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PRO BONO & HUMAN RIGHTS **ALERT**

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Victory in the SCA for two brothers after a gruelling struggle for their birthright

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Victory in the SCA for two brothers after a gruelling struggle for their birthright

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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. 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In 2014, after being faced with the realisation that their refugee status was to be withdrawn as part of the Angolan repatriation process, the brothers (born and raised in SA of Angolan refugee parents) pursued every avenue to regularise their stay in SA including obtaining temporary study permits to allow 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 DHA for assistance in applying for citizenship. 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 that an application could be made as the DHA had failed to put in place the necessary administrative procedures to apply for citizenship. 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 in June 2017 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 application succeeded with costs and in March 2019, Yacoob J ordered the Minister of Home Affairs to grant the applications of each of the brothers for South African citizenship in terms of section 4(3) of the Citizenship Act within 10 days of the order. The learned Judge was of the view that exceptional circumstances existed which rendered it appropriate for the court to order that the applications be granted.

Considering it in the public interest to do so, in August 2019 Yacoob J granted leave to the DHA to appeal to the SCA 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 brothers' applications for citizenship.

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Victory in the SCA for two brothers after a gruelling struggle for their birthright...*continued*

In its judgment the SCA also considered the recent decision of the Constitutional Court (CC) in the matter of *Chisuse and Others v Director-General, Department of Home Affairs and Another* where the CC recognised that there may be cases in which a court may need to give directions to the Executive despite the need to consider the doctrine of separation of powers.

In a compelling judgment handed down in favour of the brothers, Ponnan JA and Matojane AJA (in which Cachalia and Nicholls JJA and Poyo-Dlwati AJA concurred) recognized the importance of citizenship by quoting Hannah Arendt in their opening paragraph:

> *'[c]itizenship is more fundamental than civil rights. ''For Arendt, the issue was not simply a question of statelessness, but one of common humanity, and the responsibility we have to one another as human beings who share the world in common. As long as we live in a world that is territorially organized into national states, a stateless person "is not simply expelled from one country" they are "expelled from humanity."'*

The SCA considered the requirements for citizenship in terms of section 4(3) and confirmed that the brothers met the requirements including the fourth requirement that their births had been registered in terms of the Births and Deaths Registration Act. The SCA also rejected the DHA's defence that the brothers "never applied" for citizenship because, so it was argued, they failed to make use of the correct application forms. The SCA pointed out that this argument was *"cynical and self-serving"* as the Minister had to date failed to create the necessary application forms for section 4(3) citizenship applications. Despite the narrow scope of the appeal, the DHA also argued that it had no record of the brothers' applications – an argument the SCA rejected as *"plainly disingenuous"*.

The SCA held that the DHA had every opportunity to investigate and respond to the claims made by the brothers, but instead in their answering affidavit admitted the relevant allegations by the brothers that established that they met the requirements. It also rejected an attempt by the DHA to argue in the hearing that this (merely) constituted a *"conditional admission" made exclusively for the purposes of the application. The SCA considered this argument to be "plainly untenable"*.

In its judgment the SCA also considered the recent decision of the Constitutional Court (CC) in the matter of *Chisuse and Others v Director-General, Department of Home Affairs and Another* where the CC recognised that there may be cases in which a court may need to give directions to the Executive despite the need to consider the doctrine of separation of powers.

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Victory in the SCA for two brothers after a gruelling struggle for their birthright...*continued*

The SCA granted costs in favour of the brothers on an attorney client scale but decided against a personal cost order as it was of the view that the requirements for same were not met in this matter.

The CC held that:

> *"These authorities must also find application in determining the appropriate relief in a case dealing with citizenship. The reason for this is that citizenship does not depend on a discretionary decision; rather, it constitutes a question of law. The amended Citizenship Act does not require the Department of Home Affairs to consider any public interest when deciding whether or not to recognise a person's citizenship. Instead, if the requisite conditions to acquire citizenship are satisfied, the Department of Home Affairs is required to recognise this citizenship and proceed with the concomitant administrative procedures, without any further consideration."*

Relying on this dictum the SCA held that the DHA's argument that the matter had to be referred back to the Minister was pointless, given that the brothers clearly met the requirements of s4(3) and therefore that the appeal was contrived and served no purpose. The SCA also held that the appeal was *"unsustainable as a matter of law"* given the Chisuse judgment. It accordingly dismissed the appeal with the costs of two counsel.

The only issue that remained, was the issue of a punitive cost order. In their heads of argument filed with the SCA on 3 August 2020, the brothers had argued that the Chisuse judgment effectively disposed of the issue on appeal in their favour and accordingly invited the DHA to withdraw their appeal. In the event that the DHA failed to do so, they requested that the SCA grant a punitive costs order against the DHA and consider directing personal cost orders against the relevant DHA officials who decided to persist with the appeal.

The SCA agreed that the DHA *"should have reconsidered its position"* upon receipt of the brothers' heads of argument which it failed to do and that it would therefore be unfair to expect the brothers to bear the costs caused by the appeal after 3 August 2020. The court noted that:

> *"The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome. More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant."*

Thus, the SCA granted costs in favour of the brothers on an attorney client scale but decided against a personal cost order as it was of the view that the requirements for same were not met in this matter.

The SCA judgment hopefully brings an end to an arduous struggle by the brothers for recognition of their right to the citizenship and will assist an entire class of similarly situated vulnerable people to rightfully claim their birthright.

Jacquie Cassette and Tricia Erasmus

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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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