

SOUTH AFRICA / JUDGMENT

F.B and Others v Minister of Home Affairs and Others (11659/2018) [2018] ZAWCHC 153 (12 November 2018) [2018] ZAWCHC 153

COURT

Western Cape High Court, Cape Town

BEFORE

N P Boqwana

CASE / FILE NUMBER

11659/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

Number: 11659/2018

In

the matter between:

F
B First
Applicant
H
B Second
Applicant
F
B obo D P
B Third
Applicant
and
THE
MINISTER OF HOME
AFFAIRS First
Respondent
THE
DIRECTOR-GENERAL, DEPARTMENT
OF
HOME
AFFAIRS Second
Respondent

THE
DIRECTOR: BIRTHS, MARRIAGES, DEATH
AND
RECORDS
MANAGEMENT Third
Respondent

Delivered: 12 November 2018

JUDGMENT

BOQWANA, J

- [1] The applicants brought an application seeking an order declaring that D P B, born on 26 April 2011, is a South African citizen by birth, and directing that he be issued with an unabridged electronic birth certificate in terms of section 9 of the Births and Deaths Registration Act 51 of 1992 ('Births and Deaths Registration Act') by the second respondent.
- [2] The first and second applicants are married and both holders of South African permanent residence permits, having been awarded these on 14 December 2010. They are D's parents and reside with him in the Western Cape.
- [3] They attempted to apply for a birth certificate reflecting D's status as a South African citizen, first at the Paarl Department of Home Affairs ("the Department") and later at the Caledon office.
- [4] D's birth was registered within the 30 day period as prescribed in the Paarl office. There they were issued with a handwritten birth certificate which, according to the applicants, is provided to children whose details are not included in the National Population Register ("NPR"), for instance children whose parents are holders of temporary residence holders. The applicants contend that D is a South African citizen by birth, but his handwritten birth certificate does not contain an identity number.
- [5] The issue in contention, as appearing on the papers, was initially around the interpretation of section 2 of the South African Citizenship Act No. 88 of 1995 ('the Citizenship Act') before it was amended by the South African Citizenship Amendment Act No. 17 of 2010 ('the Amendment Act'), which came into operation on 1 January 2013.
- [6] Section 2, before its amendment, provided as follows:
"2. Citizenship by birth - (1) Any person –
 - (a) who immediately prior to the date of commencement of this Act, was a South African citizen by birth; or
 - (b) who is born in the Republic on or after the date of commencement of this Act; or

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

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

(ii) the representative or the employee of a person or an association of persons resident or established in the Republic; or

(iii) in the service of an international organisation of which the Government of the Republic was then a member,

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

(2) No person shall be a South African citizen by virtue of subsection (1)(b) if, at the time of his or her birth, one of his or her parents –

(a) was a person enjoying diplomatic immunity in the Republic in terms of any law relating to diplomatic privileges, or was a career

representative of the government of another country, or was a person employed in the embassy or legation of such a government or in the office of such a career representative, or was a member of the household or an employee of any such person; or

(b) had not been lawfully admitted to the Republic for permanent residence therein, and his or her other parent was not a South African citizen.” (Own emphasis)

[7] As appearing in the answering affidavit, the respondents initially contended that the application was premature. This issue was not argued at all. They then raised a second defence dealing with their interpretation of section 2, quoted above. Whilst

the deponent to the answering affidavit seemed to suggest that the Amendment Act was applicable to the proceedings at one point, he went on to outline the requirements applicable in the Citizenship Act prior to its amendment, and placed the following interpretation to it:

“23.1 First, of D's parents, one of them must have been lawfully admitted to South Africa for permanent residence. The First and Second Applicants, who are D's parents, were issued with permanent residence permits on 14 December

2010. Accordingly, the requirement that one of D's parents had been lawfully admitted to the Republic for permanent residence is met.

23.2 Second, D's other parent must be a South African citizen. As stated hereinabove, the First and Second Applicants, who are D's parents, are both permanent residence permit holders. The First Applicant is a Dutch citizen born in Netherlands and the Second Applicant is an Indonesian citizen born in Indonesia.

Accordingly, none of D's parents are South African citizen and thus this requirement is absent." (Own emphasis)

[8] The respondents accordingly held the view that D is not a South African citizen, as contemplated by the old section 2(1)(b) of the Citizenship Act read with section 2(2). They held that D would have qualified for citizenship by birth if, for example, at the time of his birth in South Africa, the first applicant was a permanent resident permit holder and the second applicant a South

African citizen, but found that not to be the position.

[9] The respondents further alleged that D might have been eligible to qualify for South African citizenship by birth by virtue of section 2(4), however, he was seemingly not eligible for that because he is a Dutch citizen by virtue of his father's Dutch citizenship at the time of his birth. According to the respondents D's birth is also registered with the Embassy of the Kingdom of Netherlands and he has been issued with a Dutch passport.

[10] Despite what is contained in the answering affidavit, the respondents have since made common cause with the applicants' argument with regard to the applicants' interpretation of section 2 of the Citizenship Act (pre-amendment). The new position advanced on behalf of the respondents in argument, is that the amended provision which became effective in January 2013 retrospectively applies to D.

[11] Section 2 of the current Citizenship Act (the new provision) reads as follows:

"2. Citizenship by birth - Any person -

- (a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010 was a South African by birth; or
- (b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth being a South African citizen,

shall be a South African by birth." (Own emphasis)

[12] If the new provision were to apply, it is common cause that D would not be able to attain citizenship by birth, as neither of his

parents were South African citizens at the time of his birth.

[13] Both counsel provided me with writings dealing with the issues of citizenship by birth. In an article titled *The Child's Right to a Nationality and the Acquisition of Citizenship in South Africa* Law (1998) 14 SAJHR 411, at 418, Raylene Keightley observes that although the qualification in section 2(2)(b) of the old provision:

"... is clearly intended to limit the right to claim citizenship based on birth, its actual effect is unfortunately less clear. The use of the triple negative in the language of the provision ('No person ... had not been ... or was not ...')

makes it difficult to understand its positive application, particularly where a child has a parent who has been admitted to South Africa for permanent residence. The subsection does not expressly deal with this situation and the question is whether the

limitation contained in subsection 2(2) applies? A careful reading of the subsection suggests that the limitation comes into

play as soon as a child has a non-citizen parent who has not been admitted for permanent residence. Such a child will only have a claim to citizenship by birth if the other parent is a citizen. Even if one parent has been admitted for permanent residence, as long as the other has not (and is not a citizen), then the limitation applies and the child will have no claim to citizenship based on birth. It is only if both parents have been admitted as permanent residents that a child born in South African of non-citizenship parents will be a citizen. Of course, if one of the parties is in fact a citizen then the status of the other parent, whether admitted as a permanent resident, or as a temporary resident or even an illegal immigrant, is immaterial.”

- [14] This view makes sense to me, the negative reading of the section in question connotes a disqualification as opposed to a qualification. In other words, one is disqualified from obtaining citizenship by birth, although born in South Africa, if one of the parents does not have permanent residence, and the other one is (under those circumstances) not a South African citizen. Therefore if one parent is unlawfully present in the Republic, the child will be “saved” by the other being a citizen. If these limitations are not present then a person born in South Africa should qualify, such as in this case. Here, none of the parents are persons who “have not been lawfully admitted to the Republic for permanent residence” and therefore the saving cushion of the other being a South African citizen is not required in this case.
- [15] Indeed as agreed by both parties in argument, on that interpretation, a person born in South Africa, whose parents have been lawfully admitted to the Republic for permanent residence should acquire citizenship by birth.
- [16] Now that the interpretation of the old provision is no longer an issue, I turn to deal with the issue of whether the amended provision applies to D retrospectively.
- [17] The respondents relied on the judgment of Ali and Others v Minister of Home Affairs and Another 2018 (1) SA 633 (WCC) by Wille AJ (as he then was) to support this proposition.
- [18] In the Ali matter, the Court dealt with a situation where the respondents had refused to grant applicants citizenship in terms of section 4(3) of the Amendment Act. There, the respondents had argued that section 4(3) did not apply to persons who were born before 1 January 2013 (i.e. contending that that section could not be retrospectively applied).

- [19] Acknowledging the reluctance of the Courts to interpret legislation as applying retrospectively, because of the danger of interfering with vested rights, the Court found that the applicants did not wish to take away vested rights or create new obligations, they simply maintained that they were eligible for the benefits which the new section 4(3) conferred when it came into operation. In other words they met its requirements. Therefore, the applicants were not calling for the amended section to be retrospectively applied.
- [20] The Ali case does not find application in the present case. Clearly if the amended provision was to apply to D, who was born before it came into operation, it would interfere with vested rights (i.e. rights that D acquired under the old provision operative when he was born). The respondents could not persuade the Court as to the basis upon which the new provision could be said to be applicable to D's situation. The retrospective application of the current provision to D is therefore not sustainable. In any event, this issue was not particularly raised in the answering affidavit and its premise canvassed. I deal with it for completeness.
- [21] It follows therefore that the arguments proffered by the respondents, in refusing to acknowledge that D is a South African citizen and to grant him the necessary documentation, are untenable.
- [22] I was also directed to the matter of FK Mulowayi and Others v Minister of Home Affairs and Others, case number 13550/2017, delivered on 5 June 2018, where Allie J, made a remark in passing that confirmed the applicants' interpretation of section 2(2) of the Citizenship Act, pre-amendment, at paragraph 21 of her judgment. In that case, the Director-General had apparently conceded that Mr Mulowayi's eldest child was in fact a citizen by birth. This is where both parents had been granted permanent residence at the time of their eldest son's birth in April 2011.
- [23] Turning to the issue of costs. The applicants pray for costs on the scale as between attorney and client. They contend
- that after the service of the replying affidavit, it should have been clear to the respondents that their opposition had no merit.
- The respondents conceded the interpretation advanced by the applicants in argument and went on to change their position. Their
- conduct, it is argued, is inexplicable and warrants a punitive cost order.
- [24] Whilst concessions have been made on the interpretation point, it cannot be said that persistence with opposition was motivated by
- any malice. Whilst the issue of interpretation has now crystallised, this case is by no means straightforward. I do
- accept that the issue of "retrospectivity" was not properly raised in the answering affidavit, and the averments thereto

appear to be inconsistent. The articulation of the issues by the respondents and their persistence in opposing the relief sought by the applicants could not be attributed to bad motive or dubiousness, but possibly to a mistaken belief as to the law or even genuine difficulty in locating the provisions discussed in this case. I accept there is vacillation between positions, but I do not think that a punitive cost order should be granted against them.

[25] In conclusion, D's parents have waited for too long to get their son's rights protected. The respondents must ensure that the birth certificate and other documentation or registration afforded citizens is afforded to D as expeditiously as

possible. Counsel for the applicants requested the Court to make an order that the third respondent be served with a copy of this judgment to ensure expedited processing of the order. I have no difficulty with that and there was no objection to that effect from the respondents. I do think that the respondents should be given longer than the seven days asked for by the applicants, in which to issue the relevant documentation in respect of D.

[26] In the circumstances, the following order is made:

1. It is declared that D P B (Date of birth: 26 April 2011) is a South African citizen by birth.
2. The second respondent is directed to issue an unabridged electronic birth certificate in terms of section 9 of the Births and Deaths Registration Act, No. 51 of 1992, at the Caledon office of the Department of Home Affairs within ten (10) days of the order of this Court in respect of D P B, such birth certificate to include the identity number of the first and second applicants and the identity number issued by the second respondent to D P B.
3. The respondents are to pay cost of the applicants.
4. A copy of this judgment must be served on the third respondent by the Sheriff for the expedited processing of this order.

N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicants: Adv. L. de la Hunt

Instructed by: Eisenberg & Associates, Cape Town

For the Respondents: Adv. R. Matsala

Instructed by: State Attorney, Cape Town

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Prepared on 8 October 2026 · Esheria