



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

CASE NO: 38981/17

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
12 August 2019	
DATE	SIGNATURE

In the matter between:

THE MINISTER OF HOME AFFAIRS

First Applicant

DIRECTOR-GENERAL:

DEPARTMENT OF HOME AFFAIRS

Second Applicant

DISTRICT MANAGER OF OPERATIONS: JOHANNESBURG

DEPARTMENT OF HOME AFFAIRS

Third Applicant

OFFICE MANAGER: JOHANNESBURG REGIONAL OFFICE

DEPARTMENT OF HOME AFFAIRS

Fourth Applicant

and

JOSEPH EMMANUEL JOSE

First Applicant

JONATHAN DIABAKA "JUNIOR"

Second Applicant

In re:

JOSEPH EMMANUEL JOSE

First Respondent

JONATHAN DIABAKA "JUNIOR"

Second Respondent

and

THE MINISTER OF HOME AFFAIRS

First Respondent

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

Second Respondent

**DISTRICT MANAGER OF OPERATIONS: JOHANNESBURG
DEPARTMENT OF HOME AFFAIRS**

Third Respondent

**OFFICE MANAGER: JOHANNESBURG REGIONAL OFFICE
DEPARTMENT OF HOME AFFAIRS**

Fourth Respondent

JUDGMENT

YACOOB J:

- 1 The applicants were the respondents in the main application. For convenience and to avoid confusion I shall refer to the applicants for leave to appeal, collectively, as “the respondent” unless it is necessary to distinguish amongst them. The respondent seeks leave to appeal to the Supreme Court of Appeal against the judgment and order I handed down on 15 March 2019. I refer to the respondents in the application for leave as “the applicants”.
- 2 I am indebted to the parties’ legal representatives for agreeing to argue the application for leave in Johannesburg.
- 3 The respondent sought leave on the grounds that the Court erred in:
 - 3.1. finding that there was no uncertainty as to which applications were

lodged and/or adjudicated upon by the respondent;

- 3.2. finding that, no application having been received and / or considered by the respondent, alternatively that there was uncertainty as to which application was to be considered, the decision was one in terms of section 6(2)(g) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") and had been unreasonably delayed, and
 - 3.3. finding that there was no room for discretion in applications of this nature and, on that basis, having ordered the Minister to issue citizenship to the applicants
- 4 The application was opposed, and in addition to dealing with the grounds of appeal, the applicants raised a point *in limine*, submitting that the notice of application for leave to appeal was fatally defective.
 - 5 Both parties provided heads of argument to me on the day of the hearing of the application for leave. Mr Mosikili handed his up in court, while Mr Bofilatos caused his to be emailed to me after court as he had omitted to provide a copy for the court. Judgment was therefore slightly delayed so that I could consider Mr Bofilatos's heads.
 - 6 Mr Bofilatos submitted that leave should be granted on both grounds set out in section 17(1)(a) of the Superior Courts Act, 10 of 2013. That is, that the appeal would have a reasonable prospect of success, and, in any

event, that there is some other compelling reason why the appeal should be heard.

- 7 I deal in this judgment first with the applicants' point *in limine*, then with the respondent's grounds of appeal.

THE POINT IN LIMINE

- 8 It was submitted for the applicants that the notice of application for leave to appeal was fatally defective, because it was extremely brief and did not sufficiently clearly and ambiguously set out the grounds on which the application was based. For that reason, it was submitted, the application did not comply with Rule 49(1)(b).
- 9 The applicant's counsel referred to a number of authorities elaborating on this principle, and it is obviously correct. The grounds must be sufficiently clearly stated to enable both the court and the respondent to the application for leave to know what case the applicant seeks to make out.
- 10 I asked Mr Mosikili whether he was in any doubt, substantively, about what the grounds of the respondent's application for leave were, and he agreed that he was not. I also was not in any doubt, on receiving the application for leave. Having heard argument and read the written submissions, my belief that I understood what the grounds were was reinforced. Mr Mosikili also did not raise any issues on which he was "ambushed" or which were ambiguous in any way.

11 It is true that the second ground of appeal listed in the notice of application for leave contained a typographical error, but taking into account that the relevant section of PAJA was cited, in my view it was clear what was meant.

12 I agree that, to an objective bystander, or another court if seized with the application, or if other counsel had been representing the applicants, that the application for leave may have been problematic. But in this case, nothing will be served by upholding the point *in limine*, and there was no prejudice to anyone caused by the brevity of the notice. For that reason, and I must emphasise that that is purely in the circumstances of this case, I find that there is no merit in the point *in limine*.

UNCERTAINTY AND UNREASONABLE DELAY

13 The applicants in this matter had caused letters of enquiry to be submitted to the Department of Home Affairs, requesting assistance with making applications for citizenship in terms of section 4(3) of the South African Citizenship Act, 88 of 1995 ("the Citizenship Act"). When no assistance was forthcoming, they submitted applications in the form of affidavits. This is because there was no prescribed form for applications for people in the applicants' position.

14 The respondent has maintained the position put forward in the answering affidavit and at the hearing of the main application, that the first letters submitted were also applications (although it is clear from the face of the

letters and from the respondent's own view of what applications should have been that they were not) and that therefore there was uncertainty about which "application" by each applicant had to have been considered. This despite nobody from the offices of the respondents to whom the applicants' legal representatives addressed enquiries responded to say anything of the sort.

15 This position was also fundamentally opposed to one of the respondent's original primary arguments that no applications had been received at all because the applications had not been made on the correct forms.

16 The contention was that, in those circumstances, there could have been no unreasonable delay in making the decision because the respondent could not make the decision as he didn't know what he had to decide. This was the second ground of appeal.

17 These submissions were made at the hearing of the main application. I considered them carefully at the time and have done so again. I remain convinced that I have dealt with them correctly in the judgment and find that there is no merit in these grounds.

18 In addition, Mr Bofilatos submitted at the hearing that I had wrongly imposed on a reverse onus on the respondent in finding that he had not disclosed to the Court what a reasonable period of time would be, and that the time period allowed to the respondent before approaching the court was grossly unreasonably short. This was also alleged in the respondent's

affidavit and argued in the main application.

19 Clearly there was no reverse onus. The answering affidavit made a positive allegation that the time period allowed before bringing this application (ten months and six months regarding the first and second applicants respectively) was too short. Only the respondent could know how much time would be required and it was up to it to disclose this to the Court.

20 In any event, none of the officials involved made any communication to the applicants or their legal representatives to say that more time was needed to consider the applications. And taking into account that their position was that no proper application had been received, it is obvious that no period of time could ever have been sufficient.

THE EXERCISE OF DISCRETION

21 This ground is based on the order, in terms of the notice of motion in the main application, that the respondent grant the applicants' applications for citizenship. The respondent's contention is that, as in the case of *Ali and Others v Minister of Home Affairs and Another* 2018 (1) SA 633 (WCC), I ought simply to have ordered the Minister to *consider* the applications.

22 It was submitted in the application for leave to appeal, as in the main application, that there are no exceptional circumstances permitting the order, and that it amounts to judicial overreach and infringes on the

principle of separation of powers.

23 Mr Bofilatos was once again unable to show me on the papers, or make any other submission, regarding what discretion was required to be exercised by the relevant officials.

24 It was submitted, however, that the merits of the applications had never been dealt with, and therefore that a decision on the merits of the applications for citizenship was not yet appropriate.

25 However, the merits are dealt with in the answering affidavit, and they were dealt with at the hearing of the main application. The applicants' allegations of the facts founding their contention that they fulfil the requirements of section 4(3) of the Citizenship Act are admitted.

26 Mr Bofilatos submitted that these admissions were "conditional". That is, that they were made purely for the purposes of this application. Only one of the admissions were in fact identified in the answering affidavit as being only for the purposes of this application. But even if that "condition" were expanded to every admission in the affidavit, one must then look at what the application was for the purposes of which the affidavit was made.

27 From the beginning, the applicants sought an order that the Minister *grant* rather than *consider* their applications for citizenship. The admissions were made in an affidavit intended to answer the case made out for that particular relief.

28 Absent any indication of what discretion or expertise may need to be applied in considering the applications for citizenship, there is no overreach, where all the criteria have been established, in making the order sought. There is an allegation in the written heads of argument that the respondents have failed to establish their rights to be granted citizenship, “on their own facts”. It was not pointed out what was missing, nor could I find anything missing.

29 I find therefore that there is no merit in this ground of appeal and that an appeal on this ground would have no reasonable prospect of success.

OTHER COMPELLING REASONS

30 Other “compelling reasons” contained in the heads of argument were that the matter is of immense importance to the respondent, and that there is a need for the development of the principles relating to judicial deference, and what time period may be unreasonable for a department such as the Department of Home Affairs to delay in making a decision.

31 In my view the reach of the judgment in this matter is relatively small. It is limited to the specific facts of this case, and to the particular manner in which the respondent has chosen to answer the case. It would only apply to matters in which it is established that no discretion is required to be exercised, where all the relevant facts for the decision have been

established, and where the Department concerned has acted in the manner set out in the papers and in the judgment at issue.

32 Regarding the reasonable time period point it was submitted that the respondent had so many applications to deal with and the finding regarding the reasonable time would impact those applications. That is a factual issue, regarding which the respondent ought to have placed the relevant facts, of which it has peculiar knowledge, before the Court. It chose not to.

33 My finding is limited only to the facts in this case. It has no impact on how the respondent deals with any other matter, except, of course, if the relevant officials decide as a result to inform people when more time is needed and to take the Courts into their confidence regarding how much time may be considered reasonable.

34 I therefore do not consider any of these reasons to be compelling.

35 However, it is clear that, since the Supreme Court of Appeal was not called upon to deal with the issue of the relief granted in the *Ali* case, and whether it may also have been appropriate to order the Minister to simply grant the applications for citizenship, there are conflicting High Court judgments on exactly the same issue, that is, whether a decision on an application in terms of section 4(3) of the Citizenship Act, where all the relevant facts have been established, requires the exercise of judicial deference. It is not clear whether the requirements had been clearly established in the *Ali* matter but I accept that there is a difference in approach between the two

Courts and that it is in the public interest and the interests of justice for the Supreme Court of Appeal to determine that difference.

36 As far as costs are concerned, the applicants' counsel are acting *pro bono* and it is not disputed that they are poor. I see no reason to either order that they bear the costs or that costs be in the appeal, as they are *bona fide* attempting to enforce their constitutional rights

37 In the circumstances I make the following order:

[1] The application for leave to appeal is granted only on the question whether it was competent in the particular circumstances of this case to order the Minister to grant (as opposed to consider) the applicants' applications for citizenship.

[2] Save as set out in [1] above, the application is dismissed.

[3] Each party is to pay its own costs.



S. YACOOB

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANTS:

T MOSIKILI

APPLICANTS' ATTORNEYS:

CLIFFE DEKKER HOFMEYR INC

COUNSEL FOR RESPONDENTS: M BOFILATOS SC

M MOROPA

RESPONDENT'S ATTORNEYS: THE STATE ATTORNEY, PRETORIA

DATE OF HEARING: 06 AUGUST 2019

DATE OF JUDGMENT: 12 AUGUST 2019