

SOUTH AFRICA / JUDGMENT

S v Molatsa (01/2021; 01/472/2019)

[2021] ZANWHC 7 (29 January 2021)

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COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, A Petersen

CASE / FILE NUMBER

01/2021; 01/472/2019

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG

HIGH COURT REF: 01/2021

MAGISTRATE CASE NO: 01/472/2019

Reportable: YES/NO
Circulateto Judges : YES/NO
Circulateto Magistrates: YES/NO
Circulate

to Regional Magistrates: YES/NO

In the matter between: -
THE STATE
AND
MARY MOLATSA
29
JANUARY 2021
REVIEW JUDGMENT
ORDER
Consequently,

the following order is made:

- (i)
The conviction of the accused, on 22 November 2019 by Additional Magistrate R.B Letsholo for contravention of section 9(3)(a) of the Immigration Act 13 of 2002, is reviewed and set aside;
- (ii)
The attorney on record for the accused is directed, pending the promulgation of the Regulations envisaged in section 23(a) of the Act, to forthwith provide professional legal assistance to the accused by ensuring that she applies for South African citizenship;
- (iii)
The attorney on record for the accused is further directed to file with the Court a quo a comprehensive report with copies of the application within 21 (twenty-one) days of being served with this review judgment;
- (iv)
The office of the Department of Home Affairs that is ceased with the accused's application is directed to consider the accused's application for citizenship within 30 (thirty) days of being served with this Order/ Review Judgment;
- (v)
This review judgment must be served on the Station Commander for the South African Police closest to the accused's dwelling;
- (vi)
This review judgment must be served on the Head of the Department of Home Affairs, Orkney.

JUDGMENT

HENDRICKS DJP

Introduction

[1] This matter was sent on special review by Magistrate Lestholo from Orkney, district Matlosana. The accused was charged with the offence of “contravening the provisions of Section 49 (1) (a) read with sections 1, 9 (3) (a), 9 (3) (b), 9 (4), 9A, 31, 32, 34 and 43 of the Immigration Act 13 of

2002. It was alleged that upon or about the 25th October 2019 and at or near Kanana, in the district of Matlosana, the accused being a citizen of Lesotho and therefore a foreigner,

wrongfully and unlawfully entered and remain in the Republic of South Africa in contravention of the Act, by remaining in the Republic

without being in possession of a valid passport and/or without being the holder of a valid resident permit and/or without being issued with a valid visa by the Director General of the Department of Home Affairs, in terms of the provisions of the Act and/or not by having entered through the Republic at a port of entry and thereby committed an offence". [SIC]

This is verbatim what was put to the accused as it appears on the transcribed record. No charge sheet is attached as same was lost.

[2] The accused, who was legally represented, pleaded guilty to the charge. A plea explanation in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977, as amended, was read into the record. It reads thus:

"I the undersigned Mary Molatsa hereby declares as follows. I am an adult female and the accused in this case. I plead guilty freely,

voluntarily and without any undue influence. I plead guilty to contravention of 9(1)(3)(a) and (b) read with Section 49(1)(a) of Act 13/02 as amended.

Entering or departing at a place other than at a port of entry or without a valid passport. I admit that on the 25th October 2019 I was at Kanana, in the District of Matlosana. I further admit that I am a Lesotho and possess and do not possess a valid passport. I further admit that on the said date I entered the Republic without a valid passport.

I further admit that I have seen a document purported to be an affidavit made by [indistinct] in which she alleges that she is an immigration officer employed by the Department of Home Affairs and tasked with analysing or investigating the movement of people in and out of the Republic and that according to the records, I entered the Republic illegally and I do not dispute that.

I further admit that my entry is not recorded by an immigration officer as required by the Act and further that when I entered as described above, I had the required intention to do so and I admit that entering and remaining as I did is unlawful."

[3] Having been satisfied that the accused admitted all the elements of the offence of contravening section 9 (3) (a) of Act 13 of 2002, as amended, to wit entering the country not being in possession of a valid passport, the Magistrate convicted the accused. The legal representative addressed the court in mitigation of sentence. It was said that the accused was in South Africa since she was a small child and that her mother passed away. She does not have any form of documentation. She was placed in foster care and attempted, with the assistance of a social worker, to get the required documentation but to no avail. She is a stateless person.

[4] The Magistrate remarked that the matter should be “sent on special review to the High Court to order that Home Affairs must give her an ID because if you are stateless, the country in which you are found in terms of UN conventions, South African Constitutional Court Home Affairs must give you a state. It is South African Law.” [SIC]

[5] The matter was sent on special review and the Magistrate further remarked as follows:

“Your case is postponed until 20 December so we can send the record of this proceedings to the Judge at North West High Court to tell us what to do with you because in my opinion home affairs must give you an id. I am not saying that it is going to be like that.

I do not know what the Judge will say but my little knowledge is that if a person finds him or herself in a country which is a member of United Nations and his or her country of origin refuses to take that person back the country in which she finds him or herself must give that person citizenship. So only the High Court can order that.

So I will send this records to the High Court and ask the Judge to make such an order. But for now you are released on warning you must be here 20 December half past 08h00 in the morning. In the meantime you must go to the social worker who assisted you get or if you have the foster care order you must get it, bring it to the Clerk of the Court here so that they can make me a certified copy.

So that I attach it to the records as proof that you were once fostered, you understand? And next time if the police arrest you, you must tell them that the Magistrate said that you are a person who does-not have a State. So you are waiting for the results from the High Court to hear whether you must be given a South African citizenship.

Or you must tell any Magistrate if they do not listen to you and arrest you because you are not supposed to have been arrested in the first place.”

[6] The Magistrate addressed a letter to the Registrar of this Court, the contents of which reads thus:

“Submission of records for special review in terms of the provisions of section 19(1)(a)(ii) read with section 24(1)(a) of the Supreme Court Act 59 of 1959.

1. Having found the accused guilty on her plea of guilty for contravention of section 11 Immigration Act 13 of 2002 as amended.
2. Having heard her attorney’s address that she happened to have been born in South Africa.
3. It is therefore requested that the honourable reviewing judge, if he/she reviews and set my conviction aside or make an appropriate order.

Background facts.

On 22 November 2019 accused Ms Marry Molatsa pleaded guilty through her Legal Aid Attorney to contravention of section 49(1) of Immigration Act 13 of 2002 as amended. On the said date I found her guilty for contravention of section 9(3)(a) of Immigration Act 13 of 2002 as amended, (The Act). It appeared during her attorney's mitigation that accused happened to have been in South Africa all her life, that her parents are from Lesotho and deceased and that she has never been to or visited Lesotho and South Africa happen to be the only country she has ever known, making her stateless person for whom the provisions of section 4(3) of Citizenship Amendment Act 17 of 2010

The matter has since been postponed for special review and transcribe records. Transcribed records came only to find that the original charge sheet is now missing due to circumstances which are apparent below. The original prosecutor in this matter has also been relocated to another court and the original attorney also employed elsewhere.

Citizenship by naturalization

Section 4(3) of the said Act provides:-

A child born in the Republic of parents who are not South African citizens or who have not been admitted in to the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if-

- a) He or she has lived in the Republic from the date of his or her birth to the date of becoming a major, and
- b) His or her birth has been registered in accordance with the provisions of the Birth and Deaths Registration Act 1992, (Act No 51 of 1992)

Regulations on citizenship by naturalization

There are no regulations regarding the people in the position of the accused except that there is a published regulation for comment, government gazette no. 43551 24 July 2020, which is intended to cover the accused, but as things stand and with the current regulations she is not covered and remains a victim of injustice in the sense that she stands to be arrested from time to time for being illegal in the Republic.

Case law

In Minister of Home Affairs v Ali (1289/17) [2018] ZASCA 169 (30 November 2018)-Reportable held at page 6 par [16] and page 10 par [27] that,-

1. The Minister accepts applications on affidavit from each of the applicants..., for granting of South Africa Citizenship Act 88 of

1995 and to decide on each such application within ten days of receipt of such application/s,

2. That section 4(3) of South Africa Citizenship Act 88 of 1995 applies to persons who meet the requirements of that section, irrespective of whether they were born before or after 1 January 2013,
3. That the Minister shall within one year of the date of this order make regulations in terms of section 23(a) of the South Africa Citizenship Act 88 of 1995 (the Act) in respect of applications for citizenship by naturalization in terms of section 4(3) of the Act; and
4. That pending the promulgation of the regulation in 3.1 above, accept applications in terms of s 4(3) South African Citizenship Act 88 of 1995, on affidavit.

As I have stated above, the regulations are pending as there is a draft which is published a year after the above judgment in July 2020 and this is prejudicial to the accused.

Incomplete record/ duplicate charge sheet.

I have to mention further that the attached charge sheet is not original but duplicate, this is due to the fact that at one stage our court was hit by covid 19 and charge sheets including for this matter were taken to Klerksdorp magistrate's court to help Orkney court, other charge sheets have since been returned but this one did not, at that stage the, case was being postponed for transcribe records which are hereto attached.

The only missing link in this matter is the said original charge sheet and annexure "B" which is a standard affidavit by an immigration officer confirming that in their records accused's information as to entry in the Republic is non-existent, but besides that the transcribed records is the true reflection of what happened on the date the matter was heard which lead to accused being found guilty her section 112(2) statement which is attached to the lost charge sheet but captured in the record..

The clerk of the court has also attached a statement to the effect that the said original charge sheet cannot be traced as well as the copy of the record court book when the matter started.

In *S v Chabedi* (497/14) [2005] ZASCA 5 (3 March 2005) the following was said at par[5]:

"On appeal, the record of the proceedings in the trial court is of cardinal importance, after all, that record forms the whole basis of the rehearing by the court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However, the requirement is that the record must be adequate for proper consideration. of the appeal; not that must be a perfect recordal of everything that was said at the trial..."

It is therefore my humble submission that the honourable reviewing judge accepts this record and in the principle of finality find accused not guilty, make a proper determination alternatively set the proceedings aside and direct that. Home Affairs department to assist the accused as requested above as I am functus officio.

The trite principle as, set out by the court in *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 SA 298 (A) at 306F-G and reaffirmed in various decisions of our courts (See *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (2) SACR 19 (CC) (1997 (3) SA 772 1997 (6) BCLR 677) at 26 par 22 and *S v Khumalo* 2009 (1) SACR 503 (T) at 505 -506, is that –

'once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio* its jurisdiction in the case having been fully and finally exercised its authority over the subject-matter has ceased.'

[7] It is quite apparent that the Magistrate requests that the conviction of the accused be reviewed and set aside. This is based on the fact that the accused was in the Republic of South Africa from a very young age and was even placed in foster care after the passing of her mother. Furthermore, the Magistrate expressed an opinion that this Court should order the Department of Home Affairs to issue the accused with an identity document(ID). Reliance was placed on the

matter of *Minister of Home Affairs v Ali and Others* 2019

(2) SA 396 (SCA).

[8] Citizenship is a fundamental right enshrined in section 3 of the Constitution of the Republic of South Africa, Act 108 of 1996. The Constitution requires in section 3(3) that National legislation must be enacted that provide for the acquisition, loss and restoration of citizenship. In the context of the present review, the legislation envisaged in section 3(3) of the Constitution is the South African Citizenship Amendment Act 17 of 2010. In consequence of the Amendment Act, the circumstances of the accused are now covered under section 4(3) of the South African Citizenship Act 88 of 1995.

[9] Section 4(3) provides:

“(1) ...

(2) ...

(3) A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if-

(a) he or she has lived in the Republic from the date of his or her birth to date of becoming a major; and

(b) his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992).”

[10] It is quite apparent that section 23(a) of the Act, empowers the Minister to make regulations that would give effect to section 4(3) of the Act. Unfortunately, it was only after litigation in *Minister of Home Affairs and Another v Ali and Others* 2019 (2) SA 396 (SCA) (the Ali case) that attempts were seen to be made, through the publication in the Government Gazette, of

draft regulations that would give effect to section 4(3). The draft regulations would give effect to section 4(3) by making provision for a "Certificate of naturalisation in terms of section 4(3)" under Regulation 3A, 3B and 3C of the regulations.

- [11] These regulations would have arrested the lacuna that exists between section 4(3) on the one hand which confers the rights on an individual to apply for South African citizenship if he meets the requirements set therein, and the means used for obtaining a Certificate of Naturalisation in terms of section 5 of the Act, on the other hand. Put differently, the position the accused finds herself in would have been covered by section 4(3), if the regulations had been in place. As alluded to above, the draft regulations were published for comment only on 24 July 2020 in Notice No. R 815 under Government Gazette No. 43551. Members of the public have since been invited to submit written submissions on the draft regulations on or before 30 August 2020. These regulations are not yet promulgated.
- [12] In determining the appropriate relief to which the accused is entitled, this Court is inclined, in the context of constitutional litigation, to fashion and craft a unique remedy that will provide effective relief on review. The principles governing the circumstances presented in the present review have been settled by the Supreme Court of Appeal in the Ali case. The Ali case has provided clear guidelines on section 4(3) applications pending the coming into effect of the regulations. The Ali case has held authoritatively that pending the promulgation of the regulations in respect of applications for citizenship by naturalisation in terms of section 4(3), the Department of Home Affairs ought to accept applications brought before it for purposes of section 4(3), on affidavit.
- [13] Consequently, the following order is made:
- (i) The conviction of the accused, on 22 November 2019 by Additional Magistrate R.B Letsholo for contravention of section 9(3)(a) of the Immigration Act 13 of 2002, is reviewed and set aside;
 - (ii) The attorney on record for the accused is directed, pending the promulgation of the Regulations envisaged in section 23(a) of the

Act, to forthwith provide professional legal assistance to the accused by ensuring that she applies for South African citizenship;

R. D. HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

I agree

A PETERSEN

ACTING JUDGE OF THE HIGH COURT

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Prepared on 9 October 2026 · Esheria