

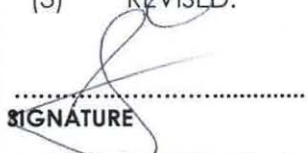
REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 53681/2019

DOH: 25 October 2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
SIGNATURE	DATE
	18/5/2022

VLADISLAV KULAGIN

APPLICANT

and

**THE DIRECTOR GENERAL
OF HOME AFFAIRS**

FIRST RESPONDENT

THE MINISTER OF HOME AFFAIRS

SECOND RESPONDENT

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 18 MAY 2022

MALI J

1. The applicant seeks an order declaring that he is a South African citizen. Second, the court to direct the Department of Home Affairs, the first respondent to advise the appropriate authorities in New Zealand that there is no impediment to the applicant's South African citizenship.
2. Section 21 (1) (c) of the Superior Courts Act, 10 of 2012, which reads as follows:

"in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."
3. The law pertaining a declaratory order is restated in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*¹ the court confirmed the two-stage approach adopted by Watermeyer JA in *Durban City Council v Association of Building Societies*.² The two stage approach involves that:

¹ 2005 (6) SA 205 (SCA).

² 1942 AD 27 at 32.

(1) *"the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation'";* and then, if so satisfied, (2) *"the Court must decide whether the is a proper one for the exercise of the discretion conferred on it."*³

4. The applicant's case is that he has an existing right in that he is a South African through naturalization. According to the applicant he is originally from the Republic of Georgia which he left in 1996 due to economic and political instability as a result of war. It is common cause that he entered South Africa through a visitor's visa. On 25 March 1996 he was issued with an asylum seeker permit for the first time. On 1 July 1998 the applicant's application for asylum status was rejected. On 22 October 1998 the Department of Home Affairs ("DOHA") issued the applicant with a permit in terms of Section 42 of the repealed Aliens Control Act, 96 of 1991. The permit was valid until 22 January 1999, which permitted the applicant to take up employment in the Republic of South Africa pending appeal against rejection.

5. On 23 December 1999, he married a South African citizen, Rosetta Martha Vorster whom he later divorced. He is a businessman residing at Hammanskraal Pretoria. He would like to emigrate to New Zealand, and according to New Zealand authorities his South African citizenship has been flagged. According to him, he has a valid South African passport, therefore the news of the flagging of his status came as a surprise.

³ Ibid, quoted in Cordiant supra at para 16 with approval.

Although he admits that there was an investigation on his status by South African authorities, he states that he was never informed of the outcome of the investigation. Significantly, his averment is that the first respondent granted him a renewed South African Passport. The applicant's averment at paragraph 4.4.1 and 4.4.2 of the founding affidavit that his permanent residence in South Africa was approved is not supported by any evidence, **to be precise he did not attach the permanent residence permit** (*own emphasis*). The applicant only annexes a non- South African Identity document. On his own admission he never had a South African Identity document.

6. Furthermore, on applicant's own version his application was submitted in 2002 and granted in 2003; this is despite no documentary proof to support his statement. Paragraph 10.9 and 10.10 of the applicant's affidavit the following is stated:

"My application was submitted in 2002/2003. My Citizenship was granted in 2003, some 16 years ago. I have no documentary proof of how I applied. It was too long ago. All I can say is that I did this myself at the regional office in Ga-Rankuwa and followed all instructions given to me by DOHA".

"I am advised by my attorneys that a few years ago all citizenship applications nationwide were move to the head of the office of the DOHA".

7. The statement about his attorneys is not supported by any confirmatory affidavit by the said attorneys.

8. Section 5(1) of the South African Citizenship Act No.88 of 1995 provides as follows:

“The Minister may, upon application in the prescribed form, grant a certificate of naturalization as a South African citizen to any alien-who satisfied the Minister that:

- (a) he is not a minor, and*
- (b) he or she has been lawfully admitted to the Republic for permanent residence; and*
- (c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than one (1) year immediately preceding the date of his or her application, and that he or she has, in addition , been resident in the Republic and that he or she has been so resident for a continuous period of not less than one (1) year immediately preceding the date of his or her application, and that he or she has, in addition, been resident in the Republic for a further period of not less than four (4) years during the eight (8) years immediately preceding the date of his or her application; and*
- (d) he or she is of good character; and*
- (e) he or she intends to continue to reside in the Republic or to enter or continue in the service of the government of the Republic or of an international organization of which the government of the Republic is a member or of a person or association or person's resident or established in the Republic; and*
- (f) he or she is able to communicate in any one of the official languages of the Republic to the satisfaction of the Minister, and*

(g) he or she has an adequate knowledge of the responsibilities and privileges of South African citizenship.”

9. The respondent's case is that at the time of the applicant's marriage in 1999 he was already a prohibited alien because his refugee status issued in 1998 was not approved, as he was granted two weeks' visitor's visa entry. The decision taken in 1998 still stands.

10. The applicant did not follow procedures, to wit to launch an appeal within thirty (30) days of decision. The applicant's reply is that he is not appealing the decision of the Minister, he is seeking to be declared a South African citizen, therefore the appeal procedure is not applicable to his case.

11. In terms of the Alien's Act 1991 which was in force when the applicant applied for refugee status the following bears:

“any person to whom a permit was issued under subsection (1) and who remains in the Republic after the expiration of the period for which, or acts in conflict with the purpose for which, or fails to comply with a condition subject to which, it was issued, shall be guilty of an offence and may be dealt with under this Act as a prohibited person.”

12. Accordingly, the applicant's marriage did not in any way legitimize his presence in the Republic. The applicant seemingly bases his right and/or naturalization status on the fact that he married a South African

citizen and was later issued a renewed South African passport. In this regard respondents' answer is that the applicant's documents were fraudulently obtained as it is not clear to the respondents as which official assisted the applicant.

13. At paragraph 5.3 of the applicant's affidavit he states that he was assisted by two officials at the Department of Home Affairs, a certain MOLOTO and LEBOHO. The court is non- the wiser whether Moloto and Leboho are names and or surnames of the officials. Paragraph 5.4 of his founding affidavit is telling. It reads as follows:

*"I filled in citizenship forms with all my details and attached two letters, one from my employer and the other stating reasons why I needed South African citizenship. I left the forms with a **DOHA official**. (own emphasis). She told me that as soon as any information becomes available she will contact me immediately."*

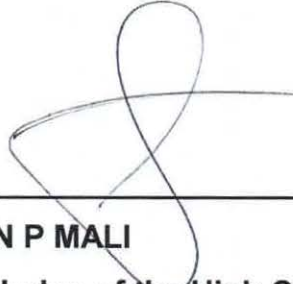
14. It is trite law that the applicant must make the case on the founding affidavit. In the present matter from the applicant's averments as above and from his replying affidavit we do not know who is Moloto, Leboho referred to above. From the replying affidavit it appears that the officer he refers to is Ms. Marian Myburgh who the applicant says she seemingly lost his documents. It is not clear on what basis the allegations against Ms. Myburgh are made.

15. The applicant cannot link his marriage to any perceived permanent residency. The date of rejection of his asylum status was in 1998, and he

got married on 23 December 1999. He married fully knowing that he was in the Republic illegally. His marriage did not automatically grant him a right to naturalization. Applicant himself cannot prove that he was issued with certificate of naturalization in terms of section 5 (1)(c) of the Citizenship Act reading as follows:

“he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application;”

16. Furthermore, the order granted on 4 May 2020 declaring the applicant a South African citizen was later rescinded by the order of court on 18 May 2021. On the facts alone the Plascon Evans Rule must find place in the present matter. The court is inclined to believe the respondent. The doctrine of separation of powers is also applicable. The court is not endowed with powers to grant permits and or citizenship as it is clear from the law above.
17. In conclusion, the applicant did not prove any existing and or future contingent right. Therefore, there is no need to get to the second leg of enquiry; that there is a proper right or obligation for the exercise of the discretion conferred on the court.
18. Having regard to the above the following order is granted;
 ORDER
 1. The application is dismissed with costs.



N P MALI
Judge of the High Court, Pretoria

APPEARANCES:

For the Applicants: ADV. HH Cowley

Instructed by: McMenamin Van Huyssteen & Botes Inc.

For the Respondents: ADV. S Mpakane

Instructed by: The State Attorney, Pretoria