
SOUTH AFRICA / JUDGMENT

Nkosi v Minister of Home Affairs and Others (63708/2016) [2017] ZAGPPHC 1078 (18 December 2017) [2017] ZAGPPHC 1078

COURT

North Gauteng High Court, Pretoria

BEFORE

Brand

CASE / FILE NUMBER

63708/2016

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 63708/2016

Reportable

Of interest to other judges

Revised

In the matter between

CLIFFORD KENNETH NKOSI Excipient

AND

THE MINISTER OF HOME AFFAIRS First Defendant

THE DIRECTOR GENERAL OF HOM AFFAIRS Second Defendant

CAROL ZULU Third Defendant

JUDGMENT

BRAND, AJ

The excipient excepts to the Defendants' plea on grounds that it fails to disclose a defence to the relief sought by him.

- [2] In the main action, the Excipient (there the Plaintiff) seeks:
- (a) the review and setting aside. (interestingly) of a decision of the Third Defendant to declare him an illegal foreigner and in the alternative to that, an order declaring that the First Defendant is obliged to consider the Excipient's Written Request for Review with respect to this decision;
 - (b) an order declaring that an immigration officer such as the Third Defendant cannot declare the Plaintiff, as a South African citizen, an illegal foreigner in terms of section 34 of the Immigration Act 13 of 2002 ('the Immigration Act').
 - (d) an order declaring that the Excipient can only be deprived of his South African citizenship by an order of the High Court.
- [3] In those portions of the Defendants' plea relevant to this exception, the Defendants in sum plead that:
- (a) the Excipient is not a South African citizen by birth, as he was in fact born in Zimbabwe;
 - (b) the Excipient obtained his South African identity number by fraud, to wit by registering falsely that he was born of a South African citizen in South Africa, when in fact he was born of a Zimbabwean citizen in Zimbabwe;
 - (c) on these grounds the Third Defendant, as she is authorised to do in terms of Section 34 read with 48 of the Immigration Act, declared the Excipient an illegal foreigner, acting in terms of these provisions; and
 - (d) as a lawfully declared illegal foreigner, he was lawfully arrested and detained for purposes of deportation to Zimbabwe, again in terms of section 34 of the Immigration Act.
- [5] Even a cursory examination of sections 34 and 48 of the Immigration Act gleans that neither separately nor the two read together in any way bestow the authority upon an immigration officer to declare a South

African citizen an illegal foreigner and so deprive him of his citizenship. Section 34 bestows authority on an immigration authority to decide to deport someone who has already been declared and illegal foreigner and sets out procedures and requirements related to that. Section 48 in turn simply determines that the provisions of the Immigration Act apply to an illegal foreigner irrespective of whether he was allowed to enter into and to remain in the Republic despite being an illegal foreigner; whether or not he was informed that he is not allowed to be in the Republic; or whether the fact that he is an illegal foreigner was undiscovered. As does section 34, it applies only to someone who is already an illegal foreigner and bestows no authority to declare someone with citizenship and illegal foreigner.

- [6] The distinction that Mr Bofilatos SC, who appeared for the Respondents, reminded this court of in his heads of argument and his submissions at the hearing of this application, between *facta probanda* and *facta probantia*, does not assist. The legal basis for the arrest,

detention and deportation of the Excipient in section 34 of the Immigration Act applies only if the Excipient has indeed lawfully been declared an illegal foreigner and has so been deprived of his citizenship. The Defendants themselves plead that that he was declared an illegal foreigner by the Third Respondent in terms of section 34 read with 48. As a matter of law and not fact, section 34 read with 48 bestows no such authority. The plea, as a result, has no basis in law.

[7] Accordingly, the exception must be upheld.

[8] It is ordered that:

1. The Defendants' plea and defense is struck out.
2. The Defendant is afforded 10 days from the date of this order within which to amend its plea and defense.
3. The Defendant is ordered to pay the costs of the exception.

JFD Brand

Acting Judge of the High Court

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/1078.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nkosi-v-minister-of-home-affairs-and-others-unknown-topic-agpphc-2017>

Prepared on 13 October 2026 · Esheria