Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable Case No: 1289/17

In the matter between:

MINISTER OF HOME AFFAIRS	**FIRST APPELLANT**
DIRECTOR-GENERAL OF HOME AFFAIRS	**SECOND APPELLANT**

and

MIRIAM ALI	**FIRST RESPONDENT**
ADEN NUREDIN SALIH	**SECOND RESPONDENT**
KANU TEKA JORSEN NKOLOLO	**THIRD RESPONDENT**
FARIEDA NSOKI	**FOURTH RESPONDENT**
CAROLINE MASUKI	**FIFTH RESPONDENT**
MURPHY NGANGA	**SIXTH RESPONDENT**

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

Coram: Lewis, Seriti, Wallis, Mathopo and Molemela JJA

Heard: 9 November 2018

Delivered: 30 November 2018

Summary: Citizenship Amendment Act 17 of 2010 (the Act) – Interpretation of s 4(3) of the Act – section does not have a retrospective effect – respondents satisfy the requirements of citizenship by naturalisation – failure of the Minister to promulgate regulations for applications for citizenship in terms of s 23 of the Act –

the order of the high court directing the Minister to accept applications on affidavits does not encroach upon the doctrine of separation of powers.

ORDER

On appeal from: The Western Cape Division of the High Court, Cape Town (Wille J sitting as court of first instance):

1. The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.
2. Paragraphs 1 and 2 of the order of the court a quo are confirmed.
3. Paragraph 3 of the order of the court a quo is amended to read: 'The Minister shall –
    3.1 Within one year of the date of this order make regulations in terms of s 23(a) of the South African Citizenship Act 88 of 1995 (the Act) in respect of applications for citizenship by naturalisation in terms of s 4(3) of the Act;
    3.2 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.'

JUDGMENT

Mathopo JA (Lewis, Seriti, Wallis and Molemela JJA concurring):

[1] This appeal concerns the right to obtain citizenship by naturalisation of a child born in the Republic of South Africa, whose parents are not South Africans and have not been admitted to the Republic of South Africa for permanent residence. The issue arises because the Department of Home Affairs (the Department) refused to receive and grant the respondents' applications for citizenship despite the fact that

they satisfied the requirements of s 4(3) of the Citizenship Amendment Act 17 of 2010 (the Act). The dispute requires us to answer the question whether the respondents fall within the category of persons mentioned in s 4(3).

[2] Section 4(3) of the Act, which came into operation on 1 January 2013, sets out requirements for citizenship by naturalisation, as follows:

> '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 (Act No. 51 of 1991).'

[3] It is common cause that all the respondents were born in South Africa, had their births registered in terms of the Births and Deaths Registration Act 51 of 1992 (Births and Deaths Act), have lived here since birth and have no other home apart from South Africa. The respondents have been unable to obtain citizenship in terms of the Act, because the Minister of Home Affairs (the Minister) interpreted the section as excluding them and also failed to promulgate the necessary forms to apply for citizenship. The background circumstances of the respondents are as follows.

[4] Ms M Ali (first respondent) was born in Beaufort West, South Africa on […] January 1998. Her birth was duly registered in accordance with the Births and Deaths Act. Her parents are not South African citizens, nor have they been admitted into the Republic as permanent residents. Her parents are Somali citizens. She has lived in South Africa since her birth and has no links with her parents' country, Somalia.

[5] Ms A Salih (second respondent) was born in Johannesburg on […] January 1998. A full birth certificate was issued to her. Her mother is Ethiopian and her father is Sudanese. Her parents have not been admitted into the Republic for permanent residence. She and her parents moved to Cape Town in 1999, where she has lived ever since. She considers herself as a South African and South Africa to be her only

home.

[6] Mr K Nkololo (third respondent) was born in Cape Town in the Mowbray Maternity Hospital on […] October 1996. He was issued with a birth certificate, though this was later lost. His parents are Angolan. He and his parents still live in Cape Town. He has never left South Africa; has never visited Angola and he does not speak Portuguese. He considers South Africa to be his home.

[7] Ms C Masuki (fifth respondent) was born in Tygerberg Hospital on […] December 1996. A full birth certificate was issued after her birth. Her mother is Congolese and her father is Angolan. She has lived in South Africa her entire life and has never left the country.

[8] Mr Nganga (sixth respondent) was born in Johannesburg on […] November 1997. An unabridged birth certificate was issued by the Department. His mother is a refugee from the Democratic Republic of Congo. His parents were married by custom in the DRC. He has lived in Cape Town all his life and regards South Africa as his home country.

[9] All the respondents have been unable to apply for citizenship by naturalisation because of the Minister's refusal to recognise their right to become naturalised citizens in terms of s 4(3) and the failure to promulgate the regulations for the application forms at this stage.

[10] The respondents contended that they meet all the jurisdictional requirements to qualify for citizenship by naturalisation in terms of the impugned section. Consequently, they brought the current application (i) in their own interests in terms of s 38(a) of the Constitution of the Republic of South Africa 1996; (ii) in the interests of persons in a similar situation in terms of s 38(b) of the Constitution; and (iii) in the public interest in terms of s 38(d) of the Constitution.

[11] The Minister interpreted s 4(3) of the Act to mean that it only applied to children born after it was enacted on 1 January 2013. The case for the Minister was that the section cannot be interpreted to apply retrospectively to children born before

1 January 2013 and who have attained majority after the enactment of this section. In short, on the Minister's approach this section did not apply even though a child turned 18 after 1 January 2013. The interpretation of the Minister was that persons who qualified for citizenship in terms of this section were those born on or after 1 January 2013 and such persons would be eligible to qualify to apply for citizenship in terms of this section only after attaining majority on 1 January 2031.

[12] In view of this interpretation, the Minister failed to promulgate the regulations giving effect to s 4(3) of the Act as required by s 23 of the Act. Frustrated by the inordinate delay and failure of the Minister to exercise his powers to prescribe the necessary forms to give effect to s 4(3) of the Act, the respondents approached the Western Cape Division of the High Court (the high court) for a declaratory order that they qualified to apply for citizenship in terms of the impugned section. They also sought an order that the Minister accept their applications on affidavits.

[13] In the high court two main arguments were raised in support of the Minister's case. The first was that s 4(3) of the Act cannot apply to persons who were born before 1 January 2013 but who turned 18 after the enactment of the section. To hold otherwise, he contended, entailed that the section would apply retrospectively and create new sets of rights and obligations on the State, which was not intended by the Legislature. The argument of the Minister was that a retrospective application of the section would create an unnecessary flow of applications and burden the already strained resources of the Department. The second was that prescribing to the Minister that he accept the applications on affidavit, a method that was not envisaged by the Act, amounted to usurping the powers of the Minister and disregarded the provisions of the Act dealing with the issuing of certificates of naturalisation.

[14] Turning to the issue of retrospectivity, the argument advanced was that the impugned section did not seek to take away vested rights or create new obligations in respect of past matters or transactions. The respondents relied on the judgment of this court in *Nkabinde & another v Judicial Service Commission & others*[1] where this

[1] Nkabinde & another v Judicial Service Commission & others [2016] ZASCA 12; [2016] 2 All SA 415

court said the following:

> 'Literally defined, a retrospective law is a law which looks backward or on things that are past; a retroactive law is one which acts on things that are past. In common use, as applied to statutes, the two words are synonymous, and in this connection may be broadly defined as having reference to a state of things existing before the act in question. A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. However, a statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing, but is retroactive only when it is applied to rights acquired prior to its enactment.'

[15] The respondents contended before the high court that denying them an opportunity to apply for citizenship on the basis that the Department has not yet formulated guidelines infringed upon their constitutional rights. Ms Ali averred that granting her citizenship would reduce the hostility she experiences as being identified as a foreigner in a country where she was born.

[16] The high court (Wille AJ) rejected the submissions made on behalf of the Minister, which were in line with what is set out in paragraph 11 above. It made the following orders:

> '1 That the respondents are to forthwith accept applications on affidavit from each of the applicants (excluding the fourth applicant), for the granting of South African citizenship in terms of section 4(3) of the 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 the 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 respondents shall:

(SCA); 2016 (4) SA 1 (SCA) para 62.

3.1 Within one year of the date of this order, enact the necessary form/s to allow for applications in terms of section 4(3) of the South Africa citizenship Act 88 of 1995; and

3.2 Pending the enactment of the form/s referred to in paragraph 3.1 above, accept applications in terms of section 4(3) of the South Africa Citizenship Act 88 of 1995, on affidavit.'

[17] It is against the above orders that the Minister now appeals to this court with leave of the high court.

[18] Before us, counsel for the Minister conceded that the respondents complied with all the jurisdictional requirements in s 4(3) of the Act and qualify to be granted citizenship by naturalisation in terms of the Act. Counsel further conceded that s 4(3) of the Act is a self-standing section and need not be read or interpreted in conjunction with s 5 of the Act. I consider these concessions to have been properly made. In addition he conceded that the argument based on retrospectivity was unsound.

[19] I turn to a new argument raised on appeal by the Minister. It was submitted that the respondents should have put the Minister on terms and requested him to deal with the applications in terms of s 25 of the Act before launching the present proceedings. This argument was untenable. It is difficult to understand on what basis the Minister could have made any decision in the absence of the application forms. The respondents were never given an opportunity to apply. They were all simply turned away several times because of the Department's attitude to the question of retrospectivity and the fact that necessary application forms were not available at that stage. In my view there was no decision to be set aside or to be reviewed.

[20] It is clear that the Minister's argument for the dismissal of this appeal on this ground alone is consistent with ongoing attempts to frustrate and delay the respondents' application to have their status recognised. It is not in the interests of justice and neither is it just and equitable to send the respondents from pillar to post simply because the Minister has adopted a supine attitude that the regulations will only be promulgated in due course. This state of affairs cannot be countenanced.

The attitude of the Minister's demonstrates unfairness in the treatment of the respondents and infringes their constitutional rights. The high court was justified in intervening by ordering that an affidavit would suffice. The order of the high court does not encroach upon the separation of powers.

[21] Although the retrospectivity argument was not pursued before us, in view of the fact that it was raised in the heads of argument and debated at length before the high court I think it is necessary to say something about the argument briefly. A reading of the section does not seek to take away vested rights or create new obligations in respect of past matters. It is intended to grant the respondents and similar persons the right to apply for citizenship when they become majors. My view is reinforced by the following facts. When the section came into operation on 1 January 2013 (i) none of the respondents had yet turned 18, (ii) none of the respondents had applied for citizenship under the provisions of the Act; (iii) none of their applications was pending in terms of the Act; and (iv) the Department had not taken any steps in relation to the citizenship of the respondents. It was right that their case does not involve a retrospective application of the section. The Minister's argument is clearly unsustainable and not in line with the authority of this Court in *Nkabinde* and the Constitutional Court judgment in *Savoi and others v NDPP*[2].

[22] The argument relating to paragraph 1 of the high court's direction to the Minister to accept applications on affidavits can be disposed of quickly. The complaint by the Minister that this order encroached upon the principle of the separation of powers ignores the harsh realities that the respondents experienced at the hands of the officials of the Department. The submission that the high court went beyond its powers by dictating to the Department that it accept applications on affidavit is misplaced. The order of the high court was informed by the Department's lackadaisical attitude to the respondents' applications.

[23] In the absence of any remedy available to the respondents and more particularly since the Minister could not give an indication as to when the regulations would be promulgated the respondents were entitled to a remedy. Mindful of these

[2] Savoi and others v National Director of Public Prosecutions and another [2014] ZACC 5; 2014 (5)

injustices the high court rightly intervened and made the order in paragraph 1. This order was remedial in nature and in line with what the Constitutional Court said in *Head of Department Mpumalanga Department of Education and another v Hoërskool Ermelo and another*:[3]

'The remedial power envisaged in section 172(1)(*b*) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(*a*). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements . . . .'

I agree with counsel for the respondents that because the order of the high court does not specify what is to be contained in the regulations but leaves the discretion to the Minister, it cannot be said that it encroaches on the separation of powers.

[24] Another argument raised by the Minister is that the high court's order disregarded the provisions of the Act which deal with the issuing of certificates of naturalisation. Section 5(1)(*b*) of the Act applies to persons who have citizenship of another country. The position of the respondents is different. They have no relationship or connection with any country except South Africa, even though some of their parents may have such connection. The argument of the Minister that the respondents are not prejudiced because they can apply for citizenship in terms of s 2(2) of the Act or for refugee status under the Refugees Act 130 of 1998 is misplaced. Refugee status does not confer a right to vote. It is a status conferred on someone whose true home is elsewhere. It is an affront to deny the respondents the right to apply for citizenship in a country where they were born, have lived in and which is the only country they have ever known.

[25] What remains is whether the orders of the high court were overbroad. As

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BCLR 606 (CC); 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC) para 83.

[3] Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) para 97.

stated earlier the respondents satisfied all the requirements in terms of s 4(3) of the Act. The attitude of the Department in refusing to accept their applications on affidavits was correctly rejected by the high court. Counsel for the Minister could not point us to any deficiencies in the proposed application by means of affidavit. The order of the high court was necessary, given the Minister's inordinate delay.

[26] As regards paragraph 2 of the order of the high court, there is no rational purpose to be served or achieved by unfairly discriminating between children born before 1 January 2013 and those born after 1 January 2013. In my view preventing children born prior to 1 January 2013, even though they have lived in South Africa since birth and have attained majority thereafter, is unfairly discriminatory. The interpretation advanced by the Minister does not promote the spirit, purport or objects of the Bill of Rights. It follows that the orders of the high court are not overbroad.

[27] In the result the following order is made:

1. The appeal is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.
2. Paragraphs 1 and 2 of the order of the court a quo are confirmed.
3. Paragraph 3 of the order of the court a quo is amended to read: 'The Minister shall –
    - 3.1 Within one year of the date of this order make regulations in terms of s 23(a) of the South African Citizenship Act 88 of 1995 (the Act) in respect of applications for citizenship by naturalisation in terms of s 4(3) of the Act;
    - 3.2 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.'

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R S Mathopo

Judge of Appeal

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