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

Case No: 26235/20

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

DATE: 21 May 2021

In the matter between:

M[.] SZ

First Applicant

M[...] BA

Second Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR GENERAL:

DEPARTMENT OF HOME AFFAIRS

Second Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

WILSON AJ:

- 1 The first respondent (“the Minister”) and the second respondent (“the Director-General”) seek leave to appeal to a Full Court of this Division

against my judgment of 3 December 2020. In that judgment I reviewed and set aside the Director-General's decision to refuse to issue an unabridged death certificate to the applicant ("Ms. M[...]"). That refusal was based on the proposition that Ms. M[...]'s deceased husband, Mr. M[...], was not a South African citizen at the time of his death.

2 In my judgment, I concluded that there no factual basis on which to conclude that Mr. M[...] was not a South African citizen at the time of his death. I also found that there was no legal basis on which the Director-General could refuse to issue an unabridged death certificate to Ms. M[...], even if Mr. M[...] did not die a South African citizen.

3 Both these conclusions are challenged in the application for leave to appeal. It is further argued that, because the review application was brought out of time without a "substantive" application to extend the 180-day period specified in section 7 (1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), I had no power, as a matter of law, to entertain it.

4 Having given the matter some thought, I am unable to conclude that there is any reasonable prospect that a court of appeal would reverse or materially alter the order I gave.

5 These are my reasons.

Whether Mr. M[...] was a citizen at the time of his death

6 At the outset of his oral argument, Mr. Luthuli, who appeared for the respondents, notified me that the respondents no longer pursue the central argument they made before me in the main application. That argument was that Mr. M[...] had obtained his South African citizenship by fraud.

7 In my judgment on the merits, I held that the respondent had failed to adduce any evidence from which that conclusion could be drawn. There was no evidence of what fraud had been committed, how the respondents had uncovered it, or of what conclusions they had drawn from their investigations. I also held that, in any event, there was no allegation that the

Minister had exercised his powers to withdraw Mr. M[...]’s citizenship in terms of section 8 of the South African Citizenship Act 88 of 1995 (“the Act”). Even if an act of fraud had been demonstrated (it had not), the exercise of that power was an essential pre-requisite to the lawful withdrawal of Mr. M[...]’s citizenship.

- 8 The respondents now accept this, and Mr. Luthuli conceded that it cannot reasonably be argued in any appeal that Mr. M[...]’s citizenship was lost because it was fraudulently obtained.
- 9 Mr. Luthuli instead concentrated his submissions on the alternative argument raised on the respondents’ behalf in the main application. That argument was that Mr. M[...] lost his citizenship by operation of law because he voluntarily acquired Zimbabwean citizenship 2013. This loss of citizenship was said to be the effect of section 6 of the Act, which provides that anyone who “whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic” thereby forfeits their South African citizenship.
- 10 It is a matter for comment that the factual basis for this claim is fundamentally inconsistent with the case the respondents initially made out. Mr. M[...] is said to have obtained a Zimbabwean ID document in 2013. If that had the effect of extinguishing in South African citizenship, then it follows that the fraud investigation that took place in 2010, and on which the respondents initially relied, could not have had that effect.
- 11 What the respondents seek to do on appeal is discard the factual foundation on which their case was originally constructed. Instead of the case they pleaded, they now rely on two lines in the applicants’ papers to the effect that Mr. M[...], at some point “went to Zimbabwe and obtained a Zimbabwean ID as per his father’s cultural and traditional demands” (see paragraph 12.1 of the founding affidavit) and that Mr. M[...] “applied for his Zimbabwean citizenship in 2013” (see paragraph 8.1 of the replying affidavit).

- 12 It does not seem to me that either of these allegations categorically confirms that Mr. M[...] voluntarily acquired Zimbabwean citizenship, but that is not an issue I decided in the main application.
- 13 Nor did I need to decide it. The parties accepted that the only way that Mr. M[...] could have acquired Zimbabwean citizenship was by virtue of the provisions of section 37 (a) of the Zimbabwean Constitution, 2013. Section 37 (a) conferred Zimbabwean citizenship on Mr. M[...] by operation of law because he had a Zimbabwean father. I held in my main judgment that it follows from this that Mr. M[...]’s acquisition of Zimbabwean citizenship was not voluntary, and that section 6 of the Act does not apply.
- 14 To meet this difficulty, Mr. Luthuli drew a distinction between a statute that confers citizenship, and the decision of an organ of state to recognise that the statute applies to a particular person. The submission was that a person upon whom citizenship is conferred by statute only acquires that citizenship once the appropriate organ of state recognises them as a citizen. It follows from this, Mr. Luthuli argued, that Mr. M[...] acquired Zimbabwean citizenship voluntarily when he applied for his Zimbabwean identity document, not when the Zimbabwean Constitution conferred it on him by operation of law.
- 15 I do not think there is any prospect that a court of appeal will accept this submission. There is a clear conceptual distinction between the fact of citizenship, and the administrative processes necessary to obtain documents in certification of that status. Were it otherwise, as Mr. Jozana, who appeared for Ms. M[...], pointed out, a baby born in South Africa to South African parents would not actually become a citizen until the state recognised them as such. This cannot be correct.
- 16 I have spent some time summarising these arguments because they were not advanced in the main application. That is, in itself, no bar to them being pursued on appeal. However, there is, in my assessment, no prospect that an appeal court will uphold them, and find that Mr. M[...] lost his South African citizenship before he died.

The power of the Director-General to issue an unabridged death certificate

- 17 This conclusion renders it strictly unnecessary to consider whether there is any prospect that a court of appeal would differ with my conclusion that the Director-General is empowered to issue a death certificate to a non-citizen.
- 18 Nonetheless, it is appropriate for me to note that the respondents' case on this point has changed as well. Mr. Luthuli placed on record that the respondents now accept that the Births and Deaths Registration Act 51 of 1992, read together with the Regulations on Registration of Births and Deaths, 2014, clearly permit the Director General to issue an unabridged death certificate to a non-citizen, for the reasons I gave in my judgment on the main application.
- 19 The problem, Mr. Luthuli submitted, was that the only difference between an abridged and unabridged death certificate is that an unabridged death certificate contains the deceased's identity number. The Director-General cannot enter an identity number onto an unabridged death certificate if the deceased is no longer a citizen.
- 20 It does not appear to me that the inclusion of an identity number is the only difference between an abridged and unabridged death certificate. However, I do not see that there is any prohibition on the Director-General entering Mr. M[...]’s identity number on an unabridged death certificate, even if Mr. M[...] had lost his citizenship at the time of his death. Mr. M[...] clearly had an identity number, and Mr. Luthuli was unable to provide a reason why that identity number could not be placed on an unabridged certificate of Mr. M[...]’s death.
- 21 Mr. Luthuli’s reliance on section 7 (1) of the Identification Act 68 of 1997 took the matter no further. Section 7 (1) states that the Director-General “shall assign an identity number to every person whose particulars are included in the national population register”. Mr. Luthuli accepted that Mr. M[...]’s particulars had been included in the national population register and an identity number had been assigned to him, but nonetheless submitted that

section 7 (1) precludes that number from being entered on an unabridged certificate of Mr. M[...]’s death.

22 I am unable to see how section 7 (1) prevents this. In my assessment, there is no prospect that a court of appeal would find such a prohibition either.

23 This is quite apart from the fact that the issue of what information could go onto an unabridged death certificate was not the issue before me in the main application. The issue before me was whether an unabridged death certificate could be issued at all. The respondents have now conceded that it can. That brings an end to any prospects of success they might have on this leg of their proposed appeal.

The court’s power to entertain the review application

24 It was finally argued that, because there was no “substantive” application to extend the 180-day time period prescribed by section 7 (1) of PAJA, I lacked the jurisdiction to entertain Ms. M[...]’s case at all.

25 Ms. M[...]’s review was brought out of time. But section 9 (2) of PAJA allows a court to extend the time within which a review application may be brought, if an application for that relief is made to it. In this case, as I recorded in my judgment on the merits, such an application was brought from the bar.

26 Mr. Luthuli submitted that there is a reasonable prospect that an appeal court will find that this was not good enough. That submission rested on the decision of the Supreme Court of Appeal in *Asla Construction v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA). At paragraph 8 of that decision, Swain JA held that section 9 of PAJA contemplates a “substantive” application to extend the time-period prescribed in section 7.

27 Mr. Luthuli submitted that “substantive” must almost always mean “written”, or at least that “substantive” meant “written” in this case. Because the application brought from the bar was not in writing, and did not clearly explain the reasons for the delay, Mr. Luthuli submitted that it was not an

“application” for the purposes of section 9 (2) of PAJA at all. It follows that I had no power to entertain it.

28 Again, none of this was argued before me in the main application, and no objection was raised, at the time, to me hearing an application for the extension of time from the bar. No prejudice to this procedure was alleged, and it is hard to see what prejudice there could have been.

29 Nonetheless, assuming that this is not in itself fatal to an appeal based on the decision in *As/a*, I do not think that there is a reasonable prospect that, on the facts of this case, a court of appeal will find that a written application was required. A “substantive” application is an application that deals with the real issues between the parties on the facts pleaded. These facts need not be pleaded in a dedicated written application. They need only be apparent from the record. If there is any prejudice at all to an application from the bar, and a written application with new facts is necessary, a court is free to require one, and either party may apply for leave to place one before the court.

30 But that is quite a different matter from placing a court under an absolute statutory obligation only to extend the time allowed under PAJA if a full written application is delivered and motivated in every case. I find nothing in *As/a*, and nothing in PAJA itself, that would yield that obligation.

31 In this case, the interests of justice cried out for the review application to be entertained. The prospects of success were so strong, and the impact on minor children of refusing to entertain it so profound, that I determined that an extension of time was appropriate on the facts as they stood. The respondents did not seek at the time to introduce new facts that would have changed that impression. The fact that much of the respondents’ case has now been abandoned reinforces that view.

32 The application for leave to appeal is dismissed with costs.

SDJ WILSON

Acting Judge of the High Court

This judgment was handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 21 May 2021.

HEARD ON: 19 May 2021

DECIDED ON: 21 May 2021

For the Applicant:

M Jozana

Instructed by Banda and Associates Inc

For the Respondents:

S Luthuli

Instructed by the State Attorney