

SOUTH AFRICA / JUDGMENT

I.F.H (Nee V.Z) and Another v Minister of Home Affairs and Another (2023-100855) [2024] ZAGPPHC 993 (27 May 2024)

[2024] ZAGPPHC 993

COURT

North Gauteng High Court, Pretoria

BEFORE

Mnisi

CASE / FILE NUMBER

2023-100855

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

GAUTENG DIVISION,
PRETORIA

CASE NO: 2023-100855

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: Yes

(3)

REVISED: NO

DATE 27 May 2024

SIGNATURE

In the matter between: I[...] F[...] H[...]
(NEE V[...] Z[...])
1st
Applicant
L[...] S[...] K[...]
V[...]
Z[...]
2nd
Applicant
And
MINISTER OF HOME
AFFAIRS
1st Respondent

THE DIRECTOR GENERAL: DEPARTMENT
OF HOME AFFAIRS
2nd
Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded it to the Case Lines system. The date and time of hand down is deemed to be 27 May 2024 at 10:00.

MNISI AJ

INTRODUCTION

[1] The applicants, brought an application in terms of which the following relief is sought:

"1. That the 1st Respondent is directed to register the 2nd Applicant's birth in terms of the Birth and Death Registration Act 51 of 1992, as amended (the "BDRA") within 30 days of this Order.

2. That the 1st Respondent is directed to grant the 2nd Applicant a Certificate of Naturalization as a South African citizen in terms of Section 5 of the South African Citizen Act 88 of 1995, within 30 days of this Order.
3. That the 2nd Applicant is declared to be a South African Citizen by naturalization in terms of Section 4(2) of the Citizenship Act 88 of 1995, as amended.
4. That the 1st Respondent is directed to enter the 2nd Applicant into the National Population Register as a citizen, to issue her with a Birth Certificate and with an Identity Document accordingly, within 30 days of this Order.
5. Ordering that the Respondents in an event they oppose this Application be ordered to pay the Costs of this Application jointly and severally, the one paying the other to be absolved.

6. Further and/or alternative relief.”

[2] The respondents are the “Minister of Home Affairs” and the “Director General of Home Affairs” (“the respondents”). The respondents did not oppose the application despite being properly served with the court papers.

BACKGROUND

AND OVERVIEW

- [3] The evidence of the first applicant is that she is a South African major female pensioner currently residing at Andante, Plot 7[...], S[...], Haartebeespoort. The second applicant, is an eighteen
- (18) year old female, born in Tanzania on 13 September 2005 from Tanzanian parents.
- [4] During February 2005, the first applicant and her former husband went to live in Tanzania to do a ‘Turnkey project’ on Tanesco which was funded by the IMF. However, during her free time she volunteered at an orphanage known as Misimbazi Orphanage.
- [5] In September 2005, the first applicant was approached by a certain gentleman known as Simba who requested her to take care of the second applicant, who was approximately two weeks old. She was advised that the mother of the second applicant, who was not married to her father passed away during birth, and that her family lacked the financial resources to take care of her.
- [6] The first applicant decided to keep the baby (second applicant) instead of taking her to the orphanage because their treatment towards the children was not of good standard. At the time, the second applicant was undernourished and weighed only 1.9 kg. Instead of keeping the second applicant for three days which was initially agreed with the uncle, she kept her for a considerable period of time. It is during this period that she fell in love with the second respondent and this led to a decision to adopt her.
- [7] On 28 September 2008, the adoption process was finalised and registered in Dar Es Salaam, Tanzania by an order of the High Court. Subsequently, the second applicant was registered as L[...] S[...] K[...] V[...] Z[...].
- [8] The first applicant continued to stay in Dar Es Salam until 2012 when she decided to return back to South Africa with the second applicant. In 2013 the second applicant was registered as a Grade R learner at Hendrick Schoeman Laerskool in Hartbeespoort. She remained there until she completed her Grade 7 in 2019. In 2020, the second applicant proceeded to Wagpos Hoerskool in Brits to study her Grade 8 where she remained until 2023. At the time of filing this application, it was anticipated that she would be registered as a Grade 12 learner at the aforementioned school.

- [9] The second applicant deposed to a confirmatory affidavit and confirmed the evidence of the first applicant in so far as it relates to her. Of importance, she confirms that she is currently 18 years of age and that her relationship with the first applicant is unbreakable. According to the second applicant, it has been an unbearable experience to live in South Africa without a birth certificate despite the fact that the first applicant has been taking care of her as if she was her biological child. She has waited for 15 years in order to be registered as a South African citizen without any success.
- [10] Moreover, the first applicant stated that she has tried to have the second applicant registered with Home Affairs since 2012 when she visited the Home Affairs offices in Modimolle without success. Other Home Affairs offices that she visited include inter alia, Cullinan, Brits, Akasia and Pretoria Central. During May 2023, she spoke to a certain Mr Patrick Makhinta telephonically and he advised her to go back to Akasia Home Affairs where she previously requested for assistance without success. At Akasia Home Affairs office she was not assisted, instead she was advised to seek a Court Order.
- [11] The first applicant further stated that in 2019 she was requested to complete a notice of birth at the Home Affairs offices which she did but nothing came out of it. She also completed an application for a Birth Certificate and a late registration of birth documents. All these efforts did not yield any positive results.

THE ISSUE OF PREJUDICE

- [12] The first applicant stated further that the failure by the Department to assist her has caused the second applicant major anxiety and abandonment issues. As a consequence, she is excluded in most of the areas where an identity document is required. The first applicant bought the second applicant a car as a present for her 18th birthday, however the latter cannot drive it because she does not have a driver's license.
- [13] Moreover, the first applicant stated that without an identity document, the second applicant will be unable to write her matric exams, and therefore she will be unable to apply to further her studies at a tertiary institution. The issue of being unable to be registered to write matric exams was confirmed by the school where the second applicant is currently attending.
- [14] It is also abundantly clear that in the event that her identity document is not granted, she will be unable to open bank accounts and she amongst others things, will not be able to apply for a driver's license and travel documents, such as passports.
- [15] It was also pointed out that the second applicant's passport has since expired in 2018 and that she has not been able to do anything due to the respondents' persistent failure to assist her.

ISSUE(S) FOR DETERMINATION

- [16] The issue arises because the Department of Home Affairs (“the Department”) refused and/or neglected to receive and grant the second applicant an application for citizenship by naturalization despite the fact that she has satisfied the requirements of s 4(2) of the South African Citizenship Act 88 of 1995, as amended (the Act).
- [17] I am required to determine the question whether the respondents unreasonably refused to receive and grant the second applicant a certificate of naturalization as a South African citizen as contemplated in section 5 of the Act.

SUMMARY OF THE APPLICANTS’ SUBMISSIONS

- [18] In their heads of argument, the applicants contended that the Act translates and gives effect to the Constitution’s provisions as envisaged under in Section 28 of the Constitution of the Republic of South Africa[1] (“the Constitution”), the rights to which children are entitled, including rights to a name and nationality.
- [19] Moreover, it was contended that the Act expands on citizenship by stating that citizenship is obtained by birth, descent or naturalization. Therefore, a foreign child adopted by a South African citizen becomes a citizen by descent whilst a naturalized citizen who has complied with the requirements for naturalization as set out in Section 5 of the Act.
- [20] Furthermore, the applicants argued that the provisions of section 5(i)(a)-(g) clearly favour the second applicant in that:
- a) she has continuously lived permanently in South Africa for a period of 12 years;
 - b) she speaks two official South African languages, namely, English and Afrikaans fluently; and
 - c) she has been of good character (according to her school reports) and planning to further her tertiary studies and thereafter remain within the borders of the Republic.

APPLICABLE LEGAL PRINCIPLES

- [21] The basic principle of South African Citizenship is that a child follows the Citizenship or nationality of his or her parents. The unchallenged evidence of the applicants is that the first applicant has been the second applicant’s parent by means of adoption since 2008.
- [22] Section 4 of the Act, sets out requirements for citizenship by naturalisation, as follows:
- “Any person who—*
- (a) immediately prior to the date of the commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by naturalisation; or
 - (b) in terms of this Act is granted a certificate of naturalisation as a South African citizen in terms of section 5, shall be a South African citizen by naturalisation.
- (2) Any person referred to in subsection (1)(b) shall, with effect from the date

of the issue of the certificate, be a South African citizen by naturalisation.

[23] On the other hand, section 5(1) of the Act provides that the Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that—

- (a) he or she is not a minor; and
- (b) he or she has been admitted to the Republic for permanent residence therein; and
- (c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application; and
- (d) he or she is of good character; and
- (e) he or she intends to continue to reside in the Republic or to enter or continue in the service of the Government of the Republic or of an international organisation of which the Government of the Republic is a member or of a person or association of persons resident or established in the Republic; and
- (f) he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister; and
- (g) he or she has adequate knowledge of the responsibilities and privileges of South African citizenship.

[24] Section 5(4) of the Act also provides that:

- (a) The Minister may, notwithstanding the provisions of subsection (1), upon application in the prescribed form for a certificate of naturalisation in respect of a minor who is permanently and lawfully resident in the Republic, grant to that minor a certificate of naturalisation as a South African citizen.
- (b) An application in terms of paragraph (a) must be made by the responsible parent of the legal guardian of the minor concerned.

[25] It is clear to me that the second applicant meets the requirements of sections 5(1)(a) – (g), 5(4)(a) and (b), as well as 5(5)(a) and (b) above and the facts in the affidavits filed in support of this application are not contested by the respondents.

[26] In *Jose and Another v The Minister of Home Affairs and Others*[2], (“Jose”) the court stated that:

“[27] The respondent’s manner of dealing with these applications is unfortunate. It is also inconsistent with a number of the governing principles of public administration set out in section 195 of the governing principles of public administration set out in section 195 of the Constitution.[3]

- [28] Even if the applicants made enquiries too soon, by the time this application was instituted, almost 8 months had passed in respect of the first applicant's application and almost 6 months in respect of the second applicant. Taking into account that PAJA requires an approach to be made to court within 180 days of a decision having been taken, it is not unreasonable to at least expect some response in less than that time.
- [29] It was open to the respondents to have made a decision at any time after the applicants' deadlines, and even the application was made to court. However, they chose to defend the matter.
- [30] It is my view that, by the time the applicants approached court, there was an unreasonable delay in the making of the decision. Certainly, by the time the matter was heard, and the decision was still not made, the delay was inordinate-it was over 2 years for the first applicant, and slightly less for the second.
- [31] The respondents could have dealt with the applications even after the applicants approached court, and then the only question would have been dealt with by means of costs order. They chose to continue not to deal with the applications."

Late registration of birth

- [27] I have taken into consideration the 1954 United Nations Convention[4] relating to the status of stateless persons which defines statelessness as:

"a person who is not considered as a national by any State under the operation of its law." One of the ways in which a person may become stateless is when his/her birth has not been documented in any country".

- [28] In my view this is exactly the predicament in which the second applicant finds herself. Her difficulty was not helped by the respondents' lack of action and manifested bad faith in handling her numerous applications to be issued with the necessary documents.
- [29] Also relevant, is section 2 of the Births and Death Registration Act, 51 of 1992, ("BDRA") which provides that the BDRA applies to all South African citizens including "persons who are not South African citizens but who sojourn permanently or temporarily in South Africa."
- [30] In *Khoza v Minister of Home Affairs and Another*[5], the court stated that:
- "It is trite that the testimony of a witness stands as evidence, even where there is no documents available. It is nonessential to claim that Khoza, who is seeking late birth registration, should have birth registration documents."*
- [31] In light of the authorities pointed out above, coupled with the evidence presented before this court, it is my view that the respondents have unreasonably precluded the second applicant from obtaining her citizenship. As a result, their continuous conduct as alleged in the papers, are infringing upon her "dignity and personhood" and effectively granting to her a status of "second-class" citizen.

- [32] Furthermore, I am of the considered view that the “issue of prejudice” is relevant in these proceedings, with specific reference to the relief as requested by the applicants in these circumstances. The prejudice to the applicants, especially the second applicant, involves not only practical implications but also fundamental constitutional entitlements.
- [33] The second applicant has a constitutional right to apply for citizenship and the respondents cannot limit or interfere with this right by not granting and/or by failing to file opposition papers to demonstrate why the court should not grant the relief requested by the applicants.
- [34] By adopting this approach, the respondents are effectively failing to respect the second applicant’s right to citizenship in a country where she has lived since she was seven years old. The mere fact that she has lived in this country for the past twelve years demonstrate that it is the only country that she has ever truly experienced and known since then.

The Interests of justice

- [35] It is my considered view that it is not in the interests of justice and neither is it just and equitable to send the applicants from pillar to post simply because the respondents have adopted an attitude of ignoring the applicants’ legally permissible request for assistance. Accordingly, this state of affairs cannot be countenanced. The attitude of the respondents demonstrate unfairness in the treatment of the second applicant and infringes her constitutional rights.

- [36] The Constitutional Court said in *Head of Department Mpumalanga Department of Education and another v Hoërskool Ermelo and another*:^[6]

“The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in

constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements . . .”.

- [37] The respondents, despite being properly served with the court papers by the applicants, failed to provide any iota of evidence showing how the second applicant has no right to citizenship or nationality to this country. No basis has been laid why the order sought by the applicants should not be granted.

CONCLUSION

- [38] In Jose^[7], the court held that:

“where an application is brought in terms of PAJA for relief related to the failure to take a decision, a court may make any order that is just and equitable, including ordering the administrator to take the decision or declaring the rights of the parties in relation to the decision, or directing any party to do anything which may be considered necessary to do justice between the parties in terms of section 8(2) of PAJA. The listed powers of the court are slightly less in number than those it has when reviewing a decision actually taken, but substantively, there is no fundamental difference.”

[39] In my view, the second applicant, having fulfilled all the requirements to apply for citizenship in terms of the Act, has a right for the citizenship to be granted. Consequently, the applicants have made a proper case.

[40] In the circumstances, I make the following order:

1. The First Respondent is directed to register the second applicant's birth in terms of the Birth and Death Registration Act 51 of 1992, as amended (“the BDRA”) within 30 days of this Order.
2. The First Respondent is directed to grant the second applicant a Certificate of Naturalisation as a South African citizen in terms of section 5 of the South African Citizen Act 88 of 1995, within 30 days of this Order.
3. The Second Applicant is declared to be a South African citizen by naturalization in terms of section 4(2) of the Citizenship Act 88 of 1995, as amended.
4. The Second Respondent is directed to enter the Second Applicant into the National Population Register as a Citizen, to issue her with a Birth Certificate and an Identity Document within 30 days of this Order.
5. No Order as to costs.

J MNISI

Acting Judge of the High Court

Heard On: 29 January 2024 Decided On: 27 May 2024 For the Applicant: A Tube Attorneys for the Applicant: Tube A Attorneys Counsel for the Defendant: Unknown Attorney for the Defendant: Unknown

[1] The Constitution of the Republic of South Africa 108 of 1996.

[2] (38981/17) [2019] ZAGPPHC 88; 2019 (4) SA 597 (GP) (15 March 2019).

[3] The Constitution of the Republic of South Africa, 1996.

[4] 954 United Nations Convention: Statelessness.

[5]

[2023] ZAGPPHC 140; 6700/2022; [2023] 2 All SA 489 (GP) (27 February 2023) at para 36.16.

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- [6] Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another [2009] ZACC 32; 2010
- (2) SA 415 (CC); 2010
- (3) BCLR 177(CC) para 97.
- [7] Supra at para 48.
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