THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1027/2020

In the matter between:

MBEMBA PIERRE MAHINGA	**Appellant**
and	
MINISTER OF HOME AFFAIRS	**First Respondent**
DIRECTOR-GENERAL HOME AFFAIRS	**Second Respondent**

Neutral citation: *Mahinga v Minister of Home Affairs and Another* (Case no 1027/2020) [2021] ZASCA 179 (17 December 2021)

Coram: ZONDI, GORVEN and HUGHES JJA and MEYER and MOLEFE AJJA

Heard: 25 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 December 2021.

Summary: Citizenship – whether the Minister of Home Affairs' decision taken in terms of s 8(1) of the South African Citizenship Act 88 of 1995 to deprive the appellant of his citizenship was reasonable and rational – certificate of naturalisation was fraudulently obtained on basis of marriage that was not bona fide – concealment of material facts.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Phahlane AJ and Maumela and Makhubele JJ sitting as court of appeal):
Appeal is dismissed with costs including those of two counsel.

JUDGMENT

Zondi JA (Gorven and Hughes JJA and Meyer and Molefe AJJA concurring)

[1] This is an appeal against the judgment and order of the full court of the Gauteng Division of the High Court, Pretoria (Phahlane AJ, Maumela and Makhubele JJ concurring) in terms of which it upheld the appeal by the respondents, the Minister of Home Affairs (the Minister) and the Director-General Home Affairs (the Director-General) against the judgment of the high court. In that judgment the high court reviewed and set aside the Minister's decision to revoke the appellant's citizenship in terms of s 8 of the South African Citizenship Act 88 of 1995 (the Citizenship Act) which allows the Minister to deprive any South African citizen by naturalisation of his or her South African citizenship in certain circumstances. The appeal is with the special leave of this Court.

[2] On 10 June 2016 the Minister revoked the appellant's South African citizenship and simultaneously terminated his employment with the Department of Home Affairs (the Department). The appellant approached the high court to review and set aside both decisions. The high court reviewed and set aside the decision to deprive the appellant of his South African citizenship. It did not review and set aside the decision to terminate the appellant's employment. The appellant did not challenge the high court's failure to make an order regarding the termination of his employment and similarly it was not an issue before the full court. The reasonableness and rationality of the Minister's decision to terminate the appellant's employment is, accordingly, not

before us and that much was conceded by the appellant's counsel at the hearing of this appeal.

[3] At the heart of this dispute, is the appellant's complaint that the Minister's decisions to deprive him of his South African citizenship was unreasonable and irrational. He contended that the Minister's decision to deprive him of his South African citizenship did not comply with s 8(1) of the Citizenship Act. Section 8(1) of the Citizenship Act deals with deprivation of citizenship. It provides as follows:

'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 representation or the concealment of a material fact; or

(b) such certificate was granted in conflict with the provisions of this Act or any prior law.'

[4] The Citizenship Act expressly allows the Minister under specific circumstances contemplated in s 8(1) to deprive a South African citizen of his or her citizenship. Where such power is exercised, it must be done in a manner that is consistent with s 36 of the Constitution as it limits a citizen's right to citizenship under s 20.[1] Section 20 of the Constitution is in line with Article 15(2) of the Universal Declaration of Human Rights, which declares that '[n]o one shall be arbitrarily deprived of his [or her] nationality . . .'.

[5] To address the issues raised in this appeal, it is necessary to set out the circumstances in which the appellant acquired South African citizenship and how he became employed by the Department.

[6] The appellant was born in Kinshasha, the Democratic Republic of Congo (DRC) on 7 February 1969. There is a dispute as to when and how he arrived in South Africa and what he did, once he was in South Africa. But it is common cause that he arrived in South Africa in early 1996. He applied for and obtained a temporary permit in terms of s 41(1) of the then Aliens Control Act 96 of 1991, which allowed him to reside in

[1] Section 20 of the Constitution provides that '[n]o citizen may be deprived of citizenship'.

South Africa for the purpose of ‘asylum seeker’. This permit was subject to renewal every three months from the date of its issue.

[7] On 5 October 1999, the appellant, while in South Africa, married a South African, Ms Jacqueline Mfuku. On the basis of his marriage to Ms Mfuku on 10 December 1999, he withdrew his asylum application, and then on 23 August 2000, applied for a permanent residence permit on the basis of the marriage. This was granted on 14 June 2001. In July 2003, he applied for naturalisation on the basis of his marriage to a South African. That application was granted on 1 October 2003. At that stage, however, there were already problems in the marriage. Ms Mfuku was allegedly seeing another man by the name of Orji. A child was born from this relationship on 15 October 2003, some four months after his application for naturalisation. He renounced his Congolese citizenship in 2015.

[8] After obtaining the permanent residence permit the appellant, in June 2004, was appointed as an administrative clerk at the Refugee Reception Centre in Pretoria. He was later promoted to the post of Assistant Director on 2 February 2006 and confirmed in the Public Service on 3 April 2007. When he applied for employment at the Department, the appellant submitted his curriculum vitae (CV) as part of his application. Under work experience on his CV, the appellant stated, among other things, that he was an employee of the Embassy of the Democratic Republic of Congo in Pretoria as an administrative officer, for a two-year period from July 1998 to August 2000, and that he left the Embassy’s employ because he was retrenched.

[9] As a senior administrative officer, his responsibilities included: managing the overall administrative functions; co-ordinating support services and supervising personnel; drafting correspondence and documents; producing synthesis on South African social, economic and political issues and their impact on the SADC region; monitoring local media, writing press releases and managing information, liaising with the media embassies and the Congolese community; handling queries and ensuring that all visitors are alluded to and given the necessary courtesy; making travel arrangements, facilitating VIP’s arrival and departures; providing support to the

consular sections in the assessment of visa applications and representing the Head of the Mission (Chargé d' Affaires) in the SADC Head of Mission monthly meetings.

[10] The manner in which the appellant acquired South African citizenship and his employment by the Department had been under investigation by the Department at least since 2007, following a complaint by an anonymous member of the public addressed to the Department in a letter dated 17 September 2007. He was asked to respond to the allegations in the letter, which he did in his undated response. He was not told of the outcome of the investigations and the issue appeared to have died.

[11] Some four years later, in or about October 2011, the appellant was approached by a certain Mr Joas Phala, Assistant Director: Physical Security of the Department. Mr Phala had asked him to provide certain personal information, which he alleged was for vetting purposes. The appellant refused to co-operate, unless he received a written authorisation for the requested information. He did not receive the written authorisation.

[12] Six years later and on 13 September 2013, the appellant received a letter from the Department, written by M E Malatsi CD: Investigations and ADDG: Counter Corruption and Security Services. The letter alleged that, upon a perusal of the Movement Control System (MCS), the Department picked up a number of discrepancies in his application for citizenship, such as when and how he entered the Republic of South Africa (RSA), his application for asylum and its subsequent cancellation, the legitimacy of his marriage with Ms Mfuku and false registration of several children on his personal and salary system (Persal).

[13] The letter concluded that it was evident from the MCS and the appellant's Persal, that he was 'an illegal foreigner, whose only two options to remain in the RSA, as such, was to apply for asylum or to go into a marriage of convenience', his application was founded on misrepresentations, and that the spouse permit in support of his citizenship application, was false.

[14] He responded to these allegations by a letter dated 27 September 2013. In short, he denied all allegations of impropriety levelled against him. In para 55 of the letter, the appellant stated:

'. . .

55.1. I have never been an illegal foreigner in South Africa.

55.2. My asylum application was based on true-life persecution experiences. My asylum claim was appropriately lodged and duly registered in 1996 first. DHA put me through a second re-registration process in 1998.

55.3. The accompanied spouse permit was legitimate. My spousal relationship was based on true love, good faith and genuine spousal relationship reinforced by shared dream, shared family life and faithfulness and meant to last until death do us a part.

55.4. Only [Department] with the help of its information and records management systems could shed light on how people that I never officially declared as being my children or being connected to me ended up being linked to me. This is a serious distortion of facts and misrepresentation of events that could tear family apart, put people's lives in danger and jeopardize children's future if one does not know the tangible truth.

55.5. I have never obtained my temporary and permanent residence permits as well as my naturalisation by misrepresentation. I have never simultaneously held two (2) permits under different Acts administered by [Department]; though, legally permitted.

55.6. I have appropriately complied with processes and key relevant laws administered by [Department] in terms of registration and documentation. I showed good cause in my 17 years of residency in RSA. As far as the enabling provisions are concerned, **I am and remain bylaw a South African Citizen.**'

[15] On 15 April 2016, the Director-General issued the appellant with a written notice of his intention to deprive him of his South African citizenship. The notice invited the appellant to make representations to the Director-General within 14 days from the receipt of the notice. The Director-General raised a number of concerns about the manner in which the appellant acquired South African citizenship. The notice to deprive the appellant of his South African citizenship was based on four grounds:

'42.1 Facilitating your entry and residence with a false permit obtained by misrepresentation, you are guilty of the contravention of section 49(14) of the Immigration Act, 13 of 2002.

The offence carries a maximum penalty of 4 years or R80 000-00.

42.2 Fraudulently registering children on the PRS, you are guilty of section 31(1)(b) of the Births and Deaths Registration Act, 51 of 1992. The offence carries a maximum penalty of 5 years or R100 000-00.

42.3 Obtaining citizenship by fraud you are guilty of the contravention of section 18 of the South African Citizenship Act, 88 of 1995. The offence carries a maximum penalty of 84 years or R160 000-00.

42.4 Applying for asylum fraudulently, you are guilty of the contravention of section 37(a) of the Refugees Act, 130 of 1998.

The offence carries a maximum penalty of 4 years or R80 000-00.'

[16] By letter dated 12 May 2016, the appellant, through his attorneys, responded to the Director-General's letter of 15 April 2016. The letter stated:

'2. It is our instruction that there was a complaint lodged on 17 September 2007 (Placement of Foreign People in the sensitive unit of the Department) against our client. The complaint in question was received on 21 November 2007 by our client and to which he responded.

3. On 13 September 2013 our client was re-investigated (Allegations of Impropriety Regarding the Status of Mr. Mbemba Pierre Mahinga) and he further responded to the investigation on 27 September 2013 directing same to the Acting Director-General: Counter Corruption & Security Services.

4. Our client was informed on the 20 October 2013 that the matter had been finalized by the Acting Director-General: Counter Corruption & Security Services. We kindly request the outcome report of the matter as it has not been provided to date.

5. Our client has answered to some of the questions you posed to him. To that effect, we will deal with facts that are both relevant and rational to our client.

6. It is further our instruction that our client arrived in RSA on 17 February 1996 and immediately applied for an asylum. Kindly provide us with the Asylum Application that our client made immediately in 1996 when he arrived. We would like to bring to your attention that our client did not apply for an asylum on 26 November 1998 as alleged, this seems to us, to be a re-capture of our client's details on the system. Further, we would like to know how authentic is Annexure A.

7. According to our client, he was issued with a Section 41 permit in terms of Aliens Control Act No. 96 of 1991, which allowed him to carry out employment in the RSA.

8. It is further our instruction and understanding that the then Standing Committee which dealt with refugees, would have reviewed our client's Asylum Application with regard to working in embassy (1999), of which it did not.

9. Kindly furnish us with the decision of the sub-committee of the Standing Committee with regard to our client working at the DRC embassy.
10. Further, we would like to refer you to the system records, as our client's child was registered on time as per the birth certificate.
11. We noted that you have inserted the names of Philip Mahlangu's children on our client's file. Kindly explain how Philip Mahlangu's children are connected to our client.
12. Accordingly, if our client had committed a criminal act, the Department would have laid a criminal charge against him however it has failed to do so since 2007.
13. According to our client, there is no misrepresentation that was committed when he applied for naturalisation. On that note, we request you to further furnish us with the Application of naturalisation of our client.
14. Failure to provide us with all the above requested information within 14 days after receipt of this letter, legal proceedings will be instituted.
15. It is further our instruction that the notice of intention to deprive our client of citizenship comes to light due to a complaint lodged with the Public Service Commission by our client. We note that our client has never been illegal in the country.
16. Therefore, we kindly request the Department to desist from victimizing and intimidating our client. We wonder whether other foreign nationals who are employed in the Department, are subjected to the same harassment of investigations.
17. Kindly note that in the event that the Department decide to revoke our client's citizenship we will approach the court as we have evidence that you have a witch hunt against our client and request punitive costs against whoever would have taken such a decision.'

[17] Not satisfied with the appellant's response, the Minister, on 10 June 2016, notified the appellant that he was satisfied that the appellant had contravened s 8(1)*(a)* and *(b)* of the Citizenship Act 'in that [he] acquired South African citizenship through fraud, false representation and or concealment of a material fact'. In consequence, the Minister decided to revoke the appellant's South African citizenship and simultaneously terminated the appellant's employment with the Department.

[18] Aggrieved by the Minister's decisions, the appellant brought an urgent application in the high court, in which he sought in Part A, an interim relief interdicting the Minister from revoking his citizenship pending the finalisation of the review.

[19] In Part B of his application, he sought an order that, first, the decision of the Minister to revoke his citizenship be reviewed and set aside; second, the decision of the Minister to terminate his employment with the Department be declared unlawful; and finally, that he be paid compensation.

[20] The review was sought under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively, under the principle of legality. The appellant advanced various grounds on which he impugned the Minister's two decisions. As already stated, the high court reviewed and set aside the decision to deprive the appellant of his South African citizenship on the basis that it was based on unreliable and insufficient evidence. But it did not review and set aside the decision to terminate his employment with the Department, neither did it order the payment of compensation sought by the appellant.

[21] It reasoned as follows at para 30 of the judgment:

'It is clear that the Minister based his decision to revoke the Applicant's citizenship on facts that [were] 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 [proved] 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.'

[22] It accordingly concluded at para 33 that:

'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.'

[23] On appeal the full court upheld the Minister's appeal. The full court rejected the appellant's contention that the Minister lacked authority, in the absence of a court order to revoke the appellant's citizenship and that the Minister's decision breached the appellant's constitutionally protected right to citizenship. It held that the word 'order' appearing in s 8(1) of the Act does not mean a 'court order,' which means that the Minister may make a ministerial determination to deprive an individual of his or her citizenship. It held further that the Act did not place a time restriction during which the Minister may invoke his powers under s 8. The Minister, the full court reasoned, has a discretion to make a decision 'in the light of the information at his disposal'. Additionally, the full court held that to the extent that there were serious factual disputes between the parties, the high court should have, in accordance with the principles as enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A), resolved them in the Minister's favour, as the appellant had not sought the disputed issues to be referred for oral evidence.

[24] The full court accepted the Minister's version that the marriage between the appellant and Ms Mfuku was a marriage of convenience and that he fraudulently acquired the South African citizenship.

[25] In his grounds of appeal the appellant advances the following arguments. He argues, first, that the full court failed to appreciate that the jurisdictional requirements of s 8(1)*(a)* and *(b)* of the Citizenship Act were not established before the Minister terminated his citizenship. In particular, he contends that the court could not determine the matter in the absence of the records relating to his asylum file held with the Department. Secondly, he argues that the Minister was not empowered to terminate his citizenship 'on the trite principle of legality when the previous Minister' had on 1 October 2003, after following due process and the law, granted him citizenship in terms of the Citizenship Act. The basis for this contention is that s 8(1) of the Citizenship Act requires the revocation to be authorised by a court and the Minister did not obtain a court order authorising him to revoke the appellant's citizenship. Thirdly, the appellant criticises the full court for having mechanically accepted Mr.

Vorster's version that his marriage with his estranged wife, Ms Mfuku, was a marriage of convenience. The fourth ground advanced by the appellant is that the full court misapplied the *Plascon-Evans* rule by finding that the Minister had successfully raised a dispute of fact. Finally, it is argued by the appellant that the full court misdirected itself by finding that he had failed to respond to the revocation notice, when he, in fact, had comprehensively responded to the allegations in November 2007, September 2013, 12 May 2016 and 14 June 2016.

[26] During argument before us, counsel for the appellant abandoned the second ground of appeal that the Minister had no power to revoke the appellant's citizenship in the absence of a court order, reviewing and setting aside the previous decision of 3 October 2003 to grant him citizenship. That contention had two legs. The first leg was that when the Minister granted the appellant citizenship on 3 October 2003, he became *functus officio*, and could not subsequently revoke that decision without first obtaining a court order. The second leg, which was based on the appellant's interpretation of the words 'by order' appearing in s 8, was that s 8 requires the Minister to revoke citizenship by court order.

[27] The appellant's abandonment of the second point was correct. It is apparent from the reading of s 8 based on its text, factual context and purpose[2] that it expressly confers on the Minister the power under specific circumstances contemplated in that section to deprive a South African citizen of his or her citizenship. The fact that the Minister may have previously granted citizenship to the appellant, does not render him *functus officio*.[3] The Citizenship Act allows him to reverse his own decision without obtaining a court order. A citizen aggrieved by the Minister's revocation decision is not without a remedy. He or she may approach the high court, as the appellant has done in his case, for an order to review the Minister's decision. The interpretation of s 8(1) contended for by the appellant would render s 25 of the Citizenship Act – providing for the review of the Minister's decision – nugatory.

---

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA); 2012 (4) SA 593 (SCA) para 18.
[3] *Thompson, t/a Maharaj and Sons v Chief Constable, Durban* [1965] 4 All SA 313 (D); 1965 (4) SA 662 (D).

[28] As regards the first ground of appeal, anchored on s 3(1)*(b)* of PAJA, it was submitted by counsel for the appellant that the full court erred in finding that the Minister had satisfied the requirements for the revocation of the citizenship under s 8(1) of the Citizenship Act. He argued that the evidence[4] relied upon by the Minister to exercise his powers under s 8(1) was hearsay, suffered from internal contradictions and was unreliable. It was, accordingly, submitted by the appellant's counsel that the full court misapplied the *Plascon-Evans* rule by finding that the Minister had successfully raised a dispute of fact.

[29] I reject the appellant's contention. In the answering affidavit deposed to by the Director-General on behalf of the Department, he stated that to the extent that he dealt with matters that did not fall within his personal knowledge, he did so on the strength of documents and records in the Department's possession and information that came about as a result of Mr Vorster's investigation. In my view, the MCS records in possession of the Department and to which the Director-General had access; and the CV, which the appellant submitted to the Department in support of his application for employment, provided sufficient evidence on which the Minister could make a determination under s 8(1) of the Citizenship Act. The appellant's contention that the evidence of the MCS records is hearsay, should be rejected. It is real evidence and is admissible in terms of s 15 of the Electronic Communications and Transactions Act 25 of 2002. The MCS document is a computer generated document extracted by the Director-General from the Department's computers, to which he had access.

[30] The entries in the MCS document contradict the appellant's assertion that he arrived in South Africa on 17 February 1996 through the border of Namibia after having fled his country of origin, because of fear of persecution by the regime that was in place at the time and that he came to South Africa as an asylum seeker.

[31] It was not disputed by the appellant that the recordal on the MCS document of his full names, date of birth and occupation, is correct. What he disputed is that he arrived in South Africa from the DRC on 5 January 1996, and entered from Johannesburg International Airport at 18h29, with an official DRC passport, bearing

[4] MCS records and Mr Vorster's affidavit.

passport number 504222, that the purpose of his visit was to work in the media industry and that he was issued with a temporary resident permit (TRP number HRCGZQH), which expired on 5 February 1996.

[32] The appellant did not provide a substantive response to the concerns raised by the Minister about his alleged misrepresentation regarding his asylum seeker status. In his response in a letter dated 27 September 2013, the appellant stated that the Department's immigration and records management systems were unreliable, erratic and untrustworthy, 'unstable, error-prone, mixing up users, picking up data not entered and mixing up several data (data manipulation) causing in the process unreliable data'.

[33] The investigations that were undertaken on behalf of the Minister in 2013 and 2016 revealed certain information about the appellant's asylum seeker status and about the process the appellant followed in obtaining his citizenship. The appellant's claims that he came to South Africa in order to seek asylum from persecution by his country of origin, are unfounded. His application for refugee status was merely a misuse of the refugee/asylum system. The evidence reveals, on the appellant's version, that upon his arrival in South Africa, he reported at the Braamfontein Refugee Reception Office to register as an asylum seeker. He was issued with a temporary permit, which he had to renew from time to time. This continues to be the case until 10 December 1999, when he withdrew his asylum application following his marriage with Ms Mfuku on 5 October 1999. During the same period, the appellant says, he worked for the DRC Embassy in Pretoria. This is inconsistent with his claims that he fled DRC, because he felt his life was in danger.

[34] The appellant's response to the concerns raised by the Minister about his status as an asylum seeker, is unsatisfactory and fails to address the pertinent questions. In his response dated 27 September 2013, the appellant stated the following in para 48 of the letter:

'DRC Embassy in Pretoria – which operates in South Africa was neither home (DRC) nor within the DRC territory (not operating under DRC jurisdiction). The Embassy during 1998-2000 abided by South African rules. The Embassy is outside the territorial jurisdiction of DRC. As such, international protection still applied (come into play). Administratively

assisting the Chargé d' Affaires on private capacity as a consultant during a turbulent and chaotic period where **there was no constitution in DRC, no rule of law and no governance** does not legally or conventionally equate to re-availment. During that period, the need for protection, the circumstances and conditions in DRC between June 1998 and August 2000 further made me a **refugee "sur place".**'

[35] The analysis of the evidence makes it clear that the appellant's application for asylum was not bona fide. The CV claimed employment in an official capacity. That included assisting in visa applications. It also claimed retrenchment. This is hardly private employment as a consultant. The appellant's explanation deals with none of this in detail but airily dismisses the legitimate concern expressed in the letter of a material misrepresentation. The appellant misrepresented his status and that to the extent that there was a factual dispute regarding this fact, the full court correctly accepted the Minister's version applying the *Plascon-Evans* principle.

[36] Additionally, another piece of evidence that was relied upon by the Minister to revoke the appellant's citizenship related to the manner in which the appellant acquired citizenship by naturalisation. On 1 July 2003 the appellant, on the basis of his marriage to Ms Mfuku, applied for permanent residence. This application was supported by Ms Mfuku. But at that stage Ms Mfuku was already in a relationship with another man, known as Orji and two children were born from this relationship, the first of whom was born on 15 October 2003. The second one was born on 12 November 2005.

[37] The appellant does not dispute that, during the subsistence of the marriage, Ms Mfuku had a relationship with Orji and that the two children were born from this relationship. The appellant in fact admits that their 'relationship had soured during or around 2003 and [they] had then decided to stay apart of each other'. He says he met his current partner, Ms Tsotetsi in July 2005. Having regard to these facts, the full court's acceptance of the Minister's version that the appellant's marriage to Ms Mfuku was a marriage of convenience, cannot be faulted. The conclusion is ineluctable that when the appellant applied for naturalisation in July 2003, there was no longer a good faith marriage between him and Ms Mfuku. The permanent residence permit that was

issued to the appellant, was thus issued through misrepresentation that they were still staying together when in fact, they were separated. There is no evidence from Ms Mfuku to corroborate the appellant's version that a good faith marriage existed when he applied for a permanent residence permit. In fact, it is the Minister's version that during the investigation Ms Mfuku was approached for a statement. She declined to co-operate, stating that she had been approached and warned by the appellant against co-operating with the officials of the Department.

[38] In the application form for permanent residence permit, the appellant stated that he had left his immediate family members in DRC, including his parents, siblings and his daughter. The extract from the Department's Traveller's Record System, on which the Minister also relied, revealed that the appellant travelled by air from Johannesburg to DRC on 13 June 2012 and returned on 22 June 2012. Although the appellant denies this fact in his replying affidavit, he, however, confirms it in para 49 of his letter addressed to Mr Malatsi on 27 September 2013. The denial that he visited DRC in June 2012, is therefore untruthful. It is apparent from this disclosure that there was no basis for the appellant to have had a well-founded fear of persecution by the DRC government and that his claim that he had come to South Africa as a refugee, is unfounded.

[39] The appellant's contention that, in the absence of the records relating to his application for a temporary permit, which had gone missing, the full court could not establish whether the requirements in s 8(1) had been met, is rejected. It is correct that it was held in *Democratic Alliance v Acting National Director Public Prosecutions*[5] that the production of the administrative record is inherently necessary for a court to undertake the task of determining the regularity of the proceedings sought to be impugned and that without the record, a court could not perform its constitutionally entrenched review function.

[40] However, in the present case the absence of the appellant's asylum file is not fatal to the Minister's case. The Minister did not have to rely solely on the asylum file

[5] *Democratic Alliance v Acting National Director Public Prosecutions* [2012] ZASCA 15; [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA); 2012 (3) SA 486 (SCA) para 33.

to establish a case based on the provisions of s 8(1) of the Citizenship Act. Apart from the asylum file other reliable evidence in the form of MCS documents was available. The evidence on which the Minister relied, was not woefully inadequate to arrive at the decision.[6] The material at the disposal of the Minister was sufficient to enable him to reach a conclusion that the appellant had obtained the certificate of naturalisation by means of false representation or the concealment of a material fact and in conflict with the Citizenship Act. The Minister's decision to deprive the appellant of his South African citizenship is therefore, not unreasonable or irrational. There is a rational objective basis justifying the connection made by the Minister between the evidence before him and the decision he made.[7]

[41] The appeal is dismissed with costs including those of two counsel.

_____

D H ZONDI
JUDGE OF APPEAL

[6] *Owners of MV Banglar Mook v Transnet* [2012] ZASCA 57; [2012] 3 All SA 632; 2012 (4) SA 300 (SCA) para 61.
[7] *Trinity Broadcasting, Ciskei v Independent Communications Authority of South Africa* [2003] 4 All SA 589 (SCA) para 21.

APPEARANCES

For the appellant:	L M G Mfazi (with T Tshabalala and S Msimanga)
Instructed by:	Z & Z Ngogodo Inc, Waterfall Park, Midrand N.W. Phalatsi & Partners, Bloemfontein
For the first and second respondents:	N A Cassim SC (with E D Richards)
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein