THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1363/2019

In the matter between:

ANTHONY OKEY NWAFOR **APPELLANT**

and

THE MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

THE DIRECTOR GENERAL:

DEPARTMENT OF HOME AFFAIRS **SECOND RESPONDENT**

DEPARTMENT OF HOME AFFAIRS **THIRD RESPONDENT**

Neutral citation: *Nwafor v The Minister of Home Affairs and Others* (1363/2019) [2021] ZASCA 58 (12 May 2021)

Coram: MBHA, ZONDI and MBATHA JJA and GORVEN and POYO- DLWATI AJJA

Heard: 09 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be have been at 14h00 on 12 May 2021.

Summary: Civil Procedure – Section 17(2)(*d*) of the Superior Courts Act 10 of 2013 (the Act) – oral hearing – application for leave to appeal against refusal by court a quo to grant leave to appeal – no reasonable prospect of success of the appeal established as required by s 17(1)(*a*) of the Act – application dismissed with costs.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Potterill J sitting as the court of first instance):

The application is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Mbha JA (Zondi and Mbatha JJA, and Gorven and Poyo-Dlwati AJJA concurring)

[1] The applicant seeks leave from this Court to appeal against the judgment and order of the High Court, Gauteng Division, Pretoria (Potterill J) which she had granted on 27 June 2019. In terms of this judgment, Potterill J dismissed with costs the applicant's application for an order to review and set aside the first and second respondents' (the respondents) decision to deprive the applicant and his minor children of their citizenship in the Republic of South Africa.

[2] This application, which is opposed, has been set down pursuant to an order issued by this Court (Navsa JA and Koen AJA) on 31 March 2020, referring the application for leave to appeal, together with condonation for the late lodgement therefor, for oral argument in terms of s 17 (2)(*d*) of the Superior Courts Act 10 of 2013 (the Act). The parties were also forewarned in the same order, to be prepared, if called upon to do so, to address this court on the merits. It bears mentioning that

condonation is no longer an issue as this was resolved by the parties at the commencement of the hearing.

[3] At the core of this dispute, is the applicant's complaint that he and his family including his minor children, have been arbitrarily and unlawfully deprived of their citizenship by the respondents, without being afforded an opportunity to be heard and in breach of the well-entrenched principle of natural justice, the *audi alteram partem* rule. This particular deprivation, the applicant alleges further, is exacerbated by the respondents' failure to so much as afford them a hearing before taking such a drastic step of revoking their citizenship.

[4] It is necessary to set out the background and factual matrix against which the dispute arose, and the litigation path that the matter has travelled. The applicant was born in Lagos, Nigeria on 16 April 1965. He acquired South African citizenship upon being granted a certificate of naturalisation (the certificate) by the Department of Home Affairs (the department), on 13 October 2009, which was issued in terms of s 5 of the South African Citizenship Act 88 of 1995 (the Citizenship Act).

[5] The granting of the aforementioned certificate was preceded by the issuing by the department to the applicant, on 22 January 2004, of a permanent residence permit (the exemption certificate) with reference numbers LEB/42/2003, in terms of s 28(2) of the Aliens Control Act 96 of 1991(the Aliens Act). This exemption certificate clothed the applicant with the right to acquire permanent residence in the Republic. It is common cause that the applicant secured the grant of this exemption certificate on the strength of his marriage to a South African citizen, Ms Gladys Sibongile

Vilankulo (Ms Vilankulo), on 25 April 2003. The validity of this marriage is strenuously disputed.

[6] On 13 April 2016, the department sent a letter addressed to the applicant and his family, advising that the Minister of Home Affairs (the Minister) intended to deprive him and his minor children of their South African citizenship. The Minister's intended action was based on the following grounds:

(a) that the applicant had obtained the permanent residence permit by means of a false representation by concealing the material fact that he was still married to Mrs Amarachukwu Ebare Nwafor (Ms Nwafor), who he married in Nigeria on 1 March 2003, when he purported to marry Ms Vilankulo in South Africa on 25 April 2003, and while presenting himself as a bachelor at the time;

(b) that the applicant's marriage to Ms Vilankulo on 25 April 2003 took place when Ms Vilankulo was still a minor without the requisite permission from her guardian; and

(c) that the aforesaid permanent residence permit was issued to the applicant in conflict with the applicable law in that it was issued on 22 January 2004, in terms of the Aliens Act but subsequent to its repeal by the Immigration Act 13 of 2004 (the Immigration Act), on 12 March 2003.

[7] In the same letter, the applicant was informed that in terms of s 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), he was entitled, within ten calendar days from the date of receipt of the letter, to make representations to the Minister setting out reasons why the Minister should not proceed with the intended deprivation of citizenship. Importantly, the applicant could approach the high court in terms of s 25 of the Citizenship Act, to review the decision made by the Minister.

[8] On 3 May 2016, representations were made in a letter written on the applicant's behalf through his lawyers, in response to the department's aforesaid letter of 13 April 2016. The salient points made in the letter which was addressed to the Minister, and copied to the Director General of the department, were the following:

(a) It was denied that the applicant obtained his permanent residence permit by means of a false representation by concealing his prior marriage to Ms Nwafor in Nigeria on 01 March 2003, and that he had presented himself as a 'bachelor' when he married Ms Vilankulo in South Africa on 25 April 2003. An explanation proffered was that shortly after 'a church blessing' between the applicant and Ms Nwafor, a serious material issue occurred which affected the marital relationship resulting in the *immediate* dissolution of the said marriage.

(b) Regarding the allegation that Ms Vilankulo was a minor at the time of her marriage with the applicant, it was averred that as Ms Vilankulo was born on 26 August 1984, she was over the age of 18 years at the time. Reliance was placed on, *inter alia*, s 24(1) of the Marriage Act 25 of 1961 (the Marriage Act) that Ms Vilankulo's mother had signed as a witness to the marriage; and that this constituted parental 'consent' as is required by the Marriage Act.

(c) Lastly, with regard to the contention that the permanent residence permit in the applicant's possession was issued contrary to the applicable law, it was contended that the applicant had followed all the required procedures as expected of him at the time of his application for permanent residence and citizenship. Furthermore, the applicant had all the necessary documentation as proof that he had followed all the correct procedures to procure the said permanent residence permit.

(d) The letter concludes by stating that the applicant had shown that there was no basis to warrant the deprivation of his South African citizenship in terms of s 8(1)*(a)* and *(b)* of the Citizenship Act.

[9] On 2 August 2016, the second respondent, acting in terms of the powers delegated to him pursuant to s 22 of the Citizenship Act, sent a letter addressed to the applicant and his family, stating that after considering the applicant's representations, he had decided to deprive them of their citizenship. The reason given for the deprivation of citizenship was that the permanent residence permit of the applicant had been acquired through false representation and concealment of a material fact.

[10] On 29 August 2016 the applicant launched an application in the court a quo to review and set aside the decision of the deprivation of citizenship. The application was brought in terms of ss 3 and 6 of the PAJA, in which the applicant averred *inter alia*:- that the respondents failed, neglected and refused to consider his representations; that he was not called by the respondents after the notice of intention to deprive him and his minor children of their citizenship was served on him for a possible hearing; that there was no indication how the respondents arrived at the decision of deprivation of citizenship; and, that he was only afforded ten (10) days to make representations which was unreasonable considering the seriousness of the matter.

[11] In a supplementary affidavit to the founding affidavit filed on 31 January 2017, the applicant averred further that:

(a) He entered into a civil marriage with Ms Nwafor on the 5 February 2000 at a court in Lagos, Nigeria but that they thereafter started having marital problems that warranted him to file for divorce;

(b) In a bid to resolve the marital problems he and Ms Nwafor attended the 'Our Saviour Church' in Lagos, Nigeria on 1 March 2003 where their marriage was blessed;

(c) Despite the church blessing, the marital problems persisted and the divorce was finalised on 12 March 2003; and

(d) After the divorce he came to South Africa and then got married to Ms Vilankulo.

[12] An exchange of papers ensued between the parties in the course of which the respondents disputed and put into question the validity and genuineness of a plethora of the applicant's documents on which he relied in his application for permanent residence and citizenship. They also referred to various incidents of irregular conduct on the part of the applicant and other relevant individuals like Ms Vilankulo, in procuring the said documentation.

[13] The respondents' opposition to the applicant's application, gleaned from the papers and documents filed on record after extensive investigation by the department's officials of the applicant's status in the Republic, reveals the following:

(a) On 1 March 2003, the applicant and Ms Nwafor entered into a marriage at 'Our Saviour Church' in Lagos, Nigeria. This is supported by the 'Certificate of Marriage' of the same date. This document records, significantly, that the applicant and Ms Nwafor are 'bachelor' and 'spinster' respectively, and, under the column with the heading 'When Married', the date is recorded '1st March 2003'. It is significant that nowhere in this document is there a reference to any so-called blessing of a marriage, as the applicant alleges.

(b) On 25 April 2003 while still married to Ms Nwafor, the applicant entered into an antenuptial contract with exclusion of the accrual system with Ms Vilankulo.

However, in the relevant part of this document, the applicant described himself as 'unmarried'. This is patently false because at the time he was still married to Ms Nwafor.

(c) The applicant's claim that he was a bachelor was repeated in form B131-E, being a declaration for purpose of a marriage, between the applicant and Ms Vilankulo, dated 25 April 2003.

(d) On the strength of the applicant's marriage to a South African citizen on 25 April 2003, the applicant then on 21 January 2004, secured an exemption certificate in terms of the predecessor to the Immigration Act, being the Aliens Act. It is not disputed that this document was issued approximately 9 months after the Immigration Act had come into operation and the Aliens Act, under which it was supposedly issued, had been repealed. Furthermore, as there was no transitional period this means that any exemption certificates issued under the repealed Act became ineffective immediately after the new legislation came into effect.

[14] As there is no valid explanation as to how the applicant managed to get hold of this permanent residence permit, the inference that it was obtained through fraudulent means as the respondents aver, is in my view, not unreasonable. In an attempt to prove the legality of his marriage to Ms Vilankulo on 25 April 2003, the applicant explained in his supplementary affidavit that he was married to Ms Nwafor on 5 February 2000, in Lagos, Nigeria, but that the marriage to Ms Nwafor was dissolved when the court in Nigeria granted a decree of divorce on 12 March 2003.

[15] However, the so called decree of divorce dated 12 March 2003 relied upon by the applicant, which on its face has patent errors, nonetheless expressly records in

the 4th paragraph thereof that it is in fact a 'Decree Nisi' and states that 'the Decree Nisi of Dissolution of Marriage shall be made absolute at the expiration of three (3) months from today if no cause is shown to the contrary.' In simple terms this means that either party can prove that the marriage should not be finally dissolved in that three - month period. If no-one does so, the divorce takes effect three months from 12 March 2003. The earliest possible date of divorce was accordingly 12 June 2003. Clearly, there was no divorce between the applicant and Ms Nwafor on 12 March 2003 as alleged by the applicant. The inescapable conclusion is, therefore, that when the applicant married Ms Vilankulo on 25 April 2003, his prior marriage to Ms Nwafor in 2000 still subsisted and remained valid.

[16] The matter eventually served before Constantinides AJ, who on 28 November 2017 referred the matter to oral evidence. In so doing, the learned judge specifically referred for oral evidence the issues identified in the first paragraph of the department's aforementioned letter to the applicant and his family dated 13 April 2016.

[17] The matter was then enrolled for the hearing of oral evidence on 6 May 2019. However, just before the trial resumed, the applicant requested a postponement indicating an intention to abandon a portion of the order of Constantinides AJ, and proposed that the matter should rather proceed by way of an application. The matter was accordingly postponed *sine die*.

[18] On 9 May 2019, the parties signed a pre-trial minute in which they agreed that the matter will no longer proceed to oral evidence as was indicated in the court order

of Constantinides AJ, and that the matter would be placed on the opposed motion roll. It was further recorded that there would be no need to call any witnesses but that the matter would be argued based on the documents and papers before the court.

[19] The matter was then argued before Potterill J, who on 27 June 2019 dismissed the applicant's application with costs. In the course of her judgment, she held that as the applicant had not sought and obtained the court's requisite leave, the applicant's supplementary affidavit that was filed on 30 June 2017, was *pro non scripto*. As such, she would not accept or consider the contents thereof. However, the learned judge dealt with a specific issue raised therein albeit as a point of law namely, that the Minister could not have delegated the power to deprive citizenship to the Director General, and accordingly, that the deprivation was unlawful.

[20] Potterill J held that this point stood to be dismissed as being bad in law because the delegation in this case was proper and accorded with s 22 of the Citizenship Act, which provides:

'**Delegation of powers**

The Minister may, subject to such conditions as he or she may deem necessary, delegate any power conferred on him or her by this Act . . . to an officer in the service of the Department, but shall not be divested of any power so delegated, and may set aside or amend any decision of the delegate made in the exercise of such a power.'

[21] Having found that there were disputes of fact in the matter and as final relief was sought, the learned judge applied the rule in *Plascon-Evans*[1] and held that the Minister's version pertaining to the unlawful exemption certificate procured by the applicant would prevail. She accepted the respondents' version that some of the documents that the applicant had used to obtain his citizenship were fraudulent and that the applicant was already married to Ms Nwafor when he purported to marry Ms Vilankulo on 25 April 2003.

[22] The applicant's subsequent application for leave to appeal, brought before Potterill J, met with the same fate on 12 November 2019, when it was dismissed with costs. In argument, reliance was sought to be placed on three points namely, the principles of legality in relation to the issue of the delegation of power by the Minister to the Director General, the issue of the deprivation of citizenship of the minor children; and the applicant's abandonment of Constantinides AJ's judgment.

[23] Potterill J found that the point raised concerning who between the Minister and the Director General had taken the decision of deprivation and that no documentary delegation was before court, was a completely new point not raised as a ground of review or canvassed before the court. She also held that the point that the minor children could not have been deprived of their citizenship fell to be dismissed on the basis that it was only raised for the first time on appeal. In any event, no ground had been raised that s 28(2) of the Constitution had not been complied with and that the children are not without care or that they cannot follow the applicant's citizenship.

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634–635; *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1*;* 2009 (2) SA 277 (SCA) para 26.

[24] Lastly, Potterill J rejected the contention made on the applicant's behalf that the abandonment of Constantinides AJ's judgment was against public policy as being laboured. In her view, a party was within his rights to abandon a judgment that ruled that a matter was referred to oral evidence. She held that *in casu*, the applicant chose, as the *dominus litis* party, not to utilise *viva voce* evidence, but to rather use the application procedure. In refusing to grant leave to appeal, Potterill J said she was satisfied that no other court would come to a different conclusion.

[25] Section 17(1) of the Act sets out the statutory matrix as well as the test governing applications for leave to appeal. The section states in relevant parts, and in peremptory language, that leave to appeal may only be given where the judge or judges concerned are of the opinion that:

'. . .

(a) (i) the appeal would have a reasonable prospect of success;

(ii) there is some other compelling reason why the appeal should be heard including, conflicting judgments on the matter under consideration;

. . .

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[26] This application is premised on the applicant's contention that the appeal has reasonable prospects of success. The applicant also contends that even where it is found there are limited prospects of success, leave to appeal may be granted if there are compelling reasons to do so such as the public importance of the case or the novelty of the issues to be determined. Accordingly, it was submitted on the

applicant's behalf that this case is a matter of public importance with far reaching consequences. Furthermore, the outcome of this matter will not only affect the status of the applicant and his family, but will also set a precedent on how issues of deprivation of citizenship are handled by the department's officials in the future.

[27] The applicant's bases or grounds for the application, which are delineated as issues for determination in the applicant's heads of argument, are as follows:

(a) Whether the applicant should be granted leave to adduce the further evidence contained in the supplementary affidavit that was filed on 30 June 2017;

(b) Whether the applicant should be granted leave to introduce new points of law pertaining to the following issues namely:

(i) the absence of delegation of authority granted to the decision - maker;

(ii) the collective deprivation of citizenship of the minor children and their mother; and

(iii) the abandonment issue.

[28] In argument before us, the intended application to adduce further evidence in the supplementary affidavit was not pursued. This decision was, in my view, well taken considering that the court a quo quite rightly disregarded the supplementary affidavit on the basis that no leave to file same was sought and obtained from the court a quo, a fact rightly conceded by the applicant in the papers. Nothing further needs to be said about this issue. Regarding the remaining issues, the applicant's counsel submitted that these would be pursued as points of law.

[29] The law and principles applicable to the raising of points of law on appeal are trite. The position was aptly described by Wallis JA in *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Other*s,[2] as follows:

'That is not to say that merely because the High Court determines an issue of public importance it must grant leave to appeal. The merits of the appeal remain vitally important and will often be decisive. Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of the leave to appeal. It has frequently been said by the Constitutional Court that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true before this Court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of legal error on the part of one of the parties in failing to identify and raise the point at an appropriate stage. But the court must be satisfied that the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.'(Footnotes omitted.)

[30] Although the applicant has in my view failed to satisfy the requirements laid down in the *Southern African Litigation Centre* case, as I will demonstrate later in this judgment, I have nonetheless decided to deal with the merits of the points of law raised. I start with the issue pertaining to the alleged absence of delegated authority.

[31] As I have explained earlier, although the court a quo disregarded, quite rightly, the supplementary affidavit, as it was filed without leave of the Court, the court still

[2] *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Other*s [2016] ZASCA 17; 2016 (3) SA 317 (SCA) para 24.

considered the point raised therein that the Minister could not have delegated the power to deprive a citizen to the Director General and that the deprivation is thus *ultra vires* the law. The court a quo rightly rejected this contention as bad in law based on the provisions of s 22 of the Citizenship Act.

[32] Before us this issue took on a new form namely, that the respondents did not follow due legal process in revoking the applicant's citizenship. This was because, so the argument went, the notice of deprivation was signed by the second respondent who at the time was not in possession of the delegation of authority in terms of s 8 of the Public Service Act 38 of 1994 requiring, *inter alia*, that a delegation by the Minister to the Director General had to be in writing.

[33] In my view, this point cannot succeed and must suffer the same fate as the one raised earlier before Potterill J. It is a completely new issue not hitherto raised before either in the papers or before the court a quo.[3] Furthermore, the delegation by the Minister accords full square with the clear provision of s 22 in the Citizenship Act. As the first respondent may under s 22 of the Citizenship Act delegate any power, conferred to him or her under that Act, this includes in my view, the power to deprive citizenship in terms of s 8 of this Act.

[34] The applicant's attempt to place reliance on the decision in *Apleni v President of the Republic of South Africa and Another*,[4] is misconceived. The facts in this case

[3] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) para 13.
[4] *Apleni v President of the Republic of South Africa and Another* [2018] 1 All SA 728 (GP) para 22.

are clearly distinguishable as the aspect of delegation was squarely raised in the papers unlike *in casu,* where the issue only rears its head on appeal.

[35] The other ground that the applicant is raising relates to the alleged collective deprivation of citizenship of the applicant's minor children and his wife. It is averred that this is a matter of public interest and that issues of the rights of women and children should be severed from their dependence on the citizenship of their husband and father.

[36] Reliance was sought to be placed on s 10 of the Citizenship Act which provides that '[w]henever the responsible parent of a minor has in terms of the provisions of section 6, 8 or 9 ceased to be a South African citizen, the Minister may, with due regard to the provisions of the Guardianship Act, (Act No.192 of 1993) [now the Children's Act 38 of 2005], order that such minor, if he or she was born outside the Republic and is under the age of 18 years, shall cease to be a South African citizen'.

[37] The complaint under this heading is that the respondents failed to put up any facts to show that the Minister considered certain factors in making the requisite determination, flowing from the need to protect the interests of children as required in s 7 of the Children's Act. It is then averred that the children's case ought to have been dealt with separately and not as though the children were mere appendages to the applicant. Similarly, the applicant's Nigerian wife, so it was submitted, is an independent bearer of rights meaning that the department was obliged to conduct a separate investigation when revoking her citizenship.

[38] This point regarding the collective deprivation of citizenship cannot succeed. To the extent that the applicant is appealing on behalf of his wife and children, it is my view that they have never been parties in the litigation. Further, this issue is raised for the first time during this application for leave to appeal. It was never raised in the founding papers of the review application. In any event, it is clear from the papers that the applicant was given an opportunity to make representations in terms of s 8(4) of the Immigration Act, which he duly did. During argument, applicant's counsel conceded that the applicant's wife could well have brought review proceedings in her own name to challenge her own deprivation of citizenship. No explanation has been proffered why this was never done.

[39] It is trite law that litigants who seek to review administrative action must identify clearly both the facts upon which they base their cause of action and their legal basis of their cause of action.[5] This Court has previously stated as follows in *Tao Ying Metal Industry (Pty) Ltd v Pooe N.O and Others*[6] '. . . [o]ur courts do not allow applicants in review proceedings to raise new grounds of review in replying affidavits or from the bar during argument (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-363B)'. In the circumstances, the point raised under this heading must also fail.

[40] The final point of law raised in support of the application relates to the challenge of the validity of the abandonment of Constantinides AJ's judgment on the basis of non-compliance with Rule 41(2) of the Uniform Rules of Court. This

[5] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 37.
[6] *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* [2007] ZASCA 54; [2007] 3 All SA 329 (SCA) para 98.

rule provides that any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof, and such judgment or decision abandoned in part shall have effect subject to such abandonment. It is averred that as the prescribed notice was never issued to the applicant, it cannot be said that the judgment was abandoned. Furthermore, the pre-trial minute dated 9 May 2019, wherein the judgment was abandoned, is of no force or effect. It was also contended on the applicant's behalf, that this sub-rule has no bearing in respect of judgments or orders which affect the status of persons.

[41] It is trite law that an order or judgment by the court has to be obeyed and complied with until set aside by a court of competent jurisdiction. This principle is applicable to orders and judgments of courts which are final in effect and are appealable.[7] Such a judgment or order will only be appealable if it 'is a decision which as a general principle, has three attributes: first, the decision must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings'.[8]

[42] Clearly, these principles do not apply to a judgment such as that of Constantinides AJ in which a matter is referred to evidence, which is not appealable. If an order has been made referring an application for the hearing of oral evidence,

[7] *Clipsal Australia (Pty) Ltd and Others v GAP Distributors (Pty) Ltd and Others* [2009] ZASCA 49; 2010 (2) SA 289 (SCA) at paras 8, 21 and 22.
[8] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533B.

it is open to that court when a matter comes before it for the hearing of such oral evidence, to hold it is unnecessary to hear oral evidence and decide the matter on papers.[9] This is especially so when the parties agree that to be the case.

[43] In the light of what I have stated above, I find that it was competent and proper for Potterill J to give effect to the applicant's election not to lead oral evidence in the matter, as confirmed in the parties' pre-trial minute of 9 May 2019, and to depart from the earlier order of Constantinides AJ. Clearly, the latter order is purely procedural and not final, did not grant definite and distinct relief and did not dispose of any portion of the relief sought in the review application.

[44] It follows that the submission by the applicant that in matters involving status, abandonment is generally not allowed is misplaced and cannot succeed. The attempt by the applicant to draw in aid the decision in *Ex parte Taljaard*[10] does not assist as the applicant in that case had sought to abandon a final sequestration order during an appeal.

[45] In the final analysis, Rule 41(2) is totally irrelevant and not applicable in this matter. The point raised is clearly based on a wrong legal premise and must accordingly fail.

[46] As can clearly be seen, all three points of law fail lamentably to meet the requirements that were well expounded by this court in *South African*

[9] See the remarks of Milne JA in *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 263H.
[10] *Ex parte Taljaard* 1975 (3) SA 106 (O) at 108A-109A.

Litigation Centre. Firstly, the points of law do not emerge from the undisputed facts before the Court. The very fact that there was a referral to evidence to determine issues pertaining to alleged fraudulent and suspicious documents is undoubtedly significant and points to the fact that material issues were in dispute. Second, the points of law do not emerge from the papers. Third, at least one of the points was based on a wrong legal premise. Lastly, as these were raised for the first time on appeal, there can be no denying that the respondents were severely prejudiced by the raising of, and wrongful attempt to call in aid, the points of law raised on behalf of the applicant.

[47] The complaint by the applicant that the deprivation of citizenship was arbitrary and unlawful and was done without being afforded an opportunity to be heard or that he was not afforded sufficient and reasonable time to make representations, must fail. An analysis of the department's letter dated 13 April 2016, addressed to the applicant and his family shows that it complies with s 3(2) of PAJA in that the applicant was given:

'. . .

(i) adequate notice of the nature and purpose of the proposed administrative action;

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.'

[48] It is so, as alluded earlier, that on 3 May 2016 the applicant forwarded, through his legal representatives, representations in response to the letter of notification of

the intention to deprive the appellant and his family of their South African citizenship.

[49] In light of what I have stated above, I find that the applicant falls short of the test set out in s 17(1)*(a)* of the Act. The applicant has failed to show there are reasonable prospects of success on appeal. The application must therefore fail.

[50] In the circumstances, the following order is made:

The application is dismissed with costs, such costs to include the costs of two counsel.

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B.H MBHA

JUDGE OF APPEAL

APPEARANCES:

For appellant:	D C Mpofu SC (with him K Pillay)
Instructed by:	Tshuketana Loselo Inc., Pretoria
	Modisenyane Attorneys, Bloemfontein
For respondent:	W R Mokhare SC (with him M H Mhambi)
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein