CONSTITUTIONAL COURT OF SOUTH AFRICA

Democratic Alliance v Minister of Home Affairs and Another

CCT 184/23
Date of judgment: 6 May 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 6 May 2025, at 14h00, the Constitutional Court handed down judgment in an application for confirmation of an order of constitutional invalidity granted by the Supreme Court of Appeal regarding the constitutional validity of section 6(1)(a) (the impugned provision) of the South African Citizenship Act 88 of 1995 (the Act). The impugned provision causes South African citizens to lose their citizenship automatically if they voluntarily acquire citizenship in another country, unless they have prior permission from the Minister of Home Affairs to retain their citizenship. At the heart of the issue before this Court is the right to citizenship under section 20 of the Constitution.

The applicant is the Democratic Alliance (DA). The first and second respondents are the Minister of Home Affairs and the Director-General, Department of Home Affairs respectively (collectively, the Department). Dr Steven Spadijer was admitted as amicus curiae (friend of the court) and was confined to making written submissions.

The DA launched an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) on behalf of South Africans who, unbeknown to them and to their surprise, had lost their citizenship through the operation of the impugned provision. In the High Court, the DA argued that the automatic loss of citizenship deprived citizens of their citizenship, thus

violating their rights to citizenship enshrined in section 20 of the Constitution and the interim Constitution. The DA argued further that this deprivation occurred without affording citizens prior notice, without a justifiable reason and without any person having taken a decision to deprive them of that right.

The High Court dismissed the DA's application on the grounds that the provision served a legitimate government purpose and the matter dealt with loss of citizenship, which is a different concept from deprivation and is permitted under section 3(3) of the Constitution. The High Court held that the loss of citizenship under section 6(2) was not automatic and was rather effected by operation of law following clearly defined voluntary conduct on the part of the citizen, as well as a formal act. The Supreme Court of Appeal granted leave to appeal and upheld the appeal, holding that, absent specified reasons by the Minister of Home Affairs as to the specific and legitimate purpose of the provision, the impugned provision was arbitrary and irrational. The Supreme Court of Appeal held further that the impugned provision was irrational, because it treated South African citizens who already have dual citizenship differently from those who intend to acquire citizenship or nationality of another country, and that the impugned provision unjustifiably limited political rights, the right to enter and remain in the Republic, and the right to freedom of trade, occupation and profession, guaranteed by the Constitution.

Before this Court, the DA submitted that the impugned provision infringed the right to citizenship contained in section 20 of both the Constitution and interim Constitution, as it deprived persons, without their consent or forewarning, of their South African citizenship. The DA argued that this deprivation lacks any legitimate government purpose to render it rational and that it could not be justified under section 36 of the Constitution. They contended that the impugned provision could not be justified by reference to the discretion granted to the Minister under section 6(2) of the Act.

The Department abided this Court's decision, though they did file written submissions to assist this Court in the interpretation of the impugned provision. Nonetheless, in the written submissions before this Court the Department supported the approach, interpretation and conclusions of the High Court. Their defence was twofold: first, that the state has a right to

regulate the process by which citizenship is acquired and lost; and second, that section 6(2) is a "saving enactment" of sorts where the impugned provision is read in the context of the Act.

Dr Steven Spadijer was admitted as amicus curiae and was confined to making written submissions. Dr Spadijer made useful submissions about foreign and international human rights law relating to citizenship. His written submissions covered international and foreign legal principles as they relate to dual citizenship and the South African human rights implications of the impugned provision, including how the impugned provision limited, among others, the rights in sections 9, 10, and 33 of the Constitution.

In a unanimous judgment penned by Majiedt J (with Maya CJ, Madlanga ADCJ, Mhlantla J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J concurring) the Court held that the impugned provision is constitutionally invalid and thus upheld the Supreme Court of Appeal's declaration of constitutional invalidity.

The Court first dealt with the impugned provision against the backdrop of the provisions in the Constitution that deal with citizenship. The Court considered the right to citizenship in light of the importance which citizenship holds for an individual's identity and their right to participate fully in the community and country. Loss of citizenship under the Act has severe consequences and entails being deemed, for the purposes of the Immigration Act, to be a foreigner.

The Court considered whether there is a distinction between the automatic loss of citizenship, as occurs under the impugned provision, and a de facto (factual) deprivation of citizenship. The Court held that the distinction between loss and deprivation of citizenship is more apparent and semantic, and is a distinction without a difference. The effect is that the impugned provision resulted in the deprivation of citizenship. The legislative scheme was such that, without a discernible lawful purpose, the citizen *ex lege* (by law) loses their citizenship.

The Court held that this automatic loss of citizenship brought about by the impugned provision is a form of deprivation in contravention of the fundamental right contained in section 20 of the Constitution. Insofar as the Act is the legislation contemplated in section 3(3) of the Constitution, it cannot subvert other rights contained in the Constitution and must conform

with the Bill of Rights. The right to citizenship is entrenched in the Bill of Rights and, in terms of section 36, cannot be infringed upon or limited without justification. Any active removal of citizenship is on the face an infringement that requires justification in terms of section 36(1) of the Constitution.

The Court then considered whether the defences raised by the respondents were sufficient to justify the limitation under section 36(1) of the Constitution. The Court emphasised that the limitation of the right to citizenship by the impugned provision served no legitimate government purpose. Save for arguing that the state has a right to regulate the acquisition and loss of citizenship, which is what, according to the state, the impugned provision lawfully does, no other legitimate purpose was advanced. The rationale behind the legislation remains unexplained. In the case of the impugned provision, there was no link between the adopted means and a legitimate government purpose. Further, the second defence put forth by the respondents was not a defence at all. The existence of a ministerial power to exercise discretion in terms of section 6(2) to alter what was otherwise an automatic loss of citizenship was no answer to the question of why citizenship must be lost in the first place.

The Court further noted that section 6(2) of the Act provided no criteria at all on how the Minister's discretion was to be exercised and what its bounds were. The Legislature argued that dual citizenship is permissible, subject only to ministerial discretion. This reasoning is unclear and utterly irrational. What this Court was left with was the bald assertion that the retention or loss of citizenship is itself a legitimate use of power. That is beyond comprehension. It is circular reasoning to argue that, because the power may be one that the state could exercise, its existence makes its exercise legitimate.

The Court held that the automatic loss of citizenship and its consequential effect far outweigh regulation as a legitimate government purpose. There is no conceivable purpose nor rational connection why a South African should automatically lose their citizenship by acquiring the citizenship of another country, particularly with the increasing cross-border migration of people. The Court thus held that, absent any check on the unfettered power of the Minister to make decisions involving who loses or retains South African citizenship, the impugned provision was constitutionally invalid. Section 6(2) of the Act could not save the impugned provision from unconstitutionality.

The Court then reflected on international and foreign law surrounding citizenship. There are no specific provisions in international law on dual citizenship, and in accordance with the principle of state sovereignty each state may make provision for this. In a world of increasing globalisation and transnational mobility, permitting dual citizenship is the norm rather than the exception. Many countries expressly provide for a right to dual citizenship, and the constitutions of a number of countries provide that citizenship may be lost only through voluntary renunciation. This by implication excludes a loss of citizenship due to acquiring the citizenship of another country.

International law generally acknowledges that it is in principle legitimate for a state to wish to protect the special relationship of solidarity, loyalty, and good faith between it and its nationals, and the reciprocity of rights and duties, which form the bedrock of the bond of nationality. But loyalty has undergone a fundamental change in light of the commonality of global issues and the loyalty objection to dual citizenship today no longer holds up to the same extent.

In sum, the Court held that the impugned provision was unconstitutional as it infringed the right to citizenship entrenched in section 20 of the Constitution and, consequentially, other constitutional rights – namely political rights, the right to enter and remain in South Africa and the right to freedom of trade, occupation and profession. The impugned provision must be struck down.

Finally, the Court noted that careful consideration was given in the Supreme Court of Appeal regarding the remedy that would grant the most effective relief. That Court struck down the offending part of the impugned provision and ordered that the striking down be with immediate effect, to take effect from the date of its enactment, 6 October 1995. The Supreme Court of Appeal could not be faulted for the conclusion it reached based upon its unassailable reasoning. The Act came into effect on 6 October 1995, when the interim Constitution was still in force. The impugned provision was unconstitutional in terms of the Constitution, but the same is true in respect of the interim Constitution. The declaration of invalidity should therefore take effect from the date of the Act's promulgation on 6 October 1995. There was no need for a suspension order and the Department accepted

throughout this litigation that, in the event of a striking down of the impugned section, such suspension would be unnecessary.

The Court made the following order:

1. The order of constitutional invalidity of the Supreme Court of Appeal is confirmed.

2. It is declared that section 6(1)(a) of the South African Citizenship Act 88 of 1995 is inconsistent with the Constitution and is invalid from its promulgation on 6 October 1995.

3. It is further declared that those citizens who lost their citizenship by operation of section 6(1)(a) of the South African Citizenship Act 88 of 1995 are deemed not to have lost their citizenship.

4. The respondents are ordered to pay the applicant's costs in this Court, including the costs of two counsel where so employed.