IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 38981/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

15 March 2019
DATE

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SIGNATURE

In the matter between:

JOSEPH EMMANUEL JOSE	First Applicant
JONATHAN DIABAKA "JUNIOR"	Second Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
DISTRICT MANAGER OF OPERATIONS: JOHANNESBURG DEPARTMENT OF HOME AFFAIRS	Third Respondent
OFFICE MANAGER: JOHANNESBURG REGIONAL OFFICE DEPARTMENT OF HOME AFFAIRS	Fourth Respondent

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JUDGMENT

YACOOB AJ:

Introduction

1 This is an application for an order requiring the respondents to grant the applicants citizenship in terms of section 4(3) of the South African Citizenship Act 88 of 1995 ("the Citizenship Act").

2 The applicants are brothers, who were born in South Africa. Their parents are Angolan refugees who sought asylum in South Africa, are not South African citizens and are not, and did not enter South Africa for, permanent residence. Both applicants have lived in the Republic from the time they were born until they attained majority. They have no links to Angola and consider South Africa their home. This much is common cause.

3 The Citizenship Act provides in section 4(3) that

> *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 the 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.*

4 The applicants applied for South African citizenship in terms of the section, by affidavit, no forms having been promulgated for the purpose, and the

respondent's officials not having responded to queries as to the correct manner in which to apply. The first applicant submitted his application on 25 August 2016 and the second applicant on 24 October 2016.

5 No substantive response was given by the respondents to the applicants' submissions and queries. On 17 March 2017 the respondents' attorneys placed the respondents on terms, and the application was instituted on 7 June 2017.

6 On 19 January 2017, the applicants also made applications for permanent residence status in terms of section 31(2)(b) of the Citizenship Act, as a result of an order of the Western Cape High Court that persons in the applicants' position were entitled to apply for permanent residence. These applications were "conditional" on the outcome of the citizenship applications.

7 The respondents' case is that:

7.1. no proper applications for citizenship were lodged, because the affidavits were not lodged on the correct forms (the DH-63 forms which are for section 5(1) applications, there being no forms for section 4(3) applications);

7.2. because the applicants had previously delivered a request for assistance in making an application for citizenship, they had made two applications each and the respondents could not know which to process (despite the respondents' contention that neither was an

application for citizenship, and the applicants' case being that only the affidavits were applications);

7.3. the time period within which the respondents were expected to make a decision on the applications before this application was instituted was "grossly unreasonable" (although there is no allegation as to what a reasonable period would be);

7.4. the applicants failed to make use of their internal remedy in terms of section 25 of the Citizenship Act;[1]

7.5. section 4(3) of the Citizenship Act applies only to people born after the amendment to the Act on which the applicants allow came into force on 1 January 2013;

7.6. the registration of the applicants' births are not registrations as intended in section 4(3) of the Citizenship Act because they are handwritten and have a stamp on them which says "alien" – and that only children born of South African citizens or permanent residents can ever be registered in accordance with the Births and Deaths Registration Act, 51 of 1992 ("the Registration Act") (this despite the fact that the applicants' allegation that their births were registered in accordance with the Registration Act is admitted);

7.7. the applicants can in any event apply to be permanent residents or

[1] This was only raised in the respondents' heads of argument, which were filed late.

refugees rather than citizens, and

7.8. the applicants would not in any event have a right to be granted citizenship, but only to apply for citizenship, and no case is made out for this court substituting its decision for that of the Minister on the applicants' applications, if any.

8 At the hearing of the matter the respondent requested the postponement of the matter *sine die* on the basis that an appeal against the judgment of the Western Cape High Court in *Ali and Others v Minister of Home Affairs and Another*[2] was due to be heard before the Supreme Court of Appeal and that the issues were similar. The respondents contended that their success in the appeal would at least deal with some of the issues in this case, but not all of them. The respondents contended also that if they were unsuccessful in the appeal that would still not be determinative of the issues in this case.

9 In those circumstances, it was clearly in the interests of justice to hear the matter. Unfortunately, due to intervening circumstances it was not possible to finalise this judgment as promptly as intended and the SCA judgment in the *Ali* judgment has in the intervening period been handed down. That judgment binds this court, and determines how a number of the issues in this case must be dealt with.

10 The applicants drew the SCA judgment in *Ali* to my attention with the

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[2] 2018 (1) SA 633 (WCC)

respondents' consent.

11 The SCA dismissed the *Ali* appeal[3] and ordered the Minister of Home Affairs to make regulations for applications in terms of section 4(3) of the Citizenship Act within one year of its order, and to accept applications for citizenship in terms of section 4(3) on affidavit pending the promulgation of those regulations. It also confirmed the orders of the High Court that the Minister accept the applications of the applicants for citizenship in that matter on affidavit and make a decision within 10 days, and declaring that section 4(3) applied to all persons who met the requirements, regardless of whether they were born before or after 1 January 2013.

12 The court *a quo* in *Ali* had found that section 4(3) applies to all persons who meet the requirements of the section, even if they were born before 1 January 2013. In the SCA, the Minister (the first respondent in this matter) conceded that there was no merit in the argument based on retrospectivity. Nevertheless, the SCA dealt with that argument and confirmed that it did not hold water.

13 It was also conceded that the applicants for citizenship in terms of section 4(3) who were the applicants in the high court in *Ali* all complied with the requirements of section 4(3) and qualify to be granted citizenship in terms of the Citizenship Act. Those applicants appear, from the face of the two judgments, to be in the same situation as far as those requirements go as

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[3] *Minister of Home Affairs v Ali* (1289/17) [2018] ZASCA 169 (30 November 2018)

the applicants in this case.

14 The SCA found that there was no merit in the argument that the applicants should have followed the remedy in terms of section 25 of the Citizenship Act, as there was no decision to be reviewed or set aside, and also because of the position taken by the Minister, that there could be no decision in the absence of application forms.

15 The SCA also dealt with and dismissed the argument that the applicants for citizenship are not prejudiced because they can also apply for permanent residence or refugee status.

16 The *Ali* case therefore disposes of the retrospectivity argument; the question of the form of the applications; the permanent residence and refugee status argument,[4] and the internal review argument.

17 What remains are the following:

17.1. whether there was any vagueness or ambiguity about what applications the respondents were to determine;

17.2. whether the time period allowed to the respondents for making a decision was "grossly unreasonable";

17.3. whether the applicants comply with section 4(3)(b) of the Citizenship

[4] The idea that people should settle for lesser rights when more complete rights were available to them was also dealt with by the Constitutional Court in *Ahmed and Others v Minister of Home Affairs and Another* 2019 (1) SA 1 (CC) which was also brought to my attention by the parties after the hearing of the matter.

Act (the registration of their births in accordance with the Registration Act), and

17.4. whether a case has been made out for this court to order the respondents to grant the applicants' applications for citizenship, rather than to consider them.

Did the applicants submit multiple applications for citizenship to the respondents?

18 The applicants do not contend that they have made multiple applications for citizenship. They are very clear that they first delivered "enquiries" as to how to apply, which included requests for assistance, and only when that assistance was not forthcoming did they each deliver an application on affidavit. They only made one application each and that is the one the respondents were requested to consider.

19 It is clear also that when the applicants enquired as to the status of their applications for citizenship they were not told that there was an issue because there were multiple applications. In fact, the only response received regarding the first applicant was an enquiry in November 2016 as to the status of the applicant and his parents, and regarding the second applicant an email stating that his birth had not been registered in terms of the correct procedure, but giving no information regarding what the shortcoming was or

what the correct procedure was, despite an enquiry being made by the applicants' attorneys.

20 The respondents in their answering affidavit state in one breath that the enquiries were not applications but merely enquiries, and in the next that the enquiries were applications and that the applications were "second applications". They cannot have it both ways. On no-one's version are the enquiries intended to be applications for citizenship and it appears the respondent is clutching at straws in order to give some semblance of substance to its defence. The fact that these points are only raised in the answering affidavit for the first time, and never previously communicated to the applicants gives credence to this impression.

21 There is one application for citizenship from each applicant before the respondent, and its contention that there are two is found to be without merit.

Was the time period within which the applicants requested a response before approaching court "grossly unreasonable"?

22 The first applicant's affidavit application was submitted on 25 August 2016. His attorney requested a response within 30 days, by 26 September 2016. She followed up on 10 October 2016. The only response received was the one referred to above, enquiring as to the status of the applicant and his parents, on 15 November 2016. This email was answered on 16 November

2016 and no response was received. A further follow up was sent on 17 March 2017, one week short of 6 months after the application was submitted, putting the respondents on terms to respond by 3 April 2017, failing which the Court would be approached. This application was only instituted on 8 June 2017, almost ten months after the application for citizenship was submitted.

23 The second applicant's affidavit application was submitted on 24 October 2016. A follow up was sent on 2 November 2016 and the only response was the email referred to earlier regarding the registration of the second applicant's birth. A query was sent enquiring as to what further procedure needed to be followed after the birth certificate had been issued and no response was forthcoming. As with the first applicant, the respondent was then put on terms on 17 March, almost 4 months after the application was submitted, to respond by 3 April 2017, and the application was instituted almost 6 months after the second applicant's application was submitted.

24 The applicants rely on the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") for relief based on the respondents' failure to make a decision. PAJA requires there to have been an unreasonable delay in the taking of the decision.

25 The respondents' point is that the applicants did not allow sufficient time for the decision to be made, and that the time allowed was grossly unreasonable in how short it was. However, the respondents, with their specialist

knowledge of their processes and workload, do not venture to suggest to the court or the applicants what a reasonable time might be.

26 I pause to comment that this is consistent with the respondents' attitude throughout. Rather than say what procedure is to be followed, they simply say that one has followed the wrong procedure. Rather than respond and say we are not able to make a decision in the time you ask, but we will do so within x number of weeks, they simply do not provide any response. Nor do they respond to a request asking what procedure to follow for making the application, allowing the applicants to submit applications in a manner the applicants considered most appropriate, not responding to them, and then only in court papers, suggesting that there are problems in the applications.

27 The respondents' manner of dealing with these applications is unfortunate. It is also inconsistent with a number of the governing principles of public administration set out in section 195 of the Constitution.[5]

28 Even if the applicants made enquiries too soon, by the time this application was instituted, almost 8 months had passed in respect of the first applicant's application and almost 6 months in respect of the second applicant. Taking into account that PAJA requires an approach to be made to court within 180 days of a decision having been taken, it is not unreasonable to at least expect some response in less than that time.

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

29 It was open to the respondents to have made a decision at any time after the applicants' deadlines, and even after the application was made to court. However, they chose to defend the matter.

30 It is my view that, by the time the applicants approached court, there was an unreasonable delay in the making of the decision. Certainly, by the time the matter was heard, and the decision was still not made, the delay was inordinate – it was over 2 years for the first applicant, and slightly less for the second.

31 The respondents could have dealt with the applications even after the applicants approached court, and then the only question would have been whether the applicants approached court too soon, which could have been dealt with by means of a costs order. They chose to continue not to deal with the applications.

32 As pointed out above, the respondents did not put up any evidence or make any submission regarding what a reasonable time would have been from their point of view. This failure is exacerbated by the respondents' position that (a) the affidavit applications were incompetent and (b) people in the applicants' position were not entitled to apply for citizenship in terms of section 4(3). This being the case, a negative decision on the applications would have been relatively easy to make, and that decision could then have been properly reviewed.

33 I find, therefore, that there is no merit in the contention that the time allowed

to the respondent was grossly unreasonable. I find also that in this case the failure to make a decision has resulted in the decision being unreasonably delayed.

Do the applicants comply with section 4(3)(b) of the Citizenship Act?

34 This argument was apparently not raised before the *Ali* court.

35 Section 4(3)(b) requires registration of the birth of the applicant for citizenship in terms of the Registration Act.

36 The Registration Act provides that "registration" of a birth is the registration mentioned in section 5 of that Act. Section 5 provides that the inclusion in the population register of information from documents relating to births is the registration of those births. However, where a non-South African citizen is temporarily in the Republic, the particulars from the documents are not to be included in the population register and the mere issuing of a certificate is the registration of the relevant particulars.

37 In terms of the definition of "registration", read with section 5, then, the mere issue of a birth certificate of (a child born to) a non-South African citizen who is temporarily in the Republic is the registration of the birth. For (children of) South African citizens, and presumably permanent residents, the registration is the entry in the population register.

38 Section 9 of the Registration Act requires notice of every child born alive in the Republic to be given, and a birth certificate or acknowledgment of receipt

of the particulars of the birth to be furnished to the person who gives that notice.

39 The regulations in terms of the Registration Act provide that when particulars are furnished of the birth of a child to South African citizens, permanent residents and refugees, a birth certificate is issued with an identity number, and when the child is born to non-South African citizens who are not permanent residents (or refugees), a birth certificate is issued without an identity number. The Refugees Act, 130 of 1998 ("the Refugees Act") provides for refugees to be issued with identity documents with identity numbers, but these at present are not South African identity documents but special refugee identity documents.

40 In all cases, then, a birth certificate is issued. And when the child is born who is not entitled to have his or her particulars entered into the population register, the mere issuing of the certificate is the registration of its birth in terms of the Registration Act.

41 The population register is dealt with in the Identification Act, 68 of 1997 ("the Identification Act"). The Identification Act applies to all South African citizens and people who are lawfully and permanently resident in the Republic. Every person whose particulars are entered into the population register must have an identity number assigned to them.

42 The birth certificates of the applicants do not have identity numbers, and are stamped with the words "Alien/Vreemdeling". This is consistent with

someone who is born to parents who are not South African citizens, not permanently resident in the Republic, and whose particulars do not appear in the population register.

43 The respondents' argument is that, because people in the applicants' position are not entered into the population register and do not have identity numbers, their births are not registered in terms of the Registration Act, and they therefore do not comply with section 4(3)(b) of the Citizenship Act.

44 This argument makes a nonsense of section 4(3). Firstly, nobody who otherwise fulfils the requirements of section 4(3) would ever be entitled to be entered into the population register on birth. Nobody could therefore ever be registered as required, and nobody could ever apply for citizenship in terms of section 4(3).

45 Secondly, the section does not require that the person's details be entered in the population register or that the person have an identity number. It only requires registration of the birth in terms of the Registration Act. And, in terms of the Registration Act, for a person who is not entitled to have their details entered into the population register, the mere issuing of the birth certificate is the registration of the birth.

46 The respondents have not, in their answering affidavit, contended that the birth certificates of the applicants were wrongly issued, despite the email of 2 November 2016 referred to above.

47 The applicants' births have, therefore, been registered in accordance with the Registration Act by the issuing of their birth certificates, and they comply with section 4(3)(b) of the Citizenship Act.

Have the applicants made out a case that it is appropriate for the court to order the respondent to grant the applicants' applications for citizenship?

48 Where an application is brought in terms of PAJA for relief related to the failure to take a decision, a court may make any order that is just and equitable, including ordering the administrator to take the decision or declaring the rights of the parties in relation to the decision, or directing any party to do any thing which may be considered necessary to do justice between the parties in terms of section 8(2) of PAJA. The listed powers of the court are slightly less in number than those it has when reviewing a decision actually taken, but substantively, there is no fundamental difference.

49 In *Ali*, the relief sought was also that the Court order the respondents to grant the applications for citizenship. However, the Court did not do so, instead ordering the respondents to accept and consider the applications. The question is whether the relief granted in this court, where the facts are fundamentally similar, should be any different, and, more particularly, whether the interests of justice demand a difference in approach.

50 In *Ali*, the High Court found that to order the respondents to grant the applications would amount to judicial overreach. The SCA found that the applicants for citizenship in that case "qualify to be granted" citizenship,

because they satisfied all the requirements. However, the SCA did not change that part of the order of the High Court. It confirmed the order that the respondents must accept the applications and decide them within 10 days. That said, it is not clear that the SCA considered whether any stronger order might have been appropriate.

51 It was argued that section 4(3) does not confer a right to citizenship, but rather a right to apply for citizenship. In my view it does both. If one fulfils all the requirements, one then has the right, and the choice to apply for citizenship, and, having made the choice to apply, one then has a right for that citizenship to be granted. There is no room for the exercise of discretion.

52 It is the case that, ordinarily, to order the decision maker to make a decision in a particular way is an order that should only be made in exceptional circumstances. The argument before this court was not that these are exceptional circumstances. The argument was simply that there is no basis on which the applications could be refused, and therefore that the Court could order them to be granted.

53 In my view, the specific circumstances of applications in terms of section 4(3), where it is clear that all the requirements are fulfilled, are sufficiently exceptional to make an order to grant the applications in the interests of justice. It is no different, in the particular circumstances of this case, to an order declaring the rights of the applicants,[6] or one directing any party to do

[6] as envisaged by section 8(2)(b) of PAJA

any thing which the court considers necessary to do justice between the parties.[7]

54 For those reasons, I am satisfied that the approach by the High Court in *Ali* was clearly wrong. The SCA not having considered the issue, I am not bound by the SCA's judgment with regard to the relief sought.

Conclusion

55 The applicants' legal representatives appeared *pro bono*. There is no reason why their costs should not be recovered.

56 A judgment of the Labour Court was handed up,[8] in which the unsuccessful respondent was ordered to pay the applicants' costs where they had been represented *pro bono* by an attorney. It relied, *inter alia*, on the judgment of the SCA in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others*,[9] in which costs were ordered, including the costs of two counsel.

57 Legal practitioners who appear *pro bono* in matters in which litigants would otherwise not be able to pursue their fundamental rights, and in particular where the claims do not sound in money, ought not in ordinary circumstances to be prevented from claiming costs. On the contrary, granting of a costs

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[7] as envisaged in section 8(2)(c) of PAJA.
[8] *Kanku and Others v Grindrod Fuelogic* (C602/2014) [2017] ZALCCT 26 (21 June 2017)
[9] 2016 (3) SA 317 (SCA)

order in these circumstances is likely to increase access to justice.

58 In the circumstances I make the following order:

[1] The first respondent or his delegated representative is ordered to grant the applications of each of the applicants for South African Citizenship in terms of section 4(3) of the South African Citizenship Act, 88 of 1995, within 10 days of this order.

[2] The respondents are to pay the costs of this application, including the costs of two counsel.

S. YACOOB

ACTING JUDGE OF THE HIGH COURT

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DATE OF HEARING:	***12 SEPTEMBER 2018***
DATE OF JUDGMENT:	***15 MARCH 2019***