REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 50365/14

(1) REPORTABLE: YES / (NO)
(2) OF INTEREST TO OTHER JUDGES: YES / (NO)
(3) REVISED.

In the matter between:-

NICOLE BREYTENBACH N.O. [redacted] APPLICANT

and

MINISTER OF HOME AFFAIRS 1ST RESPONDENT

DIRECTOR-GENERAL OF HOME AFFAIRS 2ND RESPONDENT

[redacted] 3RD RESPONDENT

[redacted] 4TH RESPONDENT

JUDGMENT

A. APPLICATION

1. This application has been launched by the curator *ad litem* on behalf of the minor child, [redacted]. This application seeks *inter alia* that [redacted] be declared a citizen of South Africa in terms of s 2(1)(b) of the South African Citizenship Act 88 of 1995.

   For the purposes of this application the first and second respondents would be referred to as Department of Home Affairs (DHA).

Issues

2. The issue is crisp and this court must determine if the minor child [redacted] is entitled to be declared a citizen of South Africa.

B. BACKGROUND

- **Curator *ad litem***

3. Ms. Breytenbach, the applicant in this matter was specifically appointed for the purpose of seeking legal relief on the minor child's behalf of enforcement of his legal rights regarding his right to South African citizenship.

At the hearing the curator *ad litem* had made it clear, that she is representing the minor child only. At no stage would she be representing the parents.

4. [redacted] was born on [redacted] 2002. His parents are [redacted] (a Zambian citizen), the fourth respondent and [redacted] the third respondent. The fourth respondent approached the Centre for Child Law (CCL) for assistance concerning [redacted] birth registration.

5. [redacted] had been issued with a birth certificate which was later blocked in 2010 due to the decision under case no: 36457/2008 - [redacted] ***v Minister of Home Affairs*** (heard in the South Gauteng High Court). The Department of Home Affairs (DHA) relied on the judgment, where the court made a finding that Ms. [redacted] had failed to prove that her children were born in South Africa. Furthermore the birth certificate was accepted as proof of the minor child's birth as the Department could not find proof of any registration of birth on its records.

6. Prior to this hearing of the aforesaid matter, it should be noted the DHA had issued the abridged birth certificate on 22 August 2006 and on 9 June 2008 and a copy of the unabridged birth certificate on 10 November 2008.

Res judicata

7. Counsel for the first and second respondents raised the point of *res judicata*, on the basis that the issue before court had already been dealt with by a

previous competent court on the same facts, same issues and the same parties were before court.

8. In a defence of *res judicata*, it is settled law that the party raising it should demonstrate that:

- There has been a prior judgment by a competent court;
- Where the parties are the same;
- The issues of dispute are the same.

9. This court having considered the aforesaid judgment which has been annexed to the papers, finds that this defence cannot succeed on the following basis:

9.1 The parties in the 2008 matter are not the same as in this matter. In the 2008 matter, the matter was between Mrs. [redacted] and the Minister of Home Affairs as well as certain officials of the DHA.

9.2 The relief sought is not the same. This matter involves the applicant seeking an order for the minor child to be declared a citizen in terms of section 2(1)(b) of the Citizenship Act. In the 2008 matter Ms. [redacted] sought a resident's visa for herself based on the averment that her children were born in South Africa.

9.3 The cause of action is not the same. This matter concerns the issue of [redacted] citizenship whereas the 2008 matter applied concerned Ms. [redacted] application for resident visa.

10. This court however does recognise that the issue of the birth of the minor children was canvassed in this application. This particular aspect had to be considered by that Court in respect of Ms. [redacted] resident status.

The court identified the dispute therein in paragraph 1:

> ***"she considers herself to be entitled a 'relative permit' to remain in South Africa on the grounds of being the mother of the two children in terms of section 27 of the Immigration Act No. 13 of 2002".***

11. The court made a decision in respect of her status on the basis that there was no acceptable explanation why the births were not registered when the children were born nor why their alleged father [redacted] under whose surname the children were registered, did not sign the registration forms and acknowledge his parenthood.

C. <u>THIS APPLICATION</u>:

12. Counsel for the applicant argued that the court in determining this matter must bear in mind that in the 2008 matter, Ms. [redacted] had not mustered sufficient evidence before the court. Certain of the documents not before court at the time, particularly confirmation from the [redacted] Hospital that

[redacted] was indeed born in South Africa as well as the maintenance order which identifies Mr. [redacted] is the father.

13. Despite the DHA stating that the records of [redacted] birth registration could not be located, they proffer no explanation to the effect that it was fraudulently or incorrectly issued.

14. Furthermore the CCL contacted the DHA as far back as 2010, requesting their assistance. Prior to the curator *ad litem* being appointed, in order to resolve the matter and gain clarity on [redacted] status. The DHA has failed to respond and have given no reasons why [redacted] should not be entitled to citizenship but just relying on the 2008 matter.

15. Ms. Breytenbach upon her appointment being confirmed, consulted with [redacted] on 30 April 2014 and established that the main concern of the minor child was his academic career. In not having a valid identity document, his registration at school as well as any extra murial activities he intends undertaking is being compromised.

In fact it is common knowledge that it would become a problem, as an identity document is always a primary requirement, which every institution would require.

16. Counsel for the application further submitted that the non-identification status

of minor children is risky as they are prone to become victims to human trafficking and even deportation as he had previously been subjected to.

17. What has become evident, is that the father, third respondent has shown no interest in this matter. However his details appear on the unabridged certificate, the maintenance order and the fact that he has accepted service of all the relevant application papers.

18. His non-participation has been noted in the previous proceedings, in this matter and generally in [redacted] life. However the question which begs an answer is does it preclude [redacted] from obtaining citizenship on the basis of Section 2(1)(b) of the Citizenship Act?

19. Section 2(1)(b) of the Citizenship Act provides that *"Any person 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."*

20. What has never been contested is the fact that Mr. [redacted] is not a South African citizen. Counsel for the applicant demonstrated that his identity number 770421 5391 087 reflects that he is a South African citizen.

21. Furthermore the confirmation from the [redacted] Hospital that a male child was born to Ms. [redacted] on [redacted] 2002, has not been challenged and neither was it before the court in the 2008 matter.

22. Ms. Seboko questioned whether the maintenance order related to [redacted] as the child identified therein was [redacted] Mr. [redacted] in respect of the maintenance order was required to pay maintenance for a minor child. The issue was raised that there could have been an incorrect spelling "[redacted]" should be "[redacted]". However in the court's view it does not take the matter any further.

23. What is of concern to the court, is the manner in which the DHA has dealt with this matter. Despite seeking their assistance they have failed to respond to CCL.

24. This uncertainty has caused unnecessary difficulties in [redacted] life. He cannot be denied access to education and other necessary amenities which every boy his age enjoys.

25. Counsel for the DHA, Ms. Seboko requested this court to instead order an investigation to be conducted into the circumstances and the general well-being of the minor. She motivated this argument particularly in light of the parents' behaviour. From the papers it appears that [redacted] was not being cared for by either parents, hence his deportation at one stage.

26. Furthermore for the court to blindly confirm his citizenship without verifying the aforesaid, will lead to the mother abusing her status rights on the basis of her son's citizenship.

27. It was also contended that the curator *ad litem* had not made the necessary enquiries as per her appointment and the court order of Tuchten J. Ms. Breytenback had addressed the Court that she had indeed followed up on her tasks in terms of the order. The court finds that Ms. Breytenbach's mandate was specific and there was no obligation to investigate the living circumstances of the minor and the basis of his deportation.

28. This court as the upper guardian of minor children is obliged to consider what is in their best interests always and which is in accordance with Section 28(2) of the Constitution. Goldstone J in ***Minister of Welfare and Population Development v Fitzpatrick and others 2000 (3) SA 422 at para 17*** stated "Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child."

29. Ms. [redacted] was present at the hearing and informed the court that the minor children are living with her and that they are cared for by her. The father, the third respondent lives in [redacted].

30. Counsel for the applicant and Ms. Breytenbach further informed the court that the CCL had attempted to make contact with him. He spoke to them on one occasion where he requested that he wants his children. At no point did he deny paternity to [redacted].

31. The issue before the court concerns [redacted] right to citizenship.

32. Section 28 of the South African Constitution stipulates that every child has a right to a name and nationality from birth and our authorities have confirmed this.

33. In ***Hadebe v Minister of Home Affairs, 2006 JDR 1071 D*** *at para 14* the court recognised the DHA duty to ensure the registration of births on their part and stated:

> ***"It is clear that if a child has, as is provided in S28(1)(a) of the Constitution, the "right to a name from birth", the official of the state who is charged with doing those things that enable is or her name to be recorded must have a correlative duty to facilitate the registration of that name in the records of the state: certainly it is not part of the function of the official to place technical difficulties in the way of such registration."***

34. In the premises, by virtue of the Citizenship Act 88 of 1995, [redacted] does qualify for South African citizenship by virtue of his father being a South African citizen.

35. There appears no dispute on whether the third respondent is the father and whether he is indeed a South African citizen. Further this court recognises

that the minor child has a basic right to education, which is being compromised by his status not being established by the DHA.

D CONCLUSION:

36. This court thus finds that [redacted] is entitled to his citizenship rights on the strength of his father being a South African citizen.

37. As already alluded to above, there has not been any evidence in the papers challenging the third respondent's citizenship. The court acknowledges that the third respondent's input is crucial for [redacted] obtaining his legal status as a citizen of South Africa and will make provision therefore.

38. Furthermore, the DHA has failed to show that [redacted] birth certificate was issued unlawfully or fraudulently. The only inference that can be drawn is that the birth certificate is valid.

E. COSTS:

39. Both parties conceded that the principle in the ***Biowatch Trust v Registrar Genetic Resources and Others 2009 (6)SA 237 (CC)*** which protects ordinary litigants in constitutional matters.

40. However in this instance, this principle is not applicable and does not find

application here. The general rule that the successful party is entitled to the costs stand.

F. ORDER

41. In the premises I make the following order:

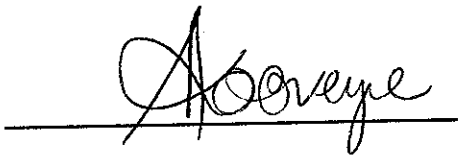
1. [redacted] ("the minor child") is declared to be a citizen of the Republic of South Africa in terms of the provisions of Section 2(1)(b) read with Section 2(2)(b) of the South African Citizenship Act 88 of 1995;

2. The First and Second Respondents are ordered to register the minor child's birth in the population register under their control and administration and proceed to issue him with a birth certificate within THIRTY (30) days from date of this order;

3. The Fourth and Third Respondents are ordered to facilitate the completion of the registration of birth of the minor child and all matters incidental thereto;

4. The Third Respondent is ordered to furnish a copy of his identity document within FIFTEEN (15) days of this order to the Centre for Child Law;

5. The First and Second Respondents are ordered to pay the costs of this application, including all costs in respect of the curator *ad litem*.



H K Kooverjie

Acting Judge of the High Court

Centre for Child Law: Adv Skelton together with Adv. Breytenbach

First and second respondent's attorney: State Attorney, Pretoria

First and second respondent's counsel: Ms. Seboko

Date of hearing: 20 May 2016

Date of judgment: 27 May 2016