system of birth registration is flexible and tailored to the circumstances of families. This could be achieved, for example, by providing mobile birth-registration units. The Committee also reminds state parties of the importance of facilitating late registration of births and ensuring that children, who have not been registered, have equal access to healthcare, education, protection, and other social services.<sup>97</sup> State parties are discouraged from imposing fines for late registration, as these limit birth registration.<sup>98</sup>

The African Charter on the Rights and Welfare of the Child (1990) (ACRWC) protects the child's right from birth to a name, to be registered immediately after birth, and to acquire a nationality.<sup>99</sup> The African Committee describes the rights to a name, to birth registration, and to acquire a nationality

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91 Khan 2020:13.

92 *Naki v Director General: Department of Home Affairs*:par. 5.

93 Scalabrini Centre 2018.

94 ICCPR:art. 24(2) and (3).

95 UNCRC:art. 7(1).

96 UNCRC:art. 7(1).

97 Committee on the Rights of the Child 2005a:par. 25.

98 Committee on the Rights of the Child 2005b:par. 28.

99 ACRWC:art. 6(1)-(3).

as the “pillars of a person’s identity”.<sup>100</sup> While birth registration alone does not normally confer nationality on children, there is a direct link between birth registration and nationality.<sup>101</sup>

In addition to the treaties dealing with the “pillars of a person’s identity”,<sup>102</sup> the following treaties deal specifically with statelessness: the Convention relating to the Status of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961). Although South Africa officially pledged to sign and ratify these conventions at a United Nations Human Rights Commission Ministerial-level conference in Geneva in December 2011, this had not yet occurred when this article was drafted.<sup>103</sup>

## 4.2 The South African Constitution

Two of the three “pillars of a person’s identity”, as identified by the African Committee,<sup>104</sup> namely the right to a name, and the right to acquire a nationality, have been incorporated into the *Constitution*. Sec. 28(1)(a) provides that “every child has the right to a name and nationality from birth”.<sup>105</sup> It is clear that this right is not restricted to South African citizens, but is available to all children in South Africa, irrespective of the nationality or legal status of their parents.<sup>106</sup> The right to a name starts at birth and includes the right to be registered in a birth register immediately after birth.<sup>107</sup> South Africa is also obliged, in terms of both the UNCRC and the ACRWC, to give effect to this right.<sup>108</sup>

In *Hadebe v Minister of Home Affairs*, the mother of a child applied to the High Court for an order to direct the respondent to amend the details of her child’s birth certificate, after she had unsuccessfully tried for 18 months to convince DHA officials to make the amendment. The court held that sec. 28(1) (a) placed a duty on the state to record the child’s name and a “correlative duty to facilitate the registration of that name in the records of the state”.<sup>109</sup>

Curiously, in *Centre for Child Law 2022*, dealing with the constitutionality of sec. 10 of the *BDRA*, the Constitutional Court did not apply this provision at all, despite being expressly referred to it by the Centre for Child Law.<sup>110</sup> The same applies to the court *a quo* (the full bench in the Eastern Cape Division

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100 African Committee 2014:par. 23.

101 African Committee 2014:par. 23.

102 African Committee 2014:par. 23.

103 Centre for Child Law & Lawyers for Human Rights 2018:3.

104 African Committee 2014:par. 23.

105 Emphasis added.

106 Proudlock & Martin 2014:10.

107 Sec. 9(6) of the *BDRA* gives legislative effect to this right (Currie & De Waal 2013:603). See also *Hadebe v Minister of Home Affairs* [2007] JOL 18606 (D):par. 14; Skelton 2017:350.

108 See 4.1 above.

109 *Hadebe v Minister of Home Affairs* 2007:par. 14. See also Currie & De Waal 2013:603; Skelton 2017:350.

110 *Centre for Child Law 2022*:par. 20.

of the High Court).<sup>111</sup> Boniface is of the view that, even though the full bench did not expressly refer to sec. 28(1)(a) in their judgment, a perusal of the case law referred to by the court makes it clear that the court had this provision in mind when deciding on the matter.<sup>112</sup> The first decision in the trilogy, delivered by a single judge in the same court,<sup>113</sup> is an exception. Although the court did not declare secs. 9 and 10 of the *BDRA* to be constitutionally invalid, the court relied on sec. 28(1)(a) of the *Constitution* when it held that certain regulations were unconstitutional.<sup>114</sup>

Mosikatsana argues that a child's right to a legal identity can also be viewed as an extension of the child's right to human dignity, which is entrenched in sec. 10 of the *Constitution*.<sup>115</sup> Moreover, it stands to reason that it is in the best interests of children to have their right to a legal identity protected, particularly against the background of the importance of birth registration highlighted in section 3 above.<sup>116</sup> The paramountcy of the best interests of the child is protected in sec. 28(2) of the *Constitution*. This protection is strengthened by sec. 9, read with sec. 7 of the *Children's Act*. Protecting the best interests of the child is also one of South Africa's obligations in terms of both the UNCRC and the ACRWC.<sup>117</sup>

## 5. THE LEGAL FRAMEWORK: THE *BIRTHS AND DEATHS REGISTRATION ACT* AND REGULATIONS

### 5.1 Introduction

The registration of the birth of a child begins with the act of giving notice of the birth of the child in terms of secs. 9 and 10 of the *BDRA* and ends with the issuing of a birth certificate from the population register.<sup>118</sup> A birth certificate contains the child's forename and surname, date of birth, and place of birth.<sup>119</sup>

When a child is born alive, any one of the child's parents, or if the parents are deceased, any of the prescribed persons, must give notice of the child's birth within 30 days after the birth of the child.<sup>120</sup> Previously, the Act distinguished between registrations before one year and registrations after one year, and regarded registrations after one year as late registrations. Since the commencement of the *Amendment Act* on 1 March 2014, all registrations after 30 days are now considered late registrations which must comply

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111 *Centre for Child Law* 2020:par. 5, where the appellant referred the court to this provision.

112 Boniface 2021:133.

113 *Naki v Director General: Department of Home Affairs*.

114 *Constitution of the Republic of South Africa* 108/1996:paras. 32 and 35. See also 5.4 below.

115 Mosikatsana 1998:370. See also Part 3 above.

116 See also Boniface 2021:133.

117 UNCRC and ACRWC:arts. 3(1) and 4(1), respectively.

118 *BDRA*:sec. 9(7), read with sec. 5.

119 *Centre for Child Law* 2020:par. 4.

120 *BDRA*:sect. 9(1).

with the prescribed requirements for a late registration of birth. The 2014 *Regulations*<sup>121</sup> distinguish between registrations after 30 days and before one year, and registrations after one year, each with their own required proof.

## 5.2 Who may register the birth of a child?

### 5.2.1 The child's parents

As a general rule, notice of birth must be given by any of the child's parents within 30 days of the child's birth.<sup>122</sup> Where possible, a notice of birth must be given by both parents.<sup>123</sup> A notice of birth given after 30 days but before one year after the child's birth is given in the same manner.<sup>124</sup> A notice of birth of a child who is older than a year must be given by the biological parents of the child.<sup>125</sup>

Prior to the decision in *Centre for Child Law 2022*, the following procedures were applicable to the registration of the births of children born of unmarried parents.<sup>126</sup> In terms of the *BDRA*, children born of unmarried parents had to be registered under the surname of the child's mother, unless both parents requested that the father's surname be used.<sup>127</sup> The *Act* did not allow for a double-barrel surname consisting of both parents' surnames to be used, as is the case with children born of married parents.<sup>128</sup> In order for the child to be registered under the father's surname, he had to acknowledge paternity in writing in the presence of the person to whom the notice of birth is given and enter his particulars on the notice of birth.<sup>129</sup> The child's birth could still be registered under the mother's surname, even if the father acknowledged paternity in the prescribed manner with the mother's consent.<sup>130</sup>

In *Naki v Director General: Department of Home Affairs*, the Eastern Cape Division of the High Court *inter alia* declared Regulation 12(1) and parts of Regulations 3 to 5 to be unconstitutional. However, this decision was overturned on appeal to the full bench in *Centre for Child Law 2020*, and sec. 10 of the *BDRA* was declared unconstitutional to the extent that it does not allow an unmarried father to register the birth of his child in the absence of

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121 All references to the regulations in this part are to the 2014 *Regulations*. See fn. 21 above.

122 *BDRA*:sec. 9(1), read with regs. 3(2) and 8(2) of the 2014 *Regulations*.

123 Reg. 3(3).

124 Reg. 4(1)-(3).

125 *BDRA*:sec. 3(1A), read with reg. 5(1).

126 Curiously, the regulations still use the outdated term "child born out of wedlock". In this article, the phrase "child born of unmarried parents" is used to denote children born of parents who were married at the time of the child's conception or birth or at any intervening time. See also 6.5.5 below.

127 *BDRA*:sec. 10(1).

128 Notice of birth of children born of married parents is given under the surname of either parent or both parents' surnames joined together as a double-barrel surname (*BDRA*:sec.9(2)).

129 *BDRA*:sec. 10(1)(b).

130 *BDRA*:sec. 10(2).

the child's mother. This judgment was referred to the Constitutional Court for confirmation in *Centre for Child Law 2022*. In this case, the court was called upon to decide the following issues:<sup>131</sup>

- Does section 10 of the *BDRA* prohibit an unmarried father to register his child's birth in the absence of the mother? Can section 10 be read in a constitutionally compliant manner? If not, does section 10 amount to unfair discrimination against both the father and the child, and an infringement of their dignity?
- What is the proper relationship between sections 9 and 10? Both the full bench and the respondents reasoned that section 9 enables either parent to register the child's birth without the other parent's consent, whereas section 10 only relates to the issue of the child's surname.

As to the interplay between secs. 9 and 10 of the *Act*, the court held that, in terms of a plain reading of sec. 9(1), either parent of a child, whether or not they are married, can give notice of the birth of a child. This is evident from the phrases "any child born alive", "any one of his or her parents" or "any prescribed person", if the parents are deceased.<sup>132</sup> If the phrase "subject to the provisions of section 10" at the beginning of sec. 9(2) of the *Act* is excised, it follows that the surname of either the father or the mother of the child, or both their surnames joined together as a double-barrel surname, can be used. The marital status of the parents is irrelevant.<sup>133</sup> Victor AJ further held that a contextual reading supports this interpretation – sec. 9(2) deals with the surname under which the child is to be registered, and sec. 10 deals with the same issue. An ordinary reading of sec. 10(1) reveals that the provision stipulates under which parent's surname the notice of the birth is given, and not who must give the notice of the birth. The latter issue is regulated by sec. 9(1), which provides that either parent may do so. Nothing in the text of either sec. 9(1) or sec. 9(2) contradicts this interpretation.<sup>134</sup>

The court then considered the constitutional issues revealed by an ordinary reading of sec. 9(1) and (2), read with sec. 10. First, either parent may give notice of the birth of a child in terms of sec. 9(1), but there are limited possibilities for the surname of an unmarried father to be assigned to his child in terms of sec. 10(1)(b). Secondly, the default position in terms of sec. 10(1)(b) is that the surname of a child born of unmarried parents is that of the mother. To circumvent this default position and assign the father's surname to the child, a cumbersome process must be followed.<sup>135</sup>

An important conclusion on the interpretation of sec. 10 was reached by Victor AJ, which differs from the interpretation advanced by the applicant. The court reasoned that "section 10(1)(a) does enable an unmarried father to give notice of birth without the mother's consent or presence". The only limitation placed on the father by sec. 10 in its entirety is the limitation on his capacity to

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131 *BDRA*:paras. 25-26.

132 *BDRA*:par. 29.

133 *BDRA*:par. 30.

134 *BDRA*:par. 31.

135 *BDRA*:par. 32.

assign his surname to his child. This can only be done if the procedures laid down in secs. 10(1)(a) and 10(1)(b) are followed.<sup>136</sup>

The court held that sec. 10 potentially violates the rights of both the unmarried father and the child born of unmarried parents.<sup>137</sup> As far as the rights of the unmarried father are concerned, the court held that sec. 10 of the *BDRA* not only infringes the rights of the unmarried father to equal protection and benefit of the law. As the grounds of differentiation (sex, gender, and marital status) are listed grounds in terms of sec. 9(3) of the *Constitution*, the differentiation also raises questions of unfair discrimination.<sup>138</sup> Sec. 10 of the *BDRA* differentiates between married and unmarried fathers, based on their capacity to assign their name to their newborn child when giving notice of their child's birth. Further, the provision differentiates between mothers (regardless of their marital status) and unmarried fathers as a category.<sup>139</sup> No legitimate government purpose is served by this differentiation.<sup>140</sup>

The court then considered the question as to whether sec. 10 of the *BDRA* constitutes unfair discrimination in terms of sec. 9(3) of the *Constitution*. The prejudicial impact of the provision on unmarried fathers is clear – they cannot register the birth of their child under their surname without the mother's consent or presence. The discrimination suffered by unmarried fathers constitutes “a barrier to their full participation as parents and perpetuates gendered narratives about men's caregiving”.<sup>141</sup> A gender-neutral and marital-neutral approach to the process of birth registration will strengthen substantive equality by abolishing these gendered and sexist stereotypes.<sup>142</sup> Sec. 10 of the *BDRA* also infringes the unmarried father's right to dignity in terms of sec. 10 of the *Constitution*, because it implies “that he is not entitled to be treated as worthy of registering the birth of his child with his surname in the mother's absence merely because he and the child's mother are not married.”<sup>143</sup>

As far as the rights of the child born of unmarried parents are concerned, sec. 10 of the *BDRA* constitutes an infringement of the child's constitutional right not to be discriminated against on the grounds of social origin and birth (both listed grounds in sec. 9(3) of the *Constitution*), the child's right to dignity, in terms of sec. 10 of the *Constitution*, and the child's right have their best interests given paramount importance in terms of sec. 28(2) of the *Constitution*.<sup>144</sup> For these reasons, the court declared sec. 10 of the *BDRA* to be unconstitutional. The court held that severance of the entire section is an appropriate remedy. The court further held that the phrase in sec. 9(2)

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136 *BDRA*:par. 35.

137 *Centre for Child Law* 2022:par. 34.

138 *BDRA*:par. 38.

139 *BDRA*:par. 41.

140 *BDRA*:par. 42.

141 *BDRA*:par. 52.

142 *BDRA*:par. 55.

143 *BDRA*:par. 64.

144 *BDRA*:par. 75.



that makes the provision “subject to the provisions of section 10” must also be severed.<sup>145</sup>

Unfortunately, the court did not declare Regulation 12(1) to be unconstitutional. In terms of this regulation, the notice of birth of a child born of unmarried parents must be given by the child’s mother. Clearly, this provision suffers from the same defect as sec. 10 of the *BDRA*, which resulted in the declaration of its constitutional invalidity by the Eastern Cape Division of the High Court in *Naki v Director General: Department of Home Affairs*. As mentioned earlier, this judgment was overturned by the full bench of the same court in *Centre for Child Law 2020*, which decision was confirmed by the Constitutional Court in *Centre for Child Law 2022*. Unfortunately, neither the full bench nor the Constitutional Court considered the validity of Regulation 12(1).

In conclusion, any one of the parents of a child who is born alive, regardless of their marital status, can give notice of the child’s birth.<sup>146</sup> The notice of birth can be given under the surname of either the father or the mother of the child, or the surnames of both parents joined together as a double-barrel surname.<sup>147</sup>

### 5.2.2 Migrant parents

Parents who are permanent residents or refugees should be assisted to register the birth of their children in the same way as South African parents.<sup>148</sup> They will be issued with an unabridged birth certificate with a unique identity number.<sup>149</sup>

Where the parents are neither South African citizens nor permanent residents or refugees,<sup>150</sup> the notice of birth must be given in terms of Regulation 8(3). This provision requires the mother or father (or both parents) to submit a certified copy of a valid passport *and* visa or permit.<sup>151</sup> This requirement has been criticised, as it may prevent many children born of migrant parents in South Africa from being registered. Proudlock and Martin indicate that many asylum seekers have valid asylum-seeker visas but no passports and are unable to obtain their passports from their country of origin. Moreover, asylum-seeker visas expire regularly, resulting in large numbers of asylum seekers not being able to register the birth of their children.<sup>152</sup>

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145 *BDRA*:par. 88. Note that a dissenting minority judgment was delivered by Mogoeng CJ (Mathopo AJ concurring) (paras. 90-145).

146 *BDRA*:sec. 9(1).

147 *BDRA*:sec. 9(2).

148 Reg. 7(1).

149 Reg. 7(2).

150 This class of parents includes temporary residents, asylum seekers, and parents with work permits (Proudlock & Martin 2014:25).

151 Reg. 8(3)(c).

152 See further Part 2 above.

### 5.2.3 Family members and legal guardians

Prior to the commencement of the *Amendment Act* on 1 March 2014, a “person having charge of the child or a person requested to do so by the parents or the said person” was allowed to give notice of the child’s birth if neither of the child’s parents was able to give notice.<sup>153</sup> A fairly broad category of persons, other than parents, was allowed to register births, and the circumstances in which this could be done were not confined to instances where the parents were deceased.

Since 1 March 2014, a child’s birth may be registered by “any one of his or her parents, or if the parents are deceased, any of the prescribed persons”.<sup>154</sup> In terms of the regulations, “prescribed persons” include the child’s next of kin or legal guardian.<sup>155</sup> This limitation does not take cognisance of the high number of children who do not live with their biological parents for reasons other than the death of their parents.<sup>156</sup>

### 5.2.4 Social workers

In the case of an abandoned child, who has never been registered, a social worker must give notice of the birth of the child, but only after a children’s court enquiry has been initiated and a court order obtained in terms of sec. 156 of the *Children’s Act*.<sup>157</sup> Since 1 March 2014, a new category of children can be registered by social workers, namely orphaned children, after the conclusion of a children’s court enquiry. However, a proviso is included that this is only possible if the notice of birth of the orphaned child does not list any of the persons contemplated in sec. 9(1) (*i.e.*, parents, next of kin, or legal guardians).<sup>158</sup>

Proudlock and Martin caution that this provision should not be interpreted to mean that all orphan children must now be registered by social workers. According to the authors, a practice has already developed in some DHA offices to require family members caring for orphan children to submit a social worker report or children’s court order when giving notice of the birth of an orphan in their care. Misinterpretation of sec. 12(2) could contribute to this unlawful practice and cause unnecessary delays in the registration of the births of orphan children. It is clear from sec. 12(2) that extended family members and legal guardians are also allowed to register orphan children, and that a social worker report or children’s court order is not needed in this instance.<sup>159</sup>

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153 *BDRA*:sec. 9(1), before the commencement of the 2010 *Amendment Act* on 1 March 2014.

154 *BDRA*:sec 9(1), as amended by the 2010 *Amendment Act*.

155 *BDRA*:sect. 9(1), read with reg. 3(2).

156 Proudlock & Martin 2014:26-27.

157 *BDRA*:sect. 12(1), read with reg. 9(1).

158 *BDRA*:sec. 12(2), read with reg. 9(1).

159 Proudlock & Martin 2014:27.

### 5.3 What kind of birth certificate is issued?

Prior to March 2013, all birth certificates were issued in an abridged form.<sup>160</sup> Unabridged birth certificates<sup>161</sup> were only issued following a separate application. Since 2013, the DHA issues only unabridged birth certificates. These documents are issued immediately, and the first certificate is issued free of charge.<sup>162</sup>

Before March 2013, children born of parents who were not registered in the National Population Register (*i.e.*, parents who were not citizens or permanent residents) were issued abridged handwritten birth certificates<sup>163</sup> without identity numbers. These handwritten birth certificates pose numerous challenges. Due to the high risk of forgery, they are not accepted as proof of birth in other countries. As a result, foreign children born in South Africa are vulnerable to becoming stateless. It is also challenging for applicants to obtain reproductions of the original birth certificates from the DHA. The lack of an identity number can also present challenges for the child later in life, for example when applying to write Grade-12 examinations.<sup>164</sup>

Against this background, the *pro forma* computer-printed unabridged birth certificate provided for in the 2014 *Regulations* is welcomed.<sup>165</sup> Unfortunately, as this amendment only came into effect on 1 March 2014, there are still many children with handwritten birth certificates. Moreover, the 2014 *Regulations* do not make provision for a unique identity number.

### 5.4 Requirements for early and late birth registrations<sup>166</sup>

#### 5.4.1 Registrations within 30 days (early registrations)

An applicant wishing to register a child's birth within 30 days must complete Form DHA-24.<sup>167</sup> The following supporting documents are required:<sup>168</sup>

Proof of birth on Form DHA-PB,<sup>169</sup> attested to by a medical practitioner who attended the birth, or examined the mother or the child after the birth of the child;

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160 This is a short version of the birth certificate containing only the child's name, place of birth, and the unique identity numbers of the child and mother.

161 This version of the birth certificate contains additional information, including the father's name and identity number.

162 Proudlock & Martin 2014:28.

163 *Regulations on the Registration on Births and Deaths, 1992* (GN R2139 Government Gazette 1992(14182)):reg. 6(3)(b).

164 Proudlock & Martin 2014:28-29.

165 Form DHA-19 (Annexure 24 of the 2014 *Regulations*).

166 Late registration of birth is defined as "notice of birth given after the expiry of the period of 30 days" (2014 *Regulations*:reg. 1).

167 2014 *Regulations*:reg. 3(3) and Annexure 1A.

168 2014 *Regulations*:reg. 3(3)(a)-(j).

169 2014 *Regulations*:Annexure 1D.

Where the birth did not take place in a health institution, an affidavit on Form DHA-24,<sup>170</sup> attested to by a South African citizen who witnessed the birth of the child;

The biometrics of the child whose birth is sought to be registered (in the form of a palm, foot, or fingerprint) must be provided in the appropriate space on Form DHA-24;<sup>171</sup>

The fingerprints of the parents, which must be verified online against the National Population Register. If the fingerprints cannot be verified online, a full set of fingerprints of the parents must be taken on Form DHA-24/A;<sup>172</sup>

A certified copy of the identity document of the biological or adoptive mother or father or both parents;

A certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen;

A certified copy of a death certificate of any deceased parent, where applicable;

Where applicable, a certified copy of the marriage certificate of the parents of the child;

Where applicable, a certified copy of the identity document or valid passport and visa or permit of the next-of-kin or legal guardian, and

An affidavit on Form DHA-288/B<sup>173</sup> by the next-of-kin or legal guardian explaining why they and not the child's parents are registering the child's birth and giving the details of the child's grandparents (if they differ from those of the applicant).

Although this document is not listed in Regulation 3(3), the checklist at the end of Form DHA-24<sup>174</sup> also requires a copy of the children's court order that orders the registration of the birth, in the case of an abandoned child whose birth is being registered by a social worker.<sup>175</sup>

The burden of proof of extended family members who want to register the children in their care is increased by two new requirements:<sup>176</sup> the affidavit by the next of kin on form DHA-288/B,<sup>177</sup> and the requirement of a certified copy

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170 2014 *Regulations*:Annexure 1E.

171 2014 *Regulations*:Annexure 1A.

172 2014 *Regulations*:Annexure 1C.

173 2014 *Regulations*:Annexure 2C.

174 2014 *Regulations*:Annexure 1A.

175 Proudlock & Martin 2014:29.

176 Proudlock & Martin 2014:30.

177 2014 *Regulations*:reg. 3(3)(j) and Annexure 2C.

of the death certificate of any deceased parent.<sup>178</sup> However, the standardised proof of birth form is welcomed.<sup>179</sup>

In *Naki v Director General: Department of Home Affairs*,<sup>180</sup> a single judge in the Eastern Cape Division of the High Court considered the constitutional validity of sub-Regulations (3)(f) and (3)(i) of Regulations 3, 4 and 5. Sub-regulation (3)(f) of Regulations 3, 4 and 5 requires a certified copy of a valid passport and visa or permit, where one parent is a non-South African citizen, whereas Sub-regulation (3)(i) of Regulations 3, 4 and 5 requires a certified copy of the identity document or valid passport and visa or permit of the next of kin or legal guardian, where applicable. The court held that these sub-regulations contravene secs. 28(1)(a) and 28(2) of the *Constitution*, and ordered that the defect should be cured by reading in “where it is available” at the beginning of Sub-regulation (3)(f) of Regulations 3, 4 and 5 and “and available” at the end of Sub-regulation (3)(i) of Regulations 3, 4 and 5.<sup>181</sup> Neither the full bench of the Eastern Cape Division of the High Court in *Centre for Child Law 2020* nor the Constitutional Court in *Centre for Child Law 2022* considered the constitutional validity of these regulations.

#### 5.4.2 Registrations after 30 days but before one year (late registrations)

Applicants who want to register the birth of a child during this period must complete Form DHA24/LRB.<sup>182</sup> This form requires the applicant to explain the reason why the birth was not registered within 30 days. In addition to the list of documents required for birth registrations before 30 days listed above,<sup>183</sup> applicants are also required to submit an affidavit by one of the parents on Form DHA-288/A,<sup>184</sup> explaining why the application is late, and proof of payment of the applicable fee.<sup>185</sup>

It is unclear why the applicant must explain the reasons for the late registration on two separate forms (DHA-24/LBR and DHA-288/A). The requirement of a fee for late registration of birth seems to have been waived.<sup>186</sup> Since about a quarter of the birth registrations in South Africa still occur after 30 days,<sup>187</sup> this development is welcomed.

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178 2014 *Regulations*:reg. 3(3)(g).

179 Proudlock & Martin 2014:30.

180 See also Part 2, 4.2, and 5.1.1 above.

181 This decision is also relevant in respect of 5.4.2 and 5.4.3 below.

182 2014 *Regulations*:reg. 4(3) and Annexure 1B.

183 See 5.4.1 above.

184 2014 *Regulations*:Annexure 2A.

185 2014 *Regulations*:reg. 4(3)(a)-(l).

186 I phoned the DHA contact centre on 6 June 2022 and was told by the contact centre agent that no fee is payable for late registration of births. I was unable to ascertain whether the fees have been waived permanently, or only as an interim measure during the COVID-19 pandemic.

187 Stats SA 2021b:4.

### 5.4.3 Registrations after one year (late registrations)

To register the birth of a child who is older than one year, the applicants must fill in form DHA-24/LRB. In addition to the documents required for birth registrations up to one year listed above,<sup>188</sup> the applicants must submit two recent photos of the child if he or she is seven years old or older. In addition, they must submit a prescribed affidavit on Form DHA-288,<sup>189</sup> completed by the parent (or family member, legal guardian, or social worker if the parent is deceased), which specifies the identity, status, and date of birth of the child and includes information on the child's life events, such as the child's birth, any religious ceremony performed on the child, and the child's school attendance.<sup>190</sup>

## 6. POSSIBLE SOLUTIONS TO THE LOW BIRTH-REGISTRATION PROBLEM: RECOMMENDATIONS FOR POLICY AND LAW REFORM

### 6.1 Poverty alleviation

As previously indicated,<sup>191</sup> one of the classes of children vulnerable to low birth-registration rates is children living in rural areas, and a significant factor contributing to their vulnerability is poverty.<sup>192</sup> It goes without saying that poverty alleviation will improve the lives of millions of children in South Africa and will have the added benefit of increasing birth-registration rates.

South Africa has alarmingly high rates of poverty, in particular child poverty. Although child-poverty rates have declined substantially over the past two decades, due to the expansion in the reach of the child support grant (CSG), many children still live in poverty.<sup>193</sup> In 2019, 56 per cent of children (11.2 million) lived below the then upper bound poverty line of R1227 per month, and 33 per cent lived below the then food poverty line of R561 per month.<sup>194</sup> The food poverty line refers to the cost of the minimum nutritional requirement of 2 100 kilocalories per person per day, whereas the upper bound poverty line refers to this minimum nutritional requirement plus other basic needs such as clothing and shelter. As the upper bound poverty line is the only poverty line that meets all the child's basic needs, it is used to track child poverty.<sup>195</sup> These poverty rates are based on reported income and existing grant amounts. At the end of March 2022, 13 million children were paid the child support grant

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188 See 5.4.2 above.

189 2014 *Regulations*:Annexure 2B.

190 2014 *Regulations*:reg. 5(3)(a)-(m).

191 See Part 2 above.

192 A detailed examination of poverty alleviation falls outside the scope of this article.

193 Hall 2022:170.

194 Hall 2022:170, read with Stats SA 2021a:4.

195 Hall 2022:170.

(CSG), which was R460 at the time.<sup>196</sup> The CSG was increased to R480 per month in April 2022.

One of the key indicators of poverty is unemployment. During the COVID-19 lockdown of 2020, there was a sharp increase in unemployment. From February to April 2020, a total of three million jobs were lost, two million to women. As more children in South Africa live with women than with men, this directly impacted on child poverty.<sup>197</sup> In the third quarter of 2020, the official unemployment rate was 30.8 per cent.<sup>198</sup> Unsurprisingly, in 2020, 35.7 per cent of children (7.3 million) were living in households without an employed adult.<sup>199</sup>

The protective effect of disaster-relief grants and existing grant top-ups was illustrated in 2020. In May of that year, the COVID-19 social relief of distress grant for unemployed adults (SRD), valued at R350, was introduced. In addition, existing grants were topped up by R250, and CSG beneficiaries received an extra R300 in May and R500 between June and October 2020. The R350 SRD grant was the only relief that continued past October 2020, into 2021 and beyond. The 2020 General Household Survey was conducted between September and December 2020, covering two months when grant top-ups were in place, and two months after their termination in October 2020. This allowed conclusions to be made on the effect of the disaster-relief grants and top-ups on child poverty. As expected, the disaster-relief grant and grant top-ups reduced the percentage of children living below the upper bound poverty line by 3 per cent, and the percentage of children living below the food poverty line by 5 per cent.<sup>200</sup>

This provides a strong argument in support of the implementation of basic income support (BIS) for all South Africans between the ages of 18 and 60 years. The Panel of Experts commissioned by the International Labour Organisation (ILO), the United Nations Sustainable Development Goals Fund, and the Department of Social Development (DSD) released their report in December 2021. The panel's recommended implementation of an entry-level version of the BIS on the platform of the existing COVID-19 SRD grant is welcomed.<sup>201</sup>

## 6.2 Access to birth-registration services

Long queues at DHA offices are a familiar sight in South Africa. In 2022, the Minister of Home Affairs, Dr. Aaron Motsoaledi, called the “long winding queues” outside DHA offices one of the “two elephants in the room”, the other being the issue of immigration.<sup>202</sup> According to the DHA, various strategies

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196 Hall 2022:172.

197 Hall 2022:170.

198 Stats SA 2020c:1. This figure increased to a staggering 34.5 per cent in the first quarter of 2022 (Stats SA 2022:2).

199 Hall 2022:171.

200 Hall 2022:170.

201 DSD 2021.

202 DHA 2022c.

were put in place to address these challenges. These include engagement with the State Information Technology Agency (SITA) to address the network issues; strengthening “leadership capacity” in DHA offices; maximum counter occupation at offices; the early opening of offices to service learners, the elderly, and people with disabilities; and the separation of queues according to the service required.<sup>203</sup> Many of these issues were mentioned in the minister’s 2022/2023 budget speech:<sup>204</sup>

- SITA committed to spending a total of almost R1 billion on IT infrastructure to support the DHA and other departments.
- To solve the problem of offices that are not purpose-built, the DHA has commenced building custom-built offices, and will continue to do so in 2022/2023. Moreover, 15 high-volume infrastructure projects were registered with the Presidential Infrastructure Coordinating Council. Finally, the DHA will roll out DHA offices in shopping centres, starting with Menlyn Mall in Pretoria in September 2022.
- The National Treasury Department awarded R266 million, which will raise the DHA staffing level from 39 per cent to 42 per cent.
- The DHA currently has 98 functioning mobile units, and an additional 10 units were procured in 2021. Another 15 units will be procured in the 2022/2023 financial year.<sup>205</sup>

The strategies put in place by the DHA to maximise service delivery at DHA offices are welcomed. However, the following additional recommendations are made to further strengthen these strategies, in order to further increase birth-registration rates in South Africa:

*Custom-built offices:* When DHA offices are modernised, an efficient workflow should inform the design of the offices, and proper signage should be put in place. The needs of birth-registration applicants should be considered. As these applicants are often mothers with young babies, appropriate restrooms are essential. It is also recommended that separate collection counters be established at all offices.

*Mobile units and collection counters:* Some mobile units were configured to serve as “collection counters” outside high-volume offices, whereas, in some provinces, dedicated offices were established for collections.<sup>206</sup> It is recommended that mobile units be reserved for areas where there are no DHA offices, and not as collection counters outside already established high-volume offices. When mobile units are deployed to remote areas, they should remain there long enough so that applicants can return with missing documents, if necessary. These units should be equipped as live-capture offices, and should have stable network connections. This strategy should contribute to increasing birth-registration rates in rural areas.

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203 DHA 2022b:18.

204 DHA 2022c.

205 DHA 2022b:20.

206 DHA 2022b:19.



*Staffing:* Although the increase in staffing levels from 39 per cent to 42 per cent is a step in the right direction, it is not nearly enough to maximise service delivery. Staffing levels should be increased further to ensure that all counters are occupied. This will also ensure that queues are managed properly, that an efficient workflow is maintained, and that offices have longer operational hours.

*Hospitals and clinics:* There are 1 445 health facilities with maternity wards in South Africa. Birth-registration facilities have been established at 391 of these facilities, and the DHA, in collaboration with the Department of Health (DOH), plans to expand this footprint.<sup>207</sup> This important strategy should be fast-tracked, so that birth registration is possible in all health facilities with maternity wards. In remote areas, where there are no hospitals or no hospitals with maternity wards, these facilities should be available at clinics, so that they can be accessed by mothers who bring their babies in for check-ups and immunisations. This practice has been implemented with good results in Zambia,<sup>208</sup> and should further contribute to increasing birth-registration rates in rural areas.

### 6.3 Directives and training

The challenge of incorrect interpretation and implementation of the law and regulations by DHA officials was emphasised above.<sup>209</sup> The problem is aptly highlighted by the position of unmarried fathers. Despite the DHA's insistence that applications from unmarried fathers to register their children without the consent of the mothers are accepted following the Constitutional Court judgment in *Centre for Child Law 2022*, this appears not to be the case in practice.<sup>210</sup>

Proudlock *et al.* report that many officials are unaware of the judgment, while others are aware of the judgment but are unwilling to implement it in the absence of a directive from the Minister, or unable to implement it, due to outdated computer software and application forms. Moreover, unmarried fathers who wish to register their child's birth are often told to provide a paternity test. At a minimum cost of R2 000, it is hardly surprising that the Constitutional Court held that insisting on these tests would create insurmountable practical burdens for unmarried fathers and their children.<sup>211</sup>

A visit to the DHA website confirms the challenges with the implementation of the Constitutional Court judgment. If one navigates to "Birth Certificates" under "Civic Services", the headings "Registering the birth of a child born within wedlock" and "Registering the birth of a child born out of wedlock" are

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207 DHA 2022d.

208 Singizi "Birth registration at the clinics brings huge results for children" <https://www.unicef.org/esa/stories/birth-registration-clinics-brings-huge-results-children> (accessed on 12 July 2022).

209 See Parts 2 and 3 above.

210 DSD Portfolio Committee 2022. See also Proudlock *et al* 2022:19-20.

211 *Centre for Child Law 2022*:par. 83.

found at the bottom of the page. Under these headings, the legal position before the Constitutional Court judgment is set out.<sup>212</sup>

Against this background, the importance of the development of directives and training on these directives can hardly be over-emphasised. The DHA website should also be updated to reflect the current legal position. The same applies to application forms and computer software used by the DHA.

## 6.4 Awareness campaigns

In view of the critical importance of birth registration, public awareness campaigns should be a priority. Non-governmental organisations such as the Scalabrini Centre,<sup>213</sup> in collaboration with Lawyers for Human Rights<sup>214</sup> and the Legal Resources Centre,<sup>215</sup> are actively involved in raising awareness on this issue. Their campaign includes a very useful YouTube video.<sup>216</sup>

It is recommended that the DHA develop a similar awareness campaign, which includes posters, pamphlets, and videos. These materials should be distributed to all DHA and DSD offices, health facilities, and schools. They should emphasise the importance of birth registration and state clearly which supporting documents are compulsory for each category of applicant, for both early and late birth registrations.<sup>217</sup> I agree with Proudlock and Martin, who recommend that the application forms and *pro forma* affidavits be made available at DHA offices and on the DHA website. Applicants should be allowed to remove the forms from the DHA offices, if necessary.<sup>218</sup>

## 6.5 Recommended amendments to the *BDRA* and 2014 Regulations<sup>219</sup>

### 6.5.1 Early versus late birth registrations

The notice of birth of children born of parents who are South African citizens, non-South African citizens, permanent residents, and refugees must be given

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212 <http://www.dha.gov.za/index.php/civic-services/birth-certificates> (accessed on 14 July 2022).

213 <https://www.scalabrini.org.za/birth-registration/> (accessed on 14 July 2022).

214 <https://www.lhr.org.za/> (accessed on 14 July 2022).

215 <https://lrc.org.za/> (accessed on 14 July 2022).

216 <https://youtu.be/iGJezBncyXU> (accessed on 14 July 2022).

217 Proudlock & Martin 2014:31.

218 Proudlock & Martin 2014:31.

219 Note that *Draft Regulations on the Registration of Births and Deaths* were published in 2018 (GN 1085 Government Gazette 2018(41970)) (2018 *Draft Regulations*). However, these *Draft Regulations* do not intend to amend any of the regulations discussed in this article. Therefore, comments on the 2014 *Regulations* are also relevant to the 2018 *Draft Regulations*.

within 30 days.<sup>220</sup> When a birth is registered after 30 days, it is regarded as a late registration of birth, for which a list of additional documents is required.<sup>221</sup>

Early birth registration (*i.e.*, birth registration within 30 days) is, understandably, a priority for the DHA.<sup>222</sup> From 2016 to 2019, early birth registrations increased steadily from 76 per cent (732 672) to 80 per cent (840 746) of all births registered. Unfortunately, in 2020, this rate dropped to 71 per cent of births registered, or 710 814 births.<sup>223</sup> If one considers the classes of children vulnerable to low birth registration,<sup>224</sup> it is clear that several factors could contribute to late birth registration. The recommended strategies discussed above<sup>225</sup> and below<sup>226</sup> will undoubtedly contribute not only to higher birth-registration rates, but also to higher early birth-registration rates.

Two issues that are specifically relevant to the provisions dealing with early and late registrations are highlighted, in this instance. First, the process for late birth registration is onerous and should be simplified.<sup>227</sup> One way to achieve this would be to do away with the requirement that the applicant must explain the reasons for the late registration on two separate forms (DHA-24/LBR and DHA-288/A). One form should suffice. Secondly, the requirement to pay a fee for late registration should be permanently waived, and the regulations requiring proof of payment of the applicable fee should be scrapped.<sup>228</sup>

### 6.5.2 Children not born at health institutions

The process for registering the birth of children who were not born at health institutions should be simplified. Currently, an affidavit attested to by a South African citizen who witnessed the birth of the child, is required.<sup>229</sup> This arbitrary requirement excludes children who are born without any witnesses and children who are born without witnesses who are South African citizens. The regulations should be amended to allow other persons to attest to the birth, or the affidavit should only be required where it is available.<sup>230</sup>

### 6.5.3 Birth registration by next of kin

The birth of a child may only be registered by their next of kin or legal guardian if the child's parents are deceased.<sup>231</sup> As stated above, this provision fails to

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220 *BDRA*:sec. 9(1), read with regs. 3(1), 7(1), and 8(1) of the 2014 *Regulations*. See also 5.4.1 above.

221 Regs. 4 and 5 of the 2014 *Regulations*. See also 5.4.2 and 5.4.3 above.

222 DHA 2022a:25.

223 Stats SA 2021b:5.

224 See Part 2 above.

225 See 6.1-6.4 above.

226 See 6.5.2-6.5.5 below.

227 Proudlock & Martin 2014:14.

228 Proudlock & Martin 2014:32.

229 2014 *Regulations*:regs. 4(3)(1) and 5(3)(m).

230 Centre for Child Law & Lawyers for Human Rights:7.

231 *BDRA*:sect. 9(1), read with 2014 *Regulations*:reg. 3(2).

take cognisance of the lived reality of millions of South African children.<sup>232</sup> The problem is exacerbated by the practice in some DHA offices to require family members caring for children to submit a social worker report or children's court order when giving notice of the birth of a child in their care.<sup>233</sup>

I therefore support the amendments proposed by Proudlock and Martin.<sup>234</sup> First, the *BDRA* and 2014 *Regulations* should be amended to remove the requirement that the parents should be deceased before a child's next of kin may register the birth. Secondly, a definition of "next of kin" similar to the definition of "family member" in sec. 1 of the *Children's Act* should be added to the regulations.<sup>235</sup> Thirdly, a directive should be issued by the DHA that extended family members caring for children are not required to obtain a social worker report or children's court order before they are allowed to register the birth of a child.

#### 6.5.4 Migrant parents

The many challenges experienced by migrant parents were highlighted above.<sup>236</sup> One of these challenges is the requirement in the regulations that a certified copy of a valid passport and visa or permit should be submitted where one parent is a non-South African citizen,<sup>237</sup> or where the next of kin or legal guardian is a non-South African citizen.<sup>238</sup> Amendment of the relevant regulations as ordered by the Eastern Cape Division of the High Court in *Naki v Director General: Department of Home Affairs*,<sup>239</sup> to only require these documents where they are available, will undoubtedly improve the position of children of migrant parents.<sup>240</sup>

#### 6.5.5 Unmarried fathers

As indicated earlier, in *Centre for Child Law 2022*, the Constitutional Court declared sec. 10 of the *BDRA* to be unconstitutional to the extent that it limited the right of an unmarried father to register the birth of his child under his surname.<sup>241</sup> Unfortunately, the Constitutional Court did not refer to Regulation 12(1) in its order. I therefore recommend that the regulation be amended as ordered by the Eastern Cape Division of the High Court in *Naki v Director General: Department of Home Affairs*. In *Naki*, the court ordered that the words "either" and "or father" should be read into this regulation to remedy

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232 See Part 2 and 5.1.3 above.

233 See 5.1.4 above.

234 Proudlock & Martin 2014:32-33.

235 This is also proposed by the Centre for Child Law and Lawyers for Human Rights (Centre for Child Law & Lawyers for Human Rights:7).

236 See Part 2 and 5.1.2. above.

237 2014 *Regulations*:regs. 3(3)(f), 4(3)(f), and 5(3)(f).

238 2014 *Regulations*:regs. 3(3)(i), 4(3)(i), and 5(3)(i).

239 *Naki v Director General: Department of Home Affairs* 2018. See also Part 2, 4.2, and 5.1.1 above.

240 See also Centre for Child Law & Lawyers for Human Rights:7-10.

241 See 5.1.1 above.

its constitutional invalidity.<sup>242</sup> Moreover, the phrase “child born out of wedlock” should be replaced by the phrase “child born of unmarried parents” to align the regulations with the terminology used in the *Children’s Act*.

## 7. CONCLUSION

In the *Nubian* case, the African Committee clarified a state’s obligation in the context of birth registration as follows:<sup>243</sup>

The African Committee is of the view that the obligation of the State Party under the African Children’s Charter in relation to making sure that all children are registered immediately after birth is not only limited to passing laws (and policies), but also extends to addressing all de facto limitations and obstacles to birth registration.

This article illustrates the inadequacy of laws and policies, the absence of proper implementation, and the failure to remove limitations and barriers to birth registration. It is hoped that the recommendations made in this article will optimise protection of the right of every child to birth registration, so that the UNICEF target of universal birth registration by 2030 can be achieved.

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242 *Naki v Director General: Department of Home Affairs* 2018:par. 39. See further Centre for Child Law & Lawyers for Human Rights:16.

243 *Naki v Director General: Department of Home Affairs* 2018:par. 40. See also Fokala & Chenwi 2013:365.

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