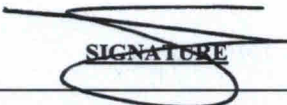




IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	NO
③ REVISED.	✓
27/6/2019. <u>DATE</u>	 <u>SIGNATURE</u>

Case Number: 66844/2016

In the matter between:

ANTHONY OKEY NWAFOR

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR-GENERAL DEPARTMENT

OF HOME AFFAIRS

Second Respondent

THE DEPARTMENT OF HOME AFFAIRS

Third Respondent

JUDGMENT

POTTERILL J

- [1] The applicant, Anthony Okey Nwafor ("Nwafor") is applying in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") for the reviewing and setting aside of the decision of the first respondent, the Minister of Home Affairs ("the Minister") and the second respondent, the Director-General: Department of Home Affairs ("the DG") which reads as follows:

"... I have decided to deprive you and your family a South African citizenship since the acquisition thereof was based on a permanent residence permit that was acquired through false representation and concealment of material fact."

- "1. According to the available information you obtained your permanent residence permit (exemption certificate, with reference number LEB/42/2003) by means of false representation by concealing the material fact that you are married to Mrs Amarachukwu Ebere Nwafor*

on (formerly Uduji) on 1 March 2003 in Nigeria and presented yourself as a bachelor when entering into a marriage in the Republic of South Africa with Ms Gladys Sibongile Vilankulu (who was then a minor) on 25 April 2003. Furthermore, the said certificate was issued to you in conflict of the applicable law in that certificate was issued on 22 January 2004 in terms of the Aliens Control Act, 1991 subsequent to its repeal on 12 March 2003 by the Immigration Act.”²

[2] This matter was for before Constantinides AJ on 28 November 2017. In a written judgment the court found that due to *“numerous factual disputes which cannot be decided on the papers before court”* the matter is to be referred to oral evidence.³

[3] The matter was then set down for the hearing of the oral evidence on 6 May 2019. The Minister and DG were ready to proceed with oral evidence present with their witnesses. Nwafor however requested a postponement indicating an intention to abandon a certain portion of the order of Constantinides AJ. The Minister and DG agreed and the matter was accordingly postponed *sine die*.

[4] In a pre-trial minute dated 9 May 2019 this intention is recorded as follows:

² Page 37 of the record

³ Court order dated 28 November 2017

- *"The matter will no more proceed on Oral Evidence as indicated in the Court Order dated 28th November 2017 delivered by the Honourable Acting Judge Constantinides.*
- *The matter will be placed on opposed motion roll whereof the counsels for the Applicant and the Respondents will argue the matter.*
- *There will be no need to call any witnesses, rather the matter be argued based on the documents and papers before the court.*
- *The applicant will proceed to obtain a preferential date for hearing in motion court."*

[5] I am thus now confronted with Nwafor, as the *dominus litis* party, choosing to proceed on motion proceedings, full well-knowing that the court has made a finding that there are disputes of fact in this matter.

[6] I however first address the two points *in limine* argued on behalf of Nwafor.

The Minister could not have delegated the power to deprive a citizen to the DG and the deprivation is thus *ultra vires* the law

[7] This point was raised, pursuant to the answering affidavit being filed and served by the Minister and DG. This point was raised by means of a supplementary affidavit alleging it was in support of Nwafor's founding affidavit. It is quite clear that this

supplementary affidavit was not filed pursuant to, or to address, any points in the record filed in terms of Rule 53. The Minister and DG objected to the supplementary affidavit and sought it to be struck out.

[8] It is trite that further affidavits can only be filed with leave of the court to do so. No formal objection from the opposing party is required.⁴ No such leave of the court was sought. It has been held that where further affidavits are filed without the leave of the court the court can regard such affidavits as *pro non scripto*.⁵ I accordingly do not accept, or take note, of the content of the supplementary affidavit.

[9] However, even if it could be argued, which it wasn't, that it is a point in law and therefore can be argued without any reference to the supplementary affidavit, the point raised herein stands to be dismissed as being bad in law. Section 22 of the South African Citizens Act, No 88 of 1995 ("the Act") reads as follows:

"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, excluding a power referred to in section 5(9) or 25, to an officer in the service of the Department, but shall not be divested of any power so delegated

⁴ *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2015 (1) SA 161 (SCA) at 165A-C

⁵ *Standard Bank of South Africa v Sewpersadh* 2005 (4) SA 148 (C) at 153H-154J

and may set aside or amend any decision of the delegate made in the exercise of such a power."

Section 25 is totally irrelevant to the deprivation of citizenship. Section 5(9) of the Act reads as follows:

- "(a) Notwithstanding anything to the contrary contained in subsection (1)(c), the Minister may under exceptional circumstances grant a certificate of naturalisation as South African citizen to an applicant who does not comply with the requirements of subsection (1)(c) relating to residence or ordinary residence in the Republic.*
- (b) The Minister shall within 14 days after the commencement of the sittings of Parliament in each year table in Parliament the names of any persons to whom certificates of naturalisation were granted under paragraph (a) in the immediately preceding year, including the reasons for the granting of any such certificate."*

This section is also totally irrelevant to section 8 of the Citizens Act i.e. only the Minister can under exceptional circumstances grant a certificate of naturalisation to a South African citizen who does not comply with the requirements of subsection (1) relating to residence or ordinary residence in the Republic. This section relates to the granting of citizenship; not the deprivation thereof.

This point *in limine* is thus bad in law and is accordingly dismissed.

The “Oudekraal” principle⁶

[10] In the heads of argument on behalf of Nwafor for the first time it is raised that this principle bars the Minister from relying on the unlawfulness of the permanent residence exemption certificate (LEB/42/2003), or the consequent unlawful granting of citizenship until both certificates are set aside by a court of law.

[11] The *Oudekraal* principle is trite. However the Minister did not, as argued on behalf of Nwafor, act *ultra vires* in usurping the function of the court in finding that the permanent residence exemption certificate was fraudulently obtained. The reason for this is that section 8 specifically grants the Minister the power to deprive citizenship:

“8. Deprivation of citizenship. -

(1) The Minister may by order deprive any South African citizen by naturalisation of his or her South African citizenship if he or she is satisfied that –

⁶ *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* 2010 (1) SA 333 (SCA)

- (a) *the certificate of naturalisation was obtained by means of fraud, false representation or the concealment of a material fact; or*
- (b) *such certificate was granted in conflict with the provisions of this Act or any prior law."*

Thus the Minister need not approach a court to set aside the documents as being fraudulent; the Minister has the power to do so. The *Oudekraal* principle is thus not applicable in these circumstances.

The reasons for the Minister's finding

[12] The Minister deprived Nwafor of his citizenship for the following primary reasons:

- 12.1 That Nwafor had entered into marriage with a South African citizen, Mrs Gladys Sibongile Vilankulu ("Vilankulu") on 25 April 2003. Nwafor did so although he was at the time already married to Mrs. A.E. Nwafor, a Nigerian wife on 1 March 2003. Nwafor had thus misrepresented himself as a "*bachelor*" at the time of his marriage to the South African wife.
- 12.2 That Vilankulu, at the time of the marriage, was a minor, under the then majority age of 21 years old.
- 12.3 The permanent residence exemption certificate (LEB/42/203) in terms of the Aliens Control Act 96 of 1991 was issued on 22 January 2004 under

circumstances where the Immigration Act had already been in operation for approximately 10 months with it coming into operation on 12 March 2003.

[13] Although Nwafor was aware of the Minister's reasons by virtue of the letter dated 13 April 2016, approximately four months before launching this application, the 32 page affidavit attached to Nwafor's notice of motion surprisingly does not address a single one of these reasons. Atmosphere is created with many paragraphs as to how Nwafor has been persecuted and harassed by the Department of Home Affairs and Dr. Nkadimeng, the Head of the Department of Health Limpopo branch (not a party to the proceedings), but never addressing the real issues before court. In application proceedings the affidavit must contain the essential evidence which would have been led at a trial.⁷ The founding affidavit in this matter should have contained the facts as to why the reasons for the deprivation are unlawful, irrational, unreasonable and unfounded. This should have been done without citations from case law and without argumentative matter.⁸

[14] The replying affidavit for the first time sets out any grounds and facts in support of the notice of motion. The application should be dismissed on this ground alone as a court would not permit an applicant to make a case in reply when no case was made out in

⁷ *Molusi v Voges NO* [2015] 3 All SA 131 (SCA) at paras [20] and [39]

⁸ *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 781

the original application.⁹ The version and arguments on behalf of Nwafor for the first time surfacing in the replying affidavit, further ballooning with new facts and arguments in the supplementary affidavit to the founding affidavit. I have already found that this supplementary affidavit should not have been before court without the leave of the court. This practice of building a case step by step is frowned upon as an abuse of process and is prejudicial to any respondent and herein to the Minister and DG.

- [15] On this ground alone, i.e. no facts set out for the relief sought in the founding affidavit this application is to be dismissed.

Merits of the matter

- [16] But, even, if the court exercised a discretion to entertain the replying affidavit the application must fail. It is common cause that there is a dispute of fact and final relief is sought. Accordingly the *Plascon-Evans* rule is applicable:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well-established under the Plascon-Evans rule that where in motion

⁹ *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 (D) at 316A

*proceedings disputes of fact arise out on the affidavits, a final order can be granted only if the fact averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order.*¹⁰

[17] The version of the Minister pertaining to the unlawful exemption certificate is to be accepted. To this application two medical certificates were attached. The Minister alleged that these two medical certificates were fraudulent and submitted evidence from Mecklenburg Hospital setting out that there are no radiologists at this hospital and that patients requiring x-rays are either sent to Mankweng or Polokwane hospitals for such reports to be issued. The ingenious reply to this is that those are not the documents which were submitted by him to the Department of Home Affairs as the genuine certificates were stamped, without stating by whom these would have been stamped and when it would have been stamped. Furthermore, both the medical certificates, one of a radiologist and the other a medical practitioner, are on the face of it signed by the same person. On these facts the respondents' version must be accepted.

[18] Pertaining to the non-compliance with the Marriage Act, No 25 of 1961, the marriage register dated 25 April 2003 records Vilankulu's mother as a witness. She did not

¹⁰ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para [26]; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-635

consent to the marriage on the date upon which the marriage was solemnised. The averred consent given by Vilankulu's mother appears to have occurred only two months thereafter on 26 June 2003. Once again there is nothing untenable, far-fetched, bald or uncreditworthy in this version of the Minister and the court accepts same.

[19] The fact that Nwafor was already married when he married Vilankulu, on the version of the Minister, must in terms of the *Plascon-Evans* rule also be accepted.

[20] I accordingly make the following order:

20.1 The applicant's application is dismissed.

20.2 The costs include the costs consequent upon the employment of two counsel.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 66844/2016

HEARD ON: 18 June 2019

FOR THE APPLICANT: ADV. J.S.C. NKOSI

INSTRUCTED BY: MWIM Attorneys

FOR THE RESPONDENTS: ADV. M.H. MHAMBI

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 27 June 2019