

SOUTH AFRICA / JUDGMENT

K.K.S N.O v Director-General of Home Affairs (59209/2021) [2025] ZAGPPHC 134 (7 February 2025) [2025] ZAGPPHC 134

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

59209/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 59209/2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

(4)

Date: 07 February 2025

Signature:

In

the matter between: K[...]
K[...] S[...]
N.O.
Applicant
And
THE
DIRECTOR – GENERAL OF HOME AFFAIRS
Respondent

JUDGMENT

NYATHI J

A.

INTRODUCTION

- [1] This is an opposed application to hold the respondent, the Director-General of Home Affairs (“the DG”), guilty of contempt of a Court Order which requires him to issue to the applicant’s minor daughter H[...] S[...], who was born on 16 December 2019 in Dubai, a South African passport and an unabridged birth certificate.
- [2] The DG failed to do so as required in terms of the Court Order and the applicant seeks his incarceration for having failed to do so. The applicant is the son of Ajay Gupta, one of the three Gupta brothers well-known in the country in recent times.
- [3] It is common cause that the applicant currently resides in Dubai in the United Arab Emirates (UAE) from where he endeavoured to apply for the two documents at issue in the application without success. The application was made at the South African Consulate General’s office in Dubai.
- [4] When his numerous follow-ups with the consular office bore no results, he sought a court order which was granted on 3 October 2022. It is the failure to comply with this order that is at the centre of this application.
- [5] Mr Hellens SC submitted that the Court Order has been ignored and that the respondent only filed his so-called rescission application on 3 July 2024.
- [6] Mr Cassim SC submitted on behalf of the respondents that this court should determine whether the respondent has rebutted the requirement of mala fides or not. He submitted that:

6.1 The DG had explained the reasons why the matter had remained unattended, having fallen through administrative “cracks” due to challenges of staff shortages at the Department’s legal Services.

6.2 The applicant's citizenship may be a nullity due to concerns raised against the Guptas' acquisition of same. The DG himself states in his affidavit that "The issue relating to the Gupta family is governed by Section 5(9) of the South African Citizenship Act. The allegations against the former Minister Malusi Gigaba in granting the Gupta family citizenship is that there were no exceptional circumstance upon which he could grant a certificate of naturalization in terms of Section 5(9)(a) of the Act. Once this matter is settled and the above honourable court is of the view that there were no exceptional circumstances. It follows therefore that the citizenship through naturalization to the Gupta family was granted unlawfully and will have to be set aside." [1]

[7] An applicant in civil contempt proceedings who alleges that another (the contemnor) is guilty of acting in contempt of a court order, must establish –

- (a) That the order alleged to have been breached was granted against the contemnor;
- (b) that the order was served upon the contemnor or that the contemnor had knowledge of it; and
- (c) that the contemnor did not comply with the order. Upon proof of those facts there is a presumption or inference of wilfulness and mala fides, and the contemnor has an onus to rebut that inference on a balance of probabilities. This may be done, for example, by establishing that the court order was not deliberately or intentionally disobeyed. Before imposing a criminal sanction, the guilt of the contemnor has to be established beyond a reasonable doubt, for other coercive remedies to be applied, the contempt must be established on a balance of probabilities. [2]

[8] Mr Cassim SC further submitted that the respondent has established on a balance of probabilities that his conduct was neither wilful nor mala fide in not complying with the Court Order. A rescission application has been filed. An explanation has been proffered for the circumstances in which the default order was obtained (paras 15 – 29). The merits for rescission are strong (para 36, 44, 45 and 47). By all accounts, applicant knew by April 2024 of the rescission application.

[9] The submission that the failure to issue the minor child with a South African passport and a birth certificate renders her to be stateless finds no traction when regard is had to the fact that she was born in and continues to live under the protection of the Government of the UAE and needs no immediate relief. Furthermore, her grandfather, Ajay Gupta and her father and the Gupta family at large are personae non gratae in the Republic of South Africa.

[10] Public policy considerations, it was submitted, lean in favour of the issue of citizenship being properly ventilated. If in fact the grandfather and the father of the minor child obtained their citizenship unlawfully it would follow that the minor child would not be entitled to citizenship of the Republic of South Africa.

- [11] In *Atul Kumar Gupta, v Director-General, the Department of Home Affairs and Another* case no. 431/21 and on 20 January 2023 this Court (Kumalo J presiding) dismissed the application of Atul Gupta to review the decision of the respondent to reject Gupta's application for a passport and concluded that Atul Gupta is a fugitive from justice and had no locus standi to approach this Court for the relief he sought.
- [12] The explanation given by the respondent and the factual allegations around the citizenship of the applicant, the Gupta family's status as fugitives from justice in the Republic of South Africa and the fact that an application for the rescission of the Court Order which is subject to this application has been filed, are persuasive factors supporting the absence of wilfulness and mala fides on the part of the respondent.
- [13] In the result, the application for contempt of the court order cannot succeed. The following order is made:

The application is dismissed with costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 30/07/2024

Date of Judgment: 07 February 2025

On behalf of the Applicant: Mr M.R. Hellens SC Applicant's attorneys: Krause Inc.; Pretoria e-mail: stiaan@krauseinc.co.za On behalf of the Respondent: Mr N. Cassim SC With him: Mr S. Mpakane Attorneys for the respondent: The State Attorney, Pretoria Ref: 5002/2022/Z19 e-mail: NMabhena@justice.gov.za

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[1] Para [47] of founding affidavit filed as part of the rescission application.

[2] *Fakie NO v CCII Systems (Pty) Ltd*

[2006] ZASCA 52; 2006 (4) SA 326 (SCA).

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