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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 31253/18

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED.

In the matter between:

GIFT SANDILE NDWANDWE

APPLICANT

And

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

**THE DIRECTOR-GENERAL
DEPARTMENT OF HOME AFFAIRS**

SECOND RESPONDENT

PATRICK LOUIS DU PLESSIE

THIRD RESPONDENT

JUDGMENT

NQUMSE AJ

Introduction

[1] This is an application for the review and setting aside of the decision of the respondents to the effect that the applicant is a Zimbabwean National, and thus a prohibited person in the country.

[2] Furthermore, the applicant seeks to have a decision that he must leave the country within 14 days thereof reviewed and set aside.

[3] The applicant alleges in his founding affidavit that he was born on 31 January 1981 in Kwazulu Natal to a Mr Solaho Ndwandwe. According to information received from his father, his mother is a Ms Gumbi who used to work with his father in a farm in Pongolo and later worked in Durban as a migrant domestic worker where the applicant was born. He states that he does not have further particulars of his mother since he had to fend for himself from a very young age.

[4] However, in paragraph 7 of the founding affidavit, he states that his mother informed him that she left his father at the said farm. He thereafter embarked on a journey to search for his father and located him at Mtubatuba. They were both overjoyed by their reunion. He was thereafter taken to Zitike Primary School where he commenced with his basic education.

[5] He further stated that on 04 August 2004, he was taken by his father to apply for an Identity Document (ID) at the offices of Home Affairs in Mtubatuba. He was thereafter issued with a green bar-coded ID bearing a reference number [....]. A copy of the ID was annexed to the founding affidavit as Annexure "A".

[6] The applicant further maintains that he is a South African by virtue that one of his parents is a South African citizen and the fact that he possessed a South African ID. A copy of the ID of his father is annexed to the founding affidavit as annexure "B". Furthermore, on 18 August 2009 he got married to Busisiwe Beverly Ngubane and their marriage was solemnized by an officer of the first respondent after verifying their ID documents. A copy of the marriage certificate as annexed to the founding affidavit as

Annexure “C” out of his marriage with Busisiwe they gave birth to two children whose birth certificates were annexed as “D” and “E”.

[7] Applicant further states that somewhere in June 2017 the third respondent embarked on investigations into his status in the country, in which it is alleged that he obtained his ID fraudulently. His response to the investigation was that he had been issued with an ID in 2004 and subsequently in 2007 he was issued with two South African passports and his documents were never objected to when he presented them at check points of his travel. Neither has he experienced any difficulty when he travelled to Botswana, Swaziland as well as Zimbabwe using the said passports.

[8] On 03 October 2017 he attended a call in the offices of the third respondent where he was informed that his names are not ‘Gift Sandile Ndwandwe’ but ‘Nkululeko Nkomo’ and was further informed that he will be deported to Zimbabwe since he is a Zimbabwean nationality. He was subsequently taken to Pretoria Central Police Station for detention and on 06 October 2017 he appeared at the Pretoria Magistrate’s Court where he was released from detention by the order of the magistrate.

[9] On 10 October 2017, he made representations to then Acting Director-General of Home Affairs. On 15 November 2017 he received the outcome of his representations from the second respondent who maintained that his ID was obtained fraudulently and was declared a prohibited person and was consequently ordered to leave the country within 14 days thereof.

[10] On 29 November 2017, he made an application to the first respondent to reconsider the decision of the second respondent in terms of Section 8(6) of the Immigration Act of 2002. He further pointed out to the first respondent that he was suspicious of certain documents that may have been placed before her by the Immigration Officer as false. He further disputes having signed such documents. It is also not true that the documents were commissioned by a certain warrant officer of the South African Police Service (SAPS) in his presence.

[11] On 14 February 2018, he received the outcome of the first respondent which confirmed and upheld the decision of the second respondent.

[12] Aggrieved by the decision of the first respondent he believes that his rights have been violated and eroded. He maintains that there are reasons that justify the court to review and set aside the decision of the first respondent acting in terms of Section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[13] It is further contended by the applicant that the investigations into his status as a citizen were motivated by personal and political considerations. That the conduct and threats made by the third respondent during his interview and the signing of documents which were never explained to him is unfair. Applicant further states that he was not given an opportunity to respond to the information that was considered by the respondents. He therefore contends that the actions of the third respondent were biased or could be reasonably suspected to be biased and failed to take into account relevant information, instead chose to believe allegations not backed up by credible evidence and in turn rejected his version.

[14] The applicant referred in his founding affidavit to legal principles based on certain pieces of legislation which ordinarily will be best suited in argument.

[15] He further stated that he is a factual citizen since both his parents were South Africans. However, in the following paragraphs of his founding affidavit he relies on a number of statutes to establish his citizenship which are the British Nationality in the Union and Naturalisation and Status of Aliens Act 18 of 1926, the Admission of Persons to the Union Regulation Act 22 of 1913, South African Citizenship Act 44 of 1949, the South African Citizenship Act 88 of 1995, the South African Citizen Amendment Act 17 of 2010. Furthermore, the respondents did not consider his family particularly what is in the best interest of his children in reaching their decision.

[16] According to the applicant this is in violation of the international conventions which South Africa is a signatory of, that the family unit which needs to be protected by society and the state and that no one should be subjected to arbitrary or unlawful interference with his privacy, family or home.

[17] Applicant further states that after he had lost his ID he approached the respondent's Regional Offices to apply for a new Smart Card which came with the country of origin as "ZWE". Whilst he was assured by the official of the respondents that it is a mistake that will be rectified, it was never rectified instead the respondents maintain that he is a Zimbabwean national.

[18] Solaho Ndwandwe (hereinafter referred to as Tat'Ndwandwe) deposed to a confirmatory affidavit in which he confirms the contents of the founding affidavit.

[19] In a supplementary affidavit the applicant mentioned that in the Gauteng High Court under case number 7442/2018, the court ordered the appointment of a curator to investigate and file a report on the effect of the applicant's deportation on his children. Advocate Kerry Howard, who compiled a report recommended that due to the impact his deportation would have on the children, he should remain in the country. A copy of the report is annexed to the supplementary affidavit as Annexure "G".

[20] Applicant further stated that he is continually harassed through social media by the third respondent who is used by certain elements within the South African Transport and Allied Workers Union (SATAWU) to advance their political agenda against him.

[21] In the answering affidavit by Patrick Louise Du Plessie, the respondents first took issue in the non-disclosure by the applicant of the relevant litigation history of this matter prior to the present application. He revealed that according to a notice of motion of 02 November 2017 and issued out of this court under case number 7527/17, the applicant had brought an urgent application wherein he sought, inter alia, for an order directing the respondents to unlock the ID with reference number [...] which had been issued to

the applicant. Further, interdicting the respondents from arresting, detaining and deporting the applicant pending the internal review proceedings. The urgent applicant was dismissed with costs. A copy of the Order was annexed as Annexure “AA1”.

[22] In a second notice of motion issued out of the Gauteng Local Division of the High Court, under case number 7442/18 on 22 February 2018, the applicant brought an urgent application in which he sought, inter alia, the following relief:

“1.....

2.....

3. Prohibiting the Minister of Home Affairs from arresting and/or deporting the applicant pending the finalisation of a judicial review of the First and Second Respondent’s decision to declare the Applicant as a prohibited person “in terms of Section 29(1)(f) of the Immigration Act 13 of 2002 and/or

3.2 Prohibiting the Minister of Home Affairs and the Director-General of the Department of Home Affairs from arresting and/or deporting the Applicant unless and until the Applicant’s Identity under the South African Citizenship Act (Act 88 of 1995) (“the Citizenship Act”) or status under the Immigration Act (Act 13 of 2002) (“the Immigration Act”) has been lawfully and finally determined.

3.3 Ordering the Minister of Home Affairs and the Director-General of the Department of Home Affairs to unlock the Applicant’s identity document pending the judicial review mentioned in paragraph 3.1 herein”. After the application was argued before Fischer J, on 13 April 2018 the application was dismissed with costs.

[23] The respondents contend that the failure by the applicant to disclose the previously failed applications is intended to mislead this court and it's an exercise of "forum shopping" in which the court should draw a negative inference from the conduct of the applicant.

[24] According to the respondents, based on information received during early June 2017, the respondents commenced with investigations on the citizenship status of the applicant. The outcome of those investigations established the following:

[24.1] That whilst the particulars of the applicant are appearing on the population register of the respondents, there exists no hard copies of source documents which would have contained the information relating to the applicant.

[24.2] That the birth of the applicant in South Africa does not exist as the "B1-24" document which is issued under Regulation 6(9) of the Regulations under Birth and Deaths Registration Act, Act 51/1992 cannot be traced and does not appear on the population register. Respondent contends that it is only by the completion and registration of the "B1-24 form" that the applicant could have been with a birth certificate and thereafter with an identity number identifying him as a citizen or permanent resident of the Republic of South Africa.

[24.3] Du Plessie further stated that when the applicant had visited his office on 25 August 2017, the applicant deposed to an affidavit in which he confirmed that he was born in Zimbabwe on 23 January 1981. The affidavit was read out to the applicant, in the presence of his attorney, Mr Jafta, and was thereafter commissioned by an official in the department of the respondents. However, his director suggested that the affidavit be commissioned by a more independent commissioner. As a result, the applicant was caused to re-sign a

typed version of the affidavit at the Pretoria Central Police Station and had it commissioned there.

[25] Notwithstanding the two affidavits in which the applicant confirms that he was born in Zimbabwe, in his application for an ID card he declared that he was born in Durban.

[26] The respondents contend that the particulars on the face of the applicant's ID card in which it is recorded that his country of birth is Zimbabwe, as well as the recordal of his country of birth as Zimbabwe in his ID card application attached as "AA9" and his citizenship status form (Form B1-529) annexed on "AA11" are factors which according to the respondents, are in line with the two affidavits which the applicant had deposed to, wherein he stated that he was born in Zimbabwe.

[27] Du Plessie also stated that on 31 July 2017 whilst in his office, the applicant furnished him with a letter from the principal of Zitike Primary School, "the school" dated 28 July 2017 which is to the effect that the applicant was a learner of the said school during the period January 1995 to December 1995. Attached to the principal's letter was a copy of the school's register which reflected the applicant's date of birth as 31 January 1991. The school register further revealed that the applicant's admission at the school as 19 January 1995. The copy of the school register was annexed as "AA13".

[28] It is further stated that, a Mr Kwazi an official of the respondents went to the school and demanded access to the original school register. His request was granted and he took a photograph of the register which was attached as Annexure "AA15". An enlarged copy of the photograph taken from the register reflects the details of the applicant against a Gift Sandile Ndwandwe with a date of birth as 09 January 1992. It also reflected the aforesaid 'Gift' as having been admitted at the school some time during 1999 when he was 7 years of age.

[29] The respondents contend in their affidavit that the document (Annexure AA14) which was attached to the Principal's letter was tempered with in that all the dates of birth of the persons whose names appear on that page of the register were tampered with so as to amend dates of birth from the mid 1990's to the early 1980's. It is also contended that the dates of admission were also tempered with.

[30] As a result of the alleged fraudulent conduct by the school or the applicant or a combination of both, the respondents stated that it received another letter dated 10 August 2017 from the Vice-Principal of the school confirming that one Sandile Ndwandwe's date of birth was in fact 1992 but had attended the school in 1995. A copy of the letter of the Vice-Principal was attached as Annexure "AA17". According to the respondents the information of the Vice-Principal is also incorrect since it suggests that the applicant would have been 3 years old when he was registered at the school. Whilst on the applicant's version he would have been 14 years old when he was registered at the school.

[31] The improbabilities, as contended by the respondents, that appear on the different version relating to the admission dates of the applicant at the school must be treated with caution. Respondents also contend that a similar caution has to be applied to the first affidavit of Tat'uNdwandwe. This is owing to a subsequent affidavit which he deposed to when he was visited and interviewed by Msibi on 05 August 2017 wherein in paragraph 5 and 6 thereof it reads:

"5. I can also confirm that our chief does not know Sandile. I know Sandile works in Johannesburg but I do not know that is doing there. (sic)

6. Insofar as I know Sandile's mother was a South African. The only proof that I have that Sandile is my son is that he came looking for me and confirmed that his mother's surname is Gumbi". The affidavit was attached as Annexure "AA19". Msibi further contacted Tolakele Musi a daughter of Tat'uNdwandwe

who informed him that she did not know Gift Sandile Ndwandwe. Msibi's confirmatory affidavit was attached as Annexure "AA28".

[32] Du Plessie further gave a chronological account of the attendance of the applicant at the respondents' offices as well the exchange of correspondence between their office and the attorneys of the applicant. Since the account is ostensibly a repetition of the facts alluded above, I do not find it necessary to traverse the same historical facts, save that according to the Movement Control System (MCS), a database utilised by the respondent to record all movements of persons into and out of the Republic of South Africa, it shows the applicant to have regularly exited RSA from the Beitbridge border post entering into Zimbabwe. An extract of the MCS was attached as Annexures "AA20" and "AA21". A copy of the applicant's passport with the number [...] which reflects the aforementioned trips into Zimbabwe was also attached as Annexure "AA22"

[33] The respondents contend that in light of the evidence of the applicant's movement, the applicant is a Zimbabwean and has misled a number of people into believing that he was a South African by birth. The documentation issued to him was obtained fraudulently and he falls foul of the Immigration Act. As a result he was issued with a Section 8(1) Notice of the Act to the effect that he was found to be an illegal foreigner.

[34] The respondents stated that after the receipt of the Section 8(1) Notice the applicant should have lodged a review to the Minister of Home Affairs acting in terms of Section 8(1) (b) of the Act, instead he opted to file a review against the finding of the second respondent in terms of Section 8(4) of the Act, a procedure which was inappropriate and incorrect. That notwithstanding, the Minister *ex abundante cautela*, considered the appeal that was lodged by the applicant and upheld the finding of the second respondent. Following the decision of the Minister the applicant filed a further review in terms of Section 8(6) of the Act against the finding of the first respondent for upholding the findings of the Immigration officer to the effect that the applicant is an

illegal foreigner. The Minister once more upheld the findings that the applicant is an illegal foreigner. Copies of the decision of the first respondent and the Minister are attached as Annexures “AA24” and “AA25”.

[35] Du Plessie also stated that the allegations made in his affidavit into the allegations of the applicant’s status are the same allegations he had made in the applicant’s previous application in the Johannesburg High Court which was dismissed on 23 April 2018. Subsequent to that judgement, he served a notice to appeal that judgment which is yet to be prosecuted. Instead he has now chosen to launch the present application.

[36] The respondents had initially in their answering affidavit took a *point in limine* on *res judicata* which was subsequently abandoned when the matter was before court for argument. I shall therefore not deal with the merits of the point in *limine* as I am not expected to make a pronouncement thereon.

[37] According to the respondents, they contend that in terms of Section 32 of the Act, it *ex lege* obliges the Minister to deport illegal foreigners and no decision is required to be taken for her action. The applicant, so it was contended, has made no reference to the decision allegedly taken by the Minister nor the date of such decision. If the applicant, relies on the document marked as “AA26” which was served on his attorneys as a purported decision taken, that document, so it was contended, flows from the provisions of Section 32(1) of the Act, read with Regulation 30 (4) and it has nothing to do with any decision for the applicant to leave the country. It was therefore contended that there is no decision that needed to be reviewed. Du Plessie also stated that in any event the 180 day within which an application for review had to be brought had elapsed and the application for review is not accompanied by any condonation application.

[38] Du Plessie stated that, the obligation of the first respondent was limited only to find whether the correct appeal had been followed against the finding he had made that

the applicant is an illegal foreigner, a decision he took in terms of Section 8(1) of the Act.

[39] He further referred to paragraph 28 of the applicant's second founding affidavit wherein he alleged as follows:

"28. A week or so after my telephone conversation with Mr Du Plessie, I went to KwaZulu Natal, collected the documents as advised and thereafter went to see Mr Du Plessie in his office. He then conducted and interviewed me during which he asked me questions such as:

28.1 -----

28.2 Who is your mother: (I answered that I do not know as I have only lived with my father).

[40] Du Plessie contends that the allegations in paragraph 28 must be contrasted with the allegations in paragraph 5.1 of the applicant's urgent application he had launched and dismissed by Raulinga J, where the applicant made the following allegations.

"5.1 in (sic) was born on 31 January 1981 to a Mr Solahu Ndwandwe, my father and Ms Gumbi, my mother in Durban or Mtubatuba in Kwa-Zulu Natal Province. My father believes that I was born in Durban as my mother was a migrant domestic worker in Durban around the time I was born (sic)."

In paragraph 5.3 of the same affidavit the applicant stated:

"5.3 My mother had informed me that she had left my father at the above farm, I then decided to look for my father and be with my family. I commenced my search in Kwa-Msane Reserve, Mtubatuba, Kwa-Zulu Natal Province." He denies the allegations made in paragraph 6, 7, 8 and 9 of the answering affidavit. The ID application of the applicant was made in June not August 2004

as alleged. This is notwithstanding that there is no record of the late registration of the applicant's birth certificate in the offices of the respondent. Therefore, so it was contended, without an ID document in terms of the Identification Act; the respondent disputes the validity of the South African ID which was received by the applicant.

[41] According to Du Plessie, no verification of ID document is done prior to the conclusion of a marriage, therefore, that the applicant entered into a marriage with a South African citizen is of no consequence.

[42] In dealing with the disputed signatories of the documents by the applicant as alleged in paragraph 27 of his founding affidavit, Du Plessie made contrast with what the applicant had said in his replying affidavit of his second application which was allegedly made before Du Plessie in 25 August 2017 wherein it was stated:

"29.2 While I confirm that I deposed to the hand-written affidavit found at page 54 of my founding papers, I deny that I did so willingly. The affidavit is part of "GSN14" page 39 of my founding papers) (but still bears the initial marking "GSN2") which are representation sent by my erstwhile attorneys to the First Respondent on 30 November 2017. I only signed that hand-written affidavit as a result of the pressure that I had been subjected to by Mr Du Plessie; the deponent in the Respondent's answering affidavit."

[43] However, Du Plessie denies that there was any pressure placed on the applicant when he signed the affidavit as this was done in the presence of his attorney. He asked the court to draw negative inferences on the versions of the applicant that are at variance with each other. He further denies the allegations in the preceding paragraphs of the applicant's affidavit and reiterates his contention that the applicant is a Zimbabwean National. He also does not see the relevance of the claim of citizenship under the Union National Flags Act of 1927 since the applicant alleges that he was born in the Republic of South Africa. He also referred to the contradictions in the averments

by the applicant, where in paragraph 3 of his affidavit dated 25 August 2017 which is annexed as “AA5” he alleged that his mother was a Zimbabwean.

[44] He disputes the allegations contained in the confirmatory affidavits of Solahe Ndwandwe, Pretty Ngenzi Mamaba, Nhlanhla Ndwandwe, Angel Boniwe Mbuyazi and Siphon Derrick Gwala.

[45] In reply the applicant first addressed the late filing of the reply affidavit. In his application for condonation, he stated that he felt ill when he was supposed to consult his attorney for purposes of the replying affidavit. As soon as he recovered from his ill-health, he sought to consult with his attorney whose offices were closed for the Easter holidays.

[46] In support of his allegation he appended a medical certificate as confirmation of his condition on the said period.

[47] The application is late by a period of 4 days. In my view the explanation is satisfactory and plausible and no prejudice will be suffered by the respondents. Therefore, it is in the interest of justice for the replying affidavit to be allowed.

[48] A point *in limine* relating to the late filing of the answering affidavit by the respondents absent a condonation application was not pursued any further and was effectively abandoned. I shall therefore not consider same as I am not expected to pronounce thereon.

[49] The applicant states that the application under case number 75279/17 which was brought on an urgent basis before Raulinga J was for the unblocking of his ID document and has no relevance to the present application which is intended to challenge the decision that he is a Zimbabwean. Further, the said application was not dismissed but struck off the roll due to lack of urgency. He further denies that he informed Du Plessie on 25 August 2017 that he was born in Zimbabwe. The meeting of the said date was

attended by his erstwhile attorney, Lerato Jafta together with Busisiwe Ngubane-Ndwandwe and Luvuyo Jordan. He denies the presence of Mathews Motendi in the said meeting.

[50] He said the third respondent turned down his request to have the Zimbabwean consulate determine whether his status is that of a Zimbabwean or not. Instead Du Plessie made the following remark *“you must resign from SATAWU and if you resign, you will go in peace because I am about to destroy your life, and will make you lose your job, your colleagues don’t want you.”* He also stated that the allegations of Kwazi Msibi to the effect that he is not known by his half-sister are not supported by any confirmatory affidavit from him.

[51] He maintains that he followed all the procedures relating to the obtaining of his ID document and is also aware of instances when the department had issued ID documents to applicants without there being any late registration of births and/or issuing of Birth Certificates. He also stated that whilst admitting that there was a pending matter in the Labour Court between himself and SATAWU (his erstwhile employer) he is surprised how that matter came to the attention of the third respondent, except that it is proof that the third respondent carries instruction from SATAWU to get rid of him.

[52] The issues for determination by this court as I see them are:

1. Whether the application to review and setting aside of the decision of the respondents to the effect that the applicant is a Zimbabwean and thus an illegal foreigner is competent under PAJA, and
2. Whether the decision for the applicant to leave the country (RSA) should be reviewed and set aside.

[53] In his heads of argument the applicant spent a great deal with reference to the Union Nationality and Flags Act; the British Nationality in the Union and Naturalisation

and status of Aliens Act; the admissions of persons to the Union Regulations, the South African Citizenship Act, the Old Citizenship Act, the amendments to the Citizenship Act as well as the New Citizenship Act, as references to prove that the father of the applicant is a South African.

[54] I must hasten to say that there has not been any challenge to doubt or dispute Tat' uNdwandwe's citizenship as a South African. The question that begs an answer is whether the applicant has succeeded to establish the fact that he was born by Tat'uNdwandwe and is consequently a South African by birth as envisaged in the Citizenship Act, Act 88 of 1995 as amended.

[55] The applicant argued that the procedure followed by the respondents to deprive him of his citizenship is an affront to the provisions of PAJA, more especially the provisions under section 6 thereof. Furthermore, the applicant was deprived an opportunity to properly address the allegations of fraud against him, neither was he afforded an opportunity to explain why he should not be deported. It was also contended in the heads of argument that the respondents did not provide the applicant with the means to obtain necessary documents that could confirm his status.

[56] Since there is no evidence to support the allegation from the applicant that the third respondent had unlawfully derived a benefit in his conduct by communicating to parties outside the department regarding his matter and evidence that he was instructed to resign from his employer (SATAWU), those allegations ought to be rejected as false. It was further argued that the enquiry held with the applicant to determine his citizenship was flawed since it ought to have been conducted in a form of a trial, with the applicant afforded the right to present evidence and be allowed to cross-examine witnesses of the respondent as well as the opportunity to present arguments on the law. The applicant relied in this regard on a number of authorities, for this proposition, notably, **Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 2004 at 231I-233H, 233F-234A.**

[57] The applicant further argued that the only person who could shed light on his registration or non-registration of birth is his mother who is untraceable.

[58] The thrust of applicants' contention to have the respondent's decisions set aside can be summarized as follows:

58.1. The third respondent is not empowered by law to make a decision that deprives the applicant of his citizenship. The decision taken by the third respondent is in contravention of section 6 (2) (a) (i) of PAJA;

58.2. The third respondent did not follow a fair procedure when he conducted the investigations against the applicant in conflict with section 6 (2) (b) of PAJA;

58.3. The respondents should not have required of the applicant to prove his citizenship status after 13 years since 1994;

58.4. The respondents cannot maintain that the applicant's perceived inability to prove the case of his citizenship equates to fraud or misrepresentation; and

58.5. There was no basis for the respondents to reject the evidence that the applicant and his father were born in South Africa.

[59] In its heads of argument the respondent has aptly explained the framework of the Act which defines in section 1 thereof an illegal foreigner, as a foreigner who is in the Republic in contravention of the Immigration Act. In section 41 (1) the immigration officers are empowered to investigate suspected illegal foreigners and in section 8 (1), the immigration officer has the authority to find one to be an illegal foreigner.

[60] It was submitted on behalf of the respondents that the Act provides two distinct and separate review or appeal processes which are a review to the Minister in terms of section 8 (1) (b) and a review to the Director General in terms of section 8 (4).

[61] The respondent further argued that the representations which were made by the applicant on 10 October 2017 to the Director-General against the findings of the immigration officer made on 4 October 2017 were incorrectly made. Similarly, the representations which were made to the Minister on 29 November 2017 to appeal the decision of the Director-General to uphold the immigration officer's findings were also incorrectly made.

[62] It is clear in terms of the Immigration Act that an immigration officer is empowered to investigate an allegation that a person is an illegal foreigner and make such determination. Therefore, the officers of the respondent cannot be faulted for conducting the investigation against the applicant as contended by the applicant. Based on the evidence presented before court there is no shred of evidence that they acted in a bias manner nor do I find that they were advancing the course of SATAWU (when doing so). The applicant has in own version stated that the allegation is based on suspicion. No evidence was presented to substantiate the claim that the officers of the respondent derived an undue benefit for their investigations.

[63] The argument that the applicant was not afforded a fair chance to prove his citizenship is not borne out by the facts. Nor is there any justification for the allegation that he was denied an opportunity to address the circumstances surrounding his alleged acquisition of citizenship and the relevant documents that were issued from the offices of the respondents. On the contrary, the applicant on 31 July 2017 furnished the third respondent with a letter from Zitike Primary School as support for his claim that he was born in South Africa, this letter was accompanied by a whole host of other documents in which the applicant sought to prove his citizenship.

[64] The applicant has opted to steer clear from responding to the allegations in the answering affidavit of the exchange of emails between the third respondent and his attorney, Mr Jafta in which the said Jafta undertook to furnish the third respondent with the statement of applicant in which he must explain where he was born and to furnish

his mother's details and any other documents that can substantiate his claim as a South African Citizen.

[65] It has to be noted that the correspondence of 4 August 2017 from the third respondent, specifically alleged in its first paragraph that the applicant was a Zimbabwean by birth. This allegation required a precise and clearer response from the applicant in the statement that was awaited from him but was never issued by the applicant. Instead the applicant, through his attorney provided many excuses that caused him not to make available such statement until his arrest two months later. The allegation by the applicant that he was not afforded a fair opportunity to address his claim that he was a South African cannot be sustained. Nor can there be any merit in the allegation that the conduct of the third respondent falls short of the provisions of PAJA, and therefore warranting the actions of third respondent to be reviewed and set aside.

[66] This brings me to an important aspect which the applicant has avoided to address in his reply. Whilst he admits having attended a meeting together with his attorney, Mr Jafta in the office of the third respondent, he nevertheless steers clear from addressing the allegation that he deposed to an affidavit to which he appended his signature whilst in the presence of his attorney in which he stated that he was born in Zimbabwe whilst under duress. If the account of the applicant is what transpired. The question that has to be asked, what was the reaction of his attorney when he was subjected to depose to a statement through force or unlawful means. This is not a lot to ask from the applicant, since it can reasonably be assumed that the purpose he hired an attorney to be present in his interview with the third respondent was to advise him and guard his legal interests and also to ensure that his constitutional rights are protected.

[67] Neither has the applicant saw it necessary to cause Jafta to depose to an affidavit in which she confirms the violation of the rights of her client and what her

reaction was, upon seeing that her client was forced into making an affidavit or a statement which was sought illegally.

[68] In reply to the serious allegations made in paragraph 5 of the answering affidavit, the applicant simply brushes those allegations aside by stating that he denies each and every allegation. He continues to allege that he was a learner at Zitike Primary School and refutes any allegations that Tat' u Ndwandwe was not his father. He deliberately avoids to deal with the gravamen of the allegations made in paragraph 28 of his second application's founding affidavit wherein he answered and said that he does not know his mother, since he has only lived with his father. However, as pointed out by the respondent, the averment in paragraph 28 is in contrast with the allegation in paragraph 5.3 of the founding affidavit in the urgent application before Raulinga J, wherein the applicant alleged that he was informed by his mother that she left his father (applicant's) at the farm.

[69] As alluded above the applicant did not even attempt to explain the contradictions in his affidavits. Instead he denies that they are contradicting each other. Similarly, the applicant failed to address the information from the MCS in which it is recorded that he has on a number of occasions exited the republic through the borders to enter Zimbabwe. The frequent movements of applicant from South Africa to Zimbabwe leads to a reasonable conclusion that the applicant has ties and conducts relations with the country of Zimbabwe and its people.

[70] It is trite that the purpose of a replying affidavit is to deal with the averments made by the respondent in an answering affidavit¹. An applicant who fails to respond to the allegations and averments in the answering affidavit of the respondent does so at his own peril².

¹ Boyat and Others v Hansa and Another 1955 93) SA 547 (N) at 553C-E

² Vaatz v Law Society of Namibia 1991 (3) SA 563 at 566 S – 567 B

[71] Being faced with the factual allegations in the answering affidavit of the respondents and which have not been dealt with by the applicant in his replying affidavit bar a bare denial, attracts the well-known Plascon Evans³ rule test in terms of which the version to be accepted is that of the respondent.

[72] I now turn to deal with the question whether the applicant has proved his claim for citizenship as a South African. It bears mentioning as a point of departure that Tat' u Ndwandwe appears to be an illiterate person. This is borne out in affixing his thumb print on his affidavit as a substitute for his written signature. This begs the question which has been raised correctly in my view by the respondents, whether he indeed read the affidavit of the applicant to which he deposed a confirmatory affidavit.

[73] Whilst it may be insignificant there are other concerns which I am unable to ignore that appear in the handwritten affidavit of Tat' u Ndwandwe and annexed as "AA19". In paragraph 3 of his affidavit; he states that *"four years ago a young man came to my house and told me his mother had died and were looking for me in order to register him at home affairs. He further told me that his mother's surname is Gumbi. I then assisted him to register for an ID (sic)."*

[74] In paragraph 6 he states *"As far as I know Sandile's mother was a South African. The only proof I have that Sandile is my son is that he came looking for me and confirmed that he's mother's surname is Gumbi."* (sic)

[75] More importantly is what is sated in paragraph 2 of the same affidavit where he states *"I know Sandile Gift Ndwandwe. He is my son long time ago when I was working at a farm in Pongola I met a woman and we had a child together. She was pregnant when I last saw her...."* (My own emphasis) It is quite interesting how tat' u Ndwandwe can state factually that they had a child with the mother of the applicant whereas the last time he saw her, she was pregnant. How would he know that a child born by Ms Gumbi

³ Plascon Evans v Plascon Evans (Pty) Ltd v Van Riebeeck (Pty) Ltd 1984 (3) SA 623A at 634E – 635C

is his child if that was never brought to his attention by the mother of the child. How does he exclude the many possibilities, such as a case where the pregnancy of Ms Gambi was not successful or that she was pregnant a child fathered by someone else. How would Tat' u Ndwandwe know a person by the name of Sandile Gift Ndwandwe as his son without any further proof, such as a DNA laboratory test or any other independent evidentiary material that confirms his paternity.

[76] What can be gleaned from the handwritten affidavit "AA19" of tat' u Ndwandwe is that the sole purpose for which the applicant came to look for him was to get his assistance to have him registered for purposes of obtaining an ID document. That view is further supported by Tat' u Ndwandwe's averments that his traditional chief does not know the applicant. Further, he knows Sandile to be working in Johannesburg but he does not know what he was doing.

[77] All this flies in the face of the applicant's averments in paragraph 7 of his affidavit in which he stated that, the purpose for searching for his father was to be united with his family. It is quite surprising why someone who goes on a journey to search for his father so desperately, after getting the help he needed from him disappears to the extent that his very father does not know what he is doing in Johannesburg. The impression that was given by the applicant that he needed to be reunited and to form a relationship with his father is not demonstrable in his conduct.

[78] Similarly, I can find no credence to the issue at hand from the confirmatory affidavits of the half sisters and brothers of the applicant. The essence of their affidavits is to the effect that they know the applicant as belonging to the Ndwandwe family and they grew up with him. None of them can state how they know him to be a Ndwandwe. Obviously, in the absence of proof which is lacking for Tat' u Ndwandwe to claim with certainty or prove that the applicant is his son, it follows that their confirmatory affidavits are hollow and are not helpful.

[79] It is worth noting that the applicant does not state anywhere for how long he stayed with his mother and at what age did he leave her or his maternal home to search for his father. The importance of this question is why did the applicant not make a similar demand from her mother, to register him for the purposes of an ID. To add, I find it curious that there is no mention of any family member of applicant's mother in the applicant's allegations. Instead as pointed out by the respondents, the applicant stated in his founding affidavit of the second application, that he does not know his mother, an allegation that is at complete variance with his averment in the founding affidavit in respect of this application.

[80] Similarly, the applicant has chosen not to deal with the allegations made in the respondent's answering affidavit that an investigation into the claims that the applicant was registered at Zitike Primary School revealed that the register of the school was tampered with. Most notably is the information according to the register of a person with the name "Sandile Ndwandwe" who was born 31 January 1991 and admitted as a pupil on 19 January 1995. This information could not have been correct according to the respondents since it would have meant the learner was three years old at the time.

[81] This matter became even more complicated when compared with the 'original' register (annexure "AA15") which revealed that one Sandile Ndwandwe with the date of both indicated as 9 January 1992 was admitted at the said school during 1999 when he was 7 years old. As if this confusion was not enough the Vice Principal of the school caused another correspondence to be written wherein he mentioned that one Sandile Ndwandwe with the date of birth indicated as 1992 had attended their school in 1995.

[82] As alluded to above the applicant chose not to dispute or reject the discrepancies that are borne out in the registers of the school which according to the respondent confirm a suspicion that the registers have been altered in order to fraudulently suit the allegation that the applicant was a learner at the said school.

[83] The absence of the applicant's documents namely, Form B1-24 which is a requirement for the late registration of birth and relevant hard copies of documents which are required as proof of the process that was followed is a cause for concern that could not have been ignored by the immigration officer. That taken together with all other facts I have pointed to above, the conclusion reached by the immigration officer that the applicant is an 'illegal foreigner' is unquestionable. A basis for the conclusion reached in my view by the immigration officer is adequately established and was justified.

[84] Consequently, based on the evidence before me, I am unable to find any justification to set aside the conclusions reached by the immigration officer. I cannot find any merit in the allegations that the immigration officers were biased towards the applicant in the investigation of the matter. Neither do I find any wrong doing in the procedure employed in the investigations and the enquiries that were conducted with the applicant. Contrary to what is stated by the applicant I find that the respondents had conducted themselves in a fair and transparent manner in dealing with the matter. The allegation that they failed to take into account the totality of the evidence is baseless with no merit.

[85] Section 6 of PAJA reads as follows:

"6. Judicial Review of Administrative action – (1) any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action, (2) A court or tribunal has the power to judicially review an administrative action if –

(a) the administrator who took it (i) – (iii)...;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

- (c) the action was procedurally unfair;
- (d) the action was materially influenced by an error of law;
- (e) the action was taken
 - (i) to
 - (ii)
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) to
 - (v)
 - (vi) arbitrarily or capriciously;
- (f) the action itself (i)...(ii) (aa) –(dd)...
- (g) the exercise of the power or the performance of the function authorised by the empowering provisions; in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function.

[86] Regard being had to the provisions of section 6 above I am of the view that the declaration of the applicant to be an illegal foreigner is an administrative action as defined in section (1) of PAJA. Therefore, an application to review such a decision by an organ of state as is the case in this matter is competent under PAJA.

[87] I am however as alluded above unable to find any conduct that supports the grounds as set out in section 6 (2) (e) (i) of PAJA as contended by the applicant. The respondents in my view acted in an ethical manner and at no stage displayed dishonor to the applicant nor attempted to act outside the perimeters of the immigration laws. Neither do I find the conduct of the respondents to have rendered the applicant stateless as contended. I also do not find any reason to deal with the old laws some of which have since been repealed which are of no consequence to this application.

[88] It may warrant commenting albeit in a brief manner, on the issue of the *curator ad litem* report which the applicant relies on as a further piece of evidence that confirms his citizenship or alternatively, evidence that was ignored or not taken into account when he was found to be an illegal foreigner.

[89] There has been no evidence that suggests that the applicant was not entitled to follow the necessary processes and satisfy the necessary requirements in order to qualify as a citizen of the republic. That he has not chosen to do. In the absence thereof nothing precluded the officials of the respondent to investigate his status in the country and upon the established evidence as it is in this matter, declare him to be an illegal foreigner, who according to the dictates of the Act ought to be deported in terms of the Act⁴.

[90] I also cannot find fault in the Minister's exercise of the powers conferred upon her in terms of the Act⁵, to reject any representations made to her if she is of the view that the case of an applicant is based on fraudulent representations as it appears to be the case in this matter.

[91] As alluded above, none of the grounds for review as envisaged in section 6 of PAJA have been established by the applicant. On the contrary, the applicant has failed to produce evidence which contradicts the facts upon which the respondents are relying

⁴ See Section 32 of the Immigration Act, Act 13 of 2002

⁵ See Section 8 (1); 8 (4) read with Section 48

on to declare him a citizen of Zimbabwe. The probabilities from the facts presented by both sides lead to a conclusion that the applicant is an illegal immigrant in the Republic of South Africa who has ties or homage traceable in Zimbabwe.

[92] I am therefore unable to disagree with the findings of the third respondent which have been upheld by both the first and second respondents. Consequently, I find no reason to remit the matter to the second respondent for reconsideration. Accordingly, the application ought to be dismissed.

[93] I now turn to deal with the issue of costs. The respondents called for attorney and client costs ostensibly on the grounds that the failure of the applicant to disclose his previous applications which bear similar features as the present one amounts to forum shopping and was misleading to the court.

[94] It bears mentioning that the conduct of the applicant in dealing with the matter from the period of its investigation is not portraying him as a candid person. This much can be gleaned in the failed attempts by the third respondent to have his corporation and even through his legal representative. His attempt to explain to this court why he failed to disclose his previous litigations which emanate from the same set of facts is concerning and I find it disingenuous. However, I take into account that notwithstanding the concerns above. Since the applicant was in a bid to establish his citizenship in the country, given all the other factors that surround this matter such as his family ties within the republic and the lapses in the system of the respondents to prevent instances such as where an illegal foreigner can access formal documentation such as ID's and Passports without fulfilling the necessary requirements, all that persuaded me to order costs on a party and party scale.

[95] I was also invited to make an order barring the applicant from bringing any further proceedings against the state in any court of law until such time that whatever cost orders have been awarded against him have been paid. The applicant had nothing to say on this request. I am therefore inclined to grant the additional order that is sought

albeit, with a degree of relaxation as opposed to a blanket bar as proposed by the respondent.

Order

[96] In the result the following order will issue:

1. The application is dismissed with costs on a party and party scale.
2. The applicant is barred from instituting any further proceedings in any court arising out of this matter, save for any appeals or reviews of the orders made against him in respect of this matter until the orders of costs made against him are paid in full.

V M Nqumse

Acting Judge of the High Court

For the Appellants

: Adv. S B Mgonezulu

Instructed by

: C R Masilela Attorneys

For the Respondent

: G Bofilatos

Instructed by

: The Office of the State Attorney

Heard on

: 15 February 2022

Judgement handed down on

: 19 July 2022