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PRO BONO & HUMAN RIGHTS ALERT

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The long and winding road | SCA hears appeal in a long battle for citizenship by two of our pro bono clients

On 11 November 2020, the Supreme Court of Appeal (SCA) heard an appeal in a matter in which Cliffe Dekker Hofmeyr's Pro Bono & Human Rights Practice (Pro Bono Practice) has long been fighting for justice for two brothers who were denied the opportunity to apply for the citizenship to which they are entitled under section 4(3) of the South African Citizenship Act (Citizenship Act).

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CLIFFE DEKKER HOFMEYR

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Section 4(3) is a provision which was introduced into the Citizenship Act on 1 January 2013 by way of the South African Citizenship Amendment Act (Amendment Act). It makes provision for individuals born in South Africa (SA) to foreign parents who have not been admitted to the Republic for permanent residence, and who have lived in the Republic from the time of birth until obtaining the age of majority, to apply for citizenship, if their births had been registered in accordance with the Births and Deaths Registrations' Act.

In 2014, after being faced with the realisation that their refugee status was to be withdrawn as part of the Angolan repatriation process, the brothers (born here in SA of Angolan refugee parents) pursued every avenue to regularise their stay in SA including obtaining temporary study permits to enable them to finish their schooling. After having been advised by a legal NGO that they were in fact eligible for citizenship under section 4(3), the brothers approached the Department of Home Affairs (DHA) for assistance in applying for citizenship in terms of the above provision. They were, however, turned away by the relevant DHA officials.

Our Practice agreed to assist the brothers on a pro bono basis and made applications on their behalf by way of affidavit. This was the only way in which they could tenably make an application because the DHA has failed to put in place the necessary administrative procedures to apply for citizenship in terms of s4(3). But our attempts to assist them in this manner were thwarted by the DHA and as a result, we were forced to bring a High Court application to enforce their rights.

The primary relief sought in the High Court was that the DHA's failure to make a decision in their applications be reviewed and that the Minister be directed to grant each of them citizenship in terms of section 4(3) of the Citizenship Act. The DHA put up a number of technical defences, including amongst others, an argument that the brothers had adopted the wrong procedure and should have made use of application forms promulgated in terms of section 5(1) (applications for naturalisation) to make their section 4(3) applications; that section 4(3) only applied to people born after 1 January 2013 (the date on which the provision took effect); and that their births had not been correctly registered for the purposes of the requirements of the Citizenship Act.

All these defences were however dismissed by Judge Seena Yacoob in a judgment in which she relied upon the SCA's decision in *Minister of Home Affairs v Ali and Others 2019 (2) SA 396 (SCA)* (a matter also dealing with section 4(3)) handed down just prior to her finalising her judgment.

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In the interests of justice she granted the DHA leave to appeal to the SCA on the narrow question of whether the court was competent in the particular circumstances of this case to order the Minister to grant (as opposed to consider) the brothers applications for citizenship to the SCA.

Judge Yacoob held that where an application in terms of section 4(3) meets all the requirements of the subsection, there is no room for the exercise of a discretion and no basis upon which such application could be refused. In the instant case the court papers established that the brothers' applications did meet all the requirements, and accordingly this was an instance in which there were exceptional circumstances which rendered it appropriate that the court order that the applications be granted. She accordingly ordered the Minister to grant the brothers citizenship within ten days of the order of the court.

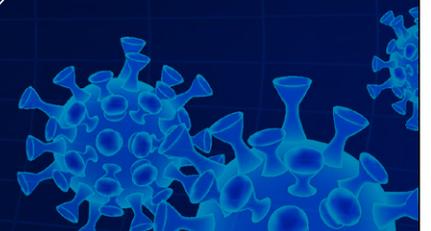
In the interests of justice she, however, granted the DHA leave to appeal to the SCA on the narrow question of whether the court was competent in the particular circumstances of this case to order the Minister to grant (as opposed to consider) the brothers applications for citizenship to the SCA.

Just prior to our legal team finalising our heads of argument in the SCA the Constitutional Court handed down its judgment in the matter of *Chisuse and Others v Director-General, Department of Home Affairs and Another* (CCT 155/19) [2020] ZACC 20 (22 July 2020) in which it held in a unanimous judgment concerning other provisions of the Citizenship Act, that citizenship does not depend on a discretionary decision; rather it constitutes a question of law. If the requisite conditions to acquire citizenship are satisfied the DHA is, so the Constitutional Court held, required to recognise this citizenship, and proceed with the concomitant administrative procedures without any further consideration.

Our legal team's submission to the SCA in the heads of argument filed on behalf of the brothers was that the *Chisuse* judgment effectively disposed of the issue on appeal in their favour and accordingly we invited the DHA to withdraw what was from the start an unmeritorious appeal. In

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We are hopeful that the SCA will reject the appeal and that this will finally pave the way for the enforcement of the High Court's order that the Minister grant the brothers their long fought for right to citizenship.

the event that the DHA did not do so, we asked the SCA to grant a punitive costs order against it and consider directing that the officials who were responsible for directing that the appeal be persisted with following receipt of our heads of argument show cause why they should not personally have to pay the costs concerned. This was on the basis that organs of state which have a heightened constitutional responsibility to litigate responsibly and ethically, should not prosecute purposeless appeals and then expect that taxpayers' foot the bill.

The DHA did not accept the invitation to withdraw the appeal and instead tried to argue that its admission of the facts set out in the brothers' founding affidavits which established that they met all the requirements of section 4(3) had merely "been conditional" and that the DHA still needed to be granted the opportunity to consider the applications. The argument however was met with great scepticism by the SCA bench. It also persisted with the cynical argument rejected by the High Court that there had been no applications before it because the brothers had failed to comply with the correct procedure

in making their applications. As the Presiding Judge Justice Ponnann pointed out it was hardly open to the DHA to complain that applicants for citizenship under section 4(3) didn't comply with proper procedures when the DHA had failed over a prolonged period of time to put in place any procedures for people to apply. This, Justice Ponnann pointed out, is especially where, like in the instance of the brothers, those persons qualifying to apply were particularly vulnerable persons. To date regulations making provision for section 4(3) applications have yet to be adopted. In the light of the *Chisuse* judgment the SCA Justices expressed the prima facie view that the appeal may indeed have been rendered academic and called on counsel for the DHA to respond to the brothers' request that punitive damages be awarded against it.

We are hopeful that the SCA will reject the appeal and that this will finally pave the way for the enforcement of the High Court's order that the Minister grant the brothers their long fought for right to citizenship.

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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