

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, EAST LONDON)**

Case No: EL1252/2020

In the matter between:

N[....]1 N[....]2

First Applicant

G[....]1 O[....] G[....]2 N[....]2

Second Applicant

And

MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR-GENERAL, HOME AFFAIRS

Second Respondent

JUDGMENT

BESHE J:

[1] The applicants in this matter are wife and husband and parents to two children, **N[....]3 E[....] N[....]2 (N[....]3)** born 25 April 2014 and **M[....] G[....]3 N[....]2 (M[....])** born 11 January 2018. Both children were born within the borders of South Africa. The applicants are Zimbabwean citizens. They currently reside in Beacon Bay, East London. The application concerns **M[....]**. They are seeking an order in the following terms:

“1. Directing the Applicants’ exemption, in the interests of justice, from first exhausting such internal remedies as may exist, as provided for in terms of section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000.

2. That the Second Respondents' refusal and/or failure and/or omission to register the birth of the Applicants' child, M[....] G[....]3 N[....]2, and issued a birth certificate thereafter with identity numbers be:

2.1 declared wrongful, and

2.3 reviewed and set aside.

3. Directing the Second Respondent to register the birth of M[....] G[....]3 N[....]2; allocate unique identity numbers to her and issue an unabridged birth certificate that reflects the correct details of her parents, being the Applicants, in terms of Regulation 7 (2) (a) of the Regulations on the Registration of Births and Deaths, 2014.

4. Directing the Respondents to pay costs of this application. Such costs to be on a scale as between attorney and own client."

[2] The founding affidavit is deposed to by first applicant who states that they relocated to South Africa in March 2003. She attained permanent residence status in October 2012. She was issued with a South African Identity Document as a non-citizen in 2014.

[3] Not only is the application opposed by the respondents, they are also making a counter-application. The counter-application relates to a birth certificate that was issued to N[....]3. Respondents seek an order in the following terms in their counter-application:

"(a) the respondent's non-compliance with the normal rules of the above honourable court relating to form, service and timelines required in terms of rule 53 of the Uniform Court rules be condoned and the First and Second Respondents be granted leave to bring this application as counter application to the main application.

(b) a declaratory order that identity number [....], issued to N[....]3 E[....] N[....]2 on 7 June 2014 was issued unlawfully and against the provisions of the Births and Deaths Registrations Act, read together with the Citizenship Act and the Identification Act.

(c) the issuing of the abovementioned identity numbers thereof is reviewed and set aside.

(d) Applicants are ordered to, within 90 days from the date of this order, to register birth of their minor child N[...]³ E[...] N[...]² in their country of citizenship and thereafter should they wish, make and application for her own status in the Republic.

(e) the Applicants shall pay the costs of this application only in the event they oppose this application. Otherwise the costs of this application shall be costs in the cause in the main application.

(f) further and/or alternative relief as it deems appropriate.”

Contentions by the applicants

[4] Their first born child N[...]³ was issued with a birth certificate with a unique identity number by the second respondent in 2014. After M[...]¹'s birth in January 2018, contrary to what obtained in N[...]³'s case, when they applied for M[...]¹'s birth certificate in 2018, they were issued with one without an identity number. She was advised that the reason for not allocating N[...]³ with an identity number was due to the fact that first applicant is not a South African citizen but a permanent resident and that N[...]³'s birth must first be registered in applicant's country of origin, Zimbabwe. She avers that the conduct of respondent's officials in refusing to allocate an identity number to N[...]³ is wrongful. It is in conflict with *Section 3, 7 and 8 of the Identification Act 68 of 1997*. Further that it is inconsistent with *Regulations 7 (2) (a) of the Births and Deaths Registration Act 51 of 1992*. Furthermore, that her permanent residency status is sufficient to justify that her children should also attain the same status regardless of their father's current status.

Respondents' opposition and counter-application

[5] The affidavit in this regard is deposed to by **Xholile Wittes** who describes himself as a senior legal administrative officer attached to the Department of Home Affairs which is headed by the first respondent. According to **Mr Wittes**, the basis for opposing the main application is that the orders sought by the applicants are incompetent. Regarding the counter-application, **Mr Wittes** avers that an act of

illegality occurred in the issuing and or processing of **N[....]3's** birth certificate, and she was issued with an identity number without due process being followed. The respondents are now seeking the reviewal of their unlawful administrative action in this regard.

[6] The respondents also assert that the applicants have not made out a case for an exemption in terms of *Section 7 (2) (c) of PAJA*¹ from utilizing or exhausting the internal remedies provided for by legislation. *Section 7 (2) (c) of PAJA* provides that “a court or tribunal may in exceptional circumstances and on application by the person concerned, exempt such a person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice”.

[7] In this regard, applicants assert that internal remedies were not explored because the respondents have shown no interest in issuing a birth certificate with an identity number for **M[....]**. This amounts to exceptional circumstances which in the interest of justice justify the exemption sought. Further that granting the relief sought in this application will protect the interest of the minor child.

[8] I do not think there is merit in the first ground raised by the applicants for asserting that they are deserving of an exemption as provided for in *Section 7 (2) (c) of PAJA*. The second ground is not without merit or bereft of merit. In every matter concerning a child, their best interest are of paramount importance.² In my view, the fact that the application concerns a child justifies the exemption of the applicants from the requirement that they first explore / exhaust internal remedies. It is therefore, in my view, in the interest of justice and therefore in the interest of the minor child that they be exempted from exhausting internal remedies.

9] The respondents assert that the applicants' minor child is not entitled to a birth certificate with a unique identity number. In support of the assertion, the court's attention is drawn to the legal framework that governs the registration of a birth. The pieces of legislation that are said to be applicable are:

Births and Deaths Registration Act number 51 of 1992.

¹ Promotion of Administrative Justice Act number 3 of 2002.

² Section 28 (2) of the Constitution. See also Section 9 of the Children's Act 38 of 2005.

Identification Act 68 of 1997.

In respect of the former Act, reliance is placed on *Section 5* thereof with special emphasis on *Section 5 (3)*. It is apposite to reproduce these provisions as I do:

“5 Custody of records and registration of births and deaths

(1) The Director-General shall be the custodian of all—

(a) documents relating to births and deaths required to be furnished under this Act or any other law; and

(b) records of any births and deaths preserved, prior to the commencement of this Act, in terms of the Acts repealed by this Act.

(2) Particulars obtained from the documents referred to in subsection (1) (a) shall be included in the population register and such inclusion is the registration of the births and deaths concerned.

(3) In the case of a non-South African citizen who sojourns temporarily in the Republic, particulars obtained from documents mentioned in subsection (1) (a) shall not be included in the population register and the issuing of a certificate in respect of such particulars is the registration thereof.”

Section 9 of the Act deals with the notice of birth. *Subsection 5* thereof provides that:

“(5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.”

[10] This, according to the respondents is what was supposed to have happened in the case of both minor children and did in fact happen in respect of **N[...]**³. It is further asserted that, based on the abovementioned provisions, it is clear that there is a different category of birth certificates that is issued to non-South African citizens whose particulars do not get to be included in the population register.

[11] This is further bolstered by provisions of the *Identification Act*. Once again, it will be apposite to reproduce the applicable provisions of this Act as I proceed to do. *Section 3* provides that:

“3 Application of Act

This Act shall apply to all persons who are South African citizens and persons who are lawfully and permanently resident in the Republic.”

Section 7 provides that:

“7 Assignment of identity numbers

(1) The Director-General shall assign an identity number to every person whose particulars are included in the population register in terms of section 8.

(2) An identity number shall be compiled in the prescribed manner out of figures and shall, in addition to a serial, index and control number, consist of a reproduction, in figure codes, of the following particulars, and no other particulars whatsoever, of the person to whom it has been assigned, namely—

- (a) his or her date of birth and gender; and
- (b) whether or not he or she is a South African citizen.”

Section 8 in turn provides that:

“8 Particulars to be included in population register

There shall in respect of any person referred to in section 3, be included in the population register the following relevant particulars available to the Director-General, namely—

- (a) his or her identity number referred to in section 7;
- (b) his or her surname, full forenames, gender, date of birth and the place or country where he or she was born;

(c) if he or she has attained the age of 16 years, his or her ordinary place of residence and his or her postal address;

(d) if he or she is a South African citizen but is not a citizen by birth or descent, the date of his or her naturalisation or registration as such a citizen, and, if he or she is an alien and was not born in the Republic, the date of his or her entry into the Republic, and the country of which he or she is a citizen.”

[12] It is the respondents’ assertion that the obvious interpretation of these provisions is that a person must have been registered as a citizen of his or her own country. That the department can only be able to register a child and provide an identity number once it is able to confirm whether the child is a citizen of another country or not. **Mr Wittes** outlines what practically is the administrative process the applicants ought to have followed as being the following:

- Give notice of birth of child in terms of *Section 9* of the *Births and Deaths Registration Act*.
- Upon which a birth certificate will be issued to the child.
- Minor children are entitled to follow their parents’ citizenship which in this case is Zimbabwean.
- The fact that first applicant is a permanent resident in South Africa, does not entail that her children are automatically granted the status of permanent residency in South Africa. Even though they qualify to follow their parents’ status, an application by their parent/s after having been registered as citizens of their country i.e. where their parent/s are citizens is required. Something they can do through the embassy of their country of origin.

[13] In a nutshell, respondents’ case is that the applicants’ minor children not being South African citizens and not being persons who are lawfully and permanently residents in South Africa, (permanent residence) they cannot be issued with a birth certificate with an identity number. It is only once the status of permanent residence has been attained by a child following an application for same, can a child qualify to have an identity number assigned to her.

[14] I note that the identity document issued to first applicant on 21 February 2014 specify that it is issued in respect of a non-South African citizen and records her country of birth, which is Zimbabwe.

[15] A letter annexed to applicants' founding affidavit and marked "NN9" shows that the applicants were apprised of what they needed to do, the steps they needed to follow in order for **N[....]3** to be allocated an identity number. The letter is addressed to applicants' attorneys and is entitled RE: CONFIRMATION OF NON-SA CITIZENSHIP, M[....] G[....]3 N[....]2, BORN ON 11 JANUARY 2018. The following is recorded therein:

"1. With reference to your correspondence dated 20th October 2020. Please note the following:

- (a) according to the available information, Ms. M[....] G[....]3 N[....]2 is not a South African citizen, as at the time of her birth, neither of her parents was a South African citizen. However, they are permanent residents.
- (b) it is advisable for the parents of Ms. M[....] G[....]3 Nadlovu, to make application at the Zimbabwean Embassy in South Africa to register the birth of the child.
- (c) Upon receipt of Ms. M[....] G[....]3 Nadlovu's Zimbabwean passport, her parents are encouraged to make application at the closes VFS Global offices for her permanent residency.

2. It is only after your client has been granted permanent residency, as per status of the parents, would we then allocate the Identity number for permanent residents.

N QALASE

LOCAL OFFICE MANAGER: EAST LONDON OFFICE LARGE

DATE: 2020.10.28"

[Reproduced as it is.]

Counter-application

[16] The counter-application is based on the same grounds as stated hereinabove for this assertion that the issuing of a birth certificate with a unique identity number to applicants' minor child, **N[....]3** falls to be reviewed and set aside. On the basis that it was issued unlawfully and against the applicable prescripts. The respondents seek a review of the administrative action taken in this regard in a bid to prevent an act of illegality being perpetuated. This only came to their attention through the main application. The way I understand respondents' counter-application is that it is based on the principle of legality and not *PAJA*

[17] Applicants' assertion that because the review application was not made within 180 days, as provided for in *Section 7 of PAJA* does not have merit. The respondents brought the application (counter-application) once the act of illegality came to their attention. In my view, the delay has been adequately explained and the review was instituted within a reasonable time after becoming aware of the "illegality". This in my view does not non suit the respondents from making the counter-claim.

Discussion

[18] Respondents' stance which is relevant to both opposition of the main application and their counter-claim is as follows:

The issuing of birth certificate with an identity number in respect of the applicants' first child, without first being granted a permanent resident permit, was erroneous. They make the point that only permanent residents have a right to be issued with an identity number. Even that identity number would be different from those allocated to South African citizens. The error was further perpetuated by issuing **N[....]3** with an identity number whose eleventh digit was an 0. "0" being reserved for showing that the holder is a South African citizen. One "1" will be the eleventh digit in respect of non-citizen of South Africa.

[19] This is also illustrated by the identity number that was issued to the first applicant – the eleventh digit being 1. As opposed to one issued to **N[....]3** whose eleventh digit is 0.

[20] Applicants point out, correctly so, that the respondents derive their power to issue or allocate identity number from *Section 7 of the Identification Act*. *Section 2 (2)* thereof prescribes how identity numbers should be compiled. *Section 7 (2) (b)* requires that the identity number should indicate whether the person concerned is a South African citizen or not.

[21] Applicants argue that based on *Regulation 7 (2)* issued in respect of the *Births and Deaths Registration Act*, the Director-General is enjoined to issue the parents of a child with an identity number.

[22] I am inclined to agree with the applicants in this regard. It is however clear that the respondents are required to issue such an identity number in accordance with the citizenship of the person concerned. In order for the respondents to determine whether that person is a South African citizen or not, that person's birth must have been registered in the persons' country of origin. It is after the birth had been registered in the country of origin that an application for permanent residency can be processed upon application by that person. If the person is a minor upon application by his / her parents on the child's behalf.

[23] This is also clear from the wording of *Section 3 of the Identification Act*. The objective of this Act amongst others is to provide for the compilation of and maintenance of a population register in respect of the Republic; for the issue of identity cards etc. *Section 3 of the Act* provides that the Act is applicable to all persons who are South African citizens and persons who are lawfully and permanently residents in the Republic. Hence respondents' argument that **N[...]**3 should apply for permanent residence status. But, in order to facilitate that, her birth must first be registered in her country of origin. The country where her parents are citizens *albeit* first applicant having been granted permanent resident status in the Republic of South Africa. That in itself, so argues the respondents, does not automatically clothe **N[...]**3 with the status of permanent residency.

[24] The issuing of identity number must be preceded by the granting of a permanent resident's permit which in turn will require that persons be reregistered in their country of origin. Both *Mr Nzuzo* for the applicants and *Mr Mpakane* for the respondents also drew my attention to the *Regulations to the Births and Deaths*

Registration Act, in particular to *Regulation (2) (a) and (b)*. from this regulation, it is clear that the second respondent is enjoined, upon receipt of a notice of birth, to issue to the parents a birth certificate with an identity number for holders of a permanent residence permit. It is common cause that neither **M[....]** nor **N[....]3** are holders of permanent residence permits. My interpretation of the legislation in this regard including the abovementioned regulation, implies that the child's status must first be registered, namely, as permanent resident, before they can be issued with an identity number. Until such time that a person has not been issued with permanent residency permit (in the case of a foreign citizen) they cannot be issued with an identity number. This procedure was also not followed before an identity number, indicating that she was a South African citizen was issued to **N[....]3**.

[25] I have no difficulty in finding that the identity number issued to **N[....]3** by the respondents was issued unlawfully and against the provisions of relevant legislation. I am of the view that it was incumbent upon the respondents to review their own unlawful decision or action as they seek to do in the counter-application. This is based on the principle of legality. In both ***State Information Technology v Gijima Holdings***³ and ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd***⁴ the Constitutional Court acknowledged that it is permissible for an organ of state to seek a judicial review of its own administrative action. In the ***Asla*** matter, the following was said at paragraphs [44] to [46]:

“[44] For a considerable time, it was accepted that organs of state that seek to set aside their own decisions were entitled, and indeed obliged, to do so under PAJA. This inevitably involved a consideration and application of section 9 of PAJA with regard to any contentions of unreasonable delay.

[45] Following this Court's decision in *Gijima*, it is now settled that an organ of state seeking to review its own decision must do so under the principle of legality and cannot rely on PAJA. What implications, if any, does this have for assessing the delay.

³ 2018 (2) SA 23.

⁴ [2019] ZACC 15.

[46] There are four principles that answer this question. First, assessing delay under PAJA and legality differs in two respects, even though both hinge on reasonableness. The first difference is the role of the 180-day bar in section 7(1) of PAJA.”

[26] The reliance by the applicants on *Section 19 of the Identification Act*⁵ is misplaced. This section deals with circumstance where the identity document concerned does not correctly reflect the particulars of the person to whom it was issued. *Section 19* provides for the correction, cancellation and replacement of identity card, temporary identity certificate or certificate. The matter serving before me in respect of both of applicants’ children is not concerned with incorrect particulars of the person to whom the documents were issued. But with the process followed in issuing the identity number in respect of **N[....]3** and refusal to do so in respect of **M[....]**.

Conclusion

[27] I am not persuaded that the applicants have made out a case for an order directing the second respondent to register the birth of **N[....]3** and allocate her with unique identity numbers. On the other hand, I am satisfied that the respondents have made out a case for the relief sought in the counter-application.

[28] I do not see why the costs should not follow the results in respect of the main application. However, as far as the counter-application is concerned, it will not be appropriate to order costs against the applicants. I do not understand it to be the case of the respondents that it was through applicants’ design or fault that their minor child was issued with an identity number even though not holding a valid permanent residency permit. The fault lies at the doorstep of respondents’ officials.

Order

- (1) The main application is dismissed with costs.**
- (2) In respect of the counter-application, the following order will issue:**

⁵ Act 68 of 1997.

It is declared that the identity number being [....] issued to N[....]3 E[....] N[....]2 on 7 June 2014 was issued unlawfully.

(3) The issuing of the abovementioned identity number is reviewed and set aside.

(4) There will be no costs order in respect of the counter-application.

N G BESHE

JUDGE OF THE HIGH COURT

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