REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 49604/2016
8/9/2017

(1) REPORTABLE
(2) OF INTEREST TO OTHER JUDGES
(3) REVISED.

In the matter between:

MBEMBA PIERRE MAHINGA	**APPLICANT**
and	
MINISTER OF HOME AFFAIRS	**FIRST RESPONDENT**
DIRECTOR-GENERAL HOME AFFAIRS	**SECOND RESPONDENT**

JUDGMENT

SARDIWALLA, AJ

Background:

[1] This is an application for review to set aside the decision of the Minister of Home Affairs ("the Minister" also referred to herein as the "Director-General") to deprive the Applicant of his citizenship by naturalization, in terms of section 8 of

the Citizenship Act ("the Act")[1].

[2] The basis for the Minister's decision is that the Applicant obtained his certificate of naturalization by means of fraud, false representation or the concealment of a material fact or that it was granted in conflict with the provisions of the Act or any prior law.

[3] Following the Minister's decision to deprive the Applicant of his citizenship, the Applicant's employment with the Department of Home Affairs ("DHA") was also summarily terminated by the Minister on 10 June 2016 following his termination of citizenship.

[4] The Applicant launched an urgent interdict out of this Honourable Court on 23 June 2016. By agreement between the parties the Respondents agreed that they will halt all processes, following the notice of deprivation of the Applicant's citizenship, pending the outcome of this review.

[5] The Applicant in his Notice of Motion seeks the following relief from this Court:

> *"1. The decision of the First Respondent taken on 10 June 2016 in terms* of *which the First Respondent decided to deprive the Applicant of his South African citizenship, is hereby reviewed and set aside;*
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> *2. The Applicant's costs of suit be paid by the Respondents, jointly and severally, on an* attorney *and client scale; and*
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> *3. The Applicant be granted such further or alternative relief."*

Jurisdiction:

[6] This matter entails issues relating to labour law, specifically, a summary dismissal which falls within the ambit of the Labour Relations Act[2] ("L RA") and an administrative decision in terms of the Promotion of Administrative Justice Act[3] ("PAJA") issue pertaining to the substantive and procedural fairness of the decision taken by the Minister, as well as an alleged infringement of the

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[1] Act 88 of 1995
[2] Act 66 of 1995.
[3] Act 3 of 2000.

Applicant's constitutional rights in section 23(1) and section 33 of the Constitution.[4]

[6] The facts in this matter, the reasons for the review as well as the relief sought, are intertwined and closely related that I'm satisfied that this Court has jurisdiction to entertain this matter in terms of Section 157(2) of the LRA which affords the High Court, concurrent jurisdiction, with the Labour Court, to entertain certain matters in limited circumstances[5].

[7] The separation of the claims on the facts in this case will lead to unnecessary delay in the resolution of the matter between the parties and should therefore be heard together in one forum. The Act itself in section 25, provides for the review of a decision taken by the Minister in terms of the Act.[6]

Asylum and Citizenship:

[8] There are material factual disputes in this matter regarding the manner and time frames in which the Applicant applied and obtained asylum and citizenship, as well as relating to the marriage of the Applicant leading to him being granted citizenship. The relevant facts which are of importance in the matter are specifically considered by me.

[9] The Applicant was born in the Republic of Zaire (now the Democratic Republic of Congo ("DRC")) and came to South Africa, sometime during January 1995 and February 1996[7]. According to the Applicant he came to South Africa as an asylum seeker, entering the Republic of South Africa ("RSA") through Namibia. The Applicant based his application for asylum on

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[4] The Constitution of the Republic of South Africa, 1996 .

[5] See ***Chirwa v Transnet Limited*** & ***Other*** *2007 ZACC 23; 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC)* - where the Constitutional Court held the High Court retain concurrent jurisdiction in respect of matters implicating constitutional rights unless the matter falls within exclusive jurisdiction of Labour Court. The employee required first to exhaust remedies before approaching High Court.

[6] Section 25 of the Act states as follows: ***"Review of Minister's decision by court of law*** *(1) Any provincial or loco/ division of the High Court of South Africa shall have jurisdiction to review any decision made bythe Minister under this Act. (2) A court hearing a reviewin terms of subsection (1) may call upon the Minister to furnish reasons and to submit such information as the court deems fit, and the court shall have jurisdiction to- (a) consider the merits of the matter under review; and (b) confirm, vary or set aside the decision of the Minister.*

[7] Both the Applicant and the Respondents reference to the exact arrival date of the Applicant in the RSA, are inconsistent, it is however, clear that it was sometime between January 1995 and

the fact that he was a target of the repressive regime in Zaire, having been arrested and detained, due to his journalistic responsibilities which were directed against the regime. The only form of identification the Applicant had when he entered into the RSA was the journalistic card from his erstwhile employer in Zaire.

[10] Having entered the RSA, the applicant submits that he was registered by the DHA as an asylum seeker in terms of the now repealed Aliens Control Act[8] and that his permit was regularly re-issued in accordance with the validity periods granted. The manner in which the Applicant alleges he entered the RSA in [9] above, is disputed by the DHA who submits that the Applicant entered the RSA on 5 January 1996 after arriving by airplane, at the then Johannesburg International Airport, on a DRC issued passport[9] At the time of entering the RSA, the applicant stated that his purpose for entering the RSA was to work in the media industry and he was accordingly issued with a one month temporary work permit, which was never re-applied for whilst the Applicant remained in the RSA.

[11] According to the Respondents, the Applicant only applied for asylum on 26 November 1998 at the Braamfontein Refugee Reception Office, more than two years after arriving in RSA[10]. Further according to the Respondents', the Applicant was working at the DRC Embassy in Pretoria, after being employed by the OCR Embassy, four months prior to apply for asylum. The Applicant denies that he only applied for asylum in November 1998 and submits that he did so, on his arrival in RSA.

[12] Neither the Applicant nor the Respondents are in possession of the old permits or copies thereof, issued to the Applicant during this period of asylum. The Applicant claims that the old permits were confiscated by the officials of the DHA every time his permit was renewed. The Respondents are unable to provide the record of the Applicant's asylum applications and / or expired permits, due to it being destroyed or missing. I will return to this issue later in this judgment.

February 1996 and the exact date of arrival won't determine the outcome of this matter.

[8] Act 96 of 1991.

[9] Passport number [….].

[10] In terms of Section 21 of the Refugee Act 130 of 1998 read with regulation 2 of the Refugee Regulations an application for asylum is to be made without delay.

During the course of 1998, the DHA introduced a biometric system and the Applicant submits that he was required to submit his fingerprints as well as demographic information to the DHA and that he was subsequently issued with a digitized permit.

[13] The Respondents' submits that the DHA were never afforded the opportunity to evaluate the Applicants' reasons for seeking asylum as the application for asylum was cancelled on 10 December 1999.[11] The Applicant however, disputes this submission by the Respondents and he maintains that he applied for permanent residency status on 23 August 2000 and obtained same on 15 June 2001 in terms of the now repealed section 28(2) of the Aliens Control Act[12] .

[14] During 2003, the Applicant applied for naturalization on the grounds of marriage, to Ms NJ Mfuku, which marriage was duly registered by the DHA on 5 October 1999. The DHA granted the Applicant citizenship of the RSA on 1 October 2003. One child was born from this marriage, duly registered by the DHA. The marriage ended in divorce on 3 November 2008 and the Applicant is currently in a life partnership with Ms Tsotetsi with whom he has three minor children, all duly registered with the DHA.

[15] It is the submission of the Respondents' that the Applican'ts marriage to Ms Mfuku was a marriage of convenience and/ or that the marriage failed to qualify as a good faith spousal relationship, in terms of the Act. The Respondent bases these submissions on the following:

15.1 the Applicant, met and started dating his current partner, Ms GY Tsetse, in 2005, two years after he obtained his citizenship on account of his marriage to Ms Mfuku;

15.2 the Applicant has three children with Ms Tsetse, the first of whom was born whilst the Applicant was still married to Ms Mfuku;

15.3 whilst the Applicant and Ms Mfuku were married, Ms Mfuku dated another man whose last name is Orji and Ms Mfuku gave birth to

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[11] The Respondents submission in regard to the evaluation of the Applicant ' s asylum application and the reasons thereof as well as the argument that the Applicant was working for the DRC Embassy while making application for asylum are irrelevant in this application, since it was never proceeded with by the Applicant .

[12] *Supra.*

the child of Mr Orji on 15 October 2003;

15.4 on 12 November 2005, while still married to the Applicant, Ms Mfuku gave birth to a second Orji child.

[16] By virtue of the Applicant obtaining citizenship in RSA, the embassy of the DRC issued a certificate confirming that the Applicant had voluntarily, lawfully and effectively relinquished his DRC citizenship and that he ceased to be a Congolese citizen.

Circumstances leading up to the notice of deprivation of RSA citizenship and termination of employment:

[17] It is not in dispute that on or about June 2004, the Applicant was employed at the DHA as an Administration Clerk and that he was later permanently employed by the DHA from on or about 3 April 2007 after being promoted to Assistant Director.

[18] The Applicant acted in the position of Deputy Director: Integrated Management and Support from 4 June 2010, which position he subsequently applied for during 2012.

[19] The Applicant's status as a South African citizen came into the spotlight after he was recommended for the applied position of Deputy Director: Integrated Management and Support but the recommendation was declined by the Director General based on the fact that the Applicant was unable to obtain the relevant security clearance certificate, which was a requirement for the post in terms of the National Strategic Intelligence Act[13].

[20] Subsequently, the Director General engaged the Directorate Counter Corruption and Security ("DCCS") of the DHA to conduct a security vetting on the Applicant, in order to establish whether he is in fad fit for the position of Deputy Director: Integrated Management and Support.

[21] The finding of the investigation for purposes of the vetting process led the Minister to consider revoking the Applicant's citizenship. The Minister sent a letter to the Applicant on 15 April 2016, inviting him to provide reasons why his

[13] Act 39 of 1994 .

citizenship should not be revoked no later than 13 May 2016. It is the submission of the Applicant that he indeed possesses the necessary security clearance, dated 18 July 2016, which is attached to the Applicant's replying affidavit.[14]

[22] The Applicant addressed a letter to the Minister dated 12 May 2016, which was only received by the Minister on 17 May 2016, well after the provided deadline of 13 May 2016.[15] The Minister nonetheless considered the response of the Applicant· dated 12 May 2016 and responded thereto in a letter dated 23 May 2016, in which the Minister states that the Applicant has not addressed the allegations placed before him in the letter of the Minister dated 15 April 2016, to his satisfaction. The Director-General afforded the Applicant another ten (10) days to respond to the allegations but the Applicant failed to do so.

Issue to be determined:

[23] This Court is required to determine whether the decision to revoke the Applicant's citizenship in terms of section 8 of the Act and the subsequent termination of his employment with the DHA, is to be set aside on the grounds alleged by the Applicant.

Grounds for review:

Lack of Documentary Evidence:

[24] The significance of the lack of records pertaining to the asylum application of the Applicant as well as other related documents which should have been kept by the DHA and provided to this Court for consideration, is a pivotal issue in this matter. In the judgment of ***Khoza v MEC for Health and Social Development,* Gauteng**[16] the effects, in a civil matter, concerning a lack of documentary evidence was found to be as follows:

> *"[37] On these facts the CTG traces constitute the original and foundational documentary evidence, having been produced directly by the machine. See Zeffertt & Paizes The South African Law of Evidence (2 ed)*

[14] Page 482 Annexure "MPM 31".
[15] Letter addressed to the Applicant from the Director-General dated 10 June 2016.

at 830 - 1. See also Schwikkard & Van der Merwe Principles of Evidence (3 ed) in para 20.3.1 pp 405 - 6. The subsequent alleged noting of the CTG data and the viva voce evidence of its alleged content are hearsay evidence. Unless there is a satisfactory explanation as to why the original documents are not available, a court is entitled to treat such 'secondary' evidence with caution or even refuse to allow it into evidence. See Vulcan Rubber Works (Ply) Ltd v South African Railways and Harbours 1958 (3) SA 285 (A) at 296D- H where Schreiner JA said:

> *'The starting point in considering the admissibility of such evidence is the statutory provision which, in each province, refers the Courts in matters of hearsay to the law of evidence in England. Though there is reference in our cases to the statutory requirement that facts must be proved by the best evidence, I do not think that it is really relevant. Weaker evidence is not excluded by the availability of uncalled stronger evidence except in the case of documents, when the original must be produced or its absence properly explained. In that case the secondary evidence itself proves the existence of the better evidence, namely, the original. No doubt the difference between evidence and hearsay can be said to be an illustration of a broad rule favouring the use of the best evidence, but the better way of stating the position is that hearsay, unless it is brought within one of the recognised exceptions, is not evidence, ie legal evidence, at all.*

[38] The Vulcan case concerned the law of evidence prior to the enactment of the Law of Evidence Amendment Act 45 of 1988 (the Amendment Act).

[39] In S v Ndhlovu and Others 2002 (6) SA 305 (SCA) (2002 (2) SACR 325; [2002} 3 All SA 760; [2002] ZASCA 70) the court was obliged to D consider the constitutionality of s 3 of the Amendment Act. In doing so the SCA (per Cameron JA, at the time) in para 14 approved the passages in Vulcan at 296F that 'hearsay, unless it is brought within one of the recognised exceptions, is not evidence, ie legal evidence, at all', but said

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[16] 2015 (3) SA 266 (GJ).

that what the Amendment Act had brought about was a fundamental E change to permit the relaxation of the evidentiary rules by allowing hearsay evidence to be received only if it is in the interests of justice to do so (relying on the statement to that effect by Navsa JA in Makhathini v Road Accident Fund 2002 (1) SA *511 (SCA) ([2002] 1 All* SA *413) in para 21)."*

[25] It is clear from the above that the affidavit by Mr Vorster, in terms of section 212 of the Criminal Procedure Act[17] does not make up for the deficient documentary evidence to substantiate the allegations made against the Applicant and consequently the contents thereof, is inadmissible.

Substantive grounds for revocation of citizenship:

[26] The Applicant submits that the Minister has no bases substantiating his decision to revoke his citizenship. The Minister relies firstly on the fact that the Applicant and Ms Mfuku was not in a *bona fide* spousal relationship. What exactly is meant by a *bona fide* spousal relationship is defined in Regulation 33(4) of the regulations published in terms of section 7 of the Immigration Act[18], which provides as follow:

"(4) A good faith spousal relationship shall be a *relationship that was not entered into primary for the purpose of gaining benefits under the Act and shall be confined to* a *relationship of two persons calling for cohabitation and intended to be permanent."*

[26] Regulation 33(5) allows for investigation by the DHA to verify if a good faith spousal relationship exists[19]. It states:

"(5) The Department may at any time satisfy itself as envisaged in section 26(b)(i) of the Act whether a *good faith spousal*

[17] Act 51 of 1977.
[18] Act 13 of 2002.
[19] However, an investigation by the DHA is not mandatory - See ***Mahmood v The Director-General Department of Home Affairs and Others*** [2013] JOL 30512 (WCC) (Unreported).

relationship exists by (a) interviewing the applicant and spouse separately; (b) contacting family members and verifying other references; (c) requesting proof of actual or intended cohabitation; and/ or (d) inspection in loco of the applicant's place of residence."

[27] Section 8(1**)(a)** of the Act provides as follow:

"8 Deprivation of citizenship

(1) The Minister may by order deprive any South African citizen 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 representations or the concealment of* a *material fact."*

[28] The Applicant was never investigated during the existence of his alleged fraudulent marriage, by the DHA until he applied for the position of Deputy Director, Integrated Management and Support even though the DHA had the power to do so in terms of section 26 and the Regulations published in accordance with section 7 of the Act. Eight years after the Applicant's divorce from Ms Mfuku after a marriage that subsisted for nine years, the Applicant is accused of a obtaining his citizenship in a fraudulent manner based on a marriage allegedly consummated by the Applicant, for the soul purpose of obtaining RSA citizenship.

[29] This creates great suspicion on the intention of the Minister especially in conjunction with the lack of documentary evidence to support the allegations on this which the decision to deprive the Applicant of his citizenship and his subsequent dismissal from the DHA, is based.

[30] It is clear that the Minister based his decision to revoke the Applicant's citizenship on facts that was never verified. The spousal relationship between the Applicant and Ms Mfuku was never investigated and the conclusion drawn by the Minister that the marriage was not *bona fide* based purely on the relationship the

Applicant had with Ms Tsetse is not a rational conclusion under the circumstances. It was never alleged nor proofed by DHA that the Applicant and Ms Mfuku, did not cohabit as required in terms of the Regulations defining a *bona fide* spousal relationship. The Minister further relies on the fact that during the duration of the marriage between the Applicant and Ms Mfuku, both of them had children with persons outside the marriage, however the Applicant was married to Ms Mfuku for almost 4 years before his application for naturalisation on grounds of marriage was granted. The Applicant only met Ms Tsetse in 2005 and the Applicant's then wife, Ms Mfuku gave birth to another man's child only in 2003 more than three years after the Applicant married Ms Mfuku.

[31] The exact circumstances regarding the children born out of wedlock, is not clear. What is however evident is that the Applicant and Ms Mfuku's marriage took a turn for the worse around September 2003 and they separated before finally having divorced in November 2008.

Promotion of Administrative Justice Act:

[32] The Act requires this Court to consider whether the decision complies with the standards for a just administrative action, that is lawful, reasonable and procedurally fair as specified in section 33 of the Constitution, read with the relevant provisions of PAJA, in particular section 6 thereof.

[33] The Minister's decision and the reasons therefore based on the investigation by DCCS, in my view is not sufficient to justify a decision to revoke the Applicant's citizenship. The information which forms the basis of the Minister's decision has not been placed before this Court, with the untenable explanation that the documents are missing and / or destroyed without any explanation. There is no plausible explanation that I can rely on to justify the revocation of the Applicant's citizenship and subsequent termination of employment. The *bona fides* of the Respondents in taking this decision is clouded with suspicion and improbable. When the custodian of citizenship and more so of an employee of the custodian in the employ for several years cannot be traced, it begs many unanswered questions!

[34] In ***Tima v Minister of Home Affairs***[20] Makgoka J held the following in considering the manner in which the Minister reached her decision to deny the Applicant in the matter permanent residency where after the Applicant brought a review application:

> *"[21] Without doubt, the fraudulent registration of birth, and the subsequent obtaining of* a *South African identity document based on that, should be* a *serious concern for the Minister. However, there is an explanation for that by the first applicant. The Minister might have considered the explanation to be implausible, deserving outright rejection. But this is not apparent from her decision. It is not clear from the Minister's decision that this was considered at all. It might well be that when considered in the light of all other factors, this factor emerges* as *the key one on which the Minister's decision rests.*
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> *[22] It is clear from the reasons advanced in the Minister's letter that she failed to apply her mind to any of the above and to the overall question whether special circumstances exist. It was an impermissible approach for the Minister to simply concentrate on only one factor and base her decision on that factor alone - despite how important she may have considered it to be."*

[35] I accordingly find that the decision of the Respondents was not substantively fair; consequently there is no need to consider the procedural fairness of the Ministers decision.

Order:

(a) The decision of the first respondent taken on the 10TH of June 2016, in terms of which the first Respondent decided to deprive the Applicant of his

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[20] 2015 JDR 1866 {GP) (Unreported).

South African Citizenship, is he by reviewed and set aside.

(b) The Applicant's costs shall be paid by the first and second Respondents jointly and severally.

(c) Such costs shall be on the scale as between attorney and client, including the costs of two counsel.

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SARDIWALLA, AJ

HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

HEARD ON:	**07 August 2017**
DATE OF JUDGMENT:	**08 September 2017**

Appearances

For the Plaintiff:	**Adv. L Mfazi & Adv. T Tshabalala**
Instructed by:	Z & Z Ngogodo Attorneys
For the Defendant:	**Adv. Thomas Tshabalala**
Instructed by:	State Attorney