

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

CASE NO: 55189/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 10 JUNE 2024

In the application between:

FHATUWANI SIBANDA

APPLICANT

And

DEPARTMENT OF HOME AFFAIRS

1st RESPONDENT

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

2nd RESPONDENT

MINISTER OF HOME AFFAIRS

3RD RESPONDENT

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020, and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14:00 on 10 June 2024

JUDGMENT

Lenyai J

[1] This is a review application against the decisions of the second respondent dated the 22nd October 2021 to block the applicant's identity document and place marks on his passport. The applicant seeks a final interdict in terms of PAJA after being granted an interim interdict on the 9th November 2021.

[2] There is also an application for Rescission/Variation in terms of Rule 42 of the Uniform Rules of Court of the order granted by me dated the 3rd October 2023. Further to that there is an Application for the Strike Out of certain portions of the second respondent's answering affidavit in terms of Rule 6(15) of the Uniform Rules of Court. I will firstly deal with the application in terms of Rule 42, followed by the Rule 6(15) application and lastly deal with the review application.

[3] The matter was before me on the 2nd October 2023 but was postponed to the 27th November 2023 due to the fact that the respondents filed an affidavit in opposition to the strike out application on the morning of the hearing. I granted an order to facilitate the smooth exchange of documents with a view to ensuring that the matter is ripe for hearing on the date of the hearing. Costs were ordered against the respondents for having occasioned the postponement.

[4] On the 10th November 2023 the respondents brought a rescission/variation application in terms of Rule 42 of the Uniform Rules of Court. On the 27th November 2023 prior to the hearing of the main matter, I listened to submissions by both parties for and against the rescission/variation application. After listening to the submissions of both parties, I ruled that I will deal with the issue in the main judgement.

[5] The respondents are seeking that paragraph 7 of the order dated the 3rd October 2023 which reads as follows, "*Costs occasioned by this postponement are borne by the respondent on an attorney and client scale, including the costs of two counsels.*", be rescinded and/or varied, and be replaced with the following: "*Costs occasioned by this postponement are borne by the Applicant on an attorney and client scale including the costs of Counsel.*" The respondents are further seeking that the applicant be ordered to pay the costs of the rescission/variation application.

[6] The respondents submit that the purpose of this application is to bring to the court's attention that an error or mistake that had occurred which resulted in an adverse cost order being granted against them, and for such error or mistake to be corrected. The respondents aver that on the 3rd November 2021, the applicant filed a review application and on the 14th February 2022 they served and filed their answering affidavit thereto. On the 25th February 2022 the applicant served and filed a replying affidavit as well as an application to strike out certain paragraphs from the second respondent's answering affidavit in terms of Rule 6(15) of the Uniform Rules of Court. The respondents further aver that it is apposite to mention that on the 9th June 2022 they served their opposing affidavit to the strike out application on the applicant, and the service or not of this affidavit is at the heart of this application.

[7] The respondents aver that the matter proceeded to court on the 2nd October 2023 and it was at this point that the applicant raised an objection to their reliance on the opposing affidavit to the strike out application. In order to afford the respondents the opportunity to rely on their opposing affidavit to the strike out application, the court ordered the postponement of the matter to the 27th November 2023 and also imposed a punitive cost order on the respondents for having occasioned the postponement of the matter.

[8] The respondents further aver that days later after the hearing on the 2nd October 2023, and upon further scrutiny of the caselines, it became clear that on the 16th October 2023 the applicant had uploaded the respondents' affidavit served in opposition to the strike out application. The respondents submit that the document uploaded by the applicant, has on it the applicant's attorney's firm stamp and is clearly signed and written *"Received copy hereof on 09 June 2022"*. The respondents further submit that this is the document that the applicant's Counsel had contended in Court on the 2nd October 2023 that it was never served.

[9] The respondents aver that the applicant was at all material times served with the document and was in possession of the opposing affidavit to the strike out application. Consequently the matter should not have been postponed for the reason for which it was postponed for, and that the respondents are not responsible for the said postponement and should not have been punished with a punitive cost order

[10] The applicant on the other hand avers that the postponement of the matter on the 2nd October 2023 to the 27th November 2023 was not sought by him. Counsel for the respondents was the one who sought the postponement of this matter after he uploaded an affidavit in the morning before the proceedings commenced. The applicant submits that his Counsel rightfully objected to the use of the affidavit as he has not set eyes on it. The Court adjourned the matter to offer the respondents' Counsel the opportunity to ascertain if the affidavit was served on the applicant and he eventually said that he cannot find any evidence that service was effected.

[11] The applicant submits that the respondents failed themselves by failing to upload the opposing affidavit themselves as required by the Practice-Directive of this division. The Court has issued the order on the basis that the Counsel of the respondents has uploaded an affidavit on the morning of the proceedings of the 2nd October 2023 and he further requested the postponement.

[12] The applicant further avers that the respondents have not met the jurisdictional requirements under Rule 42. The applicant also avers that this court is the one that issued the order and is *functus officio*, and the matter is now moot as the entire order has been complied with by the parties.

[13] For the Court to be able to deal with the application judicially a proper understanding of Rule 42 is necessary. Rule 42 of the Uniform Rules of Court provides as follows:

“42. (1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary-*

(a) *an order or judgment erroneously sought or erroneously granted in the absence of any party thereby;*

(b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*

(c) *an order or judgment granted as the result of a mistake common to the parties.*

(2) *Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*

(3) *The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.”*

[14] Turning to the matter before me, it is apparent that there was a common mistake between the parties. The respondents' counsel was under the impression that they had not served the affidavit opposing the striking out application and the applicant's counsel was also convinced that the document was not served on the applicant's attorneys. The applicant's attorney uploaded the document on caselines on the 16th October 2023. This act of uploading the document clarified the issue at the heart of this application, whether the document was served or not.

[15] On scrutinising the uploaded document it is apparent that the document was served on the applicant's attorneys of record on the 9th June 2023 as evidenced by the applicant's attorneys' firm stamp and the signature and date on which the document was received clearly indicated on the document. I am of the view that had this information been placed before the court on the 2nd October 2023, the court would not have postponed the matter and would also not have granted a punitive cost order against the respondents.

[16] The applicant is further opposed to the rescission/variation application as his counsel submitted that this court is the one that issued the order and is *functus officio*. The *functus officio* is the principle in terms of which decisions of officials are deemed to be final and binding once made. They cannot, once made, be revoked by the decision maker.

[17] Before the Uniform Rules of Court, common law was based on the principle of certainty of judgements, that is to say once a judgement has been delivered or an order has been made, that court has no jurisdiction to change or make corrections to it. See the matter of **Calyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape 2003 (2) All SA 113 (SCA)**.

[18] The duty to make corrections or change the order or judgement was extended to the appeal court. However in the matter of **HLB International (South Africa) v MWRK Accountants and Consultants 2022 (52) (113/2021) [2022] ZASCA 52 (12 April 2022)**, the court departed from the common law principle, where it was in the interests of justice to do so.

[19] Section 173 of the Constitution of the Republic of South Africa, 1996, grants the courts the power to *“protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”* Against this background, I am of the view that Rule 42(1)(c) of the Uniform Rules of Court provides that a court may on its own initiative or on application by any party affected, rescind or vary an order or judgement granted as a result of a mistake common to the parties if it finds that it is in the interests of justice to so.

[20] Turning to the matter before me, I am convinced that the court is justified to grant the application as it is in the interests of justice to do so and to refuse the application would amount to a miscarriage of justice.

[21] I will now deal with the application in terms of Rule 6(15) of the Uniform Rules of Court brought by the applicant.

[22] The applicant has brought an application in terms of Rule 6(15) of the Uniform Rules of Court to strike out portions of the second respondent’s answering affidavit on the grounds that such material is either scandalous, vexatious, defamatory and or irrelevant and or impermissible on the basis that same constitutes hearsay evidence. The applicant avers that such portions and all material if admitted will cause prejudice and compromise the entire proceedings.

[23] The said offending paragraphs are paragraphs 26, 40,76 and 78 of the second respondent's answering affidavit. Regarding paragraph 26, the applicant contends that the contents of this paragraph are impermissible as they are sourced from an unregistered company that conducted forensic investigation at Eskom where the applicant was previously employed. The applicant attached a letter at 01-95 on caselines, signed by the Chief Executive Officer of Private Security Industry Regulatory Authority (PSiRA) which clearly states at paragraph 11 that *"11. Our investigation into the enquiry further reveals that FUNDUDZI FORENSIC SERVICES (PTY) LTD is not registered with the Authority as required."*

[24] The applicant further contends that the contents of paragraph 76.1, stand to be struck out as they are scandalous and vexatious in that they label him as being born to an illegitimate father. The applicant further avers that the contents of this paragraph violate the provisions of section 10 of the Bill of Rights, which is the right to human dignity of himself and his mother.

[25] The applicant also contends that the allegations contained in paragraph 78 together with the supporting affidavit marked as LTM 20 stands to be struck out as they are inadmissible. They were sourced from a third party who furnished the first and second respondents with inadmissible evidence that offends the principles of evidence. The applicant further contends that the third party who furnished the information to the first and second respondents cannot be subjected to cross examination in application proceedings.

[26] The respondents aver that the evidence contained in paragraphs 26 and 78 was voice recorded with the knowledge of the applicant. The persons who furnished the information to the first and second respondents were party to and present as witnesses in the third party proceedings or enquiry and have deposed to affidavits in confirmation thereof. Therefore, the respondents contend that there would be no need for cross examination.

[27] The respondents aver that the applicant is not denying that he made the statement but is rather contending that the statement is inadmissible. The respondents are contending that the applicant is not prejudiced by the admissibility of this evidence. The respondents submit that the court will be well versed and

served in the discharge of its duties with this evidence, which evidence is corroborated by other relevant evidence in the matter.

[28] The respondents aver that the labelling of the applicant at paragraph 76(1) of the answering affidavit as being born of an illegitimate father, is not scandalous nor vexatious as this reference or labelling was tendered by the applicant himself in his affidavit at paragraph 5 of the said affidavit at 09-50 on caselines. The respondents further aver that the label is contained in a departmental document, the Register of Births at 09-88 on caselines, which the applicant has positively associated himself with. The respondents submit that there is nothing scandalous nor vexatious about a person being born as an illegitimate child, neither is there anything inhuman about it. The labelling does not violate the provisions of section 10 of the Constitution as alleged.

[29] The respondents aver that the document, the Register of Births, is a reflection of the facts pertaining to this matter and is therefore relevant and permissible and should not be struck out.

[30] The respondents submit that the evidence contained in paragraph 40 of the answering affidavit is considered to be hearsay evidence by the applicant and should be struck out. The respondents on the other hand aver that this evidence relates to the two affidavits deposed to by Mr Masango and Mr Komape regarding the address supplied by the applicant and /or his late uncle as that of the applicant in his application for his birth certificate. The crux of the evidence contained in the two affidavits is that the applicant and his uncle were unknown at that address during that period and currently.

[31] The respondents further submit that evidence on affidavit is acceptable in motion proceedings and the onus shifts to the other party to challenge its correctness and or validity. The evidence is relevant and permissible in this matter and the applicant is not prejudiced by the admission of this evidence.

[32] Rule 6(15) of the Rules of Court provides as follows:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.”

[33] For an applicant to succeed in an application for a strike out of any portion from an affidavit, he or she has to satisfy two requirements. The first requirement is that the portion to be struck out is scandalous, vexatious or irrelevant, and the second requirement is that the applicant must satisfy the court that he or she will be prejudiced if the matter is not struck out. In the matter of **Beinash v Wixley 1997 (3) SA 721 (SCA) at 733A-B** the court held as follows: *“What is clear from this rule is that two requirements must be satisfied before an application to strike out any matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the court must be satisfied that if such matter is not struck out the parties seeking such relief would be prejudiced.”*

[34] Turning to the matter before me, regarding paragraph 26 of the second respondents' answering affidavit, the applicant contends that the contents of this paragraph are inadmissible as they were sourced from an unregistered company that conducted the forensic investigation. PSiRA also confirmed that the company in question is not registered with them. It is clear to the court that this was an illegal act committed by the unregistered company and the court will not enforce illegal bargains. The contents of this paragraph are of no evidentiary value to the court and will not be relied upon by the court. The attack by the applicants on the contents of this paragraph are that they are impermissible on the basis that same was sourced from an unregistered company with PSiRA. I am of the view it was not necessary for the applicants to have brought the application specifically regarding this paragraph in terms on rule 6(15).

[35] Regarding the contents of paragraph 78, the applicant contends that the evidence contained in this paragraph is inadmissible as it was sourced from third party proceedings and the third party who furnished the information cannot be subjected to cross examination in application proceedings. The respondents on the other hand submit that the applicant's recorded testimony at the third party proceedings and or statements made at the enquiry by the applicant were made with his consent. The witnesses who testified at that third party enquiry have deposed to affidavits confirming their evidence, and the evidentiary burden shifts to the applicant to disprove the evidence contained in those affidavits. After considering the evidence before the court, it is clear that the third party proceedings referred to here are the same proceedings that I have already declared at paragraph 34 supra that those proceedings were illegal and tainted. The court will not rely on anything associated with the tainted proceedings as this offends the principles of justice and the same sentiments expressed in paragraph 34 supra are applicable herein.

[36] Regarding the contents of paragraph 76(1), the labelling of the applicant as being born of an illegitimate father, thereby declaring the applicant as an illegitimate child, it is important to get the dictionary meaning of illegitimate child. The Oxford dictionary describes an illegitimate child as follows: *"born of parents who are not married to each other at the time of birth; born out of wedlock; an illegitimate child; not legitimate; not sanctioned by law or custom."* The applicant contends that this labelling is scandalous and vexatious and it also infringes on the applicant and his mother's rights to human dignity as enshrined in the Constitution. It is vexatious and scandalous and may prejudice the applicant if it is not struck out.

[37] Chapter 2 of the Bill of Rights, Section 10 provides as follows:

"Human Dignity

Everyone has inherent dignity and the right to have their dignity respected and protected".

[38] I find the labelling of the applicant as an illegitimate child regrettable and painful as it has a negative inference on both the applicant and his mother. The only

reason to label someone as illegitimate is to cause shame on the person so labelled and it causes the person to feel that they are a product of some illegal activity. It is archaic, outdated, cruel and most definitely offensive of section 10 of the Constitution. I would dare say it is unconstitutional to refer to someone as an illegitimate child and the court frowns upon such conduct. The respondents should be sensitive when describing people so as not to offend their human dignity. The respondents should have rather explained the circumstances of the birth of the applicants rather than continue with the oppressive, scandalous and vexatious labelling of the applicant as used by the authorities in the dark days of our country. Although I find the labelling scandalous and vexatious, I do not see how it will be prejudicial to the applicant if not struck out, as the court understands it to mean a child born to parents who were not married to each other at the time of birth.

[39] Regarding the striking out of the contents of paragraph 40 of the answering affidavit, the applicant contends that it is hearsay evidence and should be struck out. The respondents on the other hand aver that that this evidence relates to the two affidavits deposed to by Mr Masango and Mr Komape regarding the address supplied by the applicant and /or his late uncle as that of the applicant in his application for his birth certificate. The crux of the evidence contained in the two affidavits is that the applicant and his uncle were unknown at that address during that period and currently. I agree with the respondents and I am of the view that this is evidence contained in an affidavit and it is admissible in motion proceedings. There is nothing vexatious or scandalous or irrelevant and it is not prejudicial to the applicant.

[40] I now deal with the main application wherein the applicant seeks a final interdict against the respondents. The applicant was granted an interim interdict in Part A of the proceedings on the 9th November 2021, which order provides as follows:

“1. The manner and forms of service as provided for in the Rules are dispensed with and this matter is classified as urgent as envisaged under Rule 6(12);

2. *The non-compliance with the Rules is condoned and that is the matter be heard as urgent in terms of Rule 6(12)(a) of the Uniform rules of Court;*
3. *Interdicting the respondents from implementation of the First Respondents decision dated 22 October 2021 pending the applicant's application to review the decision of the Director General of the Department of Home Affairs (DHA) the First Respondent;*
4. *That the First Respondent is ordered to reinstate and uplift the block on the South African identity number: 7[...], within 14 (fourteen) days from the date of this order, pending the finalization of Part B being the review application;*
5. *The failure by the First Respondent to reinstate and uplift the block on the South African identity number: 7[...], the Sheriff of the above Honourable court be authorised to enforce the implementation of prayer for of this order;*
6. *That Part B of this application is postponed to the 1st March 2022, and*
7. *Costs of this application to be reserved.*

[41] It is noteworthy to mention at this point that the applicant avers that the respondents have not complied with the court order and at the conclusion of these proceedings they intend to bring contempt of court proceedings against the respondents on the conclusion of the proceedings before court.

[42] On Part B of the proceedings the applicant seeks the following orders:

1. *Condoning the time frames in relation to filing of this application in terms of section 9 of the Promotion of Administrative Justice Act (PAJA);*

2. The second respondent's decision to block and or suspend the applicant's identity document with the following numbers: 7[...], dated the 22nd October 2022 is hereby reviewed and set aside in its entirety;
3. That the applicant is hereby declared a South African citizen by birth with identity numbers: 7[...] is recorded in the Birth and Death Registration Act, 1992 (Act No 51 of 1992) read with Identification Act, 1997 (Act No 68 of 1997) as recorded at the First Respondent (Department of Home Affairs);
4. That the respondents are ordered to reinstate and uplift the block on the identity number: 7[...] within 5 (five) days from the date of this order. On failure to do so, the Sheriff of the above Honourable Court is hereby authorised to facilitate the upliftment on the block of the identity document of the applicant;
5. That the First Respondent's officials who confiscated the applicant's Smart ID Card And passport, be ordered to hand them over to the applicant's custody and care within 5 (five) days from the date of this order. On failure to do so, the Sheriff of the above Honourable court is hereby authorised to facilitate the handing over of the Smart ID Card together with the passport of the applicant currently illegally held at the first respondent (Department of Home Affairs).
6. That the costs of part A are unreserved and that the respondents ordered to pay same on an attorney and client scale.
7. That the respondents ordered to pay the costs of Part B on an attorney and client scale.
8. Further and alternative relief.

[43] The applicant avers that since the relief sought in Part B of the Notice of Motion, is an application for the review and setting aside of an administrative

decision under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) read together with section 33 of the Constitution, and because this application is not brought within the 180 days from the date which he was informed of the administrative decision, he seeks condonation in terms of section 9 of PAJA. There is no opposition by the respondents to this application.

[44] Section 9 of PAJA provides as follows:

“9 Variation of time

(1) The period of –

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in section 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court order or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.”

[45] I have observed that since this matter commenced with Part A of the proceedings, by the time Part B of the proceedings would be heard by the Court, the prescribed 180 days in terms of section 7 PAJA would have long lapsed. I am of the view that the interests of justice require that the application for the extension of the *dies* in terms of section 9 of PAJA should be granted.

[46] The respondents also made an application for the late filling of their answering affidavit which is opposed by the applicant. The DG, who is the deponent to the answering affidavit, states in the affidavit that he is aware that he should have served and filed in terms of the uniform rules of court soon after the order Court in respect of Part A on the 9th November 2021. He further avers that when the parties agreed to

the Court order on the day, they did not make an arrangement as to the specific dates on which the parties were to file their subsequent papers.

[47] The respondents aver that their Counsel immediately requested a consultation with the relevant officials of the Department of Home Affairs (DHA) and a date of the 15th November 2021 was proposed. Unfortunately on the day of the consultation it became clear that some officials who are key to the matter were not available for the consultation which resulted in a postponement of the consultation. The consultation was rescheduled for the 23rd November 2021 but was unable to be proceeded with due to once again the unavailability of the relevant officials due to work pressures and commitments. Another consultation was arranged for the 1st December 2021. The respondents further aver that following various correspondences and attempts to find a suitable date for all, it became clear that the consultation could not proceed and also could not be rescheduled during that time of the year due to the unavailability of several officials of the DHA as a result of other work commitments and some officials being on leave for the December holidays. It was then agreed that the consultation will be rescheduled in early January 2022. A virtual consultation was eventually held on the 12th January 2022 after which Counsel requested further information and documentation relating to the matter from some officials. Various further postponements followed due to the officials having to obtain the requested further information and documents for purposes of finalising the answering affidavit. On the 31st January 2022, the consultation proceeded and Counsel was furnished with the requested information and documentation to enable Counsel to sufficiently respond to the applicant's founding affidavit.

[48] The respondents further aver that one of the officials of DHA went to Libangeni to obtain further information and or documentation relating to the matter. This information was then furnished to the counsel on the 7th February 2022. The DG submits that he was unavailable on the 9th and 10th February 2022 due to the State of the Nation address by the President. He was only able to peruse the draft answering affidavit and upon being satisfied attached his signature to the affidavit on the 11th February 2022. The respondents further submit that the late delivery of the answering affidavit was due to circumstances which to the best efforts could not be

avoided and that it was not due to flagrant disregard of the time set by the rules of the Court.

[49] The applicant in opposition to the condonation application for the late filling of the answering affidavit contends that the respondents are in the habit of disregarding the rules and orders of the Court. The applicant placed it on record that the respondents have not complied with the Court Order of the 9th November 2021 and this submission was repeated in Court on the 2nd October 2023 and 27th November 2023.

[50] The applicant contends that the matter was largely on the unopposed roll until the respondents filed their answering affidavit very late. The applicant contends that he and his family suffer grave prejudice because of the continued actions of the respondents in their flagrant disregard of the law and the rules of the court.

[51] In the matter of **Head of Department, Department of Education Limpopo Province v Settlers Agriculture High School and Others (CCT36/03) [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) (2 October 2003) at para 11**, the Constitutional Court when considering the issue of condonation for the late filling of the application held that:

“The main consideration whether to grant condonation of the very late filling of the application is whether it is in the best interests of justice to do so.

*Yacoob J, in **Brummer v Gorfil Brothers Investments (Pty) and Others [200] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3**, held that:*

“I now consider the application for condonation. It is first necessary to consider the circumstances in which this Court will grant applications for condonation for special leave to appeal. This Court has held that an application for leave to appeal will be granted if it is in the interests of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only

factor in the determination of the interests of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect."

[52] It is trite and in terms Rule 6(5)(d)(ii) Uniform Rules of Court that the answering affidavit must be delivered within 15 days of notifying the applicant of his intention to oppose the application. In the matter before me, an order was granted by the Court on the 9th November 2021 in regard of Part A of the proceedings. The respondents then had to deliver their answering affidavit within 15 days from the date of the Court order. The delay in delivering the answering affidavit was about 47 days, almost two months after the date of the Court order. The reasons given by the respondents for the delay, in my view display a lack of regard for the interests of the applicant and his family.

[53] The nature of the relief sought deals with issues of Citizenship of the applicant, which required all concerned to act swiftly to resolve the matter. The applicant submitted in court and in his papers about the grave prejudice he suffered and continues to suffer because of the delay caused by the actions of the respondents especially in filling their answering affidavit very late. The applicant's Smart ID Card has been blocked and marks have been placed on his passport. He has been stripped of his rights as a Citizen of the Country and he cannot freely travel anywhere without his passport and his Smart ID Card. His livelihood has been adversely affected and both he and his family are suffering immensely for as long as this matter remains unresolved.

[54] In my view, taking into consideration the Constitutional Court matters referred to in paragraph [51] supra, it is not in the interests of justice that the application for condonation for the very late filling of the answering affidavit should be granted.

[55] The applicant avers that he is a South African by birth in terms of the Citizenship Act 88 of 1995, and in confirmation he was issued with identity number 7[...] by the first respondent on the 21st November 1991. His biological mother is Tshimangadzo Mersinah Makhani with identity number 4[...], residing at stand number 0[...], M[...], M[...], Nzhelele District, Venda, Limpopo Province. The applicant further avers that he married his wife, who is also a South African by birth in 1999 and their marriage is blessed with four children. In support of these submissions the applicant attached copies of his abridged birth certificate, his identity smart card, his marriage certificate, his children's birth certificates and his mother's identity document.

[56] The applicant avers that his mother informed him that he was born out of wedlock at home in Siyabuswa, the former Eastern Transvaal, now Mpumalanga Province. The applicant further submits that he did not have a clinic card or birth certificate when he grew up. Thereafter, around the 1980's, his mother married Mr Solomon Sibanda, who was a Zimbabwean migrant labourer working at Musina Copper mine. During that time, the applicant submits that he was doing Sub B, the equivalent of the current Grade 2, at Manenzhe Primary School, at Mutale District, Venda. After her mother's marriage, his entire kindred together with his siblings moved to Zimbabwe. Around 1983 his mother fell ill and early in 1984 his late grandmother, Martha Munzhendzi Sinali came to fetch her from Zimbabwe and took her to her son's residence at Tshirendzheni, Nzhelele District, Venda. The applicant further avers that he together with his siblings remained in Zimbabwe to continue their schooling there. During 1988 after he completed his O levels, his grandmother sent a family member to fetch him and his siblings back to South Africa. They were taken to Tshirendzeni village where their mother, grandmother and uncle resided.

[57] The applicant submits that around 1992 he registered to write his Matric through correspondence and sat for his examinations around June 1993 at Mphepu Secondary School. In support of this submission the applicant attached a copy of his Matric Certificate. On 11th January 1994 applicant submits that he joined the South African Police Service (SAPS) and went for training at the Hammanskraal College. In July of the same year he was deployed at the SAPS's headquarters Finance

Department in Pretoria, and served in the police service from 1994 to December 1998. In support of this submission the applicant attached his certificate of service. The applicant further avers that immediately after joining the police service, he enrolled for a BCom in Business Management and Auditing in the University of South Africa (UNISA) in January 1994. He completed the degree in 1998 and he attached his certificate in support of this submission.

[58] The applicant avers that after his graduation he was offered a position at Standard Bank as a Fraud Officer in 1998 and he worked there for 7 years. Thereafter he moved on to Ernest & Young as an assistant Manager, Fraud Investigation in 2006. He then joined MTN group in 2009 as a Fraud Prevention Specialist for fourteen months. Then in May 2010 he rejoined Ernest & Young as a Senior Manager Fraud Investigation. On 1st August 2012 he joined Eskom in the position of middle Manager Forensic Investigations after they head hunted him for that position from Ernest & Young. He continued to work there until 3rd April 2019 when he was suspended together with his line Manager on allegations of supplier favouritism and alleged conflict of interest.

[59] During the investigation of the alleged misconduct, the investigator unilaterally extended the scope of the investigations to include the allegations of fraud on his Matric Certificate and his Citizenship status. The applicant avers that new charges were added and the disciplinary proceedings were conducted and resolved in his favour after he appealed.

[60] Applicant avers that he returned to work at Eskom on the 11th March 2020. He then received an offer from the South African Forestry Company SOC Limited (SAFCOL) and he resigned from Eskom on the 1st July 2020. In compliance with the terms and conditions of his employment contract, he served his notice period during the month of July 2020 and then joined SAFCOL on the 1st August 2020. On the 21st August he received a call from his manager requesting a meeting at the Head Office on the 24th August 2020. The meeting was chaired by the Industrial Relations Senior Manager and there he was informed that SAFCOL had received information or allegations that he had left Eskom under a cloud or with pending cases against him.

The applicant contends that this is untrue as he had resigned from Eskom and even served his notice period as required by his contract of employment. SAFCOL then took a decision to summarily suspend him pending the investigation on his citizenship in South Africa.

[61] The applicant further avers that on the 14th October 2020 he was interviewed by the officials of the Department of Home Affairs at their Head Office in Pretoria, in relation to the investigation on his citizenship status. He was then ordered to surrender his smart identity card and passport. It was further agreed during the interview that the first respondent will facilitate the conducting of DNA tests on his mother, step-grandmother and himself. On the 30th October 2020 he was requested to submit his representations to the DG, to show cause why an adverse ruling should not be made on the status of his citizenship. He proceeded to do as requested and on the 9th November 2020 submitted his representations via email for the attention of the Acting Director General, Mr Jackson McKay and also hand delivered them at the DHA.

[62] The applicant avers that on the 24th November 2020, he received a call from his line manager at SAFCOL informing him that he will email him a letter which he must sign and send back to him. On receipt of the letter he noted that it was a letter of reinstatement to his position and he was instructed to report for duty on the 25th November 2020. Applicant further submits that on the 27th November 2020 he received a notice to suspend him once again from SAFCOL. He was also requested to provide reasons why he should not be suspended by the 30th November 2020. The applicant contends that despite having complied with the request and provided his manager with the reasons on the 30th November 2020, he was still served with a second suspension letter when he attended a meeting at SAFCOL.

[63] The applicant avers that seeing that the officials of DHA were not facilitating the DNA testing as previously stated, he proceeded to approach Lancet Laboratories in Thohoyandou during December 2020 to conduct a DNA test on himself and his mother. The test results confirmed that Tshimangalo Mersinah Makhani is indeed his biological mother.

[64] The applicant submits that on the 16th April 2021 he received a notice to attend a disciplinary hearing at SAFCOL on the 22nd April 2021. The charge against him was gross misconduct in that, on the 6th April 2021 the DG (second respondent) blocked his Smart ID Card pending the finalisation of their investigation. Applicant submits that he was informed of this decision on the 7th April 2021. On the 22nd April 2021 he attended the disciplinary hearing however it was postponed to the following day for the parties to exchange their bundles of evidence. On the 23rd April 2021 the matter proceeded and the chairperson requested that the closing arguments should be submitted by the 28th April 2021. On the 28th May 2021 he received a guilty verdict and further that the aggravating and mitigating factors should be submitted by the 1st June 2021. On the 15th June 2021 applicant submits that he received the dismissal letter together with the chairman's report.

[65] The applicant avers that on the 23rd October 2021 he received a letter via email from the DG dated the 22nd October 2021, this letter informed him of the outcome of the review of the decision by the DG. The letter states as follows:

*“RE: APPLICATION TO REVIEW THE DECISION OF THE
DIRECTOR-GENERAL OF DHA: 7[...]*

- 1. The above matter refers.*
- 2. After receiving your written application for review, I wish to inform you that I have considered your application and have decided to reject your application for the reasons mentioned below.*
- 3. You claim to be a South African citizen by birth and as part of the status verification by the Department of Home Affairs, you were issued (which you signed for) with notice by emigration officer to appear before the Director-General, and specifically Mr Makgabo Kekana, in terms of section 33(4)(c) read with regulation 32(3) on 2020/10/14 until 2021/10/30 to provide supporting documents to your claim.*

4. On the 15/10/2020 you deposed and submitted four (4) page sworn affidavit with handwritten cover page detailing your life history in two countries namely Zimbabwe and South Africa.

5. Your email dated 29/10/2020 to Makgabo Kekana, indicates that you are not able to locate your South African birth certificate in your house due to hospitalisation of your wife which later claim never to have at all. You further claimed that you are issued with Zimbabwean birth certificate and identity document as in your sworn affidavit.

6. On Saturday, 26 October 2020, the Investigator conducted interview with Makhani Tshimangadzo Mersiah with identity number 4[...], your alleged mother, at her residence in the Vhembe District. However, due to her medical conditions, the information contains in your sworn affidavit about her could not be verified.

7. You have indicated that you are dissatisfied with investigator to him after the site visit to Venda, the investigator has provided response to that you acknowledged as clarity.

8. After 14 days of being issued with notice to support your claim, another notice of decision adversely affecting right of person to provide the Department with reasons why identity number 7[...] should not be cancelled in terms of section 19(4) of the Identification Act, 1997, you were given additional 10 working days to respond and provide information requested, there is no record of your response to the department except allegations contained in paragraph 2.6.7 without proof.

9. You are on audio recording, which correspond with the final report to Eskom by Fundudzi company, confirming that your born in Zimbabwe, and such information cannot be ignored by Department and there is no paragraph in your review application that clarifies same.

10. *You indicated, that your uncle who passed on, has provided assistance with the ID application to acquire identity number 7[...]. It should be noted that the Department in suing identity number 7[...] was not privy to information contained in your affidavit about your birth certificate and subsequent Zimbabwean identity document, including other information contained in the Eskom report.*

11. *The decision to temporarily suspend and place your identity number, 7[...] on hold pending finalisation of investigation was prompted by failure from your side to provide information required.*

12. *Your representations did not provide any iota of evidence that you have acquired the identity number, in line with the provisions of the Identification Act, read together with the principles set out in the South African Citizenship Act, 1995 (Act No. 88 of 1995).*

13. *In this regard, identity number 7[...] will be cancelled from the population register in terms of section 19(4) of the Identification Act, 1997 from the population register.*

14. *The Department of Home Affairs will conduct status verification on your family.*

15. *You are further given 14 days to leave the Republic, as you are now an illegal foreigner.”*

[66] The applicant avers that he was granted an interim interdict in Part A of the proceedings against the respondents from implementing the DG's decision of the 22nd October 2021. On part B the applicant seeks a final interdict against the respondents from implementing the said decision and to have the decision of the second respondent to be reviewed and set aside under the provisions of section 6(2) of PAJA.

[67] The requirements for a final interdict have been settled in our common law by matters such as **Setlogelo v Setlogelo 1914 AD 221 at 227** and **Primedia (Pty) Ltd t/a Primedia Instore v Radio Retail (Pty) Ltd 2012 29109 (SCA) at paragraph 13**. The requirements for a final interdict are the following:

76.1 The applicant must have a clear right to the relief sought;

76.2 The applicant must illustrate an injury committed or reasonably apprehended;

76.3 The applicant must prove the absence of any other satisfactory remedy.

[68] In the matter of **Hotz v University of Cape Town 2016 4 All SA 723 (SCA) at paragraph 29** the court held that: *“Once the applicant has established the three requisite elements for the grant of an interdict the scope, if any, for refusing the relief is limited. There is no general discretion to refuse relief.”*

[69] The applicant has averred that the second respondent has arbitrarily suspended and blocked his Smart Identity Card, put marks on his passport and confiscated both the Smart Identity Card and passport. An Interim order was sought and granted however the applicants failed to comply with the order granted. The applicant avers that the second respondent considered irrelevant and inadmissible documents and evidence when considering his matter and ignored his submissions and documents he furnished. This resulted in an adverse and unfair decision being taken which stripped of his status as a South African Citizen.

[70] The court is convinced after careful consideration of the papers and after listening to the parties that the applicant having produced his South African birth certificate which was issued to him by the officials of the first respondent, that the applicant has a clear right to the relief sought. The applicant's submissions to the second respondent and the circumstances of his birth are reasonable to the court. The court takes Judicial Notice thereof as most Black South Africans were born

under such unfortunate and unfavourable conditions during the dark days of the history of our country and no one should take advantage of those circumstances or persecute the people affected any further, it is enough. The applicant went as far as to present scientific evidence in the form of DNA test results to prove that he is the biological son of his mother, who is a South African Woman by birth, of Venda origin. The applicant's birth right as a Citizen of South Africa is crystal clear to the Court.

[71] On the above basis I am of the view that the applicant has established a clear right to the relief sought.

[72] The applicant has to demonstrate to the court the injury actually committed or reasonably apprehended. The applicant has submitted to the court in his papers as well as in argument the harm that he has suffered as a result of the decision of the 22nd October 2021 and continues to suffer. The applicant showed that he has been suffering since the 6th April 2021 when the DG took a decision to block his Smart Identity Card. Applicant submitted that he was suspended from work for not disclosing that he is not a South African, the situation escalated to a point where he was dismissed from work and he remains unemployed to this day. He is unable to support himself, his wife, children and his elderly ailing mother. It was also submitted during the proceedings that his daughter is unable to be registered to study nursing because of the status of her father. To make matters worse there is a reasonable apprehension of further injury or harm in that the letter of the DG is clearly stating that his family will be subjected to a status verification. The applicant submitted in court and also in his papers that one official of the first respondent when he was not getting the answers he wanted, harassed his mother when he was interviewing her and threatened to take away her Identity document, deport her and cause her SASSA benefits to be stopped. His mother was so traumatised by this interview that she collapsed and had to seek medical assistance.

[73] The applicant's Smart Identity Card and passport were confiscated by officials of the first respondent thereby stripping him of his identity as a South African and corresponding rights as a Citizen of South Africa. He does not have freedom of movement as he is now regarded as an undesirable and an "*illegal foreigner*". The

injury or harm that the applicant is experiencing is ongoing as the respondents have not complied with the interim order of the 9th November 2021 specifically paragraphs 3 and 4 thereof stating as follows:

“3. Interdicting the respondents from implementation of the First Respondents decision dated 22 October 2021 pending the applicant’s application to review the decision of the Director General of the Department of Home Affairs (DHA) the First Respondent;

4. That the First Respondent is ordered to reinstate and uplift the block on the South African identity number: 7[...], within 14 (fourteen) days from the date of this order, pending the finalization of Part B being the review application; “

[74] On the above basis I am of the view that the applicant has experienced an injury committed or reasonably apprehended.

[75] The applicant contends that he has no remedy but to approach the Court to vindicate his Constitutional rights. The applicant avers that the second respondent had no evidence to justify the block or suspension of his Smart Identity Card and place markers on his passport. The applicant avers that the second respondent relied on inadmissible evidence of third party proceedings at Eskom, where an enquiry was conducted by an unregistered forensic Company and hearsay evidence regarding the address where the applicant’s uncle, grandmother and mother stayed. The evidence though was on affidavits by two individuals, they were referring to what other people have informed them, it was not facts personally known to them. I agree with the applicant regarding the inadmissibility of the evidence and hearsay evidence relied on by the second respondent to arrive at the decision of the 22nd October 2021. The applicant contends that only the court can assist him under the circumstances.

[76] I am of the view that the applicant has proven that he has no other satisfactory remedy.

[77] It is not in dispute that the decisions of the 16th April 2021 and 22 October 2021 are administrative decisions.

[78] It is trite that an administrative action even if it is invalid, may not simply be ignored. It remains valid, effective and continues to have legal consequences until it is reviewed and set aside by a Court of Law. **Oudekraal Estates (Pty) Ltd v City of Cape Town [2004] ZASCA 48; 2004 (6) SA 22 (SCA)**. This Oudekraal principle was crystallized in the matters of **MEC for Health, Eastern Cape & Kirkland Investments (Pty) Ltd t/a Eye & Laser Institute 2014 (3) SA481 (CC)** and **Merafong City v Anglogold Ashanti 2017 (2) 211 (CC)**.

[79] In the matter of **Kirkland** stated at paragraph 78 supra, **at paragraph 103**, the Constitutional Court held that: “...*The courts alone and not public officials, are the arbiters of legality.*”

[80] This matter involves the exercise of public power, and it was instituted by the applicant as a review application under PAJA. It is settled that the application of PAJA raises a constitutional issue as PAJA gives effect to Section 33 of the Constitution.

[81] Section 33(1) and (2) of the Constitution provides as follows:

“(1) *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair;*

(2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*”

[82] Section 6(2) of PAJA provides that:

“A court or tribunal has the power to judicially review an administrative action if –

...

(c) *The action was procedurally unfair;*

...

(e) *the action was taken -*

...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered.”

[83] The applicant contends that the DG, second respondent, when he reviewed the decision of the 16th April 2021 and in arriving at his decision of the 22nd October 2021 considered inadmissible evidence and hearsay evidence and ignored his submissions. The applicant also submits that the second respondent did not afford him an opportunity to be heard before the decision was taken. The applicant further states that the decision of the second respondent was not reasonable and rational as relevant submissions brought to his attention were not taken seriously and were simply ignored.

[84] The applicant avers that the decision of the DG has gravely affected his life as he has been stripped of his Citizenship and rendered stateless, unable to find employment in the country of his birth and look after the livelihood of his family. He further states that his entire family is now threatened with status verification.

[85] I am satisfied that the applicant has made out a proper case for the decision of the second respondent to be reviewed and set aside.

[86] It therefore follows that the decision of the second respondent of the 22nd October 2021 is hereby reviewed and set aside.

[87] Under the circumstances the following orders are granted:

1. The application in terms of Rule 42 is granted and paragraph 7 of the Order of 3rd October 2023 is varied and that the said paragraph is replaced with the following:

Each party to bear their own costs occasioned by the postponement of the matter on the 2nd October 2023.

2. The application in terms of Rule 6(15) is dismissed with costs.
3. The time frames in relation to filing of this application in terms of section 9 of the Promotion of Administrative Justice Act (PAJA); is condoned;
4. The condonation of the late filing of answering affidavit is refused.
5. The second respondent's decision to block and or suspend the applicant's identity document with the following numbers: 7[...], dated the 22nd October 2022 is hereby reviewed and set aside in its entirety;
6. That the applicant is hereby declared a South African citizen by birth with identity numbers: 7[...] is recorded in the Birth and Death Registration Act, 1992 (Act No 51 of 1992) read with Identification Act, 1997 (Act No 68 of 1997) as recorded at the First Respondent (Department of Home Affairs);
7. That the respondents are ordered to reinstate and uplift the block on the identity number: 7[...] within 15 (fifteen) days from the date of this order. On failure to do so, the Sheriff of the above Honourable Court is hereby authorised to facilitate the upliftment on the block of the identity document of the applicant;
8. That the First Respondent's officials who confiscated the applicant's Smart ID Card And passport, be ordered to hand them over to the applicant's custody and care within 15 (fifteen) days from the date of this order. On failure to do so, the Sheriff of the above Honourable court is hereby authorised to facilitate the handing over of the Smart ID Card together with the passport of the applicant currently illegally held at the first respondent (Department of Home Affairs).
9. That the costs of Part A are unreserved and that the respondents ordered to pay same on an attorney and client scale.

10. That the respondents ordered to pay the costs of Part B on an attorney and client scale .

M.M.D. LENYAI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

FOR THE APPLICANT: Adv R Nthambeleni and Adv J Makhene
INSTRUCTED BY: Dabishi Nthambeleni Inc, Centurion

FOR THE RESPONDENTS: Adv R Tsele
INSTRUCTED BY: State Attorney, Pretoria

HEARD ON: 3rd October 2023 and 27th November 2023
DATE OF JUDGMENT: 10 June 2024