

SOUTH AFRICA / JUDGMENT

Ndlovu and Another v Director General: Department of Home Affairs and Another [2023] ZAGPPHC 551; 81327/2017 (11 July 2023) [2023] ZAGPPHC 551

COURT

North Gauteng High Court, Pretoria

BEFORE

NN Bam

CASE / FILE NUMBER

81327/2017

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

CASE

NOs: 81327/2017

42071/2019

1)

REPORTABLE: NO

2)

OF INTEREST TO OTHER JUDGES: NO

3)

REVISED.

DATE:11

July 2023

SIGNATURE:

In the matter between:

KALANI

NDLOVU

First Applicant

NONHLANHLA

MAUREEN NDLOVU

Second Applicant

And

THE DIRECTOR GENERAL: DEPARTMENT
OF
HOME AFFAIRS
First Respondent
THE
MINISTER OF HOME AFFAIRS
Second Respondent

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL / UPLOADING ON CASELINES. THE DATE OF HAND DOWN SHALL BE DEEMED TO BE 11 JULY 2023

BAM J

A. Introduction

1. In July 2018, the first applicant launched the present application to review and set aside three decisions. The first decision is said to be that of the first respondent[1] of 13 October 2017, which purportedly withdrew the first applicant's citizenship on the basis that it had been obtained through a fraudulent Zimbabwean Exemption Certificate. The first applicant was further declared an illegal immigrant / a prohibited person in terms of section 29 (1) (f) of the Immigration Act[2]. In terms of the second decision, the Director General of Home Affairs, (DG), on 8 January 2018, rejected the first applicant's

internal review which was launched on the strength of section 8 (4) of the Immigration Act. The third decision is that of the Minister,

issued on 28 March 2018, in which the Minister rejected the first applicant's appeal. The upshot of the three decisions is that on 6 November 2017, based on a recommendation by Mahlangu, the DG issued a letter informing the first applicant that his citizenship had ceased.

2. All three decisions according to the applicants were unlawful and fall to be set aside. The main contention advanced by the applicants is that the respondents were not at liberty to ignore the administrative decision which granted the first applicant's citizenship. The applicants assert that by the time Mahlangu and Ledwaba or the DG made their decision that he was an illegal foreigner or a prohibited person, he was and remains a full citizen of this country until that decision has been set aside by a competent authority. The subsequent decisions of the DG and the Minister refusing his review application perpetuated the unlawful administrative action/s of the two officers, submit the applicants. The second attack deals with the procedural aspects of the administrative action. For the record, the first applicant denies the allegations of fraud made against him.

3. The respondents submit that the Immigration Act does not deal with fraudulent Exemption Certificates. They argue that once the investigation had revealed that the first applicant's Exemption Certificate (certificate) had been fraudulently obtained, it had a domino effect on all subsequent legal processes, including the naturalisation certificate, rendering them null and void, hence the first applicant became an illegal foreigner and a prohibited person in the country.
4. The second application was launched on 18 June 2019, pursuant to the DG's refusal to issue the second applicant with a non-South African Identity document. She was informed that it had to do with the flagging of her father's citizenship. By agreement, and in order to manage the two matters, the second application was put on hold as the parties agreed that its fate was entirely dependent on the outcome of the first application. By way of a court order issued on 8 August 2021, the two matters were consolidated.

B. The parties

5. The first applicant, Mr Kalani Ndlovu (Ndlovu) is an adult male businessman of Zimbabwean origin. His address is [xx] Constantia Park, Cape Town. The second applicant is Nonhlanhla Maureen Ndlovu, an adult female and the first applicant's eldest daughter with the same address as the first applicant. The first respondent is the Director General of DOHA and the second respondent is the member of cabinet responsible for DOHA. Both the first and second respondents are cited in their official capacity.

C. Background

6. The common cause facts suggest that on 4 June 1996, before the National Assembly, the Minister of Home Affairs, invited citizens of SADEC (Southern African Development Community Members States) countries to apply for exemptions in terms of section 28 (2) of the erstwhile Aliens Control Act of 1991. The period allowed for submission of applications was from 1 July 1996 to 30 September
1996. Applicants for exemption had to demonstrate, inter alia, that they had been resident in South Africa for a period of at least five years. An applicant, in other words, had to demonstrate that they had been in the Republic prior to July 1991. It is common cause that Mr Ndlovu applied and his certificate was approved. Subsequent thereto, he applied for permanent residency, which was also successful. In December 2003, Mr Ndlovu became a citizen of South Africa through naturalisation granted by the Minister in terms of section 5 (1) of the South African Citizenship Act[3].
7. On 13 October 2017, Mr Ndlovu was invited by Mahlangu to attend a meeting at DOHA in Pretoria. Pursuant to the interview, he was issued a letter. Given the importance of the contents of the letter, it is necessary to quote it in full:

'With reference to your status in the Republic of South Africa, The Department has investigated your status...The investigation

revealed that you obtained the South African citizenship using a fraudulent Exemption certificate. This therefore renders the process

followed by yourself in acquiring South African identify document and citizenship null and void. In terms of section 48 of the Immigration Act..., which states, I quote: 'No illegal foreigner shall be exempt from a provision of this Act or be allowed to sojourn in the Republic on the grounds that he or she was not informed that he or she could not enter or sojourn in the Republic or that he she was admitted or allowed to remain in the Republic through error or misrepresentation or because his or her being an illegal foreigner was undiscovered', you are therefore a prohibited person in terms of Section 29 (1)

- (c) of the Immigration Act... You were afforded an opportunity to appear before immigration to state your case regarding your status, although you complied with the request to appear, you however refused to cooperate. You are therefore ordered to leave the country within 14 days.'

Ruling: Application to strike out and admission of further sets of affidavits

8. At the start of the hearing, the court was called upon to make a ruling on the question of the parties having filed additional affidavits after the applicants' consolidated reply. Both parties laid the blame at the doors of the other. The circumstances under which the additional affidavits arose are the following: On 24 October 2021, the respondents filed a duplicating affidavit to which the applicants responded with an application to strike out, against what they termed additional material, in the duplicating affidavit. The respondents filed an answering affidavit to the application to strike out. Against the additional fresh material in their duplicating affidavit, the applicants filed a triplicating affidavit, subject to the court's leave to accept such additional affidavits. I allowed the additional affidavits and undertook to provide my reasons for the ruling with this judgement.

9. The basic principle, as set out in Rule 6

- (5) of the Uniform Rules, is that the court may in its discretion permit the filing of further affidavits. In *Hano Trading CC v J R 209 Investments (Pty) Ltd*, the import of the rule is explained thus:

'[11] ...A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.

[12] This court stated in *James Brown & Hamer (Pty) Ltd* (previously named *Gilbert Hamer & Co Ltd*) v *Simmons* NO 1963 (4) SA 656 (A) at 660D-H, that:

'It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted....'[4]

10. In *Steenkamp and Others v Edcon Limited*:

‘The principle is firmly established in our law that where time limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. In *Grootboom* this Court held that:

“[i]t is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.” [5]

11. Upon perusing the additional sets of affidavit filed by either side, it was clear that the parties dealt with the case as a moving target. As critical details began to emerge, such as the record identified as SRA1, filed by the applicants with their consolidated replying affidavit, it is plain that the interests of justice will be better served by allowing the additional affidavits, including the triplicating affidavit.

D. Merits

12. Perhaps, before setting out the applicant's case, it is wise to first set out the relevant provisions of the Immigration and the Citizenship Acts:

‘Section 29 (1) (f) of the Immigration Act deals with Prohibited Immigrants. Subsection 1 reads:

‘The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit:

(f) Anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.’

Section 5 of the Citizenship Act is the section that deals with the grant of naturalisation certificates. Subsection (1) reads:

‘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 requirements set out in (a) - (h).’

Section 8 deals with deprivation of citizenship. Subsection 1 reads:

‘The Minister may by order deprive a South African citizen who also has he citizenship by naturalisation of his or her South African citizenship if he or she is satisfied that:-

(a) the certificate of naturalisation was obtained by means of fraud, false representation or the concealment of a material fact; or

(b) Such certificate was granted in conflict with the provision of this Act or any prior law. ‘

Ground 1: The action was taken for a reason not authorised by the empowering provision 2. The two administrators were not authorised by the empowering legislation

13. The applicants submit that: (i) At the time Mahlangu and or Ledwaba or the DG informed him that he was an illegal immigrant and a prohibited person, respectively, he was and still is a citizen of this country. The Immigration Act, according to the applicants, affords no power to the respondents to declare a citizen an illegal immigrant or prohibited person. (ii) Further, in terms of section 8 (1) of the Citizenship Act, it is only the Minister who has the authority to deprive him of his citizenship.
14. The applicants conclude that the applications for review to DG and later to the Minister failed to recognise the unlawfulness of the action taken by Mahlangu and Ledwaba. Thus, the DG's and the Minister's decisions perpetuated the unlawful conduct of the two officers. In any event, submit the applicants, by the time the appeals were referred to the DG and the Minister, the horse had long bolted and the stable door closed because from the start the approach to dealing with Ndlovu by the two officers was premised on the Immigration Act, which was unlawful as the two officers including the DG and the Minister were not permitted to ignore Ndlovu's citizenship.
15. In an effort designed to explain their reliance on the Immigration Act, the respondents submit that section 8 of the Citizenship Act does not cover fraudulently obtained exemption certificate. They assert that Ndlovu is in possession of a fraudulent certificate. Once the fraud had been revealed, all steps subsequent thereto become void, *ex lege*, including the citizenship, submit the respondents.
16. Neither submission is of assistance to the respondents in my view. Firstly, section 29 of the Immigration Act deals with immigrants. Ndlovu was not an illegal immigrant at the time the first decision was made by Mahlangu and or Ledwaba or the DG. Secondly, our legal system is founded on the rule of law which discourages self-help. The fact that the Citizenship Act does not cater for illegally obtained certificates did not entitle the respondents to ignore Ndlovu's citizenship and deal with him as an illegal foreigner. That amounts to self-help.
17. For purposes of emphasising this point, I assume, without necessarily making a finding, that the exemption certificate that was used by Ndlovu to apply for his citizenship was indeed fraudulent. The principle is that even an invalid administrative act — the act of granting Ndlovu the certificate — remains valid in fact, and may give rise to subsequent valid legal acts — the granting of permanent residency and citizenship, on the strength of the certificate. The point is traced in the dissenting judgement of Jafta J in *Department of Transport and Others v Tasima (Pty) Limited*, with reference to an extract from Oudekraal:

'...“In our view the apparent anomaly – which has been described as giving rise to ‘terminological and conceptual problems of excruciating complexity’– is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words

‘...an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.’[6]

18. The law as quoted in paragraph 16, albeit the majority did not agree with Jafta J’s conclusions, is in harmony with what the majority, per Kampepe J, said:

‘This important principle does not undermine the supremacy of the Constitution or the doctrine of objective invalidity. In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court:

the administrative act remains legally effective, despite the fact that it may be objectively invalid... This approach was endorsed and explained by a unanimous Court in *Economic Freedom Fighters*.... There, Mogoeng CJ concluded that our constitutional

order hinges on the rule of law:

“No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would ‘amount to a licence to self-help’. Whether the Public Protector’s decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.”

An organ of state, like any other party, must therefore challenge an administrative decision to escape its effects...’[7]

19. In *Merafong City Local Municipality v AngloGold Ashanti Limited*, the court elaborated thus:

‘The import of *Oudekraal and Kirland* was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside.

The underlying principles are that the courts’ role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring

them; and, unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully, referring to *Kirland*, in *Economic Freedom Fighters*.’[8]

20. The decisions referred to in the preceding paragraphs are decisive of the fate of the decision taken by Mahlangu and or Ledwaba, and later, the DG's and the Minister's decisions on review. All three decisions ignored Ndlovu's citizenship. The decisions were unlawful and fall to be set aside.
21. The second point made by the applicants deals with procedural fairness. The applicants, with reference to section 3 (1) and (2) of PAJA[9] say that the respondents failed to provide Ndlovu with adequate notice of the nature and purpose of the proposed administrative action. What constitutes adequate notice must be judged with reference to the circumstances of each case. Based on Mahlangu's own version in the answering affidavit, in September 2017, he or the department received a tip-off that Ndlovu was employing illegal foreigners in his company. It has not been disputed that Ndlovu runs a sizeable security company and now and again tenders for government tenders.
22. After his internal investigations, Mahlangu held an interview with Ndlovu on the 17 of October 2017. There is neither reference to a notice to Ndlovu nor an attempt to inform him before hand of the proposed administrative action. The unreasonableness of the respondents' conduct must be understood from the following common cause facts:
- (i) Ndlovu runs an established security company business.
 - (ii) It is not in dispute that Ndlovu has a family of four young children and a wife in this country, all of whom are said to depend on him, including his eldest daughter who is a student.
 - (iii) There was no urgency to deliver the decision, given that the tip-off reached the respondents on 1 September 2017 and the meeting was held only on 17 October. Based on these common cause facts, it must be concluded that there was neither urgency nor risk of Ndlovu suddenly upping and fleeing the country and abandoning his business and his family, in the event he was provided sufficient notice of the proposed administrative action. The respondents' failure to provide adequate notice of the envisaged administrative action to Ndlovu is not explained anywhere in the respondents answering affidavit. The respondents conduct was procedurally unfair unlawful and falls to be set aside on this basis alone.
- E.

Conclusion

23. For all the reasons in this judgement, the decisions of the two officers, Mahlangu and Ledwaba declaring the first applicant to be an illegal immigrant or prohibited person in the Republic and the decision of the DG on review and that of the Minister are all unlawful and cannot stand. It goes without says that the retraction or invalidation of Mahlangu's citizenship on the basis of the unlawful conduct cannot stand. Solely because the decision of the DG not to issue the second applicant with the non-South African identity document had

to do with the retraction of her father's citizenship, that decision can no longer stand. Its substratum no longer exists.

F. Order

20. The application for review is upheld.

(i) It is declared that the decision taken by the two officers, Mahlangu and Ledwaba and or the DG declaring Ndlovu an illegal immigrant and or prohibited person were unlawful and is hereby set aside.

(ii) The decision of the DG and the Minister on review lodged by Mahlangu perpetuated the unlawful conduct of Mahlangu and Ledwaba. They too are set aside.

1.The respondents must pay the applicants' costs.

NN BAM

JUDGE OF THE HIGH COURT, PRETORIA

Date of Hearing:

22 May 2023

Date of Judgement:

11 July 2023

Appearances:

Applicants' Counsel: Adv H.H Cowley Instructed by: Matojane Malungana Attorneys Bryanston, Johannesburg First and Second Respondents' Counsel: Adv M Bofilatos SC Instructed by: State Attorneys Pretoria

[1]Although the first applicant was interviewed by a Mr Joseph Thabo Mahlangu, the letter handed to him was signed by an Advocate Ledwaba, Director of Special Investigation and Joint Operations. Thus, to the first applicant, it was not clear who exactly had made the first impugned decision. According to the respondents, Mahlangu made the first decision. The respondents had raised the failure to cite Mahlangu as a party but they did not persist with the point.

[2]Act 13 of 2002, as amended.

[3] Act 88 of 1995, as amended.

[4] (650/11)

[2012] ZASCA 127; 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) (21 September 2012), paragraphs 11-12.

[5] (CCT29/18)

[2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC);

[2019] 11 BLLR 1189 (CC) (30 April 2019), paragraph 26.

[6] (CCT5/16)

[2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) (9 November 2016), paragraph 89.

[7] Note 6 supra, paragraphs 148 to 150.

[8] Merafong City Local Municipality v AngloGold Ashanti Limited (CCT106/15) [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (24 October 2016), 41-42.

[9] Section 3 (1) states: Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. (2) (a) A fair administrative procedure depends on the circumstances of each case. (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject subsection (4) must give a person referred to in subsection (1)- (i) adequate notice of the nature and purpose of the proposed administrative action. (ii) a reasonable opportunity to make representations; (iii) a clear statement of the administrative action; (iv) adequate notice of any right of review or internal appeal,..and (v) adequate notice of the right to request reasons in terms of section 5.'

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