REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 48418/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED.

6 AUGUST 2021 pp .....

DATE SIGNATURE

IN THE MATTERS BETWEEN :-

THE DEMOCRATIC ALLIANCE	APPLICANT
And	
THE MINISTER OF HOME AFFAIRS	FIRST RESPONDENT
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	SECOND RESPONDENT

DATE OF HEARING: This matter was enrolled for hearing on 10 MAY 2021, with appearance on Microsoft teams. DATE OF JUDGMENT: This judgment was hand

down electronically by circulation to parties by email/caselines. The date of hand-down is deemed to be 6 AUGUST 2021.

JUDGMENT

Kollapen J

Introduction

[1] This is an application about citizenship and in particular a challenge to the constitutionality of Section 6(1)(a) of the Citizenship Act 88 of 1995 (the Act) which provides in broad terms for the loss of South African citizenship upon voluntarily and formally acquiring the citizenship of another country.

[2] For the sake of completeness the relief sought is set at as follows in the Notice of Motion :-

> "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 3 may apply to the First Respondent in terms of section 15 of the Act for the appropriate certificate of citizenship;*
>
> *4. Directing that the Applicant's costs are be paid by the Respondents, jointly and severally, the one paying the other to be absolved, such costs to include the costs of three counsel."*

The background

[3] The applicant, the Democratic Alliance ("the DA") is a registered political party with elected representatives in local, provincial and national spheres of government and duly registered as contemplated by section 26 of the Electoral Act 73 of 1998. It brings this application in terms of Section 38 of the Constitution.

[4] The applicant in seeking to have struck down as unconstitutional and invalid section 6(1)(a) of the Act and contends that the section 6(1)(a) is irrational and arbitrary and serves no legitimate purpose, and furthermore unjustifiably violates the right to citizenship in terms of section 20 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") as well as all of the other rights that flow from the right to citizenship.

[5] Section 6 of the Citizenship Act provides that:-

> *"(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."*

[6] The case for the applicant is that the section stands to be struck down on the basis that it is irrational in that it serves no legitimate purpose as well as on the basis that it results in the violation or limitation of number of rights guaranteed in the Bill of Rights and in respect of which the respondents have not satisfied the limitation test as set out in Section 36 of the Constitution.

[7] The respondents contend that the government has a right to regulate the process by which citizenship is acquired and lost, and in particular that of dual citizenship which is also impacted on in this application. The Act provides a mechanism by which a citizen can seek permission to hold dual citizenship but failing that the loss of citizenship cannot then be said to be effected on a legal framework that is irrational and unconstitutional.

Locus Standi

[8] The respondents have on the papers challenged the *locus standi* of the applicant to bring this application and it may be convenient to deal with that issue first.

[9] Section 38 of the Constitution provides:

> *"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:*
>
> *(a) anyone acting in their own interest*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of, a group of persons;*
>
> *(d) anyone acting in the public Interest; and*
>
> *(e) an association acting in the interest of its members."*

[10] The DA, as a registered political party having public representatives in all spheres of government, contends that it has standing in terms of section 38(a) of the Constitution, as it has an interest in its own right in ensuring that no South African citizen is unconstitutionally deprived of his or her fundamental and constitutional right to citizenship, which also encompasses the right to vote.

[11] In ***Democratic Alliance v Acting National Director Public Prosecutions 2012 (3) SA 486 (SCA) ("DA 1") at paras 44-45***, the DA challenged the decision of the National Prosecuting Authority to discontinue a prosecution and on appeal the Supreme Court of Appeal in addressing the *locus standi* of political parties said the following:-

> *"It was accepted on behalf of the third respondent that all political parties participating in the national parliament can be taken to subscribe to constitutional principles. Section 48 of the Constitution provides that before members of the national assembly begin to perform their functions they must swear or affirm faithfulness to the Republic and obedience to the Constitution. All political parties participating in Parliament must necessarily have an interest in ensuring that public power is exercised in accordance with constitutional and legal prescripts and that the rule of law is upheld. They represent constituents that collectively make u the electorate. They effectively represent the public in Parliament. It is in the public interest and of direct concern to political parties participating in parliament that an institution such as the National Prosecuting Authority (NPA) act in accordance with constitutional and legal prescripts. It can hardly be argued that citizenry in general would be concerned to ensure that there was no favouritism in decisions relating to prosecutions. Few members of political parties or members of the public have the ability, resources or inclination to bring a review application of the kind under discussion.*
>
> *It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, act in a manner consistent with constitutional prescripts and within its powers, as set*

out in the National Prosecuting Authority Act 32 of 1998. Certainly the membership of the DA can rightly be expected to hold the party they support to the foundational values espoused in the DA's constitution and to expect the DA to do whatever is in its power including litigating to foster and promote the rule of law."

[12] There is nothing further to be said on this aspect of the dispute and I am satisfied that the applicant does indeed have the necessary standing to bring this application and the challenge to its *locus standi* must fail.

The merits

[13] The applicant challenges the constitutionality of Section 6(1)(a) on two fronts. It does so on the basis of what it says is the irrationality of the provision in that it does not serve any legitimate government purpose and then also on the basis that the impugned provision violates or limits a number of rights in the Bill of Rights and that the respondents have not satisfied the test in showing that limitations meet the test of Section 36 of the Constitution.

The constitutional and legal framework

Citizenship

[14] Section 3 of the Constitution is titled "Citizenship " and provides:

"(1) There is a common South African citizenship.

(2) All citizens are—

(a) equally entitled to the rights, privileges and benefits of citizenship; and

(b) equally subject to the duties and responsibilities of citizenship.

(3) National legislation must provide for the acquisition, loss and restoration of citizenship."

[15] Section 20 of the Constitution provides that *'no citizen may be deprived of citizenship'*.

[16] The status of citizenship triggers the access to other constitutional rights and they include political rights including the right to vote located in Section 19, freedom of movement and residence located in Section 21 and freedom of occupation and profession located in Section 22.

[17] Accordingly, citizenship is a self- standing right on its own but may also be described as a gateway to the benefit of other rights that flow from the status of citizenship. What is clear however is that the status of citizenship is a condition precedent to the exercise of the rights mentioned in Sections 19, 21 and 22 of the Constitution.

[18] In a society with its bewildering and enrichening diversity such as ours, it may be said that even as we are different our common citizenship has a binding and uniting value in proclaiming who we are as South Africans.

[19] In ***August and others v Electoral Commission and others (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999)*** which dealt with the rights of prisoners to vote as part of a common citizenry, Sachs J said the following in respect of the cohesive nature of a common citizenship:-

> *"The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity."*

[20] It is often so that citizenship denotes a real and symbolic connection between citizen and State and may inform how individual and collective identity is shaped and how the fidelity of a citizen to his or her country is deepened. It may also be a source of pride and inspiration in being part of and belonging to the collective that is South Africa and that is evidenced by the badge of citizenship.

[21] For others however, it may be no more than an outcome of the intersection between genetics and geography and signifies nothing more than their legal status. For others who may have fled persecution in their country of origin and obtained protection in South Africa, the acquisition of citizenship in South Africa may have been no more than an outcome of political events beyond their control. So while citizenship is important at many levels, there is also nothing magical about it that elevates it to some special place in the rights framework or that warrants its elevation above other rights.

[22] It is ultimately a matter of personal choice what weight each of us attaches to the idea of our citizenship.

[23] At the same time the connection that citizenship evidences is not always permanent. Some elect to seek and acquire the citizenship of another country in a world characterised by the constant and ongoing migration of people and the search for other and better opportunities and a different life. There is therefore nothing unusual about the loss of citizenship and the acquisition of another citizenship. The result is that old bonds and ties are severed and new ones formed or in other instances old bonds and new bonds exist side by side – this has been the experience of *homo sapiens* from time immemorial.

Citizenship and the Constitution

[24] While Section 3 provides a commitment to equality in the manner in which rights and duties are apportioned between citizens, it also expressly recognises that citizenship may be lost and in this regard there is a constitutional injunction in Section 3(3) that legislation must provide for the acquisition, loss and restoration of citizenship.

[25] Section 20 on the other hand however contains a prohibition against the deprivation of citizenship, something which is absent from the language of Section 3.

[26] Clearly deprivation is seen in a different light from the loss of citizenship and the express provision in Section 20 that no one may be deprived of citizenship is according to ***Currie and De Waal – The Bill of Rights Handbook 6th edition (page 444)***, at its core a right against statelessness which may be the consequence of the deprivation of citizenship.

[27] It is therefore important to distinguish the concept of loss from that of deprivation both conceptually as well as in their effect. While deprivation may lead to statelessness, the loss of citizenship in the context of Section 6 carries no such risk of statelessness as the condition precedent for the loss of citizenship is the acquisition of citizenship of another country.

[28] The loss of citizenship is clearly a part of the constitutional design of the overall idea of citizenship and the language of the constitution distinguishes loss, renunciation and restoration of citizenship as different features of citizenship and the Constitution mandates that there shall be national legislation to provide for this.

[29] The Citizenship Act is this legislation and recognises what may be regarded as in some instances the temporal nature of citizenship and has provisions that deal with the loss of citizenship, the renunciation of citizenship, the deprivation of citizenship and also the restoration of citizenship under certain circumstances.

[30] To the extent that Section 20 creates a prohibition against the deprivation of citizenship there is no similar prohibition relating to the loss of citizenship and the consequences that go with the deprivation of citizenship are significantly different from those that may result in the loss of citizenship.

[31] What is before the Court in these proceedings is not the deprivation of citizenship but the loss of citizenship, two considerably separate concepts in law.

The scheme of Section 6(a)(1) and (2)

[32] While only Section 6(a)(1) faces a challenge to its constitutionality it is both useful and necessary to examine it in relation to the provisions of Section 6(a)(2) as there is an inextricable link between the loss of citizenship provided for in 6(a)(1) and the process that may precede such loss as provided for in 6(a)(2).

[33] When regard is had to Section 6(a)(1) then it is clear that the loss of citizenship which the applicant has described as automatic takes place when a South African citizen, other than a minor, by some voluntary and formal act other than marriage acquires the citizenship of another country.

[34] That the acquisition of the citizenship of another country must be both voluntary and through a formal act is significant. It denotes a conscious and free choice by the citizen to acquire another citizenship – an act through one's own free will is the hallmark of a voluntary act.

[35] In addition, the acquisition of citizenship must also be accompanied by some formal act and while this is not defined, it may relate to the talking of an oath of allegiance, a formal swearing in ceremony, the issue of a citizenship certificate or some similar act in recognition of the acquisition of citizenship.

[36] These two features must both accompany the acquisition of the citizenship of another country and it is only when both are present that the trigger for the loss of citizenship is then activated.

[37] It is in that context that the argument that the loss is automatic must be examined and it may be more accurate to describe the loss as being effected by the operation of the law following clearly defined voluntary conduct on the part of the citizen as well as a formal act.

[38] However, even if one accepts that the loss is automatic which may on its own be suggestive of the absence of an opportunity afforded to the citizen to avoid the loss, the provisions of Section 6(a)(2) does indeed provide such an opportunity. The citizen has the right, prior to the loss of citizenship, to apply to the Minister to retain his or her South African citizenship and the Minister may order such retention. Section 25 of the Citizenship Act in turn provides that the decision of the Minister may be tested on review.

[39] Thus, Section 6(a)(1) and (2) read together, firstly alerts the citizen to the consequence that will follow if they are to voluntarily and through a formal act acquire the citizenship of another country.

[40] Having done so, it then creates a mechanism by which citizens, who may seek to retain their South African citizenship, can apply to the Minister for permission to do so.

[41] Therefore in law, every South African citizen who wishes to acquire the citizenship of another country has a number of choices and they are:-

a) Mindful of the consequences of acquiring another citizenship they may opt to nevertheless do so and may elect not to retain their South African citizenship.
b) They may wish to retain their South African citizenship together with the citizenship of another country. In these situations, they will have the right to apply for permission to do so before acquiring the other citizenship.
c) If permission is granted, they may then proceed to obtain the other citizenship and hold dual citizenship.
d) If permission is refused and subject to their right to challenge such refusal, they can then elect whether to proceed to obtain another citizenship with the knowledge that they will lose their South African citizenship or they can elect to retain their South African citizenship and not seek the citizenship of another country.

[42] So far from simply visiting the citizen with the automatic loss of their citizenship, the section read in its totality presents citizens with options that enable them to make informed and considered choices as to how they manage decisions around their citizenship.

The application to strike

[43] It was argued that many citizens who find themselves in these situations where they face the loss of citizenship under circumstances where they were not aware of the provisions of the law and thus lost their citizenship without their knowledge.

[44] The applicant sought to place reliance on an online survey it conducted amongst those who lost their citizenship whether they were aware of the provisions of Section 6(a)(1) and (2), whether they intended to lose the South African citizenship by applying for the citizenship of another country and whether they were aware that their loss of citizenship of South Africa would follow if they obtained a second citizenship. The online survey results showed an overwhelming majority of those who participated in the survey were unaware of the provisions of Section 6 and had never intended to lose their citizenship.

[45] The respondent brought an application to strike out most of the replying affidavit which dealt with the survey and its results on the basis that it introduced new evidence

in reply which the respondent says is impermissible in reply. My view is that the level of knowledge and awareness was an issue raised in the founding affidavit and the survey results which were not available at the time sought to build on that rather than introduce new matter in that sense.In addition, given that this is an important constitutional challenge, I will exercise my discretion in allowing the challenged portions of the replying affidavit to stand, although their ultimate value may be limited in the broader context of this application.

The first leg of the challenge – Irrationality

[46] In challenging the rationality of the impugned provision the applicant raises a number of issues that it says advances its argument that the provision is irrational and it includes that Section 6(1)(a) :-

> *"Serves no legitimate public purpose; operates automatically; unlawfully operates without notice to those affected and that it is impermissibly vague."*

[47] In this regard the constitutional design refers to the acquisition of citizenship which can be acquired by birth, descent or naturalisation. It recognises that citizenship can be lost and so the loss of citizenship is not constitutionally offensive but constitutionally permissible and sanctioned.

[48] The test for rationality has been described as follows in ***Zuma v Democratic Alliance 2018 (1) SA 200 (SCA) 674 (CC):***

> *"Rationality review is concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand, and the purpose or end itself on the other. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred."*

[49] The provisions of Section 6(a)(1) regulates the circumstances under which citizenship may be lost and in particular when the citizenship of another country is acquired. From the analysis of the Section undertaken above, the Citizenship Act provides in clear terms the voluntary acts that will trigger the loss of citizenship and the options to hold dual citizenship.

[50] The status of citizenship creates a unique set of rights and responsibilities that extends beyond the Bill of Rights. Citizenship is in many instances a precondition for the holding of office in the legislative, executive and judicial branches of government as well as other constitutional bodies.

[51] The State has a clear interest and duty in regulating and managing citizenship given the significant status of citizenship and its connection to the work of government which in turn requires a connection between citizen and country. When such 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 to seek permission to retain their South African citizenship, it can hardly be said that the loss of citizenship that follows is irrational.

[52] The scenario contemplated in Section 6(a)1) and (2) is really about personal and individual choices people make about their future and often choices come with consequences. In this regard it cannot be said that the scheme of the section is irrational in how it carefully weighs and balances the choice and interests of the individual with that of the State and the public purposes that is inextricably linked to the status of citizenship. The status of citizenship is a precondition to the construction of the political community as well as that of the government in all its spheres, and who qualifies or not for such status and when such status no longer endures, goes go the heart of democratic society. It is a legitimate end and the means deployed in Section 6(a)(1) to achieve it is rational for the reason given.

[53] In addition, it cannot be said as the applicant suggests that the loss of citizenship takes place without notice and automatically as the citizen in that position has proper notice through the structure of the section of both the opportunity to seek consent to hold dual citizenship and the consequences of acquiring a second citizenship without obtaining such permission. It therefore is not a secret provision but

one that every citizen who voluntarily seeks to acquire another citizenship should ordinarily acquaint themselves with.

[54] In this regard the online survey results cannot support the argument of unconstitutionality. Firstly, lack of knowledge of the law cannot sustain an argument that the law is unconstitutional and secondly, while it may be arguable that citizens cannot be expected to know every feature of the law, those citizens involved in migration and relocation to other countries with the possibility of acquiring citizenship there must surely be expected to acquaint themselves with the law in that area of activity they are involved in.

[55] Finally, there is nothing vague about the provision. It sets out in the clearest terms what the circumstances are that would result in the loss of citizenship and the mechanisms open to seek its retention.

[56] It is for these reasons that the argument that the section is vague is also not sustainable

[57] This part of the challenge to the section must therefore fail.

Violation of Rights

[58] The applicant argues that Section 6(a)(1) deprives a citizen of their citizenship which is prohibited by Section 20 and that unless the respondents are able to demonstrate that the deprivation of the right is justified in terms of Section 36 (the limitation clause) then the deprivation is unlawful.

[59] The problem with this argument is that it conflates the concepts of the deprivation of citizenship and the loss of citizenship. While it is so that deprivation of citizenship is prohibited by Section 20 and any deprivation of citizenship must then meet the limitation criteria set out in Section 36, the same is not the situation with the loss of citizenship. Section 20 contains no prohibition on the loss of citizenship - on the contrary the Constitution in Section 3 recognises the loss of citizenship as a constitutionally permissible and mandated outcome.

[60] Section 8 of the Citizenship Act provides that the Minister may deprive any South African of their citizenship and the grounds on which the Minister may do so are

generally related to some misconduct or crime on the part of the citizen or the public interest which may justify the deprivation. Clearly Section 6 is not dealing with the deprivation of citizenship and the resort to the language of deprivation is not applicable where the impugned provision speaks to the loss of citizenship.

[61] In addition, if one has regard to and compares the provisions of Section 3 of the Constitution with Section 20 thereof, Section 3 permits the loss of citizenship not the deprivation of citizenship while Section 20 prohibits the deprivation of citizenship and not the loss of citizenship. This is a clear and compelling demonstration that loss and deprivation are separate concepts in the context of the Constitution and the Citizenship Act and the language of Section 20 cannot be used to house a claim concerning the loss of citizenship.

[62] It must therefore follow that Section 20 is not of application in these proceedings and that reliance thereon by the applicant is misplaced.

The argument that other rights are limited

[63] Beyond reliance on Section 20 of the Constitution the applicant says that the effect of Section 6(a)(1) is the limitation of other rights including the right to vote, the right to enter and remain in the Republic and the right to freedom of trade and occupation. All of these right accrue only to citizens.

[64] Citizens and non- citizens do not enjoy the same constitutional and human rights and there is no real argument about that in these proceedings. Therefore, when a person, who for good reason, ceases to be a citizen the consequence is simply that they cease to enjoy the rights that are reserved for citizens. There can be nothing objectionable about that. It is not a limitation of their rights as citizens because they are no longer citizens nor is it a limitation of their rights as non- citizens as they do not enjoy such rights as non –citizens.

[65] Does the loss of citizenship which passes the test of legality constitute a limitation of any of the rights in the Bill of Rights? Mindful that one is not here dealing with the deprivation of citizenship which is not permitted by Section 3 but the loss of citizenship which Section 3 allows, the effect of the loss of citizenship is a change of status. The former citizen is now no longer a South African citizen and is therefore on

account of that not entitled to the benefits of that citizenship – there is therefore not a limitation of the rights of such a person as contemplated by Section 36.

[66] Citizenship is the gateway to some rights and when one's citizenship comes to an end in a lawful manner it closes the gateway to those rights. This and to the extent that certain rights can only be exercised by citizens, the loss of citizenship is not a limitation on the exercise of such rights but rather the consequence of no longer enjoying the status of citizen.

[67] There is no limitation enquiry that is triggered in such circumstances provided that the change in status (from citizen to non- citizen) was lawfully effected. While it may be argued that the non- citizen now is no longer able to vote or to choose his or trade and profession or to enjoy the freedom to enter and remain in the Republic, this is purely as a result of their loss of citizenship and the change of their status, mindful that only citizens are entitled to those rights.

[68] That should be the end of the challenge which was largely predicated on the impermissible conflation between the deprivation of citizenship and the loss of citizenship – two quote distinct and separate processes.

[69] However assuming I am wrong in concluding that the effect of Section 6(a)(1) does not result in the limitation of any rights but in a lawful change of status with the attendant consequences that go with, then the provisions of Section 36 may find application. The applicant says that it does and that the respondents have failed to meet the limitation criteria set out in Section 36(1).

[70] The provisions of Section 36 provide as follows:-

> *"(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." (my emphasis)***

[71] The provisions of Section 36(2) creates a general prohibition against any law that may limit any right entrenched in the Bill of Rights. This is a significant provision in the protection of fundamental human rights and freedoms as it insulates those rights against interference or limitation except in clearly defined and limited circumstances.

[72] Those defined circumstances in terms of Section 36(2) are _

a) That terms of Section 36(1) the rights may only be limited by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society regard being had to the factors listed in Section 36(1) and
b) Where it is provided for in any other provision of the Constitution.

[73] Thus a challenge to the limitation of a right may be met either by satisfying the criteria set out in Section 36(1), or by showing that the Constitution itself permits such a limitation.

[74] Section 3 of the Constitution recognises a common citizenship and the equal rights and responsibilities that must flow from this citizenship. It also expressly recognises that citizenship may be lost and makes it peremptory for the passing of national legislation to deal with amongst other things the loss of citizenship. The Citizenship Act is that legislation.

[75] On this basis and even if the loss of citizenship can be interpreted to mean a limitation of the right to citizenship or the other rights that flow from it, such a limitation does not fall within the scope of Section 36(1) but Section 36(2) as it constitutes a limitation of a right that is provided for in the Constitution.

[76] In ***Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996***) the Constitutional Court dealt with a provision of the interim Constitution (Section 33(2)) which is substantially similar to Section 36(2) of the Constitution. In considering the constitutionality of the amnesty provisions of the Promotion of National and Reconciliation Act 34 of 1995 the Court took the view that an argument that a provision of a statute constituted a violation of a right would be adequately met by a defence that the Constitution itself permitted such a violation. It said the following at para 10:-

> *" [1] There would therefore be very considerable force in the submission that section 20(7) of the Act constitutes a violation of section 22 of the Constitution, if there was nothing in the Constitution itself which permitted or authorised such violation. The crucial issue, therefore, which needs to be determined, is whether the Constitution, indeed, permits such a course. Section 33(2) of the Constitution provides that save as provided for in subsection (1) or any other provision of this Constitution, no law, whether a rule of common law, customary law or legislation, shall limit any right entrenched in this Chapter.*
>
> *Two questions arise from the provisions of this sub-section. The first question is whether there is 'any other provision in this Constitution' which permits a limitation of the right in section 22 and secondly, if there is not, whether any violation of section 22 is a limitation which can be justified in terms of section 33(1) of the Constitution..."*

[77] In the ***AZAPO*** matter the Court was dealing with a limitation in the context of an argument that the granting of amnesty limited the right of a victim of a crime to have access to court in order to resolve a justiciable dispute.

[78] Applying the dicta in ***AZAPO*** and regard being had to both the provisions of Sections 3 and 36(2) of the Constitution, I conclude that to the extent that it could be said that the impugned section results in a limitation of any rights then that is a limitation permitted by the terms of the Constitution. Simply put if there is provision in

the Constitution that permits the limitation (Section 3 is this provision) then the Section 36(1) enquiry is not activated as the 36(2) criteria is met.

[79] This leg of the challenge also stands to be dismissed.

Costs

[80] Applying the principle in ***Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) at paras 21-28*** my view is that no order of costs should be made.

Order

[81] I make the following order:-

1.The application is dismissed

2. There is no order as to costs.

pp

NJ. KOLLAPEN

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

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		Adv D SIMONSZ

Instructed by	:	**MINDE SCHAPIRO & SMITH ATTORNEYS**
COUNSEL FOR RESPONDENTS	:	**Adv W MOKHARI SC** **Adv M ZONDO**
Instructed by	:	**STATE ATTORNEY, PRETORIA**
DATE OF HEARING	:	**10 MAY 2021**
DATE OF JUDGMENT	:	**6 AUGUST 2021**