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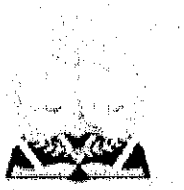


IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE NUMBER: 15566/2016

In the matter between:

MIRIAM ALI	**First Applicant**
ADEN NUREDIN SALIH	**Second Applicant**
KANU TEKA JORSEN NKOLOLO	**Third Applicant**
FARIEDA NSOKI	**Fourth Applicant**
CAROLINE MASUKU	**Fifth Applicant**
MURPHY NGAGA	**Sixth Applicant**

and

THE MINISTER OF HOME AFFAIRS	**First Respondent**
THE DIRECTOR-GENERAL OF HOME AFFAIRS	**Second Respondent**

DATE OF HEARING: 24 August 2017

DATE OF JUDGMENT: 7 September 2017

CORAM: Wille AJ

JUDGMENT

WILLE, AJ

This is an opposed motion about the interpretation of section 4(3) of the South African Citizenship Act 88 of 1995 ("the Act").

Initially, there were six applicants to the application ("the applicants"), but the fourth applicant no longer proceeds with the relief requested.

The applicants were all born in South Africa and have lived in South Africa for the past eighteen years and are majors in their own right.

The respondents are the "Minister of Home Affairs" and the "Director General of Home Affairs" ("the respondents").

The respondents have refused to grant applications for citizenship to the applicants in terms of section 4(3) of the Act.

The applicants seek an order directing the respondents to;

> *1.1 Grant each of the applicants South African citizenship within ten days of date of this order in terms of section 4(3) of the South African Citizenship Act 88 of 1995.*
>
> *1.2 Alternatively, forthwith accept applications on affidavit from each of the applicants for the granting of South African citizenship in terms of section 4(3) of the South African Citizenship Act 88 of 1995 and to decide on each such application within ten days of receiving it.*

2. Declaring that section 4(3) of the South African 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. Directing the respondents to:

3.1 Within one year of the date of this order, enact the necessary form to allow for applications in terms of seetion 4(3) of the South African Citizenship Act 88 of 1995; and

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

Section 4(3) of the Act provides 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 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 51 of 1992).

All the applicants meet the requirements of sub-section (3)(a) and (b) above and the facts in the affidavits filed in support of this application are largely common cause.

A minor dispute exists in connection with the birth certificate of the third applicant.

The third applicant makes the positive statement in his affidavit that he was born in Mowbray Maternity Hospital in Cape Town and attaches his "maternity certificate".

The third applicant further states under oath that he did have a birth certificate issued to him, but that same has been lost or misplaced.

The factual allegations in this connection made by the third applicant are not disputed by the respondents.

The respondents resort soley to legal argument in this connection.

The relevent common case facts are;

1. Each of the applicants was born in South Africa and their births have been registered in South Africa.

2. Each of the applicants lived in South Africa until they turned 18 years of age, which occurred after 1 January 1993.

3. Each of the applicants submitted an application for citizenship (in terms of section 4(3) of the Act), to the respondents and the respondents refused to accept their applications.

4. Section 4(3) was introduced into the Act by virtue of the South African Citizenship Amendment Act 17 of 2010 ("the Amendment Act") which came into operation on the 1st January 2013.

Mr Budlender represents the applicants and Mr Papier represents the respondents.

Mr Papier on behalf of the respondents takes, inter alia, the following position:

1. That there is no prejudice to the applicants because they may apply for "refugee" status alternatively, permanent residence;

2. That section 4(3) of the Act does not apply to persons who were born before the 1 January 2013; and

3. That section 4(3) must be read with provisions of section 2(2) of the Act and that section 2(2) of the Act finds application in the present case.

Section 2(2) of the Act provides as follows:

"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").

This "position" now taken by the respondents was not raised or even hinted at in their opposing papers.

As correctly pointed out by Mr Budlender, section 2(2) is of no application in and to the present matter.

It is abundantly clear that section 2(2) does not make any reference to the "parents" of the person who pursues any relief under section 2(2) of the Act.

Further, I am of the considered view that the "issue of prejudice" is relevant in these proceedings, with specific reference to the relief as requested by the applicants in these circumstances.

The prejudice to the applicants involves not only practical implications but also fundamental constitutional entitlements.

The applicants have a statutory right to apply for citizenship and the respondents cannot limit or interfere with this right by contending that "no prejudice flows".

By adopting this approach, the respondents are effectively "ring-fencing" the applicants as "non-citizens" in the country that they have lived in since birth and which most likely the only country that they have ever experienced and known.

By precluding the applicants from obtaining (or even applying) for citizenship, the respondents are infringing upon the "dignity and personhood" of the applicants and effectively granting to them a status of "second-class" citizens.

The issue of the "absence of prejudice" or not, is simply not a justification for the respondents to refuse to entertain the applications for citizenship by the applicants.

The essential, real and sole issue left for determination by this court is the issue of the allegation that section 4(3) cannot be applied retrospectively to persons born in South Africa, prior to 1 January 2013.

Put in another way, the respondents contend that section 4(3) will only become of application on ***1 January 2031***.

It is common cause that all the applicants were born before 1 January 2013.

All the applicants attained the age of majority after 1January 2013.

The applicants position is that they only seek to have section 4(3) operate for the benefit of those persons who qualified for citizenship after it came into operation.

This would apply to persons who attained majority after 1 January 2013.

This must, on any proper construction of section 4(3), be the correct interpretation.

> ***"However a statute does not operate retrospectively 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 retrospective only when it is applied to rights acquired prior to its enactment."***

(See: Nkabinde and Another v Judicial Service Commission and others 2016 (4) SA 1 (SCA)

The reluctance of courts to interpret legislation to apply retrospectively is based on the premise or danger that courts do not wish to interfere with vested rights.

The applicants, in this matter, do not wish to take away vested rights or create new obligations.

The applicant's position is simply that because the applicants only qualified for citizenship under section 4(3) after it was enacted, they stand eligible for the benefit that it confers.

By 1 January 2013, when section 4(3) came into operation;

1. None of the present applicants were majors;

2. None of the present applicants had applied for citizenship; and

3. The respondents had not taken a single step in connection with the citizenship of the applicants.

I cannot envisage an incorrect application of "retrospectivity" in these circumstances.

Even if I am wrong, the respondent's convenient interpretation takes no account of the duty to interpret statutes in a manner that promotes the spirit, purport and object of our "Bill of Rights" as is required by section 39(2) of our Constitution.

The respondents interpretation of section 4(3) as contended for, caters for an artificial distinction between two sets of children (those who attain the age majority after the statute commenced operation and children born after 1 January 2013).

This interpretation (as contended for) further potentially violates section 9 (1) of our Constitution which provides as follows:

"everyone is equal before the law and has the right to equal protection and benefit of the law".

The respondent's interpretation further potentially undermines the right to human dignity as enshrined in Section 10 of our Constitution.

The interpretation as contended for, would essentially mean that children who were born in South Africa and who lived here until they attained the age of majority, would have no right to apply for citizenship. This is clearly cannot be in their best interests.

The final issue to be dealt with is the issue of the relief requested by the applicants.

In unfortunate and sensitive matters such as these, the court must be mindful of "judicial over-reach."

The court must not be seen to usurp and undermine the function of the respondents.

The applicants contend for an order that they be granted citizenship by the respondents in terms of section 4(3) of the Act.

This issue was eloquently and thoroughly argued by Mr Budlender on behalf of the applicants with reference to many decided authorities in this connection.

In my view, for this court to direct the respondents to grant to the applicant's citizenship in terms of section 4(3) of the Act, would amount to stepping into the "arena" of the respondents and would amount to judicial over-reach.

In the circumstances, I make the following order:

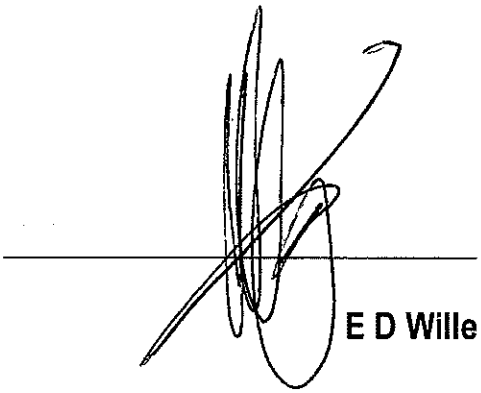
1. *That the respondents are to forthwith accept applications on affidavit from each of the applicants (excluding the fourth applicant), for the granting of South African citizenship in terms of section 4(3) of the South African Citizenship Act 88 of 1995 and to decide on each such application within ten days of receipt of such application/s.*

2. *That section 4(3) of the South African 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:*

   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 African 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) South African Citizenship Act 88 of 1995, on affidavit.*



E D Wille

Acting Judge of the High Court