SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 25 November 2020

STATUS Immediate

The Minister of Home Affairs and Others v Jose and Another (Case no 169/2020)

[2020] ZASCA 152 (25 November 2020)

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Today the Supreme Court of Appeal (the SCA) dismissed an appeal by the first to fourth appellants, collectively referred to as the Department of Home Affairs (the DHA), against a decision of the Gauteng Division of the High Court, Pretoria (the high court).

The first respondent, Joseph Emmanuel Jose (Joseph), was born on 12 February 1996 and the second respondent, Jonathan Diabaka "Junior" (Junior), was born on 28 August 1997. They were born in South Africa where they have lived their entire lives. The parents of the respondents are Angolan citizens, who fled that country in 1995 and sought asylum in South Africa. The respondents, together with their parents, were granted refugee status in 1997. This endured until January 2014, when they were informed that their refugee status had been withdrawn. Joseph was then 17 years old and Junior 16. In August 2013, they were informed by the DHA that their refugee permits would not be renewed and they were referred to the Angolan Embassy, where they were advised that in order for them to remain lawfully in South Africa, they had to apply for Angolan passports, failing which they faced 'repatriation'.

The respondents have never been to Angola. They have no family there and know little about Angola or the way of life in that country. Neither speaks any Portuguese. Each speaks only a little Lingala. In that regard, repatriation would be a forced removal from their country of birth and home country to a foreign land. When the respondents experienced difficulty in obtaining identity documents from the DHA, they approached Lawyers for Human Rights, who advised them that they were eligible to apply for citizenship in terms of s 4(3) of the South African Citizenship Act 88 of 1995 (the Citizenship Act). However, by August 2017, all efforts to obtain citizenship had come to nought. The respondents accordingly applied to the high court to direct the DHA to grant them South African citizenship in terms of s 4(3) of the Citizenship Act. The application succeeded with costs. The learned judge granted leave to the DHA to appeal to this Court only on the question whether it was competent in the particular circumstances of the case to order the Minister to grant (as opposed to consider) the respondents' applications for citizenship.

The SCA held that s 4(3) of the Citizenship Act provides for citizenship to be granted to a child who meets four requirements, namely, the child must have: (i) been born in South Africa; (ii) been born of parents who are not South African citizens and who have not been admitted into the Republic for permanent residence; (iii) lived in the Republic from the date of their birth to the date of becoming a major; and (iv) had their birth registered in terms of the Births and Deaths Registration Act 51 of 1992. On the facts, the first three requirements of s 4(3) of the Citizenship Act were plainly met. Insofar as the fourth requirement is concerned, s 4(3) applies to a child whose birth has been registered in accordance

with the provisions of the Births and Deaths Registration Act, ss 1 and 5(3) of which provide that the registration of birth of a child born to non-South African citizens occurs through the issuing of a certificate of birth. In the case of each of the respondents, the DHA had issued certificates of birth. In the circumstances, the respondents satisfied the fourth requirement of s 4(3) of the Citizenship Act.

The next issue for determination was whether a court could direct the DHA to grant the respondents' application for citizenship. The SCA recognised that whilst the doctrine of the separation of powers must be considered, that does not mean that there may not be cases in which a court may need to give directions to the Executive. Based on the precedent of the Constitutional Court, it is a firmly established principle that citizenship does not depend on a discretionary decision; rather, it constitutes a question of law. On the facts, the SCA held that given that it is already absolutely clear that the respondents meet all four requirements contained in s 4(3) of the Citizenship Act it would be purposeless to remit the matter to the Minister of Home Affairs to make a fresh decision.

The SCA held that on the issue of costs, recent precedent of the Constitutional Court affirmed that a court may direct the DHA to grant citizenship to an applicant. Although the precedent was set after the DHA's heads had been filed, its position ought to have changed with the delivery of the Constitutional Court's judgment. The DHA, however, continued as if nothing had changed and took no steps to limit the incurring of further costs. Plainly, it was obliged to have reconsidered its position, which it failed to do. The SCA held that the conduct of the DHA was beyond the pale; and an award of costs on an attorney and client scale was warranted. In the circumstances, the appeal was dismissed with costs on the punitive scale.