

SOUTH AFRICA / JUDGMENT

Tshwete v Minister of Home Affairs of the Government of Republic of South Africa (155/87) [1987] ZASCA 154; [1988] 2 All SA 140 (A) (2 December 1987)

[1987] ZASCA 154

COURT

Supreme Court of Appeal

BEFORE

Joubert, Hefer, Nestadt, Vivier, Kumleben

CASE / FILE NUMBER

155/87

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IN THE SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between

STEPHEN VUKILE TSHWETE Appellant

and

THE MINISTER OF HOME AFFAIRS

OF THE GOVERNMENT OF THE

REPUBLIC OF SOUTH AFRICA Respondent

Coram: JOUBERT, HEFER, NESTADT, VIVIER JJA et KUMLEBEN AJA

Date of Hearing: 16 February 1987, 24 August 1987 Date of Delivery: 2 December 1987.

JUDGMENT

JOUBERT, JA :

/On

2

On 30 May 1985 JONES A J in the Eastern Cape Division dismissed with costs the appellant's application for an order :

"(i) Declaring that Applicant has the right,

privilege or benefit of being permanently resident in the Republic (of South Africa) without any permit or exemption, and the right, privilege or benefit of entering the Republic without a visa;

(ii) Interdicting Respondent from prohibiting or preventing Applicant from entering the Republic of South Africa without a visa or being permanently resident therein without any permit or exemption."The judgment of the Court a quo is fully reported in 1986

(2) SA 240 (ECD). With leave of the Court a quo the appellant now appeals to this Court against its judgment and order.

/The

3

The facts material to the appeal are undisputed. They are briefly as follows. In 1938 the appellant, who is Xhosa speaking, was born in Springs, Transvaal. He was at all relevant times until December 1981 a citizen of the Republic of South Africa by birth. He returned with his parents to Nkqonkqweni, a portion of Peelton location near East London, where he was permanently resident and domiciled since 1979. Nkqonkqweni, is situated in the Republic of South Africa and outside the Republic of Ciskei when the latter came into existence on 4 December 1981 by virtue of the provisions of the Status of Ciskei Act No 110 of 1981 (the "Act").

/In

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In terms of sec 6(1) of the Act, read with Schedule B

thereto, the appellant on 4 December 1981 became a

citizen of the Republic of Ciskei and ceased to be a citizen of the Republic of South Africa.

On 22 December 1981 the then Minister of Internal Affairs issued two notices both with retrospective effect as from 4 December 1981. The one notice was issued under sec 7 bis (1) of the Aliens Act No 1 of 1937, exempting citizens of the Republic of Ciskei as a class of persons from the requirement of being in possession of temporary residence permits subject to his right to revoke such exemption in terms of sec 7 bis (3) of Act No 1 of 1937 in respect of a class of persons or a single person. The other

notice issued under sec 40 (2)(a) of the Admission of Persons to the Republic Regulation Act No 59 of 1972 exempted citizens

/of

5. of the Republic of Ciskei as a category of persons from visa requirements as laid down in sec 40(1)(c) of Act No 59 of 1972 subject to his right of revoking such exemptions in terms of sec 40(2)(c)(i) of the said Act in respect of a category of persons or a single person.

On 8 November 1984 the appellant received a

letter from the Director-General, Department of Home Affairs, which contained the following notifications:

"I have to inform you that your exemption from the visa requirements as laid down in Section 40(1)(c) of the Admission of Persons to the Republic Regulation Act, 1972 (Act 59 of 1972) has been withdrawn. This means that before you can again enter the Republic of South Africa you will have to be in possession of a visa. Application for such a visa may be made to the nearest South African Diplomatic or Consular Representative abroad or to the Director-General for Home Affairs, Pretoria.

/Should 6

Should you in future arrive at a South African port of entry without a visa you will not be permitted to enter.

Furthermore your exemption from the requirements to be in possession of a temporary residence permit in terms of section 2(b) of the Aliens Act, 1937 (Act 1 of 1937) has also been withdrawn."

The purported effect of these notifications was that the appellant would from then onwards require a temporary residence permit to reside at Nkqonkqweni or elsewhere in the Republic of South Africa. If he moved across the borders of the Republic of South Africa he would require a visa to enter it.

As a matter of urgency the appellant applied in the Court a quo against the respondent for the relief set out supra.

/Relying

7

Relying on the provisions of sec 6(3) of the Act the appellant maintained that his existing right of residence without a permit in the Republic of South Africa and his existing right to move to and from the Republic of South Africa without a visa were preserved with the coming into operation of the Act on 4 December 1981 when he was deprived of his South African citizenship. He also maintained that he could not be deprived of his preserved existing rights by administrative action as the Director-General purported to do by his notifications on 8 November

1984.

Sec 6(3) of the Act provides as follows :

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8

"No citizen of the Ciskei resident in the Republic at the commencement of this Act shall, except as regards citizenship, forfeit any existing rights, privileges or benefits by reason only of the other provisions of this Act."

(My italics).

Read in the context of the Act as a whole the words "the other provisions of this Act" in sec 6(3) undoubtedly refer to the provisions of sec 6(1) which reads as follows:

"Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of Ciskei and shall cease to be a South African citizen."

The effect of sec 6(1) was that on 4 December 1981 South African citizens, who fell within the categories of persons defined in Schedule B to the Act, by operation

9

of law ceased to be South African citizens, in lieu of which they became citizens of Ciskei. Loss of South African citizenship resulted in the acquisition of the

status of an alien or foreigner (*peregrinus*) by becoming a citizen (*civis*) of Ciskei. Moreover, in terms of sec 1(1) of the Act Ciskei was declared a sovereign independent state which ceased to be constitutionally and geographically part of the Republic of South Africa. The latter ceased to exercise any authority over Ciskei

(sec 1(2)). Sec 3(1) empowered inter alia the Legislative Assembly of Ciskei to enact laws (including a constitution) for Ciskei in the manner prescribed by the National States Constitution Act No 21 of 1971. The

Republic of Ciskei Constitution Act No 20 of 1981, duly enacted by the Legislative Assembly of Ciskei and signed by the chairman of that body in accordance with the provisions of the Republic of Ciskei Constitution Act No 20 of 1981, was published on 4 December 1981 in a Government Gazette of Ciskei and came into operation on the same day. Sec 67 (1) of the Republic of Ciskei Constitution Act No 20 of 1981 provided for the acquisition of Ciskeian citizenship. The constitutional evolution of Ciskei in constitutional law as a sovereign and independent state with its own state territory was thus finally completed on 4 December 1981. The recognition of Ciskei in international law as a sovereign and independent state is an entirely different matter which does not concern us in the present

/appeal

11

appeal. Until now the sovereign independence of Ciskei has not been recognized by members of the world community of states.

To understand the provisions of the Act it is necessary to have regard to the important pre-independence legislation which directed the various stages of Ciskei's constitutional evolution in its transition to sovereignty and independence. For present purposes the relevant pre-independence statutes and proclamations are broadly speaking the following : (i) The Glen Gray Act No 25 of 1894 (C) provided for the

creation of locations and the control of them by location /boards ...

12

boards as well as the establishment of district councils

for the administration of local affairs in the district

of Glen Gray (i.e. a portion of the Ciskeian territory).

This system of local government was also introduced by proclamation in an adapted form in the Transkeian terri=

tories.(ii) The Black Authorities Act (original title : Bantu Authori=

ties Act) No 68 of 1951 abolished the Native Representa=

tive Council and amended the Representation of Natives

Act No 12 of 1936. It provided a framework for the

establishment of Black tribal, community and territorial

authorities in respect of Black tribes or communities in

Black areas. See M.P. Olivier's unpublished doctoral

/thesis

13

thesis, 'n Juridiese Evaluering van Soewereiniteits=vestiging en die Oordrag van Owerheidsgesag met besondereverwysing na die Suid-Afrikaanse Situatie (June 1986,

University of South Africa), at p 303-304 :

"Die Wet op Swart Owerhede 68 van 1951 het die instelling van 'n hiërargiese struktuur van stam-of gemeenskapsowerhede, streeks= owerhede en gebiedsowerhede voorsien in gebiede waarvan die territoriale basis reeds deur vroeëre wetgewing verskaf is. Hierdeur is erkenning verleen aan die stamkonsep en tradisionele gesagstrukture onder die swartes, asook aan swart beheer oor swart gebiede. So byvoorbeeld het bestaande stam-of gemeenskapsregerings die basis van die statutêre stam- of gemeenskapsowerhede gevorm en moes sodanige owerhede hulle funksies oor= eenkomstig inheemse reg uitoefen. Waar die stam- of gemeenskapsowerhede oor advies- en bestuursfunksies beskik het, is die streeks-

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14

en gebiedsowerhede met adviesbevoegdhede asook met wetgewende en uitvoerende bevoegdhede ten opsigte van plaaslike aangeleenthede beklee."

By Government Notice R496 of 1961 the Ciskeian Territorial Authority was established in respect of certain areas for which Black Regional Authorities had been created. The Paramount Chief of the Rarabe section of the Xhosa tribal complex was designated as chairman of the Ciskeian Territorial Authority. (iii) The Promotion of Black Self-Government Act (original title: Promotion of Bantu Self-Government Act) No 46 of 1959 divided the Black peoples of South Africa into certain separate national units on the basis of language and

/culture 15

culture (sec 2). Its object was to provide for the gradual development of Black national units within their own areas to self-governing units on the basis of Black systems of government. See Olivier, op.cit., p 306-307:

"Gevolgtlik is die Wet op die Bevordering van Swart Selfbestuur in 1959 aangeneem. Aan gesien daar ingesien is dat swartes nie slegs in stamverband nie, maar ook in breër volksverband georganiseer is, is daartoe oorgegaan om die swart bevolking in 'n aantal volks-eenhede in te deel. - - - Hierdeur is 'n etniese grondslag vir die (latere) skepping van onafhanklike swart state gelê. Die betrokke wet het ook die instelling van die amp van kommissaris-generaal vir elke volks-eenheid gereël, waardeur verteenwoordiging van die Suid-Afrikaanse regering by die volks-eenhede teweeggebring is. Voorts is die bevoegdhede en funksies van h gebiedsowerheid ingevolge die Wet op Swart Owerhede deur

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16

die 1959-wet heromskrywe en uitgebrei, en is die oordrag van trustgrond en bevoegdhede daaromtrent aan 'n gebiedsowerheid voorsien."

(iv) The National States Citizenship Act (formerly the Bantu Homelands Citizenship Act) No 26 of 1970 introduced a rather strange concept of so-called citizenship in respect of every Black territorial authority area. It provided that every Black person in South Africa not a so-called citizen of a Black self-governing territory in South Africa (which included the Transkei) and not a prohibited immigrant became a so-called citizen of the Black territorial authority area in which he was born, or domiciled, or spoke a Black language used in such area, or was related

/to 17

to any member of the Black population of such area.

Such a Black person retained his South African citizenship but had to exercise his franchise rights in such area. Prior to its amendment in 1986 sec 2 of Act 26 of 1970, as originally enacted, provided as follows:

"(1) There shall be citizenship of every territorial authority area.

(2) Every Bantu person in the Republic shall, if he is not a citizen of any self-governing Bantu territory in the Republic and is not a prohibited immigrant in the Republic, be a citizen of one or other territorial authority area, in accordance with the provisions of section 3.

(3) Every person who is by virtue of the provisions of section 3 a citizen of a territorial authority area shall,

/subject ...

18

subject to the provisions of this Act, exercise such franchise rights in that area and enjoy all other rights, privileges and benefits and be subject to all the duties, obligations and responsibilities of citizenship of that territorial authority area as are accorded to or imposed upon him in terms of any law.

(4) A citizen of a territorial authority area shall not be regarded as an alien in the Republic and shall, by virtue of his citizenship of a territory forming part of the Republic, remain for all purposes a citizen of the Republic and shall be accorded full protection according to international law by the Republic. (5) No person who is a citizen of a territorial authority area shall by reason only of the provisions of this Act be relieved of any

duties, obligations or responsibilities or forfeit any existing rights, privileges or benefits which but for the said provisions would have been applicable in his case."

/See

19

See Olivier *op.cit.*, p 314-315. It should be borne in mind that, unlike Bophuthatswana, Ciskei and Venda, the Transkei progressed directly from Black territorial authority status to self-government according to the provisions of the Transkei Constitution Act No 48 of 1963 without having acquired the intermediate status of responsible government. Chapter III of the Transkei Constitution Act No 48 of 1963 which deals with citizenship is in condensed form unmistakably the precursor of Act 26 of 1970. The relevant provisions of sec 7 of the Transkei Constitution Act No 48 of 1963 provide as follows :

/" (1) There

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"(1) There shall be a Transkeian citizenship and every person who is a citizen of the Transkei by virtue of the provisions of sub-section

(2) shall, subject to the provisions of this Act, exercise franchise rights in the Transkei and enjoy all other rights, privileges and benefits and be subject to all the duties, obligations and responsibilities of citizenship in the Transkei as are accorded to or imposed upon him in terms of this Act.

(2)-----

(3) The Republic shall not regard a citizen of the Transkei as an alien in the Republic and shall by virtue of his citizenship of a territory forming part of the Republic of South Africa regard him for all external purposes in terms of international law as a citizen of the Republic and afford him full protection according to international law.

/ (4) No

21

(4) No person who is a citizen of the

Transkei shall by reason only of the provisions of this section be relieved of any duties, obligations or responsibilities or forfeit any existing rights, privileges or benefits which but for the said provisions would have been applicable in his case."

This concept of so-called Transkeian citizenship in 1963, before the Status of the Transkei Act No 100

of 1976 declared the Transkei a sovereign and inde=

pendent state, was really the precursor of the so-

called citizenship referred to in Act 26 of 1970.

(v) The National States Constitution Act (formerly the Bantu Homelands Constitution Act) No 21 of 1971 provided the framework within which the State President could, after

/consultation

22

consultation by the Minister of Plural Relations and

Development (subsequently the Minister of Bantu Adminis=

stration and Development) with a territorial authority, by proclamation in the Gazette transform a territorial authority into a legislative assembly for the Black area for which such territorial authority had been established (sec 1(1)). Provision was also made for the establishment of an executive council (sec 5). For the sake of convenience the status of the transformed system of government may be called responsible government. Chapter 2 contains the provisions applicable to the transformation of a responsible government into

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23

a self- government of a self- governing territory (secs 26 to 36 A inclusive). Self- government of a Black area would constitute the last pre- independence stage of constitutional development before the attainment of sovereignty and independence by such Black area. By Proclamation R118 of 1971 the State President, acting in terms of secs 1, 2 and 5 of Act 21 of 1971, established with effect from 1 June 1971 a legislative assembly, to be known as the Ciskeian Legislative Assembly, for the area described in the Schedule to the Proclamation. The Ciskei thus acquired the status of responsible government. Subsequently by the Ciskei Constitution

/Proclamation

24

Proclamation R187 of 1972 the State President, acting in terms of secs 2, 5 and 26 of Act 21 of 1971 and sec 108 of the Republic of South Africa Constitution Act No 32 of 1961 after consultation of the Ciskeian Legislative Assembly by the Minister of Bantu Administration and Development, declared Ciskei to be a self-governing territory within the Republic of South Africa with effect from 1 August 1972 (sec 2(1)). Ciskei as a self-governing territory had reached the last pre-independence stage of its constitutional evolution. Only so-called citizens of Ciskei registered as voters were entitled to vote at any election of members to

the Ciskeian Legislative Assembly (sec 6(2) read

/with

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with the definition of "citizen" in sec 1).

It is appropriate to have regard to certain events which immediately preceded the independence of Ciskei. A referendum was held to ascertain the attitude of so-called citizens of Ciskei towards the vexed question of the independence of Ciskei. See Olivier, *op.cit.*, p 403 footnote 184. It was the government of Ciskei that expressed the desire that Ciskei should become an independent state as appears from the preamble to the Act. Moreover, the government of South Africa and the government of Ciskei entered into a large number of agreements concerning relationships between South Africa and Ciskei as

/from

26

from the date on which the latter became independent

for an initial period of 5 years from that date. Worthy of mention is the "Agreement between the Government of the Republic of South Africa and the Government of Ciskei relating to the movement of citizens of the Republic of South Africa and of Ciskei across the common borders" published in Gazette No 8204 on 14 May 1982. Article 1 of this Agreement provides as follows:

"The movement to and the sojourn in the Republic of South Africa of citizens of Ciskei and the movement to and the sojourn in Ciskei of citizens of the Republic of South Africa shall, subject to the provisions of this Agreement, be governed by the laws and regulations regulating the admission to,

/residence

27

residence in and the departure from the country in question."

This Agreement is an executive act which is binding between the governments of South Africa and Ciskei but inasmuch as it was not adopted or ratified by a legislative act of our legislature it does not form part of our municipal law. See *Pan American World Airways Incorporated v S A Fire and Accident Insurance Co Ltd*, 1965(3) SA 150 (AD) at p 161 B-D.

To revert to the provisions of sec 6(1) and

(3) of the Act. I have indicated supra that on loss of their South African citizenship Ciskeian citizens became foreigners (peregrini) in the Republic of South

/Africa

28

Africa. On reading sec 6(1) in conjunction with sec

6(3) it is clear that the word "citizenship" in sec 6(3) refers to South African citizenship. The latter concept as used in sec 6(3) is not defined in the Act.

"Citizenship may be distinguished from nationality: whereas citizenship identifies a person internally, i.e. as against foreign states, as being part of the structure of a state, nationality identifies a person internationally, i.e. as against foreign states, as being under the protection of his particular state." (The Con=

stitutions of Transkei, Bophuthstswana, Venda and Ciskei,

1985, edited by M P Vorster, M Wiechers and D J Van Vuuren

at p.11). In my judgment it is clear from the provisions

29

of the Act as a whole that the legislature intended South African citizenship to encompass the legal status of a person internally as a subject of the Republic of South Africa. To suggest that Ciskeians by the loss of their South African citizenship merely lost the "higher category of political rights", viz the rights of franchise, is wholly untenable in the light of Ciskei's constitutional evolution in its transition to sovereignty and independence. I already indicated supra that when Ciskei acquired the status of responsible government the Ciskeians in consequence of their so-called citizenship of Ciskei had franchise

/rights

30

rights to elect members of the CCiskeian Legislative Assembly. At that stage they had no franchise rights as citizens of the Republic of South Africa to elect members of the South African House of Assembly. On the proper construction of sec 6(3) it consists of two provisions which I shall for convenience call the "exception phrase" and the "recording clause". The exception phrase refers to South African citizenship viz. "except as regards citizenship" whereas the "recording clause" refers to the dominant provision of sec 6(3) viz : "No citizen of Ciskei resident in the Republic at the commencement of this Act shall - - - -

/forfeit

31

forfeit any existing rights, privileges or benefits by reason only of the other provisions of this Act." (My italics). In my judgment the Legislature had no intention to preserve or entrench any existing rights,

dependent on South African citizenship privileges or benefits dependent on South African citizenship of Ciskeians resident in the

Republic of South Africa on 4 December 1981, that is to say, it had no intention to raise them to the status of privileged aliens. Had that been the Legislature's intention it could very easily have enacted that they were not to be regarded as aliens in the Republic of South Africa. Compare sec 7(3) of the Transkei Constitution Act No 48 of 1963. By means of the recording

/clause

32

clause the Legislature intended to affirm that Ciskeian

citizens who were resident in the Republic of South Africa on 4 December 1981 would not forfeit any existing rights, privileges or benefits by virtue of the other provisions of the Act ("by reason only of the other provisions of this Act") - the only qualification being the exception phrase

relating to South African citizenship. The reference to "resident in the Republic" in sec6(3) was necessitated by reason of the fact that as on 4 December 1981 the South African Legislature could not - even for recording purposes - legislate extraterritorially for Ciskeians not resident in the Republic of South Africa.

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32 (a)

I have already pointed out that it was common cause that the appellant was on 4 December 1981 domiciled and permanently resident in Nkqonkweni, i.e. in the Republic of South Africa. The acquisition or continuance of domicile or permanent residence in South Africa is according to our common law not dependent on South African citizenship. Our common law clearly distinguishes between domiciled or permanent resident foreigners and non-domiciled or non-permanent resident " foreigners. See *Magida v Minister of Police*, 1987(1) SA 1(A) at p8 J-9A, I-J. I shall hereinafter investigate the position whether the appellant on the loss of

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33

his South African citizenship lost or retained his right to be domiciled and permanently resident in the Republic of South Africa. That necessitates a careful scrutiny of the relevant provisions of the Aliens Act No 1 of 1937.

I now turn to consider the relevant provisions of the Aliens Act No 1 of

1937. Sec 2 thereof which places a restriction on alien immigration reads as

follows:

"Subject to the provisions of section 7 bis

and 12 no alien shall -

(a) enter or be in the Union for purposes of permanent residence therein, unless he is in possession of a permit to enter the

/Union

34 Union for the said purpose, issued to him in terms of section 4; or

(b) enter or be in the Union or any parti-

cular portion of the Union for the purpose of temporary sojourn therein, unless he is in possession of a temporary permit issued to him in terms of section 5(1) or unless he has been permitted to enter under section 7."

An alien is defined by sec 1 as "a person who is not a South African citizen". That is to say, a peregrinus. Sec 7 bis (1) empowers the Minister in his discretion to grant exemptions from the provisions of sec 2 while sec 7bis (3) empowers him in his discretion to withdraw any exemption granted by him. Sec 4, which deals with the application for permits for permanent residence in the then

35

Union (now the Republic of South Africa) and with the grant of such permits, is not relevant for purposes of this appeal. The same holds for sec 5 which deals with the application for and the grant of temporary residence permits. The relevant portion of sec 12 provides as follows:

"(1) The provisions of section two shall not apply -

- (a) to an alien who has lawfully acquired a domicile in the Union or who, prior to the first day of February 1937, lawfully entered the Union for purpose of permanent residence therein; or

/ At 36 At all relevant times before 13 June 1986 the word

"domicile" according to sec 1 of the Aliens Act No 1 of 1937 had the meaning ascribed to it in sec 30 of the Admission of Persons to the Union Regulation Act No 22 of

1913, the gist of which (for purposes of this case) was

"the place in which a person has his present permanent home or present permanent residence, or to which he returns as his present permanent abode, and not for a mere special or temporary purpose". As from 13 June 1986 the word "domicile" according to sec 1 of the Aliens Act No 1 of 1937 acquired the meaning ascribed to it in sec 1 of the Admission of Persons to the Republic Regulation Act No 59 of 1972. Sec 1(1)

of the latter Act added "subject to the provisions of

/subsections

37

subsections (2), (3) and (4)" to the gist of the definition

of domicile as found in sec 30 of the Admission of Persons to the Union Regulation Act No 22 of 1913, as quoted supra.

Sec 1 (3) of the Admissions of Persons to the Republic Act No 59 of 1972, however, introduced inter alia the following new qualification viz :

"For the purpose of this Act a person shall be deemed to have lost his domicile within the Republic, in the case of any person who was or is a South African citizen, on the day on which he ceased or ceased to be a South African citizen - - - - "This new qualification, which as from 13 June 1986 formed part of the word "domicile" according to sec 1 of the Aliens Act No 1 of 1937, is for purposes of this case

/irrelevant

38

irrelevant inasmuch as we are concerned with the meaning of the word "domicile" in the said Act before the introduction of the said qualification. Mr Hugo, on behalf of the respondent, contended that the word "acquired", as used in sec 12(1)(a), according to its ordinary meaning involved a personal effort on the part of the acquirer and that the appellant did not lawfully acquire a domicile in the Republic of South Africa. This contention overlooks the fact that the appellant acquired ex lege a domicile by birth in the Republic of South Africa and that he subsequently acquired a domicile by choice at Nkqonkweni where he was permanently resident. It also overlooks the fact that the word "domicile" in sec 12(1)(a) has the

/meaning

39

meaning ascribed to it in sec 30 of the Immigrants Regulation Act No 22 of 1913, the gist of which I quoted supra as appertaining to "present permanent residence". There is therefore no merit in this contention. Because the appellant was lawfully domiciled and permanently resident in the Republic of South Africa when he became a peregrinus on 4 December 1981 he falls, in my judgment, within the provisions of sec 12(1)(a) of the Aliens Act No 1 of 1937. It follows accordingly that the provisions of sec 2 of the latter Act are inapplicable to the appellant who is therefore unaffected by the ministerial notice of 22 December 1981, by which the respondent exempted citizens of Ciskei from the requirement of being in possession of

temporary

40

temporary residence permits, and the subsequent withdrawal on 8 November 1984 of the conferred exemption. The appellant is therefore entitled to an order that he has the right of being permanently resident in the Republic of South Africa without any permit or exemption.

I now turn to deal with the question whether the appellant has a right to move to and from the Republic of South Africa without a visa. The position at common law prior to the Departure from the Union Regulation Act No 34 of 1955 when there existed no statutory provision restricting citizens of the Union of South Africa from leaving it was considered by this Court in *Sobukwe and*

/Another

41

Another v Minister of Justice, 1972(1) SA 693 (AD) at p 703 C-G. According to sec 2 of Act No 34 of 1955 "no person shall leave the Union for the purpose of proceeding to another country -

- (a) unless he is, at the time when he leaves the Union, in possession of a valid passport or a permit; (b) except at a port, unless his passport or permit bears an endorsement - - - - "

According to sec 1 of Act No 34 of 1955 the word "port" has the meaning ascribed to it by section 30 of the Admission of Persons to the Union Regulation Act No 22 of 1913. It follows that prior to 4 December 1981 the appellant as a citizen of the Republic of South Africa

/had

42had no unqualified right to leave this country. He had to comply with the provisions of sec 2 of Act 34 of 1955. From 4 December 1981 he as a peregrinus has likewise to comply with the provisions of sec 2 of Act 34 of 1955 in order to leave this country.

Nor is there an unqualified right to enter or return to the Republic of South Africa. According to sec 32(1) of the Admission of Persons to the Republic Regulation Act No 59 of 1972 "no person shall enter the Republic at any place other than a port of entry". Moreover, sec 40(1) of the said Act provides as follows:

"Any

43

"Any person entering the Republic who fails on demand by an immigration officer to produce to him an unexpired passport or other document of identity of a class recognised by the Minister -

- (a) which was issued to him on behalf of the Government of the Republic or on behalf of another government recognised by the Government of the Republic; and
- (b) which contains a personal description of

him, the name of the country in which he was born and the date of his birth, and to which is attached a photograph of him, wherein his features are clearly and correctly depicted; and

- (c) which bears a valid visa or an endorsement by a person authorized thereto by the Government of the Republic to the effect that authority to proceed to the Republic for the purpose of being examined under this Act has been granted by the Minister or a person acting under his authority, or is accompanied by a document containing a statement to that effect together with particulars of such passport or other document of identity, /shall 44.

shall be a prohibited person, unless he is proved to be a South African citizen by birth or descent." (My italics). Furthermore, any person who entered this country without complying with the requirements of sec 40(1) is according to the provisions of sec 40(4) a prohibited person "unless it is proved that such . person is a South African citizen by birth or descent". (My italics), Should such a prohibited person nonetheless enter this country he would be liable to be arrested and removed from this country under a warrant issued under Act No 59 of 1972 (Sec 40(5)). Since the appellant ceased on 4 December 1981 to be a South African citizen by birth or descent he cannot at the

/moment

45

moment of entering the Republic of South Africa claim to be a South African citizen by birth or descent, as required by the exception provided for in sec 40(1). It follows that the appellant on entering this country must comply with the provisions of sec 40(1) such as having a valid visa. Failure to do so would cause him to become a prohibited person subject to the consequences of arrest and removal from the Republic of South Africa. The right which the appellant had prior to 4 December 1981 to enter this country without a valid visa was wholly dependent on and related to his status as a South African citizen by birth or descent.

/Loss

46.

Loss of this status deprived him of this right of entering this country without a valid visa. It follows, in my judgment, that this right was not an existing right, which was not dependent on and unrelated to his South African citizenship. It cannot therefore be said to have been preserved by sec 6(3) of the Act. The appellant is therefore not entitled to an order that he has the right to enter the Republic of South Africa without a valid visa.

The appeal accordingly succeeds partially to the extent that the appellant is entitled to be permanently resident in the Republic of South Africa without any official permission such as a permit or an exemption.

47 In the result the following orders are granted:

1(a) The appellant is entitled to be permanently resident in the Republic of South Africa without any permit or exemption.

(b) The appellant is not entitled to enter the Republic of South Africa without a valid visa. (c) The appellant is entitled to the costs of appeal which are to include the costs of two counsel.

2. The following order is substituted for the order of the Court a quo :

"The relief sought in prayer (c)(i) of the Notice of Motion is granted to the extent that the applicant has the right to be permanently resident in the Republic of South Africa without any permit or exemption. Save as aforesaid the other relief sought in prayer (c)(i) of the Notice of Motion is refused. The applicant is awarded his costs which are to include the costs of two counsel".

C.P. JOUBERT JA.

HEFER J A)

VIVIER J A) Concur.

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZASCA/1987/154.html>

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