

SOUTH AFRICA / JUDGMENT

Melaphi and Another v Minister of Home Affairs and Another (26235/20)

[2020] ZAGPPHC 699 (3 December 2020)

[2020] ZAGPPHC 699**COURT**

North Gauteng High Court, Pretoria

BEFORE

Wilson

CASE / FILE NUMBER

26235/20

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED.****DATE:**

3 December 2020

Case

No: 26235/20

In

the matter between:	MELAPHI SZ First Applicant MELAPHI BA Second Applicant and THE MINISTER OF HOME AFFAIRS First Respondent DIRECTOR
GENERAL:	DEPARTMENT OF HOME AFFAIRS Second Respondent

JUDGMENT

WILSON AJ:

1 The first applicant is Sylvia Melaphi (“Ms. Melaphi”). The second applicant is Ms. Melaphi’s adult daughter, Babalwa

Melaphi. Ms. Melaphi has two further minor children, in whose interest this review application is also brought. They are V[...],

a boy aged 11, and N[...], a girl aged 8.

2 The father of each of these children is Ms. Melaphi’s late husband, Robert Melaphi (“Mr. Melaphi”). Mr. Melaphi

died after a long illness in April 2019. He had made provision for the cost of his funeral, and had left savings and a life policy to support his wife and child in the event of his death.

3 Ms. Melaphi now wishes to access these benefits, but cannot do so because she is unable to convince officials acting on behalf of

the second respondent (“the Director-General”) to issue an unabridged certificate of Mr. Melaphi’s death. The death certificate is one of a series of documents necessary to access the various payments and benefits to which Ms. Melaphi and her children would otherwise be entitled. It is also necessary to finally wind up Mr. Melaphi’s estate.

4 The Director-General refuses to issue the death certificate because, so it is alleged, Mr. Melaphi was not a South African citizen at the time of his death, and, as a result, does not qualify for a death certificate from the Department for Home Affairs.

5 In my view, however, no rational or lawful basis has been laid for concluding that Mr. Melaphi was not a South African citizen at

the time of his death. Nor has the Director-General so much as alleged that Mr. Melaphi's citizenship was lawfully withdrawn.

The refusal to issue an unabridged death certificate must accordingly be reviewed and set aside. In any event, the Director-General is not entitled to refuse to issue an unabridged death certificate merely on the basis that a deceased person was not a South African citizen at the time of their death.

6 These are my reasons for reaching those conclusions.

Mr. Melaphi was a South African citizen at the time of his death

7 In her founding affidavit, Ms. Melaphi states that Mr. Melaphi was born in South Africa to a South African mother and a Zimbabwean

father. Although Ms. Melaphi's evidence to this effect is hearsay, it was evidence Ms. Granova, who appeared for the applicants, and Mr. Luthuli, who appeared for the respondents, agreed is admissible under section 3 of the Law of Evidence Amendment Act 45

of 1998. Ms. Melaphi's evidence as to Mr. Melaphi's birth and parentage was accordingly admitted by consent.

8 However, Mr. Luthuli urged me to accept that, although these allegations were admissible in principle, the Director-General had placed them in dispute in his answering affidavit, in which he averred that he denied "all the averments in the founding affidavit that [he did not] address directly". The truth of the allegations could not accordingly be accepted.

9 I do not agree. A bare denial will rarely, if ever, be sufficient to place a fact in dispute if the disputing party has the knowledge necessary to show that the relevant fact is untrue (*Wightman t/ a JW Construction v Headfour* [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13). I must accept that, as the custodian of the national population register, the Director-General has access to the information necessary to substantiate a denial that Mr. Melaphi's mother was a South African citizen. The Director-General's

unsubstantiated denial is insufficient, in these circumstances, to create a bona fide dispute of fact.

10 On that basis, then, I must accept that Mr. Melaphi acquired South African citizenship by birth, by virtue of the provisions of section 2 (1) of the South African Citizenship Act 88 of 1995 ("the Citizenship Act"). It was not explained how else Mr. Melaphi acquired the identity document, driver's licence, passport and marriage certificate annexed to Ms. Melaphi's papers. Both the driver's licence and the marriage certificate contain a citizen's identity number. The identity document confirms that Mr. Melaphi was a South African citizen, and that the Director-General issued his identity document to him on 21 November

1995. Mr. Melaphi's passport, itself strong evidence of Mr. Melaphi's citizenship, was issued to him by the

Director-General on 9 February 1998.

11 Ms. Melaphi's evidence as to Mr. Melaphi's birth, and the various documents issued to Mr. Melaphi during his life on

the basis that he was a citizen, mean that the Director-General bears the onus of demonstrating that, at some point, Mr. Melaphi was lawfully deprived of his citizenship in terms of section 8 of the Citizenship Act.

12 This has not been demonstrated.

13 The circumstances which led the Director-General to call Mr. Melaphi's citizenship into question are not really dealt on the

papers. Ms. Melaphi states that on or about 23 March 2010 Mr. Melaphi was arrested in Pretoria. His identity document was apparently

confiscated. He was granted bail and then subjected to what Ms. Melaphi calls "numerous follow-ups" – these appear

to have been meetings with the Director-General's officials to determine his immigration status.

14 On 20 August 2010, Mr. Melaphi was issued with a notice requiring him to appear before the Director-General in terms of section 7(1) (g) read with section 33 (4) (g) of the Immigration Act 13 of 2002 ("the Immigration Act"). Section 33 (4) (c) empowers an immigration officer to require any person to appear and "to give evidence or to answer questions relevant to the subject matter" of an investigation into any matter falling within the scope of the Immigration Act. Section 7 (1) (g) deals with the forms of other warrants and documents to be issued under the Immigration Act. Mr. Melaphi was directed to bring with him and produce at the meeting a "letter from primary school, (letter from the chief/municipality) letter from the clinic". This was apparently to assist with what the notice referred to as "the determination" of Mr. Melaphi's citizenship.

15 According to Ms. Melaphi, on 20 September 2020, Mr. Melaphi answered the Director-General's notice, reported to the immigration officer and submitted the documents requested in the notice. The documents were accepted, and a date on which Mr. Melaphi was required to return to the office – 20 October 2010 – was inserted and initialled on the notice. Despite Mr. Melaphi returning on that date, it appears that the Director-General's investigation into Mr. Melaphi's citizenship was never completed.

16 Ms. Melaphi states that Mr. Melaphi was so distressed by the investigation that his health deteriorated, he became chronically ill, lost his job, and eventually died.

17 Whether or not the investigation caused Mr Melaphi's ill health, one would expect some light to be thrown on the case in the

respondents' answering affidavit.

18 That was not to be. In their answering affidavit, the respondents barely address the circumstances surrounding the investigation of Mr. Melaphi's citizenship at all. Instead, an excursus of what the respondents call the "Beitbridge Project"

is provided. This was apparently a project implemented over the 2009/2010 Christmas and New Year period to "check all travel

documents for those [presumably South African citizens or residents] who travelled between South Africa and Zimbabwe". The project apparently involved interviewing travellers at the border post in Beitbridge, and deciding whether or not to seize their documents. If the documents were seized, then a receipt would be issued, together with a notice to appear on a later date with further evidence of the traveller's South African citizenship or residency status.

19 But one searches the respondents' answering affidavit in vain for an explanation of what an operation that was conducted at

Beitbridge in December 2009 and January 2010 had to do with the arrest of Mr. Melaphi and the seizure of his documents in Pretoria

three months later. Mr. Luthuli was unable to assist me with this difficulty.

20 The upshot of all of this is that Ms. Melaphi's version in her founding affidavit stands substantially undisputed. The deponent to the respondents' answering affidavit ("Ms. Raaths") claims no personal knowledge of the investigation into

Mr. Melaphi, and the officers apparently in charge of that investigation (whose names appear from the documents as "ZDM Mathebula" and "T Vhulahani") are neither referred to in Ms. Raaths' affidavit, nor depose to affidavits

themselves. Finally, there is no attempt made to establish any rational connection between the Beitbridge Project and Mr. Melaphi's

case.

21 In these circumstances, I cannot credit Mr. Raaths' allegations, at paragraph 20 of her affidavit, that Mr. Melaphi in fact failed to respond to the notice to appear, or to submit his documents. There is also no explanation of why the notice to appear

was endorsed with a "return date" – especially if, as Ms. Raaths claims, this was "not the procedure"

generally adopted by the Department for Home Affairs at the time. Saying something is not standard procedure is not the same as saying that it did not happen. Direct evidence from someone familiar with the investigation is the very least that would be required.

22 However, the gravest cause for concern in the respondents' answering affidavit is that there is simply no account of (a) on what basis Mr. Melaphi's citizenship was found to be suspect and (b) what the outcome of the respondents' investigation into the validity of his citizenship was. The investigation hangs in the air, unmoored by either motive or outcome.

23 At bottom, the evidence is that an investigation was opened into Mr. Melaphi's citizenship. We do not know why. The evidence is also that this investigation did not come to any definite conclusion. We do not know what became of it.

24 In these circumstances, it is impossible for me to conclude that Mr. Melaphi lost his South African citizenship on the basis that

it was fraudulently obtained. Had it been established that Mr. Melaphi's citizenship had been fraudulently obtained, the first respondent ("the Minister") would have been empowered, under section 8 (1) (a) of the Citizenship Act, to deprive Mr. Melaphi of his citizenship. But the respondents simply do not allege that this ever happened, much less substantiate it with admissible evidence. The closest the respondents come is the allegation that "the deceased's identity document had been issued unlawfully or illegally obtained until the [Beitbridge] Project established the falsity thereof in 2010". But, as I have already pointed out, the Beitbridge Project has not been linked to the investigation into Mr. Melaphi in any way. Even if it had been, the mere allegation that the identity document had been unlawfully issued would not be enough, unless it was shown that the Minister had exercised his powers under section 8 (1) (a) of the Citizenship Act.

25 It is also alleged that Mr. Melaphi's citizenship must have been fraudulently obtained because his identity document was "marked/blocked" on 23 March 2010, after which he is alleged to have done nothing to rectify the situation.

26 For the reasons I have already given, I cannot accept that Mr. Melaphi did nothing to answer the notice to appear or to participate

in the respondents' investigation.

27 As to the "blocking" of his identity document, Ms. Raath confirms in paragraph 10 of her answering affidavit that the

"blocking" of an identity document was a step taken as part of the investigations under the Beitbridge Project to ensure

that the identity document could not be used to obtain further documents while the investigation was pending. It does not in itself

provide evidence that the identity document was inauthentic. Much less can it support the conclusion that Mr. Melaphi's citizenship was fraudulently obtained.

28 At best for the respondents, they opened an investigation into Mr. Melaphi's citizenship, but did not complete that investigation before he died. The ineluctable conclusion to be drawn is that Mr. Melaphi died a South African citizen. There is no evidence that his citizenship was ever lawfully withdrawn.

29 It remains to deal with an alternative argument advanced on behalf of the respondents, which appears to be separate from the contention that Mr. Melaphi's citizenship was fraudulently obtained. Noting Ms. Melaphi's admission in paragraph 12.1 of her founding affidavit that "at a certain age [Mr. Melaphi] went to Zimbabwe and obtained a Zimbabwean ID as per his father's cultural and traditional demands", and the admission in Ms. Melaphi's replying affidavit that Mr. Melaphi "applied for his Zimbabwean citizenship in 2013", the respondents allege that Mr. Melaphi thereby forfeited his South African citizenship in terms of section 6 (1) (a) of the Citizenship Act. Section 6 (1) (a) provides that a South African citizen forfeits their citizenship if they voluntarily acquire the citizenship or nationality of another country, other than by marriage.

30 This submission is, of course, entirely destructive of the primary basis on which the respondents resist the application. If Mr.

Melaphi lost his citizenship by virtue of an application made in 2013, that entails the conclusion that he was still a South African

citizen at that point, three years after the events that the respondents rely on to contend that Mr. Melaphi's citizenship

was somehow lost.

31 In any event, read in light of the applicable provisions of the Zimbabwean Constitution, it is clear that, whatever Mr. Melaphi did in 2013, he did not "apply" for Zimbabwean citizenship. He rather sought recognition of the citizenship of Zimbabwe he had been given from birth.

32 Section 37 (a) of the Zimbabwean Constitution, 2013, provides that a person born outside Zimbabwe is a Zimbabwean citizen by descent if they have a Zimbabwean parent or grandparent. The effect of this provision was to retrospectively confer Zimbabwean birth citizenship on Mr. Melaphi, because his father was Zimbabwean. That is not the same as the "voluntary" acquisition of Zimbabwean citizenship.

33 Section 37 is to be contrasted with section 38 of the Zimbabwean Constitution, which provides for citizenship to be conferred on adoptive children, spouses and long-term residents "on application". By implication, then, section 37 citizenship is conferred by operation of law, and not "on application".

34 The “application” made in 2013 could accordingly not have been for Zimbabwean citizenship. At best for the respondents, it was for recognition of Mr. Melaphi’s citizenship by descent, which he acquired involuntarily when he was born to a Zimbabwean father. To the extent that it may be argued that Mr. Melaphi only really acquired Zimbabwean citizenship when the 2013 Constitution conferred it on him, his acquisition of Zimbabwean citizenship could hardly be said to be “voluntary” for the purposes of section 6 of the Citizenship Act .

35 Mr. Luthuli made much of two decisions of the Zimbabwean Constitutional Court which apparently held that the Zimbabwean Constitution precludes citizens by descent from holding Zimbabwean citizenship concurrently with that of any other country (*Mawere v The Registrar General* (Case No. CCZ 4/15) and *Madzimbamuto v The Registrar General* (Case No. CCZ 114/13)). Even if that is correct, it is not relevant to the question of whether Mr. Melaphi lost his South African citizenship. It might have provided a basis on which he could have been deprived of his Zimbabwean citizenship, but that is not the question before me.

36 I accordingly conclude that Mr. Melaphi was a South African citizen at the time of his death.

Is the Director-General unable to issue an unabridged death certificate to a non-citizen?

37 The position taken on behalf of the respondents in argument – viz. that a non-citizen is not entitled to an unabridged death

certificate – appears to me to be wrong in law.

38 Having reviewed the Births and Deaths Registration Act 51 of 1992 (“the Registration Act”), I can find no obstacle that would preclude the Director-General from issuing a death certificate to a non-citizen who died in South Africa. Section 22 of the Registration Act states that “after a death has been registered in terms of this Act, the Director-General [of Home Affairs] shall issue a prescribed death certificate”. Section 5 of the Registration Act clearly envisages that a death certificate

may be issued to a non-citizen, but section 5 (3) provides that the particulars of the death of a non-citizen will not be recorded in the population register kept under the Identification Act 68 of 1997. But that does not, of course, preclude the Director-General from issuing an unabridged death certificate to a non-citizen.

39 I asked the parties to address written argument to me on whether, assuming in favour of the respondents that Mr. Melaphi was not a South African citizen at the time of his death, there was any legal obstacle to issuing Ms. Melaphi with an unabridged certificate

of Mr. Melaphi’s death.

40 The submissions advanced in response to this request were of limited assistance. The applicants’ submissions (prepared by Ms. Granova’s instructing attorney) simply repeated that Mr. Melaphi was a citizen at the time of his death, which obviously

misconceived the nature of the inquiry. The respondents' submissions amounted to the proposition that the Registration Act

does not permit a non-South African citizen's identity number to be entered on a death certificate. But that sheds no light on why an unabridged death certificate cannot be issued.

41 The Registration Act, and the Regulations made under it, in fact specifically envisage the issuing of an unabridged death certificate to a non-citizen. Section 22 of the Regulations on Registration of Births and Deaths, 2014 (GN R128 in GG 37373 of 26 February

2014) provides for the issuing of an unabridged death certificate to a non-citizen, and refers to the prescribed form the certificate must take, which is set out in the annexures to the Regulations.

42 In these circumstances, it is clear that the death of a non-citizen in South Africa can and must be recorded in an unabridged death certificate issued by the Director-General.

43 It is true that the Regulations on Registration of Births and Deaths, 2014 define "non-citizen" as a person holding some legal right to be in the country short of citizenship. This creates the unfortunate possibility that an undocumented migrant cannot be issued with an unabridged death certificate.

44 But that is not something it is necessary for me to consider, as Mr. Melaphi never lost his South African citizenship.

The first respondent's decision to withhold the unabridged death certificate is reviewable under the Promotion of Administrative Justice Act 2 of 2000

45 The decision to refuse to issue an unabridged death certificate in respect of Mr. Melaphi is not rationally connected to the purpose proffered for it or to any of the purposes of the Immigration Act or the Registration Act (section 6 (2) (f) (ii) (aa) and (bb) of PAJA). It is also not authorised by any relevant empowering provision (section 6 (2) (e) (i) of PAJA).

46 It was nonetheless finally argued that this application has been brought beyond the 180-day time limit imposed on reviews of administrative action under the Promotion of Administrative Justice Act 2 of 2000 ("PAJA"). Ms. Melaphi found out that Mr. Melaphi had been "blocked" and "marked as an illegal immigrant" on the national population register in April 2019. This application was instituted on 29 June 2020, approximately eight months late.

47 Section 9 (2) of PAJA empowers a court to extend the time period in section 7, on application, if the interests of justice so require. Ms. Granova made such an application from the bar. The application met with little real opposition from Mr. Luthuli.

48 In the circumstances, I am inclined to grant the extension of time.

49 Although the delay in instituting this application was never really explained, It is apparent that Ms. Melaphi has had real difficulty in raising the funds necessary to institute this application. There was, for example, a delay in the delivery of her supplementary written submissions because the funds available to her to pay her legal representatives were temporarily exhausted.

50 But, notwithstanding the lack of a detailed explanation for the delay, what weighs with me in this matter is the respondents' failure to provide any rational or lawful basis for concluding that Mr. Melaphi was not a South African citizen at the time of his death, and the drastic consequences the refusal to issue an unabridged death certificate has had for his wife and three children.

51 I have also given some thought to the fact that the High Court is the upper guardian of children within its jurisdiction, and that

section 28 (2) of the Constitution, 1996, requires me to give priority to the best interests of the minor children involved in this case. These considerations militate strongly in favour of granting an extension of time.

52 The respondents have not alleged that they would suffer any prejudice from the extension of time sought. There is none apparent on the papers. The extension is accordingly granted.

Section 1 (c) of the Constitution, 1996

53 Even if I were to decline the extension sought under section 7 of PAJA, it seems to me that the Director-General's decision to refuse to issue an unabridged death certificate would then be reviewable under section 1 (c) of the Constitution, 1996, at least on the grounds of rationality and legality.

54 Section 1 (c) of the Constitution requires that the exercise of a public power must be authorised by law (*Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC) para 58). It must also be "rationally related to the purpose for which the power was conferred". The process leading to the decision must also be rational. (*Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) paras 27 and 34).

55 It seems to me that, for the reasons I have given, there was no rational or lawful basis on which to conclude that Mr. Melaphi was

not a South African citizen at the time of his death. The basis of the investigation into his citizenship has never been explained. The only thing we really know about it is that it had no definite outcome, and accordingly did not actually result in the deprivation

of Mr. Melaphi's citizenship. In addition, for the reasons I set out above, there is no basis on which to conclude that Mr.

Melaphi lost his citizenship under section 6 of the Citizenship Act.

56 It follows that, even if the Director-General were correct in concluding that he cannot issue an unabridged death certificate to a non-citizen (he is not), Mr. Melaphi was a citizen at the time of his death, and an unabridged death certificate should have been issued in respect of his death in any event.

57 For all of these reasons, the refusal to issue an unabridged death certificate is neither rational nor lawful. The applicants are entitled to the relief they seek.

58 Ms. Granova asked for costs on the attorney and own client scale in the event that the applicants were substantially successful.

However, no basis for such an order has been made out. Attorney and own client costs are generally awarded against a party that has misconducted itself in the litigation. While the respondents have perhaps not taken the attitude I would ideally expect from a responsible organ of state in matters of this nature, and ought perhaps to have responded to the applicants' plight with more reasoned compassion than has been in evidence in this case, I cannot fairly conclude that they have misconducted themselves during the course of this litigation. An ordinary award of costs will accordingly suffice.

59 I make the following order –

1. The deadline for the institution of this review application is extended to 29 June 2020.
2. It is declared that Robert Melaphi (Identity number [....]) was a South African citizen at the time of his death.
3. It is declared that the first applicant is the surviving spouse of Robert Melaphi (Identity number [....]), who died of natural causes on 11 April 2019.
4. The second respondent's refusal to issue an unabridged certificate certifying the death of Robert Melaphi (Identity number [....]) is reviewed and set aside.
5. The second respondent's decision to "mark" and/or "block" the entry in respect of Robert Melaphi (Identity number [....]) in the national population register is reviewed and set aside.
6. The second respondent is directed forthwith to issue an unabridged death certificate, substantially in accordance with the requirements of the Regulations on Registration of Births and Deaths, 2014, and to provide a copy of that certificate to the first applicant.
7. The second respondent is directed forthwith to remove any "mark", "block" or other endorsement indicating that Robert Melaphi (Identity number [....]) was not a South African citizen at the time of his death from his entry in the national population register, and to ensure that it is recorded that Robert Melaphi (Identity number [....]) was the first applicant's spouse at the time of his death.
8. The respondents are directed to pay the applicants' costs.

SDJ WILSON

Acting Judge of the High Court

This judgment was handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 3 December 2020.

HEARD ON: 2 November 2020

DECIDED ON: 3 December 2020

For the Applicant:

A Granova

Instructed by Banda and Associates Inc

For the Respondent:

S Luthuli

Instructed by the State Attorney

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