CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 249/18

In the matter between:

FLORETTE KAYAMBA MULOWAYI	First Applicant
NSONGONI JACQUES MULOWAYI	Second Applicant
GADDIEL MUTAMBA MUBENISHIBWA MULOWAYI	Third Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Respondent

Neutral citation:	*Mulowayi v Minister of Home Affairs* [2019] ZACC 1
Coram:	Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J
Judgment:	Mhlantla J (unanimous)
Decided on:	29 January 2019
Summary:	declaration of invalidity in respect of regulations not subject to confirmation — suspension of order of invalidity set aside

ORDER

On appeal from the High Court of South Africa, Western Cape Division, Cape Town:

1. Condonation is granted.
2. The application for the confirmation of the declaration of invalidity of regulation 3(2)(a) of the Regulations on the South African Citizenship Act, 1995 is refused on the basis that it is superfluous.
3. Leave to appeal is granted.
4. The appeal is upheld.
5. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside to the extent that the order of the High Court of South Africa, Western Cape Division, Cape Town suspending the declaration of the invalidity of regulation 3(2)(a) of the Regulations on the South African Citizenship Act, 1995 is set aside.
6. There is no order as to costs.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Petse AJ and Theron J concurring):

Introduction

[1] This is an application for confirmation of an order of the High Court of South Africa, Western Cape Division, Cape Town (High Court) declaring regulation 3(2)(a) of the Regulations on the South African Citizenship Act, 1995[1] (Regulations)

[1] GN 1122 in GG 36054 of 28 December 2012.

unconstitutional and invalid. In the alternative, the applicants apply for leave to appeal against that part of the order suspending the declaration of invalidity in which the applicants recognise that this Court does not confirm invalidity of regulations.

[2] This matter was determined without oral argument or written submissions.

Parties

[3] The applicants are husband and wife, namely, Mr Nsongoni Jacques Mulowayi and Mrs Florette Kayamba Mulowayi, as well as their minor son Gaddiel Mutamba Mubenishibwa Mulowayi (Gaddiel). For convenience, I sometimes refer to Mr and Mrs Mulowayi as the couple. The first and second respondents are the Minister of Home Affairs (Minister) and the Director-General of Home Affairs (Director-General) respectively. The respondents have filed no opposing papers.

Facts

[4] Mr and Mrs Mulowayi came to South Africa as refugees from the Democratic Republic of Congo (DRC). Both were granted permanent residency in South Africa – Mr Mulowayi on 1 February 2011 and Mrs Mulowayi on 5 May 2011.

[5] Since their arrival in South Africa, the couple has had three children. Hadriel Tshiamakanda Mubenishibwa Mulowayi (Hadriel) was born on 13 April 2011, Yokheved Bipetabilenga Mubenishibwa Mulowayi (Yokheved) on 2 February 2013 and Gaddiel on 14 March 2017. Hadriel and Yokheved were recognised as citizens of South Africa by birth and issued with South African identity numbers. This is not the case with Gaddiel, who has an unabridged birth certificate but does not have an identity number. He is not recognised as a citizen despite being registered in terms of the Births and Deaths Registrations Act.[2]

[2] 51 of 1992.

[6] Mr and Mrs Mulowayi were informed by the officials of the Department of Home Affairs (Department) that they would have to wait for five years before applying for citizenship. These officials also informed the couple that in order to be considered for South African citizenship they must renounce their Congolese citizenship. The couple did so in December 2015 and in 2016 they applied for citizenship.[3] Mr Mulowayi applied on 1 April 2016 and Mrs Mulowayi on 12 May 2016.

[7] On 24 October 2016, the couple received letters from the Department informing them that their applications for citizenship had been rejected in terms of regulation 3(2)(a)[4] as they had applied before the time of qualification. It was stated that the time of qualification was "after ten years of permanent residence".

[8] Since the couple has renounced their Congolese citizenship, the effect of the rejection of their applications is that they are now stateless. The Department has also

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[3] Section 5(1) of the South African Citizenship Act 88 of 1995 (Act) sets out the requirements for naturalisation:

> "The Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that—
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> . . .
>
> (c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application; and
>
> . . .
>
> (h) he or she is a citizen of a country that allows dual citizenship: Provided that in the case where dual citizenship is not allowed by his or her country, such person renounces the citizenship of that country and furnishes the Minister with the prescribed proof of such renunciation."

[4] Regulation 3(2), entitled "Certificate of naturalisation", reads:

> "(a) The period of ordinary residence referred to in section 5(1)(c) of the Act is 10 years immediately preceding the date of application for naturalisation.
>
> (b) Any person who lodges an application for naturalisation must, at the time of his or her application, not have been absent from the Republic for a period of more than 90 days in any year during the five-year period of ordinary residence immediately preceding the date of application for naturalisation.
>
> (c) Any person who has been absent from the Republic for a period of more than 90 days in any year during the five-year period of ordinary residence immediately preceding the date of application for naturalisation does not qualify for naturalisation."

refused to recognise Gaddiel as a South African citizen as his parents were not South Africans at the time of his birth, thus he too is stateless.

[9] The couple took issue with this. Department officials had informed them before they applied that the qualification period was five years. Further, section 5(1)(c) of the Act provides:

> "The Minister may, upon application in the prescribed manner, grant a certificate of naturalisation as a South African citizen to any foreigner who satisfies the Minister that—
>
> . . .
>
> (c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application."

[10] The couple tried to resolve the dispute with the respondents but this proved fruitless.

High Court

[11] The applicants launched an application in the High Court[5] and sought an order declaring regulation 3(2)(a) invalid and unconstitutional. They also asked the Court, in terms of section 6(2) of the Promotion of Administrative Justice Act[6] (PAJA), to review and set aside the Director-General's decision and substitute it with an order approving their application for citizenship and an order declaring Gaddiel to be a South African citizen in terms of section 2(2) of the Act.[7]

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[5] *Mulowayi v Minister of Home Affairs; Eisenberg Attorneys v Minister of Home Affairs* unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, case no. 13550/2017 and case no. 8542/2017 (8 June 2018) (High Court judgment).

[6] 3 of 2000.

[7] Section 2 of the Act provides:

> "(1) Any person—
>
> (a) who immediately prior to the date of commencement of the South African Citizenship Amendment Act, 2010, was a South African citizen by birth; or

[12] The applicants submitted that the decision to reject their applications was taken by someone other than the Minister whereas only the Minister has the power to make the decision under section 5 of the Act. The couple also argued that Gaddiel, who was a newborn baby when his application for citizenship was launched, was vulnerable to infections or accidents and as long as he remained undocumented no hospital would assist him. They further submitted that flights could not be booked for the minor child and he would not be able to attend school. Last, the DRC could not grant him citizenship as he was not born there and his parents had renounced their citizenship.

[13] The respondents argued that the "decision" was not subject to a review challenge under PAJA for three reasons. First, the letter could not be regarded as a decision of the Minister because it had not been signed by him. Second, the Minister had not delegated his power to consider applications for citizenship under section 5 of the Act. Third, the letter did not contain all the criteria for a citizenship by naturalisation decision. It was thus an incomplete decision.

[14] The respondents did not satisfactorily address the incongruity of the number of years provided in regulation 3(2)(a), namely 10 years and section 5(1)(c), namely

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(b) who is born in or outside the Republic, one of his or her parents, at the time of his or her birth, being a South African citizen, shall be a South African citizen by birth.

(2) Any person born in the Republic and who is not a South African citizen by virtue of the provisions of subsection (1) shall be a South African citizen by birth, if—

(a) he or she does not have the citizenship or nationality of any other country, or has no right to such citizenship or nationality; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992).

(3) Any person born in the Republic of parents who have been admitted into the Republic for permanent residence and who is not a South African citizen, qualifies to be a South African citizen by birth, if—

(a) he or she has lived in the Republic from the date of his or her birth to the date of becoming a major; and

(b) his or her birth is registered in the Republic in accordance with the Births and Deaths Registration Act, 1992 (Act 51 of 1992)."

five years.[8] They argued that section 5(1) provides a minimum period and that the Minister has the power to regulate a period in excess of the minimum. The respondents further argued that Gaddiel was not without remedy as he could apply for citizenship once he attained the age of majority.

[15] The High Court rejected the argument that no decision had been made. Regarding section 5(1), the High Court accepted that the section does create a minimum but it does not allow for an extension of that period nor does it create a maximum period. The High Court further held that if the Legislature intended otherwise, it would have stated this in the Act. The High Court held that regulation 3(2)(a) should be interpreted accordingly.

[16] The High Court held that section 23 of the Act empowers the Minister to make regulations which must be consistent with the Act. Thus the Minister's powers to make regulations must be used only in so far as those regulations achieve the objective of giving effect to the Act or make its administration more effective. The High Court held that regulation 3(2)(a) does neither. The High Court thus concluded that the regulation could not amend the legislation and the 10 year period in regulation 3(2)(a) was a patent error.

[17] The High Court held that the respondents' argument that Gaddiel could apply for citizenship when he reached the age of 18 years was not in accordance with the right of the child to a nationality as set out in section 28(1)(a) of the Constitution. Furthermore, Gaddiel ought to be placed in a position where he too can qualify for South African citizenship.

[18] In the result, the High Court upheld the constitutional challenge. It held that regulation 3(2)(a) was promulgated in a manner inconsistent with section 33 of the Constitution and section 6(2) of PAJA and declared it invalid. The High Court held

[8] See section 5 of the Act above n 3 and regulation 3 above n 4.

that there was no need to provide interim measures pending the Minister's correction of regulation 3(2)(a). However, the High Court refused to grant the substitution order on the couple's applications for citizenship stating that it was not in as good a position as the administrator to make that decision.

[19] Consequently the High Court declared the reference to "10 years" in regulation 3(2)(a) to have been *ultra vires* (beyond the legal power or authority) of section 5(1) of the Act and irrational, vague and inconsistent with the Constitution and therefore invalid. The High Court suspended the declaration of invalidity pending the confirmation of its order by this Court. It set aside the decision made on behalf of the Director-General. The respondents were directed to reconsider the applicants' citizenship applications in terms of section 5(1) of the Act within two months of the order.

In this Court

[20] The applicants now seek that the declaration of constitutional invalidity be confirmed. In the alternative, they apply for leave to appeal directly to this Court against paragraph two of the order, that is, the suspension order. There is also an application for condonation.

[21] This Court must determine the following issues:

(a) Should condonation be granted?

(b) Does this Court have jurisdiction?

(c) Should leave to appeal be granted?

(d) What is an appropriate remedy?

Applicants' submissions

Condonation

[22] The High Court judgment was handed down on 5 June 2018. The application in this Court was filed on 4 October 2018. The applicants submit that they immediately attempted to ascertain whether a joint application could be made by them and the respondents to the High Court. This was to vary its order in terms of rule 42 of the Uniform Rules of Court[9] and / or the common law to remove the suspension. This required the parties' legal representatives to take instructions which were only forthcoming on 8 August 2018 but they are not in a position to divulge more than this as any further information may be privileged. The applicants submit that once it became clear that no consensus could be reached, they decided to raise funds to launch the application. The couple had not anticipated that they would need to approach this Court as they had not requested a suspension order.

[23] The applicants submit that it is in the interests of justice to hear this matter as the declaration of invalidity will remain suspended unless and until this Court confirms it. Further, the respondents were part of the discussions in pursuit of an agreement; therefore there is no potential prejudice to the respondents.

[24] The application is late by three months. The explanation for the delay is plausible and adequate. No prejudice will be suffered by the respondents. Therefore it is in the interests of justice that condonation should be granted.

[9] Rule 42(1) of the Uniform Rules of Court entitled "Variation and Rescission of Orders" provides:

> "The court may, in addition to any other powers it may have, *mero motu* (of its own accord) or upon the application of any party affected, rescind or vary:
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> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected 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."

Merits

[25] The crux of the applicants' complaint against the High Court judgment is the suspension of the declaration of invalidity of regulation 3(2)(a). They submit that the High Court misunderstood that substitution under PAJA has nothing to do with suspension. Second, the applicants submit that it appears that the High Court's reference to "suspension" may be intended to apply to suspending a declaration of invalidity pending rectification of the statute by the Legislature. This, they continue, is different to a suspension under section 172(2)(a) of the Constitution.

[26] The applicants submit that if their interpretation of the High Court's findings is incorrect, then they seek this Court's confirmation of the declaration of invalidity.

Assessment

[27] It is trite that declarations of invalidity in respect of regulations are not subject to confirmation by this Court. However, a party can still appeal to this Court against orders of constitutional invalidity concerning regulations. Section 172(2)(a) of the Constitution provides that an order invalidating an Act of Parliament, a provincial Act, or any conduct of the President made by the High Court has no force unless it is confirmed by this Court. This constitutional provision is silent about a declaration of invalidity concerning a regulation promulgated by a Minister in terms of an Act of Parliament.

[28] In *Liebenberg*, this Court pronounced that declarations of invalidity of regulations do not fall within section 172 of the Constitution. It held:

> "The Constitution does not prescribe how regulations are to be made or enacted. All it does is to provide in section 92(1) that 'Ministers are responsible for the powers and functions of the executive assigned to them by the President'. This highlights the fact that Ministers exercise no more than subordinate, delegated authority when they make regulations in terms of Acts of Parliament or perform other ministerial duties.

> Accordingly, regulations are not Acts of Parliament and their invalidity is not subject to confirmation by this Court."[10]

[29] Therefore the application for confirmation of the order of invalidity must fail.

[30] The next issue to be determined is whether leave to appeal against that part of the order suspending the declaration of invalidity should be granted. I propose to deal with this issue together with remedy.

[31] The High Court suspended the declaration of invalidity pending confirmation by this Court, notwithstanding the fact that this Court does not confirm declarations of invalidity in respect of regulations. This means that regulation 3(2)(a) remains in force. This will be an obstacle to the applicants and other persons in similar circumstances. The question that has to be determined is what is an appropriate remedy under these circumstances?

[32] The applicants have obtained some relief but this is not effective due to the suspension order. The rights of a child are adversely affected as the High Court declined to consider Gaddiel's application for citizenship and held that his application was dependent on the outcome of his parents' permanent residence applications. The applicants explored the avenue of approaching the High Court to rescind the impugned portion of its order in terms of rule 42(1)(a).[11] However, that did not yield positive results. Any further delay in finalising this matter will prejudice the applicants who remain stateless. It is in the interests of justice that leave to appeal be granted.

[33] The applicants must be afforded effective relief. This can be done by determining whether the High Court was correct in suspending the order of invalidity.

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[10] *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 13 (*Liebenberg*).

[11] See above n 9.

The High Court laboured under a mistaken belief when it held that the declaration of invalidity of regulation 3(2)(a) had to be confirmed by this Court. There was no basis for the suspension order as this Court does not need to confirm a declaration of invalidity relating to regulations.

[34] Consequently, the High Court erred when it suspended the declaration of invalidity of regulation 3(2)(a). The appeal must succeed and the order of suspension be set aside.

Costs

[35] There should be no order as to costs.

Conclusion

[36] In the result the following order is made:

1. Condonation is granted.
2. The application for the confirmation of the declaration of invalidity of regulation 3(2)(a) of the Regulations on the South African Citizenship Act, 1995 is refused on the basis that it is superfluous.
3. Leave to appeal is granted.
4. The appeal is upheld.
5. The order of the High Court of South Africa, Western Cape Division, Cape Town is set aside to the extent that the order of the High Court of South Africa, Western Cape Division, Cape Town suspending the declaration of the invalidity of regulation 3(2)(a) of the Regulations on the South African Citizenship Act, 1995 is set aside.
6. There is no order as to costs.