



**IN THE HIGH COURT OF SOUTH AFRICA;
LIMPOPO DIVISION; POLOKWANE**

CASE NO: 4013/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/~~NO~~
(3) REVISED.

DATE: 01 SEPTEMBER 2023 **AJ MAKWEYA T.R**

SIGNATURE:

In the matter between:

ONAI MUZORE

: FIRST APPLICANT

JUNIOR MUNYAKA

: SECOND APPLICANT

And

MINISTER OF HOME AFFAIRS

: FIRST RESPONDENT

DIRECTOR-GENERAL DEPARTMENT

OF HOME AFFAIRS

: SECOND RESPONDENT

JUDGMENT

Heard: 29 MAY 2023

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **01ST SEPTEMBER 2023**.

MAKWEYA AJ:

INTRODUCTION:

[1] This is a review application wherein the applicants want the court to review the decision of the Minister of Home Affairs of not to issue births certificate to non-South African who were born in the republic of South Africa as it is unlawful, unconstitutional and invalid.

FACTS:

[2] The first and second applicants are both Zimbabwean adult citizens who are currently staying in South Africa at Ga-Maesela village, in Sekhukhune district. They have three minor children who were born between **2010** and **2016**. All their minor children were given unabridged certificated for non-Citizens. The first applicant is allegedly in south Africa on a work permit and the second applicant is his partner and mother of his children.

[3] The applicants want the court to review the first respondent's administrative decisions or rules on the basis of certain grounds of review regulated by section 33 of the constitution and section 6 of the promotion of administrative Justice Act 3 of

2000. Section 33 protects the right to administrative action that is lawful, reasonable and procedurally unfair.

[4] The applicants claim that the issues at hand go into the hearts of the applicants' right to administrative decision that is lawful, reasonable and procedurally fair. The applicants rely on provisions of PAJA for their application for review and settling aside of the first respondent decision to not issue birth certificates for South African citizens for the applicant's minor children.

[5] The applicants also stated that the application for review in terms of PAJA raises constitutional issues in that it is premised on the right to fair administrative action enshrined in section 33 of the constitution.

[6] The second respondent is Minister of Home Affairs who oversees the registration of everybody born and who dies in South Africa. The second respondent should also keep track of people entering and leaving the south African borders. Due to the first respondent responsibility a review of its decision in terms of the PAJA raises constitutional issue.

[7] The applicants approached the department of Home Affairs in Moleletshe clinic Sekhukhune to apply for birth certificate for south African citizens for their minor children. The applicant's application was prompted by the fact that the applicant's minor children were all born in South Africa and don't have citizenship or nationality of Zimbabwe. The applicant's basis for south African citizenship of their minor children is in terms of section 2(2)(a) and (b) of the south African Citizenship Act 88 of 1995 as amended.

[8] The applicants were informed that the only assistance they could get from the second respondent was to be issued with unabridged birth certificates for non- south African citizens for their minor children in order for them to go to Zimbabwe so that the authorities issue them with Zimbabwean birth certificates to their minor children.

[9] The respondents stated that the issue at the heart of this application or the dominant interpretation is lawful residence or citizenship. In the constitutional text, citizenship being interpreted to include holders of various permits, e.g. work or visits permits. That section 28 of the constitution sets out rights to which children have including the right to nationality in south Africa, citizenship or nationality of their parent's section 2(2)(a) and (b) of the citizenship Act.

[10] South African citizenship is acquired through naturalization if the applicant held a permanent residence permit for at least 5 years or if the applicant is married to a south African and/or is a minor under the age of 21 years with permanent residence. If one parent is a south African citizen, a minor will be a citizen by birth. Since the advent of constitutional democracy, a new concept of constitutional citizenship was introduced.

[11] Applicants claim to be holders of work and visitor's permit respectively and that all their minor children are born in south Africa whilst the applicants held such permits.

[12] The procedure for acquisition of citizenship in south Africa is set down in all applicable legislation, the citizenship Act 1995, Birth and Death Registration Act and

Identification Act 1992. The purpose of the identification Act is to provide for the compilation and maintenance of a population register in respect of the identity cards and certain certificates to persons whose particulars are in the population register.

[13] The respondent also stated that it is difficult to issue a south African birth certificate for citizenship where grounds for citizens has not been established as in this case it has not been established in terms of either birth or naturalisation.

[14] Children born of permanent residents follow their parent's status and the respondents would not wish to separate children from their parents. The applicants are from Zimbabwe and have not renounce their citizenship. In terms of their Zimbabwean Citizenship Act 2018 in sections 4 and 5, it provides that Zimbabwean citizenship is acquired by birth. Dual citizenship is prohibited under their section 9 of that Act, as such the applicant's children are Zimbabweans citizenship.

[15] The respondents also stated that citizenship cannot be conferred on children of permit holders for work approved for that purposes of work, study business and holiday. The notification of birth can be taken to the parents' country of origin which is Zimbabwe for registration and issuing of passport.

[16] Despite the special permit dispensation extended to Zimbabwean nationals, over some time, some parents have failed to regularise their stay and thus disadvantaging their children. The applicants failed to safeguard their children's identity and nationality because they might be in the country illegally for the possibility of expired permits. Not every person who is south Africa is with an intention of staying.

[17] The constitution also deals with citizenship rights in two angles, bill of rights and section 3 of the constitution. The constitution recognises that certain rights accrue to citizens only and those are in the bill of right adhere to everyone.

[18] It is the respondent's argument that the applicants have failed to elevate their status to that of residence as a result it is doubtful that having arrived in the early 2000 as they still remain permit holders. This position emphasises the constitutional court's findings that citizenship is not just a legal status but goes to the core of a person's identity and their sense of belonging.

[19] The constitution delegated the authority of defining citizenship to national legislation, Citizenship Act in section 2. The applicants and their minor children have Zimbabwean citizenship and are not refugees. They have also not disclosed their hindrance for application to be permanent residents.

[20] The following persons are South African citizens by birth: Persons born in South Africa before October 6, 1995. Persons born in or out of wedlock on or after October 6, 1995 if one of his or her parents is either a South African citizen or a permanent resident.

[21] Section 2, Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if— (a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality.

[22] To be eligible for naturalization, a person must have been a permanent resident

of South Africa for a specified period, typically five years or longer. They must also meet certain requirements, such as being of good character, being able to speak one of the official languages, and passing a citizenship test.

[23] The applicants do not meet the requirements for permanent residency nor citizenship and the same applies to their minor children. However, the children are favoured by the Act in that the provision which states that children born within the republic to non-south African parents or who are admitted in the republic for permanent residence qualifies to apply for south African citizenship upon becoming major, if the child lived in the country from their date of birth to age of majority and their birth had been registered in accordance with the birth and deaths registration act.

[24] That the respondent's decision states that persons can apply for the confirmation of their South African status, this may include Citizenship or Permanent Residency. These applications are referred to the South African Department of Home Affairs where the information will be checked against the National Population Register.

[25] Citizenship is a relationship between an individual and a state to which the individual owes allegiance and in turn is entitled to its protection. Citizenship implies the status of freedom with accompanying responsibilities.

[26] Expanding on citizenship in South Africa it says it is obtained by birth, descent or naturalisation. The basic principle of the South African citizenship is that a child follows the citizenship or nationality of his or her parents. If one parent is a South

African citizen, the child will be a citizen by birth.

[27] But if you have a visa or permit that gives you the right to live permanently in a country outside of your country of origin, that country will then be your country of residence.

[28] Non-South African citizen means a person who holds a valid temporary residence visa contemplated in sections 11 to 23 of the Immigration Act, and includes an asylum seeker or refugee issued with a permit in terms of section 22 or 24 of the Refugees Act 38 of 1998.

[29] Obtaining South African citizenship by naturalization is a process by which a person who is not a citizen of South Africa can apply to become one. To be eligible for naturalization, a person must have been a permanent resident of South Africa for a specified period, typically five years or longer.

THE ISSUES:

[30] The issues to be considered is whether the applicant's children can be granted citizenship:

1. Whether citizenship can be granted to children of persons who are neither permanent residents nor citizens who have renounced citizenship of their country of origin.
2. Whether the minor children qualify for the south African citizenship by birth in terms of section 2(2)(a) and (b) of the citizenship Act.
3. Whether the legal status of admission of a parent in South Africa determines

the citizenship of the child under section 2(2) of the citizenship.

THE LAW

[31] Section 2(2)(a) and (b) states that:

‘Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if—
(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and
(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992)’

[32] ***Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11** It is now axiomatic that the interpretation of legislation must follow a purposive approach. This purposive approach was described in *Bato Star* as follows:

“Certainly, no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background.”

[33] The purposive or contextual interpretation of legislation must, however, still

remain faithful to the literal wording of the statute.

[34] The applicants in their argument rely on the above-mentioned section, however they don't quote it in full. The section 2(2) states clearly that a person who is not a South African can be a south African by birth if he does not have citizenship or nationality of any other country or has no right to such citizenship.

[35] **Chisuse and Others v Director-General, Department of Home Affairs and Another [2020] ZACC 20**, *"the Court considered the evidence of citizenship brought by the applicants and, save in respect of the second applicant, found that the requirements had been met; namely, that the first and third to fifth applicants were, indeed, born to a South African parent outside of the Republic"*.

The facts of the Chisuse case were different from the current case in that in Chisuse, the parents of the children were South Africans and the court declared their children South African citizen as per their parent's origin.

[36] In the present case the minor children do have citizenship and/or nationality of a country as their parents are of Zimbabwean nationality and therefore they assume the citizenship of Zimbabwe like their parents. The minor children have a right to Zimbabwean citizenship by virtue of their parents being its citizen. The applicant's submission is that the above argument is misplaced. However, it should be taken into consideration that one cannot separate the children from their parents only with regard to citizenship. The first issue which the court should look at is the fact that the applicants are the natural guardians of the three minor children and that the next step is the children's Act which states that when dealing with matters concerning

children. The court should take the interest of the children into consideration.

[37] The applicant's children are not entitled to a full citizenship status as their parents don't qualify to be the said status. The south African Children's Act 38 of 2005 ,give effect to the following constitutional rights of children, namely- (i) family care or parental care or appropriate alternative care when removed from the family environment; (ii) social services; (iv) protection from maltreatment, neglect, abuse or degradation; and that the best interests of a child are of paramount importance in every matter concerning the child; (c) to give effect to the Republic's obligations concerning the well-being of children in terms of international instruments binding on the Republic; (d) to make provision for structures, services and means for promoting and monitoring the sound physical, psychological, intellectual, emotional and social development of children; (iii) protection from maltreatment, neglect, abuse or degradation.

[38] Investigating Directorate: **Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.** [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (Hyundai) at **para 22**. it was stated that *"strengthening this interpretive exercise is the obligation enshrined in section 39(2) of the Constitution, which requires courts when interpreting legislation to give effect to the "spirit, purport and objects of the Bill of Rights". This requires that— "judicial officers [must] read legislation, where possible, in ways which give effect to [the Constitution's] fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."*

[39] The minor children cannot be separately assessed without looking into the status of their parents as Zimbabweans, because whatever decision the court arrives at will also affect them as their guardians. Their best interest with regard to family relations and belonging should be taken into consideration.

[40] They derive their rights from their parent's status. The fact that they were born in South Africa does not mean that they abandon their parent's country, especially because their parents are in South Africa allegedly on a 'work permit' which was not attached in the applicants bundle and therefore the court cannot elaborate more on it because it was not before court on the date of argument.'.

[41] The terms of the work permit are unknown and 'its start off' and 'end off' dates are not known and the applicant did not argue about it. The court as it stands does not know if the applicant is indeed on work permit or not. And in that case the court will assume that the applicants especially 1st applicant as he was the one claiming that he has a work permit not to have one, that will mean that the applicants are assumed to be visitors as they only have their passports to prove that they are legally in the country.

[42] If indeed the applicants wants their children to have south African citizenship, the law does not bar them from doing so, Section 3 of the citizenship Act 1995, further states that any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth, 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 is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992).

[43] It should also be noted that every time the Children's Act 2005 requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

(a) the nature of the personal relationship between- (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances; (b) the attitude of the parents, or any specific parent, towards- (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;

(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;

(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from- (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;

(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; the need for the child- (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition.

[44] The rights which a child has in terms of this children's Act supplement the rights which a child has in terms of the Bill of Rights.

[45] Also, Section 19 of the children's Act 2005, states that the biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.

[46] The court must take into account of the best interests of the child; the relationship between the applicants and the children, and any other relevant person and the children, the degree of commitment that the applicant has shown towards the children; the extent to which the applicants have contributed towards well-being of the children.

[47] Parties must take into consideration the sensitiveness of this matter and note that since the applicants are non- South Africans. One of them is on a visitor's permit but claims citizenship for their minor children. Their application must be regarded as an inter-country adoption for the purposes of The Hague Convention on Inter-Country Adoption and Chapter 16 of this Act 1995.

[48] Inter-country adoption entails the legal transfer of parental rights and responsibilities from birth parent(s) to you across international borders. This occurs when a child is adopted into a family whose country of origin and citizenship differs from the child's own. The applicants will be retaining their Zimbabwean citizenship but however want their minor children to have South African citizenship. The applicant's application is bad in law as it will separate the children from their natural parents.

[49] The court has to be very careful when dealing with minor children and has to take the interest of the children into consideration. In this case it is not in the children's interest to be separated from their parent's origin and their parents have to follow the correct process and procedure of the law for them to be recognised as the South African citizen.

[50] The applicants have also failed to make available a report and recommendations of a family advocate; a social worker or other suitably qualified person who could have submitted a report to court, to enable court to satisfy itself with regard to the interest of the minor children.

[51] The applicants have stated that section 6(2)(f)(ii) of Promotion of Administrative Justice Act 3 of 2000 (PAJA) is applicable but that is not the case in this matter as this decision is rationally connected to the information which was before the Administrator.

[52] I therefore find that the respondent's decision of not registering the applicant's children as South African citizen is lawful and the applicants should register their children from at their place of origin which is Zimbabwe. The Applicants application does not meet the requirements for review and their application should be dismissed.

ORDER

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

53.1. The applicant's application is dismissed

53.2. That each party pay their own costs.


T.R Makweya AJ

Acting Judge Limpopo Division.

APPEARANCES:

Counsel for the Applicant

: Adv. SS Tebeila

Instructed by

: Ntene Attorneys

Respondents

: Adv. T A Makola & Sefula

Email:nteneattorneys@gmail.com

Instructed by

: State Attorneys

Date of Hearing

: 29 May 2023

Date of Judgment

:01 September 2023