

SOUTH AFRICA / JUDGMENT

Muduviwa and Others v Minister of Home Affairs and Another (18971/2021) [2023] ZAGPPHC 1586; [2023] 4 All SA 211 (GP) (14 July 2023) [2023] ZAGPPHC 1586

COURT

North Gauteng High Court, Pretoria

BEFORE

De Beer

CASE / FILE NUMBER

18971/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 18971/2021

In the matter between: MUDUVIWA C.F.C
First Applicant
KERE E
Second Applicant
KERE TD
Third Applicant
And
THE MINISTER OF
HOME AFFAIRS
First Respondent
DIRECTOR GENERAL,
HOME AFFAIRS
Second Respondent

JUDGMENT

DE BEER AJ

Introduction

1. In this matter the applicants mainly seek to review and set aside the respondents' decision to block their identity numbers and to reinstate the same on the population register of the Republic of South Africa. Further, the applicants seek an order declaring the first and second applicants' children to be South African citizens by virtue of their birth in South Africa and directing the respondents to issue their children with identity documents.

The applicants' version

2. The first applicant is a Zimbabwean national and holds a corresponding passport. She is also a holder of a South African permanent residence permit and was thereafter issued with an identity document (ID No: [...]). She is employed as an operations director at Watershed Capital located in Rivonia. The first applicant is a qualified Coach Consultant and graduate of the Stellenbosch Business School.
3. The second applicant also a Zimbabwean national and holder of a passport, holds a South African permanent resident permit and identity document (ID No:[...]). He is a director of Watershed Capital, a qualified Investment Banker, and a graduate of the University of Milpark Business School.
4. The third applicant is the first-born son of the first and second applicants born in South Africa with identity number[...]. He is employed as a student intern at Watershed Capital.
5. According to the first and second applicants, they are married in community of property. Their marriage was negotiated, concluded, and celebrated on 1 March 1996 in Zimbabwe. Their marriage was later registered in South Africa and an extract from the population register was issued to them.

6. The following three children were born as a result of the relationship between the first and second applicants (“the applicants”):
 - 6.1. The third applicant, currently 25 years old.
 - 6.2. Tapiwa Michael Kere, is currently 20 years old.
 - 6.3. Ruvimbo Megani Kere, is currently 20 years old.
7. The first applicant initially entered South Africa in 1994 on a 30-day visitor’s visa for the purpose of visiting family. Thereafter, the first applicant visited South Africa again in 1995 and 1996. In 1996, the second applicant accompanied the first applicant to South Africa. In early 1997, the applicants approached the Krugersdorp Home Affairs branch to enquire about the procedure to obtain citizenship, alternatively permanent residence. The applicants were advised that the respondents shall consider the same.
8. The applicants applied for their respective identity documents on the same day. Later in 1997, they were advised by the respondents that their applications were successful and that their identity documents were ready for collection, whereafter they collected their identity documents. Copies of these identity documents were annexed to the applicants’ founding affidavit.
9. According to the applicants, in early 1998 the second applicant had a fallout with his South African partner. The partner alluded to the second applicant that he is of the intention to report the applicants for holding “possible fraudulent South African Identity documents”. Hereafter, officials of the respondents raided the applicants’ residence, and the said officials seized their identity documents “pending the completion of their purported investigation”.
10. The applicants followed up with the said officials regarding the investigation. They were informed that their identity documents were blocked, cancelled, and removed from the population register and that they must return to their country of origin as soon as possible, failing which they will be deported. The applicants contend that they were never provided reasons for such a decision and were never furnished with an opportunity to provide representations and/or a hearing.
11. To assist them, the applicants procured the services of an immigration lawyer. The immigration lawyer advised the applicants that he can assist with new applications for permanent residence exemption. In late 1999, the lawyer assisted with such applications which were submitted at Marabastad branch of Home Affairs in Pretoria. Both applicants were issued with certificates of exemption. The applicants’ annexed the purported certificate of exemption to their founding affidavit. However, ex facie the certificates, they were issued on 15 September 1997 (and not 1999 as contended by the applicants).

12. Be that as it may, during the latter part of 2000, the applicants applied to be issued with identity documents under the issued exemption permits. The first applicant was summoned to Home Affairs Head Office in Pretoria to explain why she had two identity numbers registered with Home Affairs. The interrogating officials confiscated the first applicant's identity document with identity number [...] and confirmed the deletion of the same in the respondents' population register. According to the applicants, the officials informed the first applicant that the third applicant (the first and second applicants' eldest son), was "transferred" to the first applicant's new residency exempted identity number, since their investigation into the legitimacy of her application for permanent residence was concluded.
13. Upon a subsequent procurement of the same immigration lawyer, an agreement between the first and second applicants and the respondents was concluded to the effect that the latter would issue the former with another set of permanent residence permits containing the same identity numbers. These permanent residence permits were "stamped" into the applicants' passports. They were informed by the respondents that they should await the issuing of (permanent residency) "PR Certificates". This never materialized.
14. In 2005, the applicants requested to be provided with a printout from the respondents' system to confirm their status on the population register. The relevant official only provided a printout in respect of the second applicant. The applicants contend that this printout confirmed that the second applicant was a citizen of South Africa.
15. In 2009, the applicants approached the respondents again and lodged applications for citizenship based on their permanent residence permits "stamped" in their passports. The respondents issued the applicants with temporary South African passports to enable them to travel abroad and to be able to return to South Africa.
16. During 2009/2010 the second applicant returned to South Africa, he travelled abroad for business. He was stopped at O.R Tambo International Airport by immigration officers and informed that his permanent residence (stamped in his passport) had been blocked again and formed the subject matter of a pending investigation. The immigration officers allowed the second respondent to enter South Africa. They informed him that he should immediately attend to a Home Affairs branch to "sort his issue out".
17. The second applicant immediately attended to the Germiston Home Affairs branch and presented his identity book document and requested information pertaining to the investigation mentioned. The Home Affairs officials informed the second applicant that both the first and second applicants' permanent residency was "blocked". The second applicant was further advised that he should apply for the Zimbabwean Dispensation Permit as an "intermediary permit" in order to remain legal in the country whilst waiting for the conclusion and outcome of the purported investigations.

18. Following the aforesaid advice, the applicants applied for the Zimbabwean Dispensation Permits which were issued to them.
19. In October 2010, the applicants attended the Home Affairs office in Johannesburg to follow up on the investigation. They were informed by a Home Affairs official that a certain Mr Abel Lelwane placed a “negative comment” on their family file. The applicants did not receive notice of any intended action, nor the opportunity to make representations or a hearing.
20. Since then, the applicants have been unable to receive any feedback from the respondents.
21. With regards to the first and second applicants’ children, the following:
 - 21.1. During 2019, the applicants approached the respondents to attempt to “normalize and legalize” the stay of Tapiwa Michael Kere and Ruvimbo Megani Kere (“the twins”) in South Africa. The respondents merely advised that the applicants should approach the respondent’s visa facilitation agent (VFS) and apply for study permits.
 - 21.2. Again, the applicants followed the respondents’ advice and approached VFS in Johannesburg to apply for study visas for all three of their children (the third applicant and the twins).
 - 21.3. The application for study permits for the third applicant and one of the twins Ruvimbo Megani Kere were rejected on the grounds that they were South African citizens. Curiously, the other twin Tapiwa Michael Kere’s application was successful, and a valid permit was issued until 2021.
 - 21.4. To date, one twin is a citizen, and the other one is not.
 - 21.5. During 2020, the applicants approached VFS and lodged an application for determination of their childrens’ status. Again, confusingly, the respondents’ representative concluded that the first-born child (the third applicant) and twin Ruvimbo Megani Kere are SA citizens, but twin Tapiwa Michael Kere is not.
22. Accordingly, the applicants seek an order reviewing and setting aside the respondents’ aforesaid decisions and that the respondents be ordered to reinstate the first and second applicants’ identity documents on the population register of South Africa. In respect of their children, the applicants seek an order declaring that they are South African Citizens and that they should be issued with identity documents.

The respondents’ version

23. According to the respondents the first applicant’s application for a “South African identity” indicated “that her name was Mudziwa Christina born in 1968, in Vuwani Thohoyandou, Limpopo”. However, in “her permanent identity application”, she indicated that she was Mudziwa Christina Fungai Chiwoniso born in Wedza, Zimbabwe (the date of the application was 12 April 1990).

24. When the second applicant made an application for an “identity document” in 1996, he stated that he is a South African from Ficksburg. In 1997, the second applicant indicated that the third applicant was born in Johannesburg.
25. In 2007 the second applicant amended his country of birth when he applied for permanent residence, indicating that he hails from South Africa and not Zimbabwe.
26. Both the first and second applicants “misrepresented themselves all the time” in South Africa. That whenever misrepresentation was detected or found, the Department of Home Affairs “had to act and block/lock their identity so that they are not able to transact”.
27. That the first applicant “has had four identity cards issued to her on her identity number[...]. She also received (2) two identity book as a non-citizen under identity number[...], applying as a citizen of Zimbabwe and according to permit, she used a fraudulent exemption certificate”.
28. Regarding the twins, the respondents stated that “there is no record of them”. The respondents only have a record of the third applicant. Notwithstanding the aforesaid, “the registration of all three children falls away or is invalid since they were ‘born and registered’ under identity number [...]which is an illegal identity number”.
29. The remainder of the respondents’ contentions attested to on oath in the answering affidavit constitutes bare denials failing to proffer a version.

Relevant statutes

30. It is common cause from a perusal of the respective affidavits that the respondents blocked and suspended the identity documents of the first and second applicants and that certain predicaments or challenges seem to remain regarding the statutes of the three children born from the marriage. The applicants seek relief to set aside such a decision, i.e., the removal that their particulars that have been blocked and suspended, and to reinstate the same on the population register and to issue them all with identity documents.
31. It is conceded on behalf of the respondents that this matter “should be decided in favour of the applicants”, however, the respondents seek that the matter “should be referred back to the Respondents for reconsideration”[1]. At the hearing, the same concession and submissions were made. The aspect of the reconsideration sought by the respondents is dealt with in detail in this judgment.
32. The facts of a particular matter should be considered against the relevant statutes which contain the rights and obligations of individuals and the state alike, with due regard to constitutionally entrenched rights.
33. In casu, the interplay of various statutes must be considered. They are, inter alia, the Identification Act[2], the South African Citizenship Act[3], and the Immigration Act[4].

34. The Immigration Act regulates aspects such as permanent residence[5] and visas. The Citizenship Act regulates various aspects of the acquisition of South African citizenship as well as the loss, renunciation, or deprivation thereof i.e., it concerns the status of its citizens. The Identification Act pertains to the compilation and maintenance of a population register of its citizens and the issuing of identity cards and certain certificates.
35. In casu, the applicants (first and second) were provided with permanent residency by way of certificates of exemptions issued by the respondents[6] in terms of the now repealed Aliens Control Act[7], permanent residency is currently regulated in terms of the Immigration Act.
36. It is not the respondents' case that the permanent residency granted to the applicants in 1997 was withdrawn in terms of section 28 of the Immigration Act of 2002.
37. Hereafter, the applicants applied for and obtained identity documents and identity numbers were issued to them in terms of the Citizenship Act and Identification Act. Subsequently, their rights, i.e., the applicants, are vested in terms of the South African Citizenship Act.
38. Hereafter, the respondents blocked and suspended the identity documents issued in terms of the Identification Act. Their particulars have also been suspended, it seems, from the population register, which register must be compiled and maintained in terms of the Identification Act.
39. Corrections, cancellations, and replacements of identity cards are governed by Chapter 5, more specifically section 19, of the Identification Act.
40. To deprive a person of citizenship, the first respondent is empowered to do so by virtue of Chapter 3 of the Citizenship Act, more particularly section 8 thereof. An amendment of certificates of citizenship is dealt with in terms of section 19 of the Citizenship Act with reference to any "error has occurred in any certificate", and section 18 provides for a penalty for false representation or statements, as the case may be.
41. Rather than invoking any of the aforementioned provisions, officials representing the respondents seemingly took decisions to block the identity documents/cards issued with corresponding identification numbers to the applicants registered on the population register.
42. The statutory basis for the respondents' decision to block and suspend the identity documents has not been dealt with in the papers and was not dealt with during argument.
43. The decision to block and suspend the identification documents of the applicants seems ultra vires, even if the same was implemented and effected by invoking a regulation for instance, which is not the respondents' case,

even in that regard the regulation would not be able to introduce a substantive requirement, that may only be so introduced if it cannot be sourced in the statute[8].

44. In the Abraham[9] matter, reference was made to the court a quo in that matter incorrectly relying on the interpretation of regulations providing immigration officers with certain procedural

rights to block the application of asylum seekers in terms of the regulations empowered by the Immigration Act. Specific reference is made to paragraphs [28] to [33] of that judgment, which formed the basis of the finding that the respondents' officials in that matter interpreted and invoked the regulation to block incorrectly.

45. In casu, the respondents fail to deal with the statutory basis of their decision.
46. Whether the respondents provided a cogent response or defence in casu, has not been proved on the probabilities, wherefore this court referred to the concession correctly made on behalf of the respondents that this matter should be decided in favour of the applicants. This principle and aspect is confirmed in another decision by this court which also involved the same respondents, which stated the following in that judgment:

"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 (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13). I must accept that, as a 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."

47. In that matter, the court went on to make a finding that Mr Melaphi acquired South African citizenship by birth, for the purpose of issuing a death certificate on application and for the benefit of beneficiaries in litigation pertaining to the deceased estate of Mr Melaphi.
48. In casu, the version by the respondents cannot and does not rise to any form of defence, as already conceded, and referred to above. Put

differently, no dispute exists on the papers. No information to assist this court in adjudicating this matter has been submitted,

neither under oath nor as part of the record provided as requested in terms of Uniform Rule 53. In fact, references in the respondents' records to aspects such as "Just any information that will assist to oppose the matter[11] ..." and "how did the applicant obtained citizenship..."[12] does little to assist this court in finding whether the decision to block and conduct of the respondents was just in the context of this matter.

49. Conversely, the applicants attempted on various occasions to explain their predicament to the respondents which have seemingly gone unnoticed, alternatively the respondents were unresponsive to their pleas[13].

50. In casu, the court accept that the three applicants were issued with identification numbers, documents, and cards by the respondents in

terms of the Citizenship Act, read with the Identification Act. The court finds that the Immigration Act does not apply in casu. Hereafter, the fact that the twins were born in South Africa of their parents holding identification documents at the time of their birth in 2003 allowed them to become valid South African citizens and the holders of identification cards in terms of the respective Acts referred to above. In all the circumstances, the court finds that the applicants are entitled to the relief sought.

51. Further confirmation of this finding is contained in the records of the respondents who stated that the second applicant's SA citizenship was verified[14]. Regrettably, it remains unexplained why after the respondents "verified and confirmed" the second applicant's citizenship in 2005 decided to "delete" his "passport" in 2007 and declared him an "illegal immigrant".

52. This court does keep in mind the executive and administrative burdens of the respondents and keeps in mind the constitutional separation of powers and the nature of the orders should be that the courts may grant.

53. However, the enforcement of the applicants' rights is important, whatever practical difficulties the respondents may experience. The rights of all the relevant and applicable parties must be considered and after due consideration an order that is just and equitable must follow[15].

PAJA review

54. The respondents are both organs of state as defined in Section 239 of the Constitution of the Republic of South Africa Act No. 108 of 1996 ("the Constitution") and perform a public function in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

55. The above decisions taken by the respondents constitute administrative actions as contemplated by section 1(a)(i) and (ii) of PAJA.

56. The respondents fall within the definition of "administrator" as defined in Section 1 of PAJA.

57. The actions or decisions of the respondents detailed above adversely affected the rights of the applicants and the twins to not be recognised as South African citizens and/or residents with associated rights and privileges.

58. Consequently, the actions of the respondents constitute administrative actions, and such decisions are thus subject to the provisions of PAJA.

59. One of the purposes of PAJA is to give effect to the Constitutional right to administrative action that is lawful, reasonable, and procedurally fair. Another purpose of PAJA is to give effect to the right to written reasons for administrative action. Inherent in this right, is the right of the applicants to receive written reasons that are coherent, logical, and non-contradictory.
60. Section 5(3) of the PAJA states that if an administrator fails to furnish adequate reasons for an administrative action it must, subject to sub-section 4 and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reasons.
61. The actions of the respondents were procedurally unfair in that they denied the applicants an opportunity to make representations and/or to be heard.
62. The respondents failed to take important considerations into account when making their decisions.
63. The decision taken ultimately was invalid and, it seems, ultra vires.
64. Therefore, this court is of the view, having regard to the above requirements duly applied to the facts, that the respondents made decisions which are illogical, contradictory, and incorrect. It should be presumed in terms of sections 5(3) and (4) of PAJA that the actions and decisions of the respondents were taken without good reason and should consequently be set aside.

Relief sought

65. In general terms the remedies for judicial review in terms of PAJA, as was confirmed in *Steenkamp v Provincial Tender Board of the Eastern Cape*[16], are public law remedies, the purpose of which is to pre-empt, correct or reverse an improper administrative function (or action).
66. Section 8 of PAJA confers on a court, in proceedings for judicial review, a generous jurisdiction to grant orders that are “just and equitable”.
67. The court’s discretion is wide, and it must fashion an appropriate remedy for unlawful administrative action. This gives legislative consent to the Constitution’s “just and equitable” remedy.
68. In this regard, section 8(1)(c) of PAJA reads as follows:

“(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable,

including orders –

- (a) Directing the administrator –

- (i) to give reasons; or
 - (ii) to act in the manner the court or tribunal requires;
 - (b) Prohibiting the administrator from acting in a particular manner;
 - (c) Setting aside the administrative action and –
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) in exceptional cases –
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;
- ...”

69. The setting aside of an administrative action may not properly remedy the matter and the courts will usually exercise the power to remit the matter for reconsideration by the administrator. This is affirmed as a general power in section 8(1)(c)(i) of PAJA, and it is accepted that this is usually the prudent and proper course. In general terms, this will suffice unless it is not sufficient to achieve a just and equitable remedy. Section 8(1)(c)(ii) of PAJA recognises the exceptional case where the court may substitute or vary the administrative action or decision for that of the decision-maker/administrator.
70. To decide whether a case is exceptional, the court will consider all the facts, and whether the decision should not be left to the decision-maker. The application of this provision will depend on the circumstances of each case. [17]The following factors must be considered:
- 70.1. Whether it would serve any purpose to remit the matter[18];
- 70.2. Whether a further delay would cause undue prejudice to the other party[19];
- 70.3. Whether the court is in as good a position as the decision-maker to make the decision[20];
- 70.4. That the decision-maker might not fairly apply his or her mind if the matter were to be remitted[21].
71. In *UWC v MEC for Health and Social Services*[22], the court summarised the general position in respect of remedies, commenting that the mere fact that a court considers itself as qualified as the administrator to take a decision, does not of its own justify usurping the administrator’s powers and functions. The court went on to point out that in some cases, however, fairness to an applicant may demand that the court should take such a view.

72. The Constitutional Court has emphasised the need for effective remedies[23]. A good example can be found in the judgment of *Hoffmann v South African Airways*[24] where the Constitutional Court ordered an employer to appoint an applicant who had been turned down based on his HIV-positive status.
73. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another*[25], the Constitutional Court comprehensively analysed the law relevant to a substitution order as follows:

“(1) Exceptional circumstances test

- [34] Pursuant to administrative review under section 6 of PAJA and once administrative action is set aside, section 8(1) affords courts a wide discretion to grant “any order that is just and equitable”. [26] In exceptional circumstances section 8(1)(c)(ii)(aa) affords a court the discretion to make a substitution order.
- [35] Section 8(1)(c)(ii)(aa) must be read in the context of section 8(1). Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution.
- [36] Long before the advent of PAJA, courts were called upon to determine circumstances in which granting an order of substitution would be appropriate. Those courts almost invariably considered the notion of fairness as enunciated in *Livestock* and the guidelines laid down in *Johannesburg City Council*.
- [37] In *Livestock*, the Court percipiently held that –
- ‘the Court has a discretion, to be exercised judicially upon consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides.’[27]
- [38] In *Johannesburg City Council*, the Court acknowledged that the usual course in administrative review proceedings is to remit the matter to the administrator for proper consideration. However, it recognised that courts will depart from the usual course in two circumstances:

“(i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary

to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.

(ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.”[28]

- [39] On a plain interpretation of Johannesburg City Council, the factors under the exceptional circumstances enquiry – like foregone conclusion, bias or incompetence – are independent. That is, if any factor is established on its own, it would be sufficient to justify an order of substitution. Indeed, this interpretation is also supported by subsequent case law.[29]
- [40] The Supreme Court of Appeal in Gauteng Gambling Board seems to have added another consideration, whether the court was in as good a position as the administrator to make the decision.[30] For this, it noted that the administrator is “best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision”. [31] The Court also considered the broader notion of fairness in accordance with *Livestock*. [32] This notion seemed to colour the Court’s analysis of whether, after the Court was satisfied that it was in as good a position as the administrator and a foregone conclusion was established, an order of substitution was the appropriate remedy. [33] In applying the notion, the Court’s findings were also informed by how a party is prejudiced by delay and potential bias or the incompetence of an administrator if the matter were remitted. [34]
- [41] It is instructive that cases applying section 8(1)(c)(ii)(aa) of PAJA have embraced a similar approach to those that ordered substitution under the common law. However, because the section does not provide guidelines on what exceptional circumstances entail, it is of great import that the test for exceptional circumstances be revisited.
- [42] The administrative review context of section 8(1) of PAJA and the wording under subsection (1)(c)(ii)(aa) make it perspicuous that substitution remains an extraordinary remedy. [35] Remittal is still almost always the prudent and proper course.
- [43] In our constitutional framework, a court considering what constitutes exceptional circumstances must be guided by an approach that is consonant with the Constitution. This approach should entail affording appropriate deference to the administrator. Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.
- [44] It is unsurprising that this Court in *Bato Star* accepted Professor Hoexter’s account of judicial deference as –
- ‘a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect;
- and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints

under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.’[36]

[45] Judicial deference, within the doctrine of separation of powers, must also be understood in the light of the powers vested in the courts by the Constitution. In *Allpay II*, Froneman J stated that -

‘[t]here can be no doubt that the separation of powers attributes responsibility to the courts for ensuring that unconstitutional

conduct is declared invalid and that constitutionally mandated remedies are afforded for violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights.

...

Hence, the answer to the separation-of-powers argument lies in the express provisions of section 172(1) of the Constitution. The corrective principle embodied there allows correction to the extent of the constitutional inconsistency’.[37] (Footnote omitted.)

[46] A case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference and their obligations under the Constitution. As already stated, earlier case law seemed to suggest that each factor in the exceptional

circumstances enquiry may be sufficient on its own to justify substitution.[38] However, it is unclear from more recent case law whether these considerations are cumulative or discrete.[39]

[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight.[40] The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the

decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator.

The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.

[48] A court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned

administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator

having already exercised its specialised knowledge. In these circumstances, a court may very well be in the same position as the administrator to make a decision. In other instances, some matters may concern decisions that are judicial in nature; in those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.[41]

[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider the matter".[42] Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion.

However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that the decision is a foregone conclusion.

[50] The distinction between the considerations in as good a position and foregone conclusion seems opaque as they are interrelated and inter-dependent. However, there can never be a foregone conclusion unless a court is in as good a position as the administrator. The distinction can be understood as follows: even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator. This is typical in instances of policy-laden and polycentric decisions.[43]

[51] A court must consider other relevant factors, including delay. Delay can cut both ways. In some instances, it may indicate the inappropriateness of a substitution order, especially where there is a drastic change of circumstances and a party is no longer in a position to meet the obligations arising from an order of substitution or where the needs of the administrator have fundamentally changed. In other instances, delay may weigh more towards granting an order of substitution. This may arise where a party is prepared to perform in terms of that order and has already suffered prejudice by reason of delay. In that instance, the delay occasioned by remittal may very well result in further prejudice to that party. Importantly, it may also negatively impact the public purse.

- [52] What must be stressed is that delay occasioned by the litigation process should not easily clout a court's decision in reaching a just and equitable remedy. Sight must not be lost that litigation is a time-consuming process. More so, an appeal should ordinarily be decided on the facts that existed when the original decision was made.[44] Delay must be understood in the context of the facts that would have been laid in the court of first instance as that is the court that would have been tasked with deciding whether a substitution order constitutes a just and equitable remedy in the circumstances.
- [53] There are important reasons for this approach. Where a matter is appealed, delay is inevitable. Thus assessing delay with particular reference to the time between the original decision and when the appeal is heard could encourage parties to appeal cases. This, they would do, with the hope that the time that has lapsed in the litigation process would be a basis for not granting a substitution order. Where a litigant wishes to raise delay on the basis of new evidence, that evidence must be adduced and admitted in accordance with legal principles applicable to the introduction of new evidence on appeal.[45] Ultimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties.
- [54] If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances, bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.
- [55] In my view, this approach to the exceptional circumstances test accords with the flexibility embedded in the notion of what is just and equitable. It is, therefore, consonant with the Constitution while at the same time giving proper deference and consideration to an administrator."

Applying the law and authorities to the facts of this matter

74. Duly contextualised and applied, the exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances of a particular case. Even where there are exceptional circumstances, this court must be satisfied that it would be just and equitable to grant an order of substitution, as opposed to the usual position of remitting upon review. This court has a discretion that must be exercised judicially.
75. To exercise its discretion, it is important to have regard to the factual evidence before this court. It is trite that where factual disputes arise, relief should only be granted if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, justify an order.
76. In casu, the respondents' version under oath consists of bald and baseless allegations. In fact, the answering affidavit consists

mainly of bare denials proffering no version. Accordingly, this court is satisfied that having regard to the versions contained in the affidavits and applying the Plascon-Evans[46] principle, the probabilities are overwhelmingly in the applicants' favour.

77. That being said, it remains necessary to apply the exceptional circumstances test enunciated by the Constitutional Court as referred to above in order to determine whether a substitution order should or can be granted or whether this matter ought to be remitted back to the respondents to take a decision afresh as the relevant decision-maker or administrator.
78. This court is of the view that if this matter is remitted back, the result is a foregone conclusion and would merely be a waste of time if the respondents are to reconsider this matter. This view is premised on the fact that the respondents have not taken any steps to reconsider this matter since the initial decisions were made. The respondents need not await a ruling by the court to investigate the affairs of any citizen, commence proceedings or conduct themselves and invoke powers in accordance with various statutes, the Constitution, and the provisions of PAJA.
79. The applicants attempted to engage the respondents on numerous occasions which still yielded or resulted in the same outcome, i.e., invalid decisions were taken, and defective administrative procedures were followed. It would be unfair, unreasonable, unjust, and inequitable to subject or submit the applicants to the same process that has yielded no proper investigation process, nor a hearing or engagement process between the parties, and has caused a delay of more than a decade.
80. As to the element of skill, expertise or incompetence referred to in the judgment of the Constitutional Court referred to above, according to the respondents the status of the twins differs. How the respondents came to this conclusion is unknown. The respondents had ample opportunity to address or remedy these aspects, but they failed to do so. This the respondents should have addressed, investigated, or remedied independently prior to the institution of this application for review, it will after such institution serve little to no purpose to remit this and other

issues.

81. The authorities set out above and the court's finding that a remittal would be a foregone conclusion, is sufficient to justify an order of substitution. This coupled with the delay to have addressed the issues and predicaments of the applicants since 2009, at least, should not continue

indefinitely, it is in the interest of justice to be finalised, it is also just and equitable.

82. Notwithstanding the above and having regard to and applying the SCA's finding in Gauteng Gambling Board, this court is in as good a position as the respondents, having regard to the facts before it, to take or effect the decision of the administrator i.e., the respondents. This court is therefore of the view that a substitution order is the appropriate remedy.

Costs

83. Costs should follow the event, the applicants as successful parties should receive their costs against the respondents as the state.[47]

Order

84. Accordingly, this court grants the following order:

84.1. The respondents' decision to block and suspend the applicants' identity documents is declared invalid.

84.2. The respondents' decisions to block and suspend the applicants' identity documents are reviewed and set aside.

84.3. The respondents' decision to block and suspend the applicants' identity documents is substituted with a decision to reinstate and activate the applicants' identity document numbers [...]and [...] on the population register of the Republic of South Africa within 30 days from date of this order.

84.4. It is declared that the following children born from the relationship between the first and second applicants are citizens of the Republic of South Africa ("the children"):

84.4.1. The third applicant, TINOMUDA DYLAN KERE, with identity number[...];

84.4.2. TAPIWA MICHAEL KERE, with identity number[...];

84.4.3. RUVIMBO MEGANI KERE, with identity number[...].

84.5. The respondents are ordered to issue the applicants and the children with South African identity documents within 60 days from the date of this order.

84.6. The respondents are ordered to pay the applicants' costs on a party-and-party scale.

Acting Judge of the High Court

Gauteng Division

Date of hearing: 25 April 2023

Additional heads submitted: 5 May 2023

Judgment delivered: 14 July 2023

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[1] CaseLines page 014 – 14.

[2] No. 68 of 1997.

[3] No. 88 of 1995.

[4] No. 13 of 2002.

[5] See: Sections 25 – 28 of the Immigration Act.

[7] No. 96 of 1991.

[8] See: Shamko Abraham v Minister of Home Affairs/Director General, Department of Home Affairs, case number A5053/2021; A5054/2021;

A5055/2021 full bench appeal of the Gauteng Division, Johannesburg.

[9] See: Shamko Abraham v Minister of Home Affairs supra.

[10] See: Melaphi SZ and another v Minister of Home Affairs/Director General: Department of Home Affairs, at para [9].

[11] CaseLines page 005 – 16.

[12] CaseLines page 005 – 4.

[13] See: Annexures “SA06” to “SA08” – CaseLines pages 008 – 34 to 008 – 40.

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- [14] CaseLines page 005 – 3.
- [15] See: *Eisenberg and Others v Director General, Department of Home Affairs and Others* [2014] JOL 29900 (WCC).
- [16] 2007
- (3) bclr 200 CC.
- [17] *Administrative Law*, Yvonne Burns, 4th Ed, Lexis Nexis, p558.
- [18] This element was considered in *Gauteng Gambling Board v Silverstar Development Ltd* 2005(4) SA 67 (SCA) para 29 and 38; and in *Hangklip Environmental Action Group v MEC for Agriculture Environmental Affairs and Development Planning Western Cape* 2007 (06) SA 65 (CC) 84F – J.
- [19] This element was considered in *Hangklip Environmental Action Group v MEC for Agricultural Environmental Affairs and Development Planning Western Cape* 2007(6) SA 65(CC) para 126.
- [20] This element was considered in *Silverstar Developments*, at para 39.
- [21] This element was considered in *Silverstar Development*, at para 38.
- [22] 1998
- (3) SA 124 (CC) at 131
- [23] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(2) SA 1 (CC) at para 65
- [24] 2001
- (1) SA 1 (CC)
- [25] 2015
- (5) SA 245 (CC).
- [26] See section 8(1) of PAJA above n 13.
- [27] *Livestock* above n 29 at 349G.
- [28] *Johannesburg City Council* above n 30 at 76D-G.
- [29] See generally *Vukani Gaming Free State (Pty) Ltd v Chairperson of the Free State Gambling and Racing Board and Others*
- [2010] ZAFSHC 33 at paras 53-4 and *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another*
- [1998] ZASCA 91; 1999 (1) SA 104 (SCA) at para 109F.

- [30] Gauteng Gambling Board v Silver Star Development Limited and Others 2005 (4) SA 67 (SCA) (Gauteng Gambling Board) at para 39, where the Court held that— “the court a quo was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter.”
- [30] Gauteng Gambling Board v Silver Star Development Limited and Others 2005 (4) SA 67 (SCA) (Gauteng Gambling Board) at para 39, where the Court held that—
- “the court a quo was not merely in as good a position as the Board to reach a decision but was faced with the inevitability of a particular outcome if the Board were once again to be called upon fairly to decide the matter.”*
- [31] Id at para 29.
- [32] Id at para 28. See also Livestock above at 29 at 349G.
- [33] Gauteng Gambling Board above n 34 at paras 39 and 40.
- [34] Id at para 40.
- [35] See section 8(1) of PAJA above n 13.
- [36] Bato Star above n 25 at para 46. See Hoexter “The Future of Judicial Review in South African Administrative Law” (2000) 117 SALJ 484 at 501-2.
- [37] Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others
- [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at paras 42 and 45.
- [38] See [36] to [39].
- [39] See Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others [2014] ZAWCHC 134; [2015] 1 All SA 100 (WCC) at paras 33-9; Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa and Another
- [2014] ZAGPJHC 194 at para 25; Nucon Roads and Civils (Pty) Ltd v MEC for Department of Public Works, Roads and Transport: N.W. Province and Others
- [2014] ZANWHC 19 at paras 32, 41 and 44; and Reizis NO v MEC for the Department of Sport, Arts, Culture and Recreation and Others
- [2013] ZAFSHC 20 at paras 33 4.
- [40] It should be emphasised that the exceptional circumstances enquiry only arises in the context of the appropriate remedy to be granted as per section 8(1) of PAJA. Thus, it is only after the unlawfulness of the award has been established pursuant to section 6 of PAJA that the remedy, and therefore the exceptional circumstances enquiry, arises.

[41] See *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976

(2) *SA 1 (A) and Hutchinson v Grobler NO and Others* 1990

(2) *SA 117 (T)* at 157B-E.

[42] *Johannesburg City Council above* n 30 at 76D-H.

[43] See *Bato Star above* n 25 at para 48.

[44] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*

[2010] *ZACC 3; 2010 (5) BCLR 422 (CC)* at para 35 where it was held: “In general a court of appeal when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards.” (Footnote omitted.)

[44] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*

[2010] *ZACC 3; 2010 (5) BCLR 422 (CC)* at para 35 where it was held:

“In general a court of appeal when deciding whether the judgment appealed from is right or wrong, will do so according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards.” (Footnote omitted.)

[45]

See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] *ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC)* at paras 42-3.

[46] As enunciated in the matter of *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd.* 1984(3) *SA 623 (A)*.

[47] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (1) *BCLR 1014 (CC)*; See section 8(1)(f) of PAJA; administrative Law *supra* at p565 read with footnote 95.

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