THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

Case no: 67/2022

In the matter between:

DEMOCRATIC ALLIANCE **FIRST APPELLANT**

and

THE MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS **SECOND RESPONDENT**

Neutral citation: *Democratic Alliance v The Minister of Home Affairs and another* (67/2022) [2023] ZASCA 97 (13 June 2023)

Coram: ZONDI, SCHIPPERS and MATOJANE JJA and KATHREE-SETILOANE and UNTERHALTER AJJA

Heard: 23 February 2023

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Summary: Constitutional Law – South African Citizenship Act 88 of 1995– loss of citizenship – whether s 6(1)*(a)* is unconstitutional – s 3(3) of the Constitution – authorising national legislation to provide for loss of citizenship – does not permit limitation of right of citizenship – loss of citizenship under s 6(1)*(a)* when acquiring citizenship of another country – irrational and constitutionally invalid – just and equitable remedy under s 172 of the Constitution.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kollapen J, sitting as court of first instance):

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the High Court is set aside and replaced with the following order:

'(a) It is declared that s 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.

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

(c) The respondents are ordered to pay the applicant's costs including the costs of two counsel where so employed.'

JUDGMENT

Zondi JA (Schippers and Matojane JJA and Kathree-Setiloane and Unterhalter AJJA concurring):

Introduction

[1] This appeal concerns the constitutional validity of s 6(1)*(a)* of the South African Citizenship Act 88 of 1995 (the Act) which provides that adult citizens automatically lose their South African citizenship when they voluntarily and formally acquire citizenship or nationality of another country (except through marriage), without first applying for and obtaining ministerial permission to retain their citizenship. The appellant, the Democratic Alliance (DA) brought an application in the Gauteng Division

of the High Court, Pretoria (the high court) in which it sought, among other things, the following order:

'1. declaring that section 6(1)(a) of the South African Citizenship Act 88 of 1995 ("the Act") is inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and invalid from the date of 6 October 1995;

2. declaring that all persons who had lost their South African Citizenship in terms of section 6(1)(a) of the Act on or after 6 October 1995, are South African citizens;

3. declaring that all persons referred to in paragraph [2] may apply to the first respondent in terms of section 15 of the Act for the appropriate certificate of citizenship.'

[2] The high court dismissed the application with no order as to costs. It rejected the contentions that s 6(1)*(a)* of the Act violates the principle of legality due to its irrationality and that it unjustifiably infringes certain constitutional rights. The high court dismissed the DA's application for leave to appeal. The appeal is before us with the leave of this Court.

Background

[3] The DA brought the application on behalf of South African citizens who, to their surprise, discovered that they had lost their South African citizenship through the operation of s6(1)(a). It relied on the evidence of Mr Phillip James Plaatjes, a South African living in the United Kingdom (UK). Mr Paatjes alleges that on 27 February 2004, while working in South Korea, he married a British citizen. Shortly thereafter, the couple moved to the UK. On 8 November 2006, Mr Plaatjes was granted indefinite leave to remain in the UK and became a naturalised citizen on 19 November 2007. In December 2007 he obtained his first British passport. Mr Plaatjes alleges that it was only in July 2014 that he discovered that he had probably lost his South African citizenship after reading an online article. Between 2007 and 2014, he had travelled a number of times using his South African passport without any queries from South African immigration officials.

[4] On 20 July 2015 Mr Plaatjes went to the South African embassy in London to renew his South African passport. He was told he had automatically lost his South African citizenship by acquiring British citizenship. The embassy officials thereupon

cancelled his South African passport. Mr Plaatjes says that he never wanted to leave South African permanently, nor relinquish his South African citizenship.

[5] Mr Plaatjes, the DA alleged, is one of many South African citizens living abroad who have acquired a second citizenship in good faith, but lost their South African citizenship by virtue of s 6(1)*(a)* of the Act. The DA contended that s 6(1)*(a)* takes away their right of citizenship, without any notice to them.

[6] The respondents opposed the application. They denied that s 6(1)*(a)* is unconstitutional. They asserted that the DA misconstrued s 6(1)*(a)*. It failed to read s 6(1)*(a)* with s 6(2) to which the former is subject. The respondents contended that the loss of citizenship under s 6(1)*(a)* occurs as a result of a voluntary act on the part of the citizen, not the State; and that s 6(2) enables the citizen to retain South African citizenship on application to the first respondent, the Minister of Home Affairs (the Minister).

[7] Against this background, two issues arise for determination. The first is whether s 6(1)*(a)* is inconsistent with the Constitution due to its irrationality; and the second, whether the section infringes any right in the Bill of Rights and, if so, whether such infringement is justifiable under s 36(1) of the Constitution.[1]

The constitutional and statutory provisions

[8] Section 3 of the Constitution is headed 'Citizenship'. Section 3(1) declares that 'There is a common South African citizenship'. In terms of s 3(2)*(a)-(b)* 'all citizens are equally entitled to the rights, privileges and benefits of citizenship'; and they are 'equally subject to the duties and responsibilities of citizenship'. Section 3(3) mandates

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[1] Section 36 provides:
(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

that national legislation must be enacted to provide for the acquisition, loss and restoration of citizenship.

[9] The Constitution protects citizenship. It expressly provides in s 20 that 'no citizen may be deprived of citizenship'. The Constitutional Court in *Chisuse and Others v Director General of Home Affairs and Another* explained why it is important to protect the citizenship. It held:

'Citizenship is the gateway through which a number of rights in the Constitution can be accessed. It enables a person to enjoy freedom of movement, freedom of trade, and political representation. However, caution must be exercised not to overemphasise the importance of citizenship. While it is true that certain rights in our Constitution adhere to South African citizens alone, this Court has repeatedly affirmed that arbitrary and irrational distinctions between citizens and non-citizens are inconsistent with the Constitution. It bears reiterating that the Preamble to the Constitution states that "South Africa belongs to all who live in it" and the rights in the Bill of Rights are afforded to everyone, unless expressly stated otherwise.'[2]

[10] The Constitutional Court provided the following historical context within which the protection of the citizenship must be understood:

'Citizenship in South Africa, in particular, has a controversial history. Many black Africans were denied their citizenship through unfair and discriminatory colonial and apartheid laws. Under the Black Land Act, Population Registration Act and Bantu Homeland Citizenship Act, black African people were segregated to the detriment of their enjoyment of full citizenship.'[3]

[11] The Court went on to say that it was important to protect the right to citizenship to prevent the negative impact the deprivation of, or interference with, the right to citizenship will have on the citizen's ability to enjoy his or her life.

'Citizenship and equality of citizenship is therefore a matter of considerable importance in South Africa, particularly bearing in mind the abhorrent history of citizenship deprivation suffered by many in South Africa over the last hundred and more years. Citizenship is not just a legal status. It goes to the core of a person's identity, their sense of belonging in a community and, where xenophobia is a lived reality, to their security of person. Deprivation of, or interference with, a person's citizenship status affects their private and family life, their

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[2] *Chisuse and Others v Director General of Home Affairs and Another* [2020] ZACC 20; 2020(6) SA 14 (CC) para 24.
[3] Ibid para 26.

choices as to where they can call home, start jobs, enrol in schools and form part of a community, as well as their ability to fully participate in the political sphere and exercise freedom of movement.'[4]

[12] The South African Citizenship Act is the legislation contemplated in s 3(3) of the Constitution. It came into effect on 6 October 1995. Its purpose as set out in the Preamble is 'to provide for the acquisition, loss and resumption of South African citizenship…'. That purpose is reflected in the design of the Act. Chapter 2 deals with the acquisition of South African citizenship. It stipulates how South African citizenship can be acquired. This can be by birth, descent, naturalisation or by grant by the Minister of a certificate of naturalisation to any foreigner who meets certain specified requirements.

[13] Chapter 3 of the Act, in which ss 6, 7, 8 and 10[5] are located, deals with the loss of citizenship. Section 6 provides:

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[4] Ibid para 28.

[5] Sections 7, 8 and 10 provide:'7 Renunciation of citizenship
(1) A South African citizen who intends to accept the citizenship or nationality of another country, or who also has the citizenship or nationality of a country other than the Republic, may make a declaration in the prescribed form renouncing his or her South African citizenship.
(2) The Minister shall upon receipt of a declaration made under this section cause such declaration to be registered in the manner prescribed, and thereupon the person who made the declaration shall cease to be a South African citizen.
(3) Whenever a person ceases under subsection (2) to be a South African citizen, his or her minor children who are under the age of 18 years shall also cease to be South African citizens if the other parent of such children is not, or does not remain, a South African citizen.

8 Deprivation of citizenship
(1) The Minister may by order deprive any South African citizen by naturalisation of his or her South African citizenship if he or she is satisfied that-
(a) the certificate of naturalisation was obtained by means of fraud, false representation or the concealment of a material fact; or
(b) such certificate was granted in conflict with the provisions of this Act or any prior law.
(2) The Minister may by order deprive a South African citizen who also has the citizenship or nationality of any other country of his or her South African citizenship if-
(a) such citizen has at any time been sentenced in any country to a period of imprisonment of not less than 12 months for any offence which, if it was committed outside the Republic, would also have constituted an offence in the Republic; or
(b) the Minister is satisfied that it is in the public interest that such citizen shall cease to be a South African citizen.
(3) Whenever the Minister deprives a person of his or her South African citizenship under this section or section 10, that person shall cease to be a South African citizen with effect from such date as the Minister may direct and thereupon the certificate of naturalisation or any other certificate issued under this Act in relation to the status of the person concerned, shall be surrendered to the Minister and cancelled, and any person who refuses or fails on demand to surrender any such certificate which he or she has in his or her possession, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

'(1) Subject to the provisions of subsection (2), a South African citizen shall cease to be a South African citizen if-

(a) he or she, whilst not being a minor, by some voluntary and formal act other than marriage, acquires the citizenship or nationality of a country other than the Republic; or

(b) he or she in terms of the laws of any other country also has the citizenship or nationality of that country, and serves in the armed forces of such country while that country is at war with the Republic.

(2) Any person referred to in subsection (1) may, prior to his or her loss of South African citizenship in terms of this section, apply to the Minister to retain his or her South African citizenship, and the Minister may, if he or she deems it fit, order such retention.

(3) Any person who obtained South African citizenship by naturalisation in terms of this Act shall cease to be a South African citizen if he or she engages, under the flag of another country, in a war that the Republic does not support.'

[14] The consequences of loss of South African citizenship are dealt with in chapter 4. The relevant provisions are contained in s 11(3) which provides the following:

'Whenever-

(a) a South African citizen by naturalisation or registration ceases to be a South African citizen by virtue of the provisions of any prior law; or

(b) a South African citizen by naturalisation ceases to be a South African citizen by virtue of the provisions of section 6, 7, 8 or 10,

he or she shall, for the purposes of the Immigration Act, but subject to the provisions of subsection (4), be deemed to be a foreigner who is not-

(i) in possession or deemed to be in possession of a permit referred to in section 10(2) or 25(2) of that Act; or

(ii) in terms of section 31(2)(a) of the said Act, exempted or deemed to be exempted from the provisions of section 10(1) of that Act.'

Finally, chapter 5 deals with resumption of South African citizenship.

The high court's findings

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10 Deprivation of citizenship in case of children

Whenever the responsible parent of a minor has in terms of the provisions of section 6 or 8 ceased to be a South African citizen, the Minister may, with due regard to the provisions of the Children's Act, order that such minor, if he or she was born outside the Republic and is under the age of 18 years, shall cease to be a South African citizen.'

[15] The high court rejected the DA's argument that s 6(1)*(a)* is irrational, for two reasons. First, s 6(1)*(a)* serves a legitimate government purpose, namely the State's interest in regulating and managing citizenship, given its connection to the work of government, which in turn requires a connection between citizen and country. Second, the provision is not irrational because a person through a voluntary act acquires the citizenship of another country and does not avail himself or herself of the right to approach the Minister for permission to retain their South African citizenship.

[16] The high court reasoned that the scenario contemplated in s 6(1)*(a)* and (2) is about personal and individual choices people make about the future and often choices come with consequences. According to the high court, it could not be said that the scheme of the section is irrational as it carefully weighs and balances the choices and interests of the individual with those of the State and public purposes, which are inextricably linked to the status of citizenship.

[17] As regards the contention that the section unjustifiably violates various constitutional rights, such as the right not to be deprived of citizenship in s 20 of the Constitution, the high court held that the DA's argument conflates deprivation of citizenship with loss of citizenship, which are different concepts. The court concluded that while deprivation of citizenship is prohibited by s 20 unless it can be justified under s 36 of the Constitution, the same is not true for the loss of citizenship. Section 20, reasoned the high court, contains no prohibition on the loss of citizenship. On the contrary, s 3(3) of the Constitution recognises the loss of citizenship as a constitutionally permissible and mandated outcome.

[18] The high court found that there is a textual difference between s 6 and s 8 of the Act. Section 6 deals with the loss of citizenship. Section 8 deals with deprivation of citizenship, which may be ordered by the Minister if a citizen is sentenced in any country to a period of imprisonment of not less than 12 months for any offence; or if the Minister is satisfied that it is in the public interest that such citizen ceases to be a South African citizen.

The parties' submissions

[19] The DA contended, firstly, that the effect of s 6(1)*(a)*, read with s 6(2), is that South African citizens automatically and without their knowledge, lose their South African citizenship if they voluntarily acquire the citizenship or nationality of another country, unless they obtain prior permission from the Minister to retain their citizenship. It submitted that s 6(1)*(a)* is irrational, arbitrary and serves no legitimate government purpose. Secondly, the DA contended that s 6(1)*(a)* unjustifiably violates the right to citizenship enshrined in s 20 of the Constitution.

[20] The DA argued, even if there was a basis to assume that affected citizens intended to renounce their citizenship, there is no reason why the respondents themselves should be largely ignorant as to who a citizen is. This is the effect of s 6(1)*(a),* proceeded its argument. It operates without notice to the respondents or any official in the Department of Home Affairs. Moreover, the DA argued, it is not the purpose of s 6(1)*(a)* to allow citizens to renounce their citizenship: that is the explicit purpose of s 7 of the Act. Statutes should not be interpreted in a manner which renders one of its provisions redundant.

[21] In response the respondents denied that s 6(1)(*a*) results in the automatic loss of citizenship. They contended that s 6(1)*(a)* deals with South African citizens who have taken a voluntary and conscious decision to take the citizenship of another country, by formally applying for citizenship of that country. Upon approval of that application, proceeded the argument, the loss of South African citizenship occurs by the operation of law. The respondents argued that these citizens do not wish to retain their South African citizenship, neither do they desire dual citizenship. They submitted that s6(1)(*a*) serves a legitimate government purpose, namely to control the attainment of dual citizenship to which the section is not averse.

[22] The respondents asserted that South Africa, like many other countries permits dual citizenship with selected countries, by prior arrangement. They submitted that South Africans who take up citizenship of one of the countries which has a dual citizenship arrangement with South Africa, do not lose their South African citizenship and need not apply to the Minister for permission to retain their South African citizenship.

Is s 6(1)*(a)* irrational ?

[23] The question whether s 6(1)*(a)* of the Act is irrational involves an objective enquiry. As was stated in *Levenstein and Others*: [6]

'The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution. The rule of law requires that all public power must be sourced in law. This means that (s)tate actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose.'

[24] In *Pharmaceuticals Manufacturers*,[7] the Constitutional Court, however, made it clear that the fact that rationality is a minimum requirement for exercise of public power 'does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or consider that the power was exercised inappropriately.'[8] See also *United Democratic Movement v President of the Republic of South Africa*.[9]

[25] Before this Court, counsel for the respondents were unable to point to a legitimate government purpose which s 6(1)*(a)* seeks to achieve, by the cessation of citizenship when a South African citizen formally acquires the citizenship of another country, save for a generalised submission that its purpose is to regulate the acquisition and loss of South African citizenship.That is not to state a legitimate purpose. All legislation regulates something. That is its function. But this overarching function is not the purpose of a particular piece of legislation. To meet the standard of rationality the Minister was required, in the first place, to provide the specific and legitimate purpose that the impugned provision was designed to foster. That is not

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[6] *Levenstein and Others v Estate Late Sidney Lewis Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC) para 47.
[7] *Pharmaceutical Manurfactureres Association of South Africa and Another: In re Ex Parte President of the Republic of South African and Others* 2000 (2) SA 674; 2000 (3) BCLR 241 para 86.
[8] Ibid para 90.
[9] *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 494(CC) para 55.

done by saying that the legislation is there to regulate. Moreover, the answering affidavit discloses no legitimate government purpose. It merely states that the citizen makes a conscious decision, accompanied by a formal act, to accept foreign citizenship.

[26] However, the respondents' counsel sought refuge in s 6(2), which allows citizens to retain their South African citizenship on application to the Minister. But s 6(2) merely underscores the arbitrariness and irrationality of s 6(1)*(a)*. Section 6(2) authorises the retention of citizenship on application to the Minister. What then is the purpose of the automatic loss of citizenship in s 6(1)*(a)*? That remains unspecified. And it cannot be a legitimate object to threaten the deprivation of citizenship so as to invest the Minister with power to avoid that consequence. If that were so, every arbitrary deprivation would be transformed into the legitimate exercise of power simply because the Minister is given an untrammeled discretion to avoid that outcome. In sum, to deprive a citizen of their rights of citizenship for no reason is irrational. That irrationality is not cured because a power is conferred on the Minister to exercise a discretion to decide whether that deprivation should take place. The scheme of ss 6(1) and (2) is simply to compound an irrational deprivation effected by operation of law, with an arbitrary discretionary power in respect of that power. The compounding of one irrationality upon another does not save the provision. It makes the want of constitutionality even more apparent.

[27] What is more, s 7(1) and s 8(2) expressly recognise dual citizenship and nationality of another country. Section 7(1) permits a South African citizen 'who intends to accept the citizenship or nationality of another country, or who also has the citizenship or nationality of a country other than the Republic', to renounce his or her South African citizenship.[10] Section 8(2) provides that the Minister may by order deprive a South Afircan citizen who also has citizenship or nationality of another country, if such citizen has been sentenced to a certain period of imprisonment, or if it is in the public interest to do so.[11] These provisions make it clear that Parliament has

[10] Note 5.
[11] Note 5.

sanctioned the holding of dual citizenship, and that s 6(1)*(a)* cannot be based on a proposition that dual citizenship is inherently undersirable.

[28] Section 6(1)*(a)* is arbitrary and irrational, also because it treats South African citizens who already have dual citizenship differently from those who intend to acquire citizenship or nationality of another country. The high court held that s 6(1)*(a)* was rational because citizenship is often a prerequisite to hold office in government, and is connected to the work of government, which in turn requires a connection between citizen and country. This is an error. The Act expressly recognises dual citizenship. South African citizens who hold dual citizenship do not 'lose their connection' with South Africa, and can run for public office. But those who acquire foreign citizenship, by the operation of law somehow lose their connection and become ineligible to run for public office. The Act simply fails to provide a coherent basis as to how dual citizenship may be recognised as permissible and unobjectionable, but also warrants the drastic consequence of the loss of South African citizenship in terms of s 6(1), save for the exercise of ministerial discretion. The statutory scheme is indefensible and the impugned provision is irrational.

[29] The purpose of s 6(1)*(a)* cannot be to regulate the renunciation of citizenship, for that would render s 7 of the Act, which expressly deals with renunciation, redundant. In *Qwelane v South African Human Rights Commission and Another*[12] the Constitutional Court held that 'a statute ought to be so construed that, if it can be prevented, no clause shall be superfluous, void or insignificant'. So, s 6(1)*(a)* and s 7 of the Act cannot have the same purpose.

[30] Likewise, the purpose of s 6(1)*(a)* cannot be the control and regulation of dual citizenship. The legislative scheme it envisages permits the loss of South African citizenship without any decision being made by any person, and without any notice to the affected citizen. The loss of citizenship – a fundamental right entrenched in s 20 of the Constitution – in these circumstances is arbitrary. Citizenship is an important right that brings with it many benefits. To deprive persons of this right, with no regard

[12] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22*;* 2021(1) (6) SA 579 (CC) para 153.

for their individual circumstances and the reasons that they are taking out another citizenship is both unfair and capricious. The legislature is not against dual citizenship we were told. If that is so, why take away South African citizenship by automatic operation of law, and require that its retention depends upon the invocation of a ministerial discretion that is entirely unspecified as to what its exercise is intended to achieve? Moreover, given the operation of s 6(1)*(a)*, the Department of Home Affairs (Department) would not know when or how South Africans obtain second citizenship in foreign countries. It is often only when South African citizens renew their passports, that the Department becomes aware of this, as the case of Mr Plaatjes shows.

[31] Section 6(2) does not remedy the arbitrariness and irrationality of s 6(1)*(a)*. The discretion to decide whether to grant or deny the retention of the South African citizenship is vested entirely in the Minister. It reposes in the Minister a vague and undefined discretionary power in relation to the retention of a fundamental right, inextricably linked to other fundamental rights such as the political rights guaranteed by s 19(1) of the Constitution (which includes the right to vote and stand for public office), the right to enter and remain in the Republic (s 21) and the right to freedom of trade, occupation and profession (s 22).[13] In terms of s 6(2) the Minister may, if he or she deems it fit, order the retention of citizenship. The Minister is thus afforded an unconstrained discretion without any guidelines as to how such discretion is to be exercised. Nothing is specified as to what the Minister should seek to secure by a decision to permit a citizen to retain their citizenship. The discretion is cast in terms that do not permit of an assessment of reasons that may support retention, nor, by implication, what it is that requires the loss of citizenship. The scheme of the legislation, automatic loss, subject to unbounded discretionary retention, is a recipe

[13] Section 19 of the Constitution provides:
'Political rights
(1) Every citizen is free to make political choices, which includes the right-
(a) to form a political party;
(b) to participate in the activities of, or recruit members for, a political party; and
(c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right-
(a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
(b) to stand for public office and, if elected, to hold office.'

for capricious decision-making, without the specification of legitimate objects. Nor is it clear why the voluntary act of taking another citizenship should warrant automatic loss of South African citizenship. Since we have been told that there is no policy that is hostile to dual citizenship, the drastic automatic consequence of loss of citizenship is supported by no clearly articulated legitimate object. Yet the exercise of that discretion may result in the denial of the right of citizenship and other political rights protected by the Constitution.

[32] In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Mininster of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*,[14] the Constitutional Court held:

'It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision.'

[33] What all of this shows, is that there is no rationale for why an individual adult citizen who applies for citizenship of another country, must by operation of law lose their South African citizenship.[15] The high court's reasoning does not provide an explanation as to why the State may automatically strip its citizens of their citizenship merely because they acquired another citizenship. This is so more especially because the legislature has offered no clear basis why dual citizenship is a problem, indeed they say it is permissible but should be subject to ministerial discretion. But why? Also, simply to say that the retention or loss of citizenship is itself a legitimate use of power is to state the matter at such a high level of generality as to be meaningless. Rationality is tested against substantively legitimate objects and not by saying that because the power may be one that the State could exercise legitimately, its existence makes its exercise legitimate.

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[14] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Mininster of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 47.

[15] See D Bilchitz and R Ziegler 'Is the automatic loss of South African citizenship for those acquiring other citizenships constitutional? Democratic Alliance v Minister of Home Affairs' (2023) South African Journal on Human Rights at 5.

Whether s 6 (1)*(a)* infringes constitutional rights

[34] This brings me to the DA's contention that s 6(1)*(a)* infringes constitutional rights. Section 20 of the Constitution stipulates that 'no citizen may be deprived of citizenship'. The high court found that s 6(1)*(a)* does not result in the infringement of a right of citizenship, and for that reason found it necessary to undertake a s 36 limitation of rights analysis. As indicated, it rejected the DA's contention that s 6(1)*(a)* of the Act deprives a citizen of his or her citizenship holding that the DA's construction of the section conflates the concepts of the 'deprivation of citizenship' and the' loss of citizenship'. According to the high court s 20, which deals with the deprivation of citizenship, is not implicated in cases where there is loss of citizenship. This is so, reasoned the high court, because s 3(3) of the Constitution does not prohibit loss of citizenship. In its view s 20 of the Constitution only applies in cases where the deprivation of citizenship results in statelessness, and since s 6 of the Act is not dealing with the deprivation but with loss of citizenship, it is incorrect to resort to the language of deprivation to 'house a claim concerning the loss of citizenship'.

[35] The high court's analysis of the relationship between s 20 and s 3 of the Constitution is incorrect. First, the national legislation referenced in s 3(3) is subject to the Bill of Rights, as s 8 of the Constitution makes clear. In other words, if legislation is passed in terms of s 3(3) of the Constitution that legislation may not infringe the rights in the Bill of Rights unless the legislation is justified in terms of s 36 of the Constitution. Second, s 3(3) of the Constitution cannot be read as authorising legislation that limits a right in the Bill of Rights. Third, the high court's interpretation disregards the fact that any form of deprivation of citizenship under any circumstances may constitute an infringement of s 20. Finally, legislation passed pursuant to s 3 (3) of the Constitution providing for the loss of citizenship is subject to the constitutional conformity with s 20 of the Constitution. The loss of citizenship is one type of deprivation of citizenship.

[36] The purpose of s 20, among other things, is to prevent the denial of citizenship which may arise in any manner other than renunciation under s 7 of the Act and which may not necessarily result in statelessness. This is because citizenship is a gateway to political rights under s 19, freedom of movement and residence rights under s 21 and freedom of trade, occupation and profession under

s 22 of the Constitution. Thus when a citizen loses his or her citizenship through the mechanism of s 6(1)*(a)* of the Act he or she faces the risk of being denied the constitutional guarantees and other rights under ss 19, 21 and 22 of the Constitution. The existence of these rights cannot depend on a decision of the Minister who may in the exercise of his wide and unconstrained discretion under s 6(2) allow or refuse a citizen to retain his or her South African citizenship.

[37] I therefore find that s 6(1)*(a)* of the Act is irrational and inconsistent with the Costitution. It also unjustifiably limits 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.

Remedy

[38] Section 172(1) of the Constitution provides:

'When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[39] In terms of s 172(1) of the Constitution, a declaration of constitutional invalidity must be made, including any order that is just and equitable. The offending portion of s 6(1)*(a)* of the Act must be struck down. That leaves the question whether it should be struck down with immediate effect or the striking down should be suspended to allow Parliament to enact remedial legislation. Related to this question is the question as to when the order of invalidity shall take effect.

[40] The Constitutional Court has said that in granting appropriate relief, and making an order that is just and equitable under s 172(1)*(b)*, it is imperative that where possible

and appropriate, successful litigants should obtain the relief they seek.[16] Relief should also be effective, as Ackermann J stated in *Fose v Minister of Safety and Security*:

‘ In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.’[17]

[41] The Act came into effect on 6 October 1995 at the time when the Interim Constitution was still in force. The Interim Constitution was repealed by the current Constitution which came into effect on 4 February 1997. The Act was inconsistent with the Interim Constitution and remained so when the current Constitution took effect. To the extent that it was inconsistent with the Interim Constitution, it was therefore invalid and unconstitutional. The declaration of invalidity should therefore take effect from the date of its promulgation on 6 October 1995. This principle has been ‘endorsed many times’, in the words of Cameron J in *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others*:

‘It is as well to clarify that it is misleading to speak of a ”default rule” that declarations of invalidity operate retrospectively. In the case of pre-constitutional legislation, an order of invalidity takes effect, if not otherwise specified, with retrospective effect to the effect to the date the Constitution came into operation. That is the default position simply because, if a court does not make an order limiting the retrospective effect of a declaration of invalidity, its effect reaches back to its constitutional roots. This flows from the objective theory of constitutional invalidity this court adopted in *Ferreira v Levin* and which it has endorsed many times. It means that all pre-existing laws inconsistent with the Constitution are invalid from the date of the Constitution and that post-constitutional enactments are invalid from the date they came into effect. But this is subject to the court’s remedial power, afforded by the Constitution, when declaring law or conduct inconsistent with the Constitution invalid, to make any order

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[16] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[17] *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 (CC) para 69.

that is just and equitable, including an order limiting the retrospective effect of a declaration of invalidity.'[18]

[42] Similarly, in *Gory v Kolver NO and Others*, the Constitutional Court held:

'As already discussed, a pre-existing law or provision of a law which is unconstitutional became invalid at the moment the Constitution took effect. This is the effect of the so-called 'supremacy clause' of the Constitution (section 2), in terms of which the Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid. Item 2(1) of Schedule 6 to the Consitution provides that all law that was in force when the Constitution took effect, continues in force until amended or repealed, but only to the extent that it is consistent with the new Constitution. When making a declaration of invalidity, a court simply declares invalid what has already been invalidated by the Constitution. This doctrine, known as "objective constitutional invalidity", means that an unconstitutional law in force at the time of the commencement of the interim Constitution might be invalidated by that Constitution with effect from 27 April 1994, even if the applicant's cause of action arose after the coming into force of the 1996 Constitution on 4 February 1997. Thus, in terms of s 172(1)(a) of the Constitution, a court deciding a constitutional matter must declare any law or conduct that is inconsistent with the Constitution, a court deciding a constitutional matter must declare any law or conduct that is inconsistent with the constitution to be invalid to the extent of its inconsistency.'[19]

[43] As no good grounds exist to limit retrospectivity, an order of full retrospectivity should be made. An order of full retrospective force would restore South African citizenship to all persons who had lost their South African citizenship in terms of s 6(1)*(a)* of the Act between 6 October 1995 when the Interim Constitution was operative and 4 February 1997 when the current Constitution came into effect. In other words, those citizens who lost their citizenship by reason of s 6(1)(*a)* are deemed not to have lost their citizenship. This restoration remedy, which is a consequential relief under our fair and equitable remedial jurisdiction, is necessary to ensure that those citizens, such as Mr Plaatjes, who have had their citizenship revoked by some formal administrative action, taken in reliance upon s 6(1)(a), will enjoy the benefit of restoration, without the need for any further litigation.

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[18] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and Others* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) para 47.

[19] *Gory v Kolver NO and Others* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) para 39.

[44] The next question is whether the order of invalidity in respect of s 6(1)*(a)* of the Act should be suspended, and, if so, for how long? In *J and Another v Director General, Department of Home Affairs and Others* the Constitutional Court explained the rationale for granting an order suspending invalidity:

'The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a lacuna. In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the legislature an opportunity "to correct the defect". It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants.'[20]

[45] The striking down of s 6(1)*(a)* of the Act without a suspension order would not result in the disruption of the administration of justice, as those South African citizens who lost their citizenship because of the operation of s 6(1)*(a)* of the Act would automatically regain their citizenship. There is no suggestion that an interim regime is necessary to facilitate the processing of any pending applications for the retention of citizenship under s 6(2) of the Act by persons who consider taking citizenship or nationality of another country.

[46] As far as the liability for costs is concerned, there is no reason to deviate from the general principle that costs should follow the event. The DA, being a successful party, is entitled to its costs.

The order

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

1 The appeal is upheld with costs including the costs of two counsel where employed.

2 The order of the high court is set aside and replaced with the following order:

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[20] *J and Another v Director General, Department of Home Affairs and Others* [2003] ZACC 3; 2003 (5) SA 621 (CC) at para 21.

‘(a) It is declared that s 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.

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

(c) The respondents are ordered to pay the applicant’s costs including the costs of two counsel where so employed.’

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D H ZONDI

JUDGE OF APPEAL

Appearances

For the appellant:	A Katz SC
	D Simonsz
Instructed by:	Minde Schapiro & Smith Inc, Pretoria
	Symington De Kok Attorneys, Bloemfontein
For the first respondent:	W R Mokhare SC
	M Zondo
Instructed by:	The State Attorney, Pretoria
	The State Attorney, Bloemfontein