

27 SEPTEMBER 2021

EMPLOYMENT LAW ALERT

IN THIS ISSUE

A South African citizen automatically loses their citizenship when they acquire the citizenship of another country in terms of section 6(1)(a) of the Citizenship Act: Is this unconstitutional?

In the recent case of *Democratic Alliance v Minister of Home Affairs and Another* 48418/2018 (6 August 2021), the High Court dismissed an application by the Democratic Alliance (DA) in which the DA challenged the constitutionality of section 6(1)(a) of the Citizenship Act 88 of 1995 (Act).



INCORPORATING
KIETI LAW LLP, KENYA

CLICK HERE 

For more insight into
our expertise and
services

A South African citizen automatically loses their citizenship when they acquire the citizenship of another country in terms of section 6(1)(a) of the Citizenship Act: Is this unconstitutional?

When a person voluntarily acquires the citizenship of another country and does not follow the process of retaining their citizenship, it can hardly be said that such a loss is irrational.

In the recent case of *Democratic Alliance v Minister of Home Affairs and Another* 48418/2018 (6 August 2021), the High Court dismissed an application by the Democratic Alliance (DA) in which the DA challenged the constitutionality of section 6(1)(a) of the Citizenship Act 88 of 1995 (Act). Section 6(1)(a) of the Act makes provision for the automatic loss of citizenship when a citizen, who is not a minor, acquires the citizenship or nationality of another country through a voluntary and formal action, other than marriage. The DA's challenge centred on its argument that the provision is irrational, arbitrary and serves no legitimate purpose. The DA also challenged the constitutionality of this provision on the basis that it violated several guaranteed rights entrenched in the Bill of Rights, without the Minister and the Department of Home Affairs (respondents) first satisfying section 36 of the Constitution of the Republic of South Africa, 1996 (Constitution).

The respondents defended this application on the basis that the Government has the right to regulate the process by which citizenship is acquired or lost and how dual citizenship can be obtained.

While this application sought only to challenge the constitutionality of section 6(1)(a) of the Act, in its analysis, the court also considered section 6(2) of the Act as the two sections are intertwined. Section 6(2) of the Act regulates the process in which citizenship can be retained.

The court also considered section 3(3) of the Constitution which regulates the loss of citizenship and expressly states that national legislation must provide for the acquisition, loss and restoration of citizenship. In addition, the court considered that section 20 of the Constitution prohibits the deprivation of citizenship, which is not specifically regulated in section 3(3) of the Constitution. The wording of section 20 of the Constitution is of fundamental importance. While it prohibits the deprivation of citizenship, it does not prohibit the loss of citizenship.

Deprivation versus loss of citizenship

For purposes of this judgment, the court distinguished between deprivation and loss of citizenship. Deprivation of citizenship was held to have the consequence of statelessness, while the loss of citizenship was only triggered by the acquisition of the citizenship of another country.

In challenging the constitutionality of section 6(1)(a) of the Act, the DA argued that many citizens were unaware of the application of this section when they lost their citizenship, and this argument was supported by an online survey it conducted with people who had lost their citizenship.

A South African citizen automatically loses their citizenship when they acquire the citizenship of another country in terms of section 6(1)(a) of the Citizenship Act: Is this unconstitutional?...*continued*

The DA argued that the application of section 6(1)(a) also limits several other rights, including the right to vote and enter and leave South Africa, which only accrue to citizens. The automatic loss of citizenship therefore has a ripple effect on the protections that would otherwise ordinarily be afforded to South African citizens.

On the DA's assertion of irrationality, the court applied the test for rationality, namely an analysis of the relationship between the means employed to achieve a particular purpose compared to the legitimate end itself. In applying this test, the court held that the purpose of section 6(1)(a) of the Act was to regulate the circumstances under which citizenship may be lost. It further held that when a person voluntarily acquires the citizenship of another country and does not follow the process of retaining their citizenship, it can hardly be said that such a loss is irrational. Sections 6(1)(a) and 6(2) of the Act strike a balance between the personal choices of an individual and those of the state, as well as the public purposes that are linked to the status of citizenship. This is the legitimate end that section 6(1)(a) seeks to achieve and can therefore not be seen to be irrational.

The court therefore held that section 6 of the Act was not vague as it clearly provides for an opportunity to obtain dual citizenship, as well as the consequences of obtaining a second citizenship. The results of the online survey were therefore not sufficient to support the argument of unconstitutionality, as citizens involved in relocation to other countries, with the possibility of acquiring citizenship there, must acquaint themselves with that area of the law.

On the DA's assertion that section 6(1)(a) of the Act deprives a citizen of their citizenship, which is specifically prohibited by section 20 of the Constitution, the court noted that the DA was conflating the concepts of deprivation and loss of citizenship. While any deprivation of citizenship must be justified by section 36 of the Constitution, the same is not applicable to the loss of citizenship, and section 20 does not prohibit the loss of citizenship. The court therefore held that section 20 of the Constitution was not applicable to the loss of citizenship and that the DA's reliance on it was misplaced.

Limitation rights

The DA argued that the application of section 6(1)(a) also limits several other rights, including the right to vote and enter and leave South Africa, which only accrue to citizens. The automatic loss of citizenship therefore has a ripple effect on the protections that would otherwise ordinarily be afforded to South African citizens.

In determining whether section 36 of the Constitution was applicable to section 6(1)(a) of the Act, the court held that the loss of citizenship results in a change of status and because of that, the former citizen is no longer entitled to the benefits of that citizenship. The former citizen's rights are therefore not limited because their citizenship was lost after acquiring the citizenship of another country, without applying to retain their South African citizenship. No section 36 enquiry is therefore triggered in these circumstances.

A South African citizen automatically loses their citizenship when they acquire the citizenship of another country in terms of section 6(1)(a) of the Citizenship Act: Is this unconstitutional?...*continued*

Section 3(3) of the Constitution expressly recognises that citizenship may be lost and records that the loss of citizenship must be regulated by national legislation.

The court held that should its conclusion be incorrect, with the effect that section 6(1)(a) does not result in the limitation of rights but in a lawful change of status with the respective consequences that go with it, the provisions of section 36 may apply. Section 36(1) of the Constitution states that the rights set out in the Bill of Rights may only be limited in terms of the law of general application, while section 36(2) creates a general prohibition against any law that may limit a right entrenched in the Bill of Rights, subject to a limitation in terms of section 36(1) or in any other provision of the Constitution. A challenge to the limitation of any right may therefore be met by satisfying the criteria set out in section 36(1) of the Constitution or by showing that the Constitution itself permits such a limitation.

Section 3(3) of the Constitution expressly recognises that citizenship may be lost and records that the loss of citizenship must be regulated by national legislation. The Act is the legislation that regulates the loss of citizenship. On this basis, the court found that section 36(2) of the Constitution was therefore applicable to this dispute, and not section 36(1).

In support of its finding, the court relied on *Azanian Peoples Organisation and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16 wherein it was held that "an argument that a provision of a statute constituted a violation of a right would be adequately met by a defence that the Constitution itself permitted such a violation". In applying this *dictum* together with the provisions of sections 3(3) and 36(2) of the Constitution, the court held that, to the extent that it can be said that section 6(1)(a) of the Act results in a limitation of rights, then the limitation is specifically permitted by the Constitution.

The DA's application was accordingly dismissed.

This judgment confirms that all citizens who voluntarily choose to acquire the citizenship of another country will automatically lose their citizenship, together with all the rights associated with such citizenship, by operation of law, unless they apply to retain their citizenship.

Michael Yeates and Taryn York

AN EMPLOYER'S GUIDE

TO MANDATORY WORKPLACE VACCINATION POLICIES

FOR A COPY OF THE CDH EMPLOYMENT PRACTICE GUIDE, [CLICK HERE](#)

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Aadil Patel
Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Bongani Masuku
Director
T +27 (0)11 562 1498
E bongani.masuku@cdhlegal.com



Hedda Schensema
Director
T +27 (0)11 562 1487
E hedda.schensema@cdhlegal.com



Anli Bezuidenhout
Director
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com



Phetheni Nkuna
Director
T +27 (0)11 562 1478
E phetheni.nkuna@cdhlegal.com



Njeri Wagacha
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E njeri.wagacha@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Desmond Odhiambo
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Mhossina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mhossina.chenia@cdhlegal.com



Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com



Imraan Mahomed
Director
T +27 (0)11 562 1459
E imraan.mahomed@cdhlegal.com

OUR TEAM

For more information about our Employment Law practice and services in South Africa and Kenya, please contact:



Jean Ewang
Consultant
M +27 (0)73 909 1940
E jean.ewang@cdhlegal.com



Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com



Peter Mutema
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E peter.mutema@cdhlegal.com



Avinash Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com



Jaden Cramer
Associate
T +27 (0)11 562 1260
E jaden.cramer@cdhlegal.com



Mayson Petla
Associate
T +27 (0)11 562 1114
E mayson.petla@cdhlegal.com



Riola Kok
Professional Support Lawyer
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com



Rizichi Kashero-Ondego
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E rizichi.kashero-ondego@cdhlegal.com



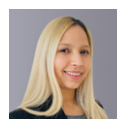
Kgodisho Phashe
Associate
T +27 (0)11 562 1086
E kgodisho.phashe@cdhlegal.com



Tamsanqa Mila
Senior Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Jordyne Löser
Associate
T +27 (0)11 562 1479
E jordyne.loser@cdhlegal.com



Taryn York
Associate
T +27 (0)21 481 6314
E taryn.york@cdhlegal.com



Dylan Bouchier
Associate
T +27 (0)11 562 1045
E dylan.bouchier@cdhlegal.com



Christine Mugenyu
Associate | Kenya
T +254 731 086 649
T +254 204 409 918
T +254 710 560 114
E christine.mugenyu@cdhlegal.com

BBBEE STATUS: LEVEL ONE 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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

CVS Plaza, Lenana Road, Nairobi, Kenya. PO Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114 E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2021 10438/SEPTEMBER



INCORPORATING
KIETI LAW LLP, KENYA



EMPLOYMENT LAW | cliffedekkerhofmeyr.com