CONSTITUTIONAL COURT OF SOUTH AFRICA

Yamikani Vusi Chisuse and Others v Director-General, Department of Home Affairs and Another

CCT 155/19

Date of hearing: 13 February 2020
Date of judgment: 22 July 2020

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 22 July 2020 at 10h00, the Constitutional Court handed down judgment in an application for confirmation of an order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court declared section 2(1)(a) and (b) of the South African Citizenship Act 88 of 1995, as amended by the South African Citizenship Amendment Act 17 of 2010 (amended Citizenship Act) unconstitutional and invalid. The central question before the Constitutional Court was whether the impugned provisions are, indeed, unconstitutional and therefore whether the order of invalidity should be confirmed.

Acquisition of citizenship in South Africa is governed by legislation. South Africa has had a number of Citizenship Acts throughout its history, and each has prescribed various requirements for the acquisition of citizenship. Historically, citizenship was in many ways used as a deeply fraught political, social and ideological tool to define access to membership of the South African polity. Pre-constitutional citizenship legislation in South Africa systemically stripped millions of black South Africans of their citizenship through unfair and discriminatory laws. The removal of full citizenship from many black South Africans during the previous century, and longer, constituted an assault on the dignity and equality of many persons living in South Africa. In the constitutional dispensation, however, citizenship is now protected by the Constitution which states in section 20 that citizens may not be deprived of their citizenship.

The applicants are persons born outside of South Africa to a South African parent before 1 January 2013, which was when the South African Citizenship Amendment Act 17 of 2010 (2010 Amendment) came into effect. The first respondent is the Director-General of the Department of Home Affairs – the functionary responsible for registering births, entering people onto the

population register and assigning identity numbers and issuing identity documents. The second respondent is the Minister of Home Affairs: the member of the Executive responsible for the administration of citizenship legislation.

Based on the parties' interpretation of the amended Citizenship Act, the applicants have been unable to acquire citizenship under the amended Citizenship Act; despite the fact that they could have acquired citizenship under the previous Citizenship Act, prior to the 2010 Amendment, had they simply registered their births. The applicants thus brought an application before the High Court requesting that the impugned provisions be declared unconstitutional and invalid for depriving them, and people in a similar situation, of their citizenship and that a reading-in be made to cure the constitutional defect. The application was heard by the High Court on the unopposed motion roll due to the respondents' repeated failure to file their answering affidavit.

The High Court granted the relief sought and declared section 2(1)(a) and (b) of the amended Citizenship Act unconstitutional. It remedied the impugned section by reading-in the words "or by descent" and "or was" into subsections (a) and (b) respectively. The first remedy was to cater for those who had acquired citizenship by descent in terms of the previous Citizenship Act and the second remedy was to cater for those who, like the applicants, were born to a South African parent outside South Africa before the commencement date of the 2010 Amendment. The High Court also made a declaratory order to the effect that four of the applicants are South African citizens and directed the Director-General of Home Affairs to assign them identity numbers, and grant them birth certificates and identity documents.

The order of invalidity was brought to the Constitutional Court for confirmation, in accordance with sections 167(5) and 172(2) of the Constitution.

Before the Constitutional Court, the applicants relied on arguments similar to those they made before the High Court and argued that sections 2(1)(a) and (b) of the amended Citizenship Act are unconstitutional. The challenged section 2 states that any person who was a South African *citizen by birth* immediately prior to the commencement of the 2010 Amendment or *who is born* in or outside of South Africa to a South African parent, shall be a South African citizen by birth.

In a unanimous judgment penned by Khampepe J (Jafta J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring), the Constitutional Court declined to confirm the order of invalidity on the basis that the impugned section could be interpreted in a constitutionally compliant manner. The Court recognised the constitutional importance of citizenship in South Africa, especially bearing in mind South Africa's history of citizenship-deprivation, and exclusion, which unfairly and discriminatorily stripped many black South Africans of their citizenship and barred entry into the membership of the South African polity on the basis of race. The Constitutional Court further emphasised that citizenship goes to the core of a person's identity, their sense of belonging and security of person. Deprivation of, or interference with, a person's citizenship affects many aspects of their private and public life, including that of their family.

The Constitutional Court held that the proper approach to statutory interpretation is a purposive one which must have due regard to the ordinary, grammatical meaning of the words, the context

of the impugned provisions and the obligation, placed on the courts by section 39(2) of the Constitution, that legislation be interpreted in a manner which "promotes the spirit, purport and objects of the Bill of Rights". Turning to the impugned section in this case, the Constitutional Court found that the proper interpretation of section 2(1)(a) is that it retains citizenship only for those who were considered "citizens by birth" immediately before the coming into effect of the 2010 Amendment. The Court reasoned that it would be straining the ordinary meaning of the words to interpret it to include those who had also acquired citizenship by descent under previous legislation. However, the Court held that this did not necessarily make it unconstitutional; as long as section 2(1)(b) could be interpreted so as to include the remaining categories of persons who had previously acquired South African citizenship.

In respect of section 2(1)(b), the Constitutional Court held that the purposive interpretation of the words "who is born" is one which applies to those born both before and after the commencement of the 2010 Amendment. The Court held that the parties were mistaken in interpreting the words as being prospective only. The words describe a state of being and the word "is" is used in this context as a linking verb. The Constitutional Court found that this is not only a reasonable and grammatically-sound construction of the phrase, but also a more constitutionally compliant one than that which gives the word "is" a narrow interpretation. In light of this conclusion, the Constitutional Court held that four of the applicants, and those similarly placed, would now fall within the ambit of section 2(1)(b), as they were all born to a South African parent.

The Constitutional Court concluded that this reading of the section would accommodate all categories of citizens who had acquired citizenship through either birth or descent in terms of the previous Citizenship Act. As a result, section 2(1)(a) and (b) was found to be capable of being read in a constitutionally compliant manner and, therefore, the confirmation of the order of invalidity by the High Court was declined. As the applicants fell within section 2(1)(b), however, the Constitutional Court upheld the declaratory order of the High Court which declared that four of the applicants are South African citizens. Finally, the Constitutional Court held that the interests of justice dictate that the applicants' prayer for consequential relief be granted and that the Department of Home must issue the applicants birth certificates and assign them South African identity numbers.