REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

9/7/15

CASE NO: 34392/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

SOLOMON TIMA	First Applicant
MEMORY TIMA	Second Applicant
SHAUN TIMA	Third Applicant
OWEN TIMA	Fourth Applicant
and	
MINISTER OF HOME AFFAIRS	Respondent

REASONS FOR ORDER

MAKGOKA, J

[1] On 9 July 2015 I made an order setting aside, with costs, the respondent's decision refusing the applicants' application for permanent residence and remitted the matter to the respondent for reconsideration. I undertook to furnish the reasons for the order later. These are the reasons.

[2] The matter concerns a decision of the respondent, the Minister of Home Affairs (the Minister) made on 8 November 2013 in terms of s 31(2) of the Immigration Act 13 of 2002 (the Act), refusing the applicants' application for the right

of permanent residence in South Africa. The applicants seek an order setting aside that decision, and for this court to substitute its own decision for that of the Minister, by granting them an exemption for permanent residence in South Africa. In addition, the applicants seek the court to "confirm" their permanent resident status in South Africa, and "to further issue non-citizen identity documents and/or passports" to them. In the alternative to the above, the applicants seek referral to the Minister to reconsider their application. The relief sought by the applicant is opposed by the Minister.

[3] Section 31(2) of the Act clothes the Minister with a discretionary power to grant a foreign national the right of permanent residence in South Africa. It provides:

"(2) Upon application, the Minister may under terms and conditions determined by him or her –

...

(b) grant a foreigner or a category of foreigners the right of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may-

exclude one or more identified foreigners from such categories; and

for good cause, withdraw such rights from a foreigner or a category of foreigners:

(c) for good cause, waive any prescribed requirement or form; ..."

[4] The facts are these. The first and second applicants are husband and wife. The third and fourth applicants are the couple's children. The first applicant alleges that he was born in Evaton, South Africa to a Zimbabwean mother on 20 November 1983. According to him, when he was 10 years old, his mother abandoned him.

He was left in the care of one Zanele Tima, a South African. He was brought up by Ms Zanele Tima as her own child, hence the adoption of the surname, Tima.[1]

[5] The first applicant states that he grew up in Evaton. He never went to school. His mother's whereabouts are said to be unknown. His birth was never registered with the department of Home Affairs in South Africa. When he turned 16 years old in 1998, he wished to apply for a South African identify document. He says that at that stage he believed that he was a South African citizen who was entitled to be issued with a South African identity document. During that time, Zanele got involved in a love relationship with a Mr Lamola (Lamola) who played a father-figure role to him. On 1 March 2000 Lamola accompanied him to a Home Affairs department office in Potchefstroom to apply for a South African identity document.

[6] Because his birth was not registered in South Africa, he first had to apply for late registration of his birth. As he is completely illiterate, he relied on Lamola to complete the form on his behalf. In the form, Lamola stated that he was Zanele's biological son. He was issued with a South African identity document and a passport on the basis of the information furnished to the department of Home Affairs by Lamola. During 2001 Lamola left Zanele after their relationship had terminated and went to live in Mokopane. Later, he also left Evaton and settled in Mokopane in Limpopo Province, where he practised as a traditional healer.

[7] The first applicant further states that during the early part of 2003 he visited Zimbabwe where he met the second applicant through the latter's grandmother. Through 'the intervention' of the second applicant's grandmother, he and the second

[1] As the first applicant and his family also use the surname of Tima, the same as Ms Zanele Tima's, I shall refer to her by her first name, in order to avoid any confusion, and without meaning any disrespect to her.

applicant started a long distance courtship which lasted about 5 months. He again visited Zimbabwe in August 2003 during which he and the second applicant got married to each other, on 30 August 2003.

[8] Shortly after their marriage, he obtained a permit from the South African consulate in Harare, Zimbabwe, for the second applicant to accompany him to South Africa. He says that up to that point he believed himself to be a South African. On 3 September 2003 he was accompanied to South Africa by the second applicant, where they settled in Mokopane. On 31 May 2004 the couple's first born, the third respondent, was born. On 11 November 2004 the second applicant was issued with a permanent residence permit. On 3 March 2006 she was issued with a South African identity document.

[9] During early 2007 the first applicant applied to the department of Home Affairs in Mokopane for the citizenship of his wife, the second applicant. An interview was conducted with the first applicant by an immigration officer. In that interview, he was questioned about the information furnished when he applied for late registration of birth as fully discussed in paras 6 and 7 above. I pause here to mention that it is common cause that the late registration of the first applicant was based on false information. For example, it was stated that Zanele was the first applicant's biological mother, and that Lamola was Zanele's brother, thus the first applicant's uncle.

[10] After these discrepancies were pointed out by the immigration officer, the first applicant signed a statement prepared by the immigration officer. The statement stated that the first applicant's mother was a Zimbabwean who came to South Africa in 1968. She died during or about 1993, whereafter she was brought up by Zanele,

whose whereabouts were unknown. Zanele had told him that although he had a Zimbabwean inoculation mark (birth mark), he was born in South Africa.

[11] After the statement was made, the first applicant was arrested and charged with contravention of s 49(14) of the Act for misrepresentation of facts when applying for a South African identity document. He was issued with a notice to appear in court on 9 March 2007. The notice to appear in court had an option to pay an admission of guilt fine of R3 000. The first applicant opted to pay the admission of guilt fine, instead of appearing in court.

[12] The effect of the admission of guilt meant that the first applicant's presence in South Africa was illegal. It followed that he had to leave the country. Accordingly, an order to that effect was issued in terms of s 32(2) of the Act in terms of which he was given until 30 March 2007 to leave South Africa. Simultaneously, the first applicant noted his intention to appeal the decision to deport him. On 12 March 2007 a notification was issued by the immigration officials for the deportation of the second applicant.

[13] After an abortive urgent application in May 2007 by the first and second applicants to prevent the deportation of the second applicant, this court granted an order by agreement on 17 July 2007, also on an urgent basis, staying the deportation of the second applicant pending the consideration of a representation in terms of s 31(2)(b) and (c) of the Act, which application was submitted to the Minister on 31 July 2007. The Minister did not timeously consider the application.

[14] The first and second applicants launched an application in this court on 26 October 2010 to compel the Minister to consider the application. On 3 February 2011

this court ordered the Minister to make a determination regarding the application "within three days". On 14 February 2011 the Minister raised certain queries in respect of the application. The response to those queries was furnished to the Minister on 1 February 2013. On 8 November 2013 the Minister declined the application for exemption on the basis that the first applicant had admitted to have obtained the South African identify document fraudulently. Accordingly, the first applicant and his family were advised to make preparations to leave the country. The Minister's response triggered the present application, which was launched on 14 May 2014.

[15] The applicants rely primarily on five grounds for reviewing the Minister's decision. First, it is contended that the Minister had taken irrelevant considerations and/or factually incorrect considerations into account in that the first applicant did not intentionally participate in the fraudulent representation when the late registration of birth was registered. Second, it is argued that the decision was taken without considering the relevant available information, among others, that the first applicant was born and raised in South Africa, and thus has no roots in Zimbabwe and that him and his family had lived in the country since 2007. Third, it is said that the first applicant contributes to the South African economy. Fourth, it is stated that the Minister took the decision in an arbitrary or capricious manner by focusing only on the false registration of birth. Fifth, the applicants contend that the decision was not rationally connected to the purpose for which it was taken.

[16] It is further submitted that the Minister should have found that special circumstances existed to grant the exemption in terms of s 31(2)(b) of the Act, alternatively, to find that good cause existed to grant the applicants an exemption in

terms of s 31(2)(c) of the Act. That evidence is said to be constituted by the following factors: that the first applicant was born in South Africa and that he had spent his entire childhood and adult life in South Africa; that the first and second applicants contribute towards the economy in South Africa and have not been a burden to the State; and the adverse effect the refusal of the exemption application would have on the applicants. It was further contended that even if the Minister had correctly accepted that the first applicant participated in making fraudulent statements of fact when the registration of birth form was completed, that fact alone should not have outweighed all the other factors which supported the granting of exemption.

[17] On behalf of the Minister, it is emphasized that the first applicant obtained both the South African identity document and the passport fraudulently, and that he should not be allowed, when he is caught out in his fraud, to resort to an application for exemption. The upshot of the argument is that fraud cannot tenably give rise to a right to be exempted in terms s 3(2) of the Act. It is further contended that the first applicant approbates and reprobates as to his citizenship. It is said while he contends to be a South African citizen and born in South Africa, he at the same time, applies for an exemption on the basis that he is a foreigner.

[18] In considering the contentions of the parties, I must guard against considering the Minister's decision on an after-the fact basis. I must confine the enquiry to the reasons furnished by the Minister for refusing the exemption application. In her letter rejecting the application, the Minister stated the following:

"I have considered all the information at my disposal and in view of the fact that Mr. Tima has admitted to being a Zimbabwean national who obtained his South African citizenship fraudulently and is unable to provide any documentary evidence that his biological mother was a South African citizen or that he has resided in the country all his life, I have decided

not to grant an exemption to Mr. and Mrs Tima, as no special circumstances exit Mr. Tima and his family must make the necessary arrangements to leave the country."

[19] It is clear from the Minister's letter, and the stance taken on behalf of the Minister in these proceedings, that the only consideration taken into account was that the applicant is possibly a foreigner from Zimbabwe who had obtained the South African identity document and passport fraudulently. While this is a very important consideration, it is certainly not the only one. The Minister had to consider whether there existed 'exceptional circumstances' justifying the exemption. See, for example, *Littlewood and Others v Minister of Home Affairs and Another*.[2]

[20] In the context of the applicants' application, the Minister was enjoined to consider the aspect of false information within the totality of factors, including the explanation given by the first applicant of the circumstances under which the false information was furnished when the late registration of birth was applied for. In particular, the Minister was expected to consider whether, despite the false information, special circumstances existed for granting the permit. In this regard, the following factors should have come into reckoning: that the first applicant's wife and children have lived with him in South Africa since 2007; that the first applicant is self-employed as a traditional healer and reportedly providing employment for at least two people in South Africa.

[21] Without doubt, the fraudulent registration of birth, and the subsequent obtaining of a South African identity document based on that, should be a serious concern for the Minister. However, there is an explanation for that by the first applicant. The Minister might have considered the explanation to be implausible,

[2] 2006 (3) SA 47 (SCA) paras 16 and 18.

deserving of an outright rejection. But this is not apparent from her decision. It is not clear from the Minister's decision that this was considered at all. It might well be that when considered in the light of all other factors, this factor emerges as the key one on which the Minister's decision rests.

[22] It is clear from the reasons advanced in the Minister's letter that she failed to apply her mind to any of the above, and to the overall question whether special circumstances exist. It was an impermissible approach for the Minister to simply concentrate on only one factor and base her decision on that factor alone - despite how important she may have considered it to be. She could have, for example, given consideration to granting a temporary permit subject to a condition that the first applicant applies for the review and setting aside of the admission of guilt fine.

[23] At the risk of repetition, all what is required by the section is a demonstration by the Minister that the decision was taken after taking into account all relevant factors, and not only one. To that extent, I conclude that the Minister failed to consider whether 'special considerations' existed justifying an exemption. This means that the Minister has failed to exercise the discretion conferred on her by the Act. Her decision thus falls to be set aside.

[24] I now consider whether the court should substitute its own decision for that of the Minister or whether the matter should be remitted to the Minister to reconsider the decision. Unsurprisingly, the applicants contend for substitution, while the Minister requests, in the event of the decision being set aside, the remittal of the matter to him [3] for reconsideration. The law in this regard is well-settled. Courts will

[3] A new male Minister had since been appointed since the decision was taken by the former female Minister.

not lightly interfere with the exercise of a discretionary power of the executive or administration.

[25] In terms of s 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 the court has the discretion to substitute the administrative action in "exceptional cases". What constitutes 'exceptional' was considered in *Gauteng Gambling Board v Silverstar Development Ltd and Others*[4], where the Supreme Court of Appeal stated:

'Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair'.

[26] In the present case, it is contended on behalf of the applicants that 'an exceptional case" has been made out for the court to substitute its own decision for that of the Minister. The following is said to be exceptional: that Minister had sufficient time to consider the 'extremely persuasive evidence' which the applicants offered in their exemption application; that the Minister had adopted a delaying approach to the matter, and had to be compelled by this court to take the decision; and that when the decision was eventually taken, it was not properly considered.

[27] It is submitted further that the decision cannot be left to the Minister for reconsideration, for following reasons: that the facts which are now before the court were available to the Minister when she made the decision, and that it is unlikely that

[4] 2005 (4) SA 67 SCA para 28.

"more persuasive facts" will arise if matter is remitted; the length of time over which the Minister failed to take a decision, and the "inherent urgency" of the matter; and that the evidence justify a finding that the applicants should have been granted exemption.

[28] I do not share the applicants' enthusiasm. It is by no means clear that the applicants are entitled to an exemption. The fact is, objectively, the first applicant has pleaded guilty and paid an admission of guilt fine for having obtained a South African identity document on the basis of false information provided in the application for late registration of birth. Such admission of guilt stands as a criminal offence against the first applicant.

[29] The applicants say that the admission of guilt and the payment of the fine was not the result of a proper and truthful admission of the allegation that the first applicant misrepresented the facts when he applied for a South African identity document. But this is the mere say so of the first applicant. Until such conviction is set aside by a competent court, the conviction stands against the first applicant. It is worth noting in this regard that the first applicant does not appear to have taken any steps to have that admission of guilt set aside – at least it does not appear from the papers in the present application.

[30] In the absence of an order by a competent court setting aside the conviction, the court would be sanctioning an illegality if it were to grant the exemption in the face of the first applicant's criminal conviction. That, a court cannot competently do.

As succinctly explained by the Supreme Court of Appeal, albeit in a different context:[5]

"If this court were to direct that possession of the vehicle be restored to the appellant, it would be 'lending its imprimatur to an illegality'. Consequently, were this court to grant the relief sought, it would be party to allowing 'a state of affairs prohibited by law in the public interest'. As Innes CJ pointed out in *Hoisain v Town Clerk, Wynberg* 1916 AD 236 at 240

> 'It is sought to compel the Town Clerk to place the applicant's name upon the statutory list; he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which the Statute does not allow him to do; in other words we are asked to force him to commit an illegality.'

In *Essop v Abdullah* 1988 (1) SA 424 (A), this court restated the principle that no court will compel a person to perform an illegality. The relief sought by the appellant, namely possession of the vehicle, would have the result of compelling the police to commit an illegality".

(footnotes omitted)

[31] Regarding the false information furnished during the application for late registration of birth, I make this observation. The first applicant lays the blame on Lamola for that. It would be recalled that among others, it was there stated that Zanele was the first applicant's biological mother. The first applicant says that he did not know what Lamola had stated, as he supposedly is illiterate.

[32] It was argued on behalf of the applicants that save for the false representations by Lamola as stated above, concerning the identity of the first applicant's mother, the first applicant never represented that his mother was a South African citizen. Thus, so is the argument, the Minister should not have had any expectation that the first applicant had to provide documentary evidence that his biological mother was a South African.

---

[5] *Ngqukumba v Minister of Safety and Security and Others* 2013 (2) SACR 381 (SCA) para 16.

[33] I disagree. It is not correct that the first applicant never represented that his mother was a South African citizen. He did. In the interrogation and declaration questionnaire in terms of s 33(4) of the Act, and to the question as to the identity of his parents, the first applicant stated his mother's names to be 'Zanele Norra Tima'. It should be remembered that Zanele Tima is the South African woman who supposedly brought up the first applicant after his biological mother, Nora, had deserted him.

[34] By naming Zanele Tima, a South African, as his mother, the first applicant created an impression that he was born of a South African citizen, thus perpetuating the misrepresentation of facts similar to when the late registration of birth was applied for. Nora is supposedly the name of his biological mother. This is according to the first applicant himself, where, in his founding affidavit, he made a clear distinction between his supposed biological mother named Nora (Zimbabwean), and his supposed *de facto* mother, Zanele[6] (supposedly South African). Lamola also makes the same distinction between the two women, and of the name of the applicant's supposed biological mother.[7]

[35] Another discrepancy in that questionnaire concerns his place of birth, which he stated it to be Potchefstroom. Furthermore, in the duplicate original marriage register when the first and second applicants got married, the first applicant's residential address at the time of marriage was given as no. 6 Mimosa Midder Park, Potchefstroom, Republic of South Africa. The supposed birth and residential place of the first applicant as stated in these document is contrary to his version in the present application, according to which he was born and bred in Evaton, until he

[6] See para 12 of the founding affidavit.
[7] See paras 3.2 - 9.2 of Lamola's confirmatory affidavit.

moved to Mokopane in Limpopo Province. Potchefstroom was mentioned only as the place he applied for late registration of birth and the identify document, and never as a place of birth or residence.

[36] What is clear from the answers furnished by the first applicant in the forms referred to above, is that the first applicant clearly presented himself as a South African, born of a South African mother. This he confirms in the present application when he seeks to justify this. He says that at that stage he considered himself to be a South African. It is in that context that the Minister's statement that the first applicant was probating and approbating as to his citizenship, and that had failed to furnish proof that the first applicant was born of a South Africa mother was made, and should be understood.

[37] It is also instructive that right until he was confronted about his citizenship in early 2007, the first applicant had presented himself as a South African. Only when this appeared problematic for him, he changed tune, and sought foreigner exemption under s 31(2) of the Act, thus confirming his status as a foreigner. The criticism against the Minister in this regard is therefore unwarranted. The first applicant's assertion that when he presented himself as a South African he considered himself as such, rings hollow because at that stage, on his own version, he was aware that he was born of a Zimbabwean mother, which made him a Zimbabwean.

[38] These discrepancies, to a great extent, undermine the first applicant's *bona fides*, especially his claim to have been born in South Africa. He also seemingly does not deny the fact that he has a Zimbabwean 'birth mark' – whatever that means. But if this is an indication of a person having been born in that country, this further

undermines the claim of the first applicant to have been born in South Africa. These are issues that only the Minister and the immigration officials can thoroughly investigate and decide on. For these reasons I decline the invitation to substitute this court's decision for the Minister's, and would rather remit the matter for reconsideration by the Minister in the light of what is discussed in the judgment.

[39] To sum up. The Minister did not properly exercise her decision properly in considering the applicants' exemption for permanent residence, by constricting herself to only the false information furnished during the application for late registration of birth. The applicants have not made out a case for this court to substitute its own decision for that of the Minister. The matter should be remitted to the Minister.

[40] There remains the issue of costs. To the extent the applicants have obtained the relief for reconsideration, they have been successful, and are entitled to their costs.

[41] These are the reasons for the order referred to in paragraph 1 above, which, for completeness' sake, is repeated below:

1. The respondent's decision on 8 November 2013 in terms of which the first and second application for exemption in terms of section 31(2) (b) and/or (c) of the Immigration Act 13 of 2002 is reviewed and set aside;
2. The matter is remitted to the respondent to reconsider the application in the light of this judgment;
3. The respondent is ordered to pay the costs of the application.

T.M. Makgoka
Judge of the High Court

Appearances

For the Applicants:	Adv. H.H. Cowley
Instructed by:	Mc Menamin, Van Huyssteen & Botes Inc. Pretoria
For the Respondent:	Adv. W Mkhari SC Adv. M.S Masemene
Instructed by:	State Attorney, Pretoria