CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 184/23

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS Second Respondent

and

STEVEN SPADIJER Amicus Curiae

Neutral citation:	*Democratic Alliance v Minister of Home Affairs and Another* [2025] ZACC 8
Coram:	Maya CJ, Madlanga ADCJ, Majiedt J, Mhlantla J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J
Judgment:	Majiedt J (unanimous)
Heard on:	05 November 2024
Decided on:	06 May 2025
Summary:	Citizenship Act 88 of 1995 — confirmation application — constitutionality of section 6(1)(a) — loss of citizenship — order of constitutional invalidity confirmed

ORDER

On application for confirmation of an order of constitutional invalidity granted by the Supreme Court of Appeal:

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.

JUDGMENT

MAJIEDT J (Maya CJ, Madlanga ADCJ, Mhlantla J, Seegobin AJ, Theron J, Tolmay AJ and Tshiqi J concurring):

Introduction

[1] In *Chisuse*,[1] this Court observed that "[c]itizenship is the gateway through which a number of rights in the Constitution can be accessed. It enables a person to enjoy

[1] *Chisuse v Director-General of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC).

freedom of movement, freedom of trade, and political representation."[2] This case concerns a constitutional challenge against section 6(1)(a) (the impugned provision) of the South African Citizenship Act[3] (the Act). That 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. In relevant part, the impugned provision reads:

> "(1) Subject to the provisions of subsection (2), a South African citizen shall cease to be a South African citizen if—
>
> (a) [that citizen], 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 . . .
>
> . . .
>
> (2) Any person referred to in subsection (1) may, prior to [their] loss of South African citizenship in terms of this section, apply to the Minister to retain [their] South African citizenship, and the Minister may, if [they] deem it fit, order such retention."

[2] The Supreme Court of Appeal declared the impugned provision constitutionally invalid from the date of its promulgation on 6 October 1995.[4] That Court made an ancillary order declaring that those citizens who had lost their citizenship by virtue of that section, are deemed not to have lost their citizenship. Lastly, it made a costs order against the respondents. The matter is before this Court for confirmation of the order of constitutional invalidity, in terms of section 167(5), read with section 172(2)(a) of the Constitution, and further read with rule 16 of this Court's Rules. Although the respondents abide the decision of this Court, we are obliged to consider the constitutionality of the section to assess whether the declaration of invalidity must be confirmed.[5]

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[2] Id at para 24.

[3] 88 of 1995.

[4] *Democratic Alliance v Minister of Home Affairs* [2023] ZASCA 97; 2023 (6) SA 156 (SCA) (Supreme Court of Appeal judgment).

[5] *Phillips v Director of Public Prosecutions* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 8.

[3] The applicant is the Democratic Alliance (DA) and the first and second respondents are the Minister and Director-General of Home Affairs respectively (collectively, the Department). Dr Steven Spadijer (Dr Spadijer) was admitted as amicus curiae (friend of the court), and was confined to making written submissions. Dr Spadijer holds dual citizenship of Australia and Montenegro. He worked as a barrister in Australia before continuing his studies in the United Kingdom where he obtained postgraduate qualifications in law. Dr Spadijer explains that he has, under Article 150 of the Montenegrin Constitution, referred a question regarding the constitutionality of Article 24(1) of the Montenegrin Citizenship Act, which imposes an automatic ban on dual citizenship, to the Montenegrin Constitutional Court. That referral deals comprehensively with foreign and international human rights law relating to citizenship.

[4] Dr Spadijer says that his referral to the Montenegrin Constitutional Court is a comprehensive assessment of relevant international and foreign legal principles and it would be of assistance to this Court in its determination of the DA's application for confirmation. His amicus application, ultimately, seeks to place the months of research and work that went into his Montenegrin Constitutional Court referral before this Court for its consideration, should those submissions be of any assistance. His written submissions cover two central topics:

(a) first, foreign and international legal principles as they relate to dual citizenships, including the number of states that allow dual citizenship, foreign jurisdictions that have struck down prohibitions on dual citizenships, and international human rights implications for prohibitions on dual citizenships; and

(b) second, the South African human rights implications of the impugned provision. The submissions consider how the impugned provision limits, among others, the rights in sections 9, 10, and 33 of the Constitution.

[5] The DA launched an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) in which it sought, broadly, the relief eventually granted in the Supreme Court of Appeal. It sought a further order consequential to the declaration of invalidity "declaring that all persons [who had lost their citizenship through the operation of the impugned provision] may apply to the [Minister] in terms of section 15 of the Act for the appropriate certificate of citizenship".

[6] The High Court dismissed the application with no order as to costs. It held that the impugned provision is not irrational and thus does not offend the principle of legality nor does it infringe any constitutional rights.[6] On appeal to it, with its leave, the Supreme Court of Appeal upheld the appeal and, as stated, made a declaration of constitutional invalidity and granted the further orders.

Litigation history

[7] In the High Court, the DA brought the application on behalf of South Africans who, unbeknown to them and to their surprise, had lost their citizenship through the operation of the impugned provision. To illustrate the effect of that section, the DA filed an affidavit by Mr Phillip Plaatjes, a chartered accountant who was born in Cape Town and who had lost his South African citizenship in this fashion.

[8] Mr Plaatjes states that he was born and raised in Cape Town and left after qualifying as a chartered accountant in November 2002. He started working as an English teacher in South Korea in March 2003. According to Mr Plaatjes, his departure was never meant to be permanent, but while in South Korea he met Ms Karen Crouch, a British citizen, with whom he subsequently fell in love. They got married on 27 February 2004, and settled in the United Kingdom after Mr Plaatjes obtained work there and acquired a work visa.

[6] *Democratic Alliance v Minister of Home Affairs* [2021] ZAGPPHC 500 (High Court judgment).

[9] Mr Plaatjes was naturalised as a citizen of the United Kingdom on 19 November 2007 and received his British passport in December 2007. Mr Plaatjes says that during this period he was under the impression that he would obtain citizenship as a consequence of marrying a citizen of another country, thereby acquiring "dual citizenship". He last renewed his South African passport in London in July 2005, long before he had acquired the equivalence to permanent residency, had been naturalised as a citizen, and had received his British passport.

[10] In the period between December 2007 and July 2014, Mr Plaatjes had travelled a number of times to South Africa, using his South African passport. According to Mr Plaatjes no one at immigration had, during this time, enquired whether he had a second citizenship, even when he travelled with his wife and two daughters, all who had British citizenship by way of birth. Seven years after obtaining his British citizenship he came across an article online which explained the true state of affairs – that South African citizens stand to lose their citizenship where they voluntarily acquire citizenship of another country. Only then did Mr Plaatjes become aware that he did not in fact acquire British citizenship by marriage and, in fact, could not have done so in the first place. Upon further investigation, he discovered many more people in the same situation, also as shocked and confused as he was concerning dual citizenship.

[11] On 20 July 2015, the expiry date of his South African passport, Mr Plaatjes went to the South African embassy in London, requesting a determination of his citizenship. He did so because, as a member of the South African Institute of Chartered Accountants, integrity is an important part of his profession. Mr Plaatjes says he received his passport back, cut at the corners, with the words "cancelled" stamped across the pages, as well as a letter stating that he committed a voluntary act which resulted in the automatic loss of his South African citizenship but that he would, however, remain a permanent resident of South Africa. This, he says, was one of the saddest days of his life as he was desirous of retaining his South African citizenship.

[12] The DA contends that it brought its application in defence of the many South Africans living abroad who have acquired a second citizenship in good faith and who, like Mr Plaatjes, have been stripped of their citizenship automatically by operation of law. The DA says the application was brought in the public interest. It states that this automatic loss of citizenship occurred without the knowledge of these persons and, on the probabilities, also even without the knowledge of the Department of Home Affairs.

[13] The thrust of the DA's case in the High Court was that the impugned provision deprives citizens of their citizenship, thus violating the right to citizenship enshrined in section 20 of both the Constitution and interim Constitution. Furthermore, the section does so without affording citizens prior notice, without a justifiable reason and without any person having taken a decision to deprive them of that right.

[14] The respondents opposed the application. They denied that the impugned provision is unconstitutional and contended that the DA misconstrued the section because they failed to read that section alongside section 6(2). They contended that the loss of citizenship under the impugned provision occurs as a result of a voluntary act on the part of the citizen, not the state, and that section 6(2) enables a South African citizen to retain citizenship on application to the Minister. The respondents also argued that the state has a right to regulate the process by which citizenship is acquired and lost, including that of dual citizenship. The Act provides a mechanism by which a citizen can seek permission to hold dual citizenship and so, failing that, the loss of citizenship cannot be said to be effected on a legal framework that is irrational and unconstitutional.

[15] The High Court dismissed the DA's application and rejected its argument that the impugned provision is irrational because:

(a) it 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; and

(b) it is only where a person through a voluntary and formal act acquires citizenship of another country, and does not thereafter avail themselves of the right to approach the Minister for permission to retain their South African citizenship, that their citizenship is lost.

[16] The High Court held that what was before it in the proceedings was not a deprivation of citizenship, but a loss of citizenship, which the High Court reasoned are two completely different concepts. That Court referred to the Constitution which in section 3 expressly recognises that citizenship may be lost and, in subsection 3, states that legislation must provide for the acquisition, loss, and restoration of citizenship. Section 20, on the other hand, contains a prohibition against the deprivation of citizenship. The High Court further reasoned that, while deprivation of citizenship may lead to statelessness, the loss of citizenship carries no such risk as the condition that must be met for the loss of citizenship to occur is the acquisition of citizenship of another country. Thus, when section 20 of the Constitution is compared to section 6 of the Act, it is plain that at the core of section 20 is the right against statelessness, while the loss of citizenship in terms of section 6 carries no risk of statelessness as citizenship would only be lost where citizenship of another country had been acquired.

[17] The High Court then had regard to the impugned provision, read with section 6(2), and held that, when read together, they serve to inform citizens about the consequences of voluntarily acquiring citizenship in another country and provide a way for citizens to seek permission to retain their South African citizenship after obtaining other citizenship. The High Court laid emphasis on the voluntary and formal nature of the acquisition of citizenship of another country.[7] In this context, the High Court held that the loss was not automatic, as the DA argued, but was more accurately described as being effected by operation of law following clearly defined voluntary conduct on the part of the citizen, as well as a formal act.

[7] The High Court stated that this could relate to "the taking 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".

[18] The High Court reasoned that in law, every South African citizen who wishes to acquire the citizenship of another country has a number of choices:

(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.

According to the High Court, if these citizens claim to have been unaware of these options, or argue that the provision is unclear, their lack of knowledge about the law cannot be used to support the argument that the provision is unconstitutional.

[19] In relation to the argument that other rights were unjustifiably limited, the High Court held that, 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 a citizen. The High Court reasoned that 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 mandates that there shall be national legislation to provide for this. The Act is this envisioned legislation, providing for the constitutionally mandated regulation of loss, renunciation and restoration of citizenship. Thus, to the extent that it could be said that the impugned provision results in a limitation of any rights, that is a limitation permitted by the terms

of the Constitution. The High Court thus dismissed the application, but made no order as to costs.

[20] The Supreme Court of Appeal granted leave to appeal to it and upheld the appeal. It held that, to meet the standard of rationality, the Minister was required, in the first place, to explain the specific and legitimate purpose that the impugned provision was designed to foster. In the absence of specified reasons, the Court held that the impugned provision is arbitrary and irrational. The Court held 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. 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. It held further that the impugned provision is irrational, because it treats South African citizens who already have dual citizenship differently from those who intend to acquire citizenship or nationality of another country.

[21] The Supreme Court of Appeal further held that the purpose of the impugned provision cannot be to regulate the renunciation of citizenship, for that would render section 7 of the Act, which expressly deals with renunciation, nugatory. 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 their South African citizenship. Moreover, said that Court, section 8(2) expressly recognises dual citizenship and nationality of another country, where it provides that the Minister may by order deprive a South African of citizenship or nationality of another country, if they have been sentenced to a certain period of imprisonment, or if it is in the public interest to do so.

[22] Finally, the Supreme Court of Appeal held that the impugned provision 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 and it declared the section inconsistent with the Constitution.

[23] Before us, the DA presented argument similar to that advanced in the previous Courts:

(a) the impugned provision infringes the right to citizenship contained in section 20 of both the Constitution and interim Constitution, as it deprives persons, without their consent or forewarning, of their South African citizenship;

(b) that deprivation lacks any legitimate government purpose to render it rational;

(c) contrary to the initial contention by the respondents that the impugned provision exists to allow citizens to give up their citizenship, it is actually section 7 of the Act that provides this function;

(d) the impugned provision cannot be justified by reference to the discretion granted to the Minister under section 6(2) of the Act;

(e) as the impugned provision is irrational, it cannot be justified under section 36 of the Constitution and falls to be declared to be invalid; and

(f) there is common ground between the parties that there is no need for the suspension or limitation of the retrospectivity of the declarations of invalidity.

[24] As stated, the Department abides this Court's decision and states that their submissions had been filed 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, but at the hearing no further submissions were made in this respect.

Analysis

[25] The crucial importance of citizenship has been noted.[8] An oft quoted truism is that every person has "a right to have rights". In her seminal work, Arendt persuasively argues that this "right to have rights" emanates from citizenship and belonging to a distinct national community.[9] Citizenship has been described as a revered and "cherished status" and the right to citizenship has been said by the US Supreme Court to be "the most precious of all".[10] It is a right of which one should not be lightly deprived.[11] The stark reality of the impugned provision is that the loss of citizenship occurs automatically without the knowledge, consent and any input of the citizen concerned. That legal position must be assessed against the backdrop of the provisions in the Constitution that deal with citizenship.

[26] Section 3 of the Constitution is headed "Citizenship". It reads:

> "(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.

[8] *Chisuse* above n 1. See also, further afield, *Alvin Teage Jalloh v Olubankie King-Akerele et al Petition In Re: Constitutionality of Sections 22.1 and 22.2 of the Aliens and Nationality Law* Supreme Court of the Republic of Liberia (23 December 2019) at 7: "Once acquired, citizenship is the pillar that secures all other rights and privileges Liberians enjoy, including the right to life and the right to own real property, etc."; *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56 at para 2: "There are many benefits to being a British citizen, among them the right to vote, the right to live and to work here without needing permission to do so, and everything that comes along with those rights."; *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62 at para 12; and *2 BvR 2236/04* Bundesverfassungsgericht (18 July 2005) at B.I(1)(a)66: "[C]itizenship is the legal prerequisite for an equal civic status, which on the one hand establishes equal duties, but on the other hand, and above all, establishes the rights whose guarantee legitimises public authority in a democracy."

[9] Arendt *The Origins of Totalitarianism* 2 ed (Meridian Books, New York 1958) at 296-7. The Canadian Supreme Court cites this and Kesby *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, New York 2012) at 5 in *Divito v Canada (Public Safety and Emergency Preparedness)* [2013] 3 SCR 157 at para 21.

[10] *Knauer v United States* (1946) 328 US 654 at 658, 674 and 679.

[11] *Afroyim v Rusk* (1967) 387 US 253 at 267-8: "Citizenship is no light trifle to be jeopardised any moment Congress decides to do so under the name of one of its general or implied grants of power".

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

[27] Citizenship is protected by the Constitution in section 20, by expressly providing that "[n]o citizen may be deprived of citizenship". Importantly, that section forms part of Chapter 2 of the Bill of Rights. In *Chisuse*, this Court extensively adumbrated the importance of citizenship in the context of the maleficent historical deprivation of citizenship in this country. In this regard, the Court cited the moving lament by Sol Plaatje:

> "For to crown all our calamities, South Africa has by law ceased to be the home of any of her native children whose skins are dyed with a pigment that does not conform with the regulation hue."[12]

[28] This Court emphasised further:

> "Citizenship and equality of citizenship are therefore matters 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 100 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 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*."[13] (Emphasis added.)

[29] The Act is the national legislation contemplated in section 3(3) of the Constitution. It came into effect on 6 October 1995. One of the objectives of the Act, as outlined in its Preamble, is "to provide for the acquisition, loss and resumption of

[12] *Chisuse* above n 1 at para 27 citing Plaatje *Native Life in South Africa* (Picador Africa, Johannesburg 2007) at 68.

[13] *Chisuse* id at para 28.

South African citizenship". The Act makes provision in chapter 2 for the acquisition of South African citizenship as follows: by birth (section 2); descent (section 3); naturalisation (section 4); or by grant by the Minister of a certificate of naturalisation to any foreigner who meets certain specified requirements (section 5).

[30] Loss of citizenship has severe consequences, set out in section 11(3) of the Act. It entails being deemed, for the purposes of the Immigration Act,[14] to be a foreigner, who is not in possession or deemed to be in possession of a permit referred to in section 10(2) or section 25(2) of that Act; or in terms of section 31(2)(a) of that Act, not exempted or deemed to be not exempted from the provisions of section 10(1) of that Act.

[31] Section 7 of the Act regulates the renunciation of citizenship. It reads:

> "(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, [their] 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."

[32] For the sake of completeness, reference must be made to the provisions in the Act which regulate the deprivation of citizenship, namely, sections 8 and 10. They read:

> "8. **Deprivation of citizenship**

[14] 13 of 2002.

(1) The Minister may by order deprive any South African citizen by naturalisation of [their] South African citizenship if [they are] 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 [their] 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 [their] 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 [they have] in [their] 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.

9. . . .

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 [they were] born outside the Republic and [are] under the age of 18 years, shall cease to be a South African citizen."

[33] The primary challenge in respect of the unconstitutionality of the impugned provision is that it infringes section 20 of the Constitution, that no citizen may be deprived of citizenship. This raises the central issue whether the automatic, *ex lege* (by law) loss of citizenship constitutes a de facto (factual) deprivation of citizenship and thus constitutes an infringement of the constitutional right to citizenship. Put differently – is there a distinction between the automatic loss of citizenship as it occurs under the impugned provision and a de facto deprivation of citizenship, as the High Court held?

[34] Where a citizen voluntarily and formally acquires citizenship or nationality of another country, section 6(2) of the Act requires that citizen to seek permission from the Minister of Home Affairs to retain their South African citizenship. A failure to do so results in the automatic cessation of South African citizenship by virtue of the impugned provision, read with section 6(2). The loss eventuates as a matter of course by operation of law through a voluntary and formal act (except marriage) and the lack of permission granted by the Minister for the retention of the citizenship.

[35] The High Court, it will be recalled, laid much emphasis on what it perceived as the dichotomy between the loss and deprivation of citizenship. It underscored the difference in the wording of the text between sections 3 and 20 in relation to this dichotomy. According to that Court, deprivation of citizenship within its constitutional meaning in section 20 pertains to a prohibition of citizenship, rendering a South African citizen stateless.[15] Loss and deprivation of citizenship are separate concepts in the context of the Constitution and the Act, and the language of section 20 cannot be used to house a claim concerning the loss of citizenship, said the High Court.[16] This was the primary basis for that Court's rejection of the DA's constitutional challenge.

[15] High Court judgment above n 6 at para 25.

[16] Id at para 61.

[36] The Cambridge English Dictionary defines the verb "to deprive" as to "take something away from someone". "Loss" is more passive in nature: "to no longer have something or have less of something". The Oxford Dictionary defines the two concepts thus: "to deprive" means "to dispossess (a person) of a thing, experience, status, etc." "Loss", on the other hand, means "not retained in possession".

[37] As I see it, the distinction between the automatic loss of citizenship occasioned by the impugned provision is more apparent than real and more semantic than substantive, a distinction without a difference. Where the law automatically terminates a citizen's "cherished and revered status" and closes the "gateway to a number of rights", without any forewarning and even knowledge of the citizen (and possibly even the Department itself) simply on account of dual citizenship, it is plainly a deprivation of citizenship. The legislative scheme is such that, without a discernible lawful purpose, the citizen *ex lege* loses citizenship, something that the Supreme Court of Appeal correctly described as "capricious".[17]

[38] But, even if there was this artificial distinction (I reiterate that I do not see any), the 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. Axiomatically, all law is subject to and must comply with the Constitution,[18] and section 8(1) of the Constitution in no uncertain terms declares that "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". Inasmuch 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 can in terms of section 36 not be infringed upon or limited without justification.

[17] Supreme Court of Appeal judgment above n 4 at para 31.

[18] Section 2 of the Constitution: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled". See ***Barkhuizen v Napier*** [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 35.

[39] Stripping citizens of the entrenched right in section 20 can only legitimately occur through renunciation in terms of section 7 of the Act and in a fashion that does not lead to statelessness. As stated, the right to citizenship is of cardinal importance as it provides access to a number of other important rights like political rights,[19] freedom of movement and residence rights[20] and freedom of trade, occupation and profession rights,[21] as emphasised by this Court in *Chisuse*.[22] Deprivation of citizenship, thus, occasions loss of these other constitutional rights embodied in sections 19, 21 and 22.

[40] Regarding this approach by the High Court, Bilchitz and Ziegler state:

> "There is nothing in section 20 to suggest that it only applies in cases where the deprivation of citizenship results in statelessness. Whereas the detrimental effects of a deprivation of citizenship differ, inter alia, based on whether it leads to statelessness (which is a particularly egregious form of deprivation), the literal meaning of this provision is that 'no citizen' may be deprived of their citizenship: hence, any form of deprivation of citizenship under any circumstances constitutes a prima facie infringement of section 20, requiring justification."[23]

[41] I agree. Deprivation is, as they state, a broader concept entailing any active removal of citizenship, irrespective of whether it leaves an individual stateless. This interpretation accords with the text of section 20, which unconditionally prohibits depriving any citizen of citizenship and, where deprivation occurs, it must be justified under section 36 of the Constitution. In contrast, loss denotes a more passive state, where citizenship is no longer held without direct action taken to remove it. The authors rightly argue that section 20 prohibits active deprivation without justification. This reasoning is persuasive since it captures the constitutional protections surrounding

[19] Section 19 of the Constitution.

[20] Section 21 of the Constitution.

[21] Section 22 of the Constitution.

[22] *Chisuse* above n 1 at para 24.

[23] Bilchitz and Ziegler "Is the Automatic Loss of South African Citizenship for Those Acquiring Other Citizenships Constitutional? *Democratic Alliance v Minister of Home Affairs*" (2023) 39 *SAJHR* 97 at 105.

citizenship more robustly, emphasising that any active removal of citizenship is prima facie (on the face of it) an infringement that bears justification in terms of section 36(1) of the Constitution.

[42] Plainly then, even on the High Court's incorrect approach, the impugned provision infringes the right to citizenship. We were told both in the respondents' answering papers and their oral submissions in this Court that the state has no objection to dual citizenship. They argued that the impugned provision, read with other related sections in the Act, is not averse to dual citizenship. The respondents asserted that South Africa, like many other countries, permits dual citizenship with selected countries, by prior arrangement. According to them, 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.

[43] The respondents' defence was twofold: first that the state has a right to regulate the process by which citizenship is acquired and lost, including that of dual citizenship which under the impugned provision occurs through a voluntary act by the citizen; and second, that section 6(2) is a "saving enactment" of sorts. The first defence has been adequately addressed, but I add a few further observations before considering the second contention.

[44] It bears emphasis that the limitation of the right to citizenship by the impugned provision serves 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. That argument has already been firmly dispelled. The rationale behind this legislation remains unexplained. That legislative scheme not only flies in the face of the respondents' avowed lack of aversion to dual citizenship but also bears no discernible legitimate purpose.

[45] Legislation is constitutionally required to be rationally related to a legitimate government purpose – if not, it is invalid.[24] The test imposes a relatively minimal requirement: an identification of a legitimate government purpose and a link between the adopted means and that purpose. In the case of the impugned provision there is no such link.

[46] With regard to the second defence – it was not a defence at all. Section 6(2) seeks to avert the loss of citizenship, which is otherwise automatic. The antecedent question is why citizenship must be lost in the first place. For the reasons stated before, there is no reason at all. The existence of a ministerial power to exercise a discretion in terms of section 6(2) to alter what is otherwise an automatic loss of citizenship is no answer to the antecedent question.

[47] Whilst I do not consider it necessary to deal with the nature of the discretion contained in section 6(2), I cannot but make the following observations about it. Section 6(2) provides no criteria at all on how the Minister's discretion is to be exercised and what its bounds are. The Minister is simply given unconstrained free rein by the section to determine in her untrammelled discretion whether to permit dual citizenship. The Supreme Court of Appeal rightly observed:

> "What then is the purpose of the automatic loss of citizenship in section 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 untrammelled discretion to avoid that outcome. In sum, to deprive a citizen of their rights of citizenship for no reason is irrational."[25]

[24] *United Democratic Movement v President of the Republic of South Africa (No 2)* [2002] ZACC 21; 2002 (11) BCLR 1213 (CC); 2003 (1) SA 495 (CC) at para 55.

[25] Supreme Court of Appeal judgment above n 4 at para 26.

[48] The Supreme Court of Appeal cannot be faulted for then concluding in light of this observation that section 6(2) merely "underscores the arbitrariness and irrationality of [the impugned provision]".[26] The High Court's reasoning as an imprimatur for this automatic forfeiture of citizenship merely because they acquired another citizenship is singularly unpersuasive. The Legislature has offered no clear basis why dual citizenship is a problem; on the contrary, we were made to understand that dual citizenship is permissible, subject only to ministerial discretion. The reason for this conditionality is unclear and utterly irrational. What we are left with is 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. After all, rationality must be determined against substantively legitimate objects.[27]

[49] According to the High Court's reasoning, states have an interest in regulating citizenship, given the significance of the status and the link between citizenship and the work of the government. In this country, for example, said the High Court, holding South African citizenship is a precondition, in many instances, for holding certain public offices. Thus, reasoned the High Court, a connection between citizen and country is required, and when a citizen through a voluntary act acquires the citizenship of another country, and does not avail themselves 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.[28]

[50] As stated, in their written submissions in this Court the respondents supported the reasoning and outcome of the High Court's judgment, but they made no further oral submissions. As I see it, the automatic loss of citizenship and its consequential effect far outweighs regulation as a legitimate government purpose. There is no conceivable

[26] Id.

[27] See generally *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at para 32.

[28] High Court judgment above n 6 at para 51.

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. Absent any check on the unfettered power of the Minister to make decisions involving who loses or retains South African citizenship, the impugned provision is constitutionally invalid.

[51] This Court has firmly set its face against unbounded and undefined discretionary power. In *Dawood*,[29] this Court held:

> "There is . . . a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable. It is true that as employees of the State they bear a constitutional obligation to seek to promote the Bill of Rights as well. But it is important to interpret that obligation within the context of the role that administrative officials play in the framework of government, which is different from that played by judicial officers."[30]

[52] It further held:

> "[I]f 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. . . . In the case of the statutory discretion at hand, there is no provision in the text providing guidance as to the circumstances relevant to a refusal to grant or extend a temporary permit. I am satisfied, that in the absence of such

[29] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

[30] Id at para 46.

> provisions, it would not promote the spirit, purport and objects of the Bill of Rights for this Court to try to identify the circumstances in which the refusal of a temporary permit to a foreign spouse would be justifiable. Nor can we hold in the present case that it is enough to leave it to an official to determine when it will be justifiable to limit the right in the democratic society contemplated by section 36. Such an interpretation, of which there is no suggestion in the Act, would place an improperly onerous burden on officials, which in the constitutional scheme should properly be borne by a competent legislative authority. Its effect is almost inevitably that constitutional rights (as in the case of two of the respondents before this Court) will be unjustifiably limited in some cases. Of even greater concern is the fact that those infringements may often go unchallenged and unremedied."[31]

[53] The impugned provision therefore cannot pass constitutional muster. First, section 6(2) cannot save it from unconstitutionality, because the section does not address the question why there is automatic loss of citizenship in the first place. Second, section 6(2) affords the Minister broad, unchecked power without any guidelines as to how the Minister's decisions are to be made. This is untenable, given the infringement of citizenship as a fundamental right. This is exacerbated by the consequential loss of the enjoyment of other fundamental rights.

[54] Section 6(2) affords the Minister the discretionary power to, as she deems fit, order the retention of citizenship. It bears repetition that this is an unconstrained discretion without any specification as to how such discretion is to be exercised. There is no indication at all regarding what facts, factors and circumstances would guide the Minister in deciding either way on the retention of citizenship. Thus, there can be no meaningful assessment of the reasons for the decision that may support retention, nor, by implication, what it is that requires the loss of citizenship. I agree with the Supreme Court of Appeal that "the scheme of the legislation, automatic loss, subject to

[31] Id at paras 47 and 50.

unbounded discretionary retention, is a recipe for capricious decision-making, without the specification of legitimate objects".[32]

[55] While constitutional validity is always tested objectively,[33] the plight of Mr Plaatjes vividly demonstrates the irrationality of the impugned provision. He lost his South African citizenship without his knowledge and against his wishes to remain a citizen of this country. Mr Plaatjes discovered by chance that he was no longer a South African citizen. It seems that even the Department and its officials were under the misapprehension that he was still a citizen of this country. That explains why, between December 2007 and July 2014, Mr Plaatjes had travelled to this country numerous times, using his South African passport. According to him, no one at immigration had, during this time, enquired whether he had a second citizenship, even where he was travelling with his wife and two daughters, who all had British citizenship by way of birth. This automatic loss of citizenship, unbeknown to him (and maybe even to the Department), without any hearing whatsoever, is a constitutional aberration.

[56] As the amicus' comprehensive submissions demonstrate, the High Court's reasoning is out of step with international instruments and international law. 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. Many have done so. The amicus' affidavit and written submissions provide useful insight into the global position. In 1960, some 62% of countries prohibited dual citizenship. However, by 2020, 76% of countries allow its ethnic citizens to voluntarily acquire the citizenship of another country, without automatic repercussions for their citizenship of origin. A breakdown of these figures shows that dual citizenship is allowed as follows: 93% of countries in Oceania; 91% in the Americas; 70% in Africa; 65% in Asia; and 80% of European countries. In the European context, the entire European Union (EU) project

[32] Supreme Court of Appeal judgment above n 4 at para 31.

[33] *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (4) BCLR 441 (CC) at para 26.

presupposes dual loyalty, that is, loyalty to the EU and its institutions through EU citizenship, and loyalty to the nation state. According to legal commentators, in a world of increasing globalisation and transnational mobility, permitting dual citizenship is the norm and not the exception.[34]

[57] Many countries, including a few in Africa, expressly provide for a right to dual citizenship. Article 36 of the Constitution of Cuba provides: "the acquisition of other citizenship does not imply the loss of Cuban citizenship".[35] The Zambian Constitution provides in Article 39(1) that "[a] citizen shall not lose citizenship by acquiring the citizenship of another country". Article 8(1) of the Constitution of Ghana provides: "[a] citizen of Ghana may hold the citizenship of any other country in addition to [their] citizenship of Ghana".[36]

[58] The constitutions of a number of countries provide that citizenship may be lost only through voluntary renunciation – by implication excluding a loss of citizenship due only to dual citizenship. For example, the Constitution of Albania provides in Article 19(2): "[a]n Albanian citizen may not lose [their] citizenship, except when [they] [give] it up". Similar provisions can be found in the constitution of the Slovak Republic.[37]

[59] Foreign case law provides useful insight into the approach to the deprivation of citizenship beyond our shores. In *Schneider*[38] the Supreme Court of the United States (US Supreme Court) had to consider the legal position of Ms Angelika Schneider, a German immigrant and citizen, who came to the US with her parents and became a citizen at 16 years of age. When she graduated from college, Ms Schneider moved

[34] Boll *Multiple Nationality and International Law* (Martinus Nijhoff Publishers, Leiden 2007) at xviii.

[35] Other countries whose constitutions have similar provisions are Cabo Verde, Somalia, Seychelles, Venezuela, Colombia and Kyrgyzstan.

[36] See also Manby *Citizenship Law in Africa: A Comparative Study* 3 ed (African Minds, Cape Town 2016) at 2, 18 and 109-11.

[37] Constitution of the Slovak Republic, Article 5(2): "No one shall be deprived of citizenship of the Slovak Republic against [their] will".

[38] *Schneider v Rusk* 377 US 163 (1964).

abroad and later resided in Germany. The State Department claimed that Ms Schneider had lost her US citizenship in accordance with a section of the Immigration and Nationality Act, which revoked the citizenship of any naturalised citizen who returned to their country of birth and remained there for at least three years. The US Supreme Court declared this law to be unconstitutional. The Court held that naturalised US citizens have the right to return to and reside in their native countries, and retain their US citizenship, even if they never return to the US.[39]

[60] In another matter later before the US Supreme Court, *Afroyim*, the central question before the Court was whether one can automatically lose one's citizenship simply by voting in a foreign election, when they have not renounced their citizenship. Mr Beys Afroyim, a Polish-Latvian Jew, immigrated to the US and, in 1926, became a naturalised US citizen. In 1950, Mr Afroyim, a dual citizen of the US and Poland, travelled to Israel and, while there, participated in an Israeli election. When he subsequently tried to renew his US passport, the US government refused, arguing that he automatically lost his citizenship by voting in a foreign election. The US Supreme Court held that, because of the Fourteenth Amendment, Mr Afroyim could not be stripped of his citizenship without his assent. The Court held that section 401(e) of the Nationality Act, providing for automatic loss of citizenship for voting in a foreign election, was unconstitutional.[40]

[61] Closer to home, in *Mathe*,[41] the Botswana High Court was recently faced with the legal question whether children who were dual citizens of Botswana and other countries could be compelled to give up one nationality in favour of the other. Section 15 of the Citizenship Act required a citizen of Botswana who is born with dual citizenship to renounce their foreign citizenship in order to retain their Botswanan

[39] Id at 168. The Court cited one of its earlier decisions in *Kennedy v Mendoza-Martinez* 372 US 144 (1963).

[40] Id at 267. In a commentary on this decision, Spiro argues that it is virtually impossible to lose American citizenship without formally and expressly renouncing it: Spiro "Afroyim: Vaunting Citizenship, Presaging Transnationality" in Martin and Schuck (eds) *Immigration Stories* (Foundation Press, New York 2005) 147 at 163.

[41] *Mathe v The Attorney General*, Case No. MAHGB-000321-20, High Court of Republic of Botswana, 29 April 2022.

citizenship once they turn 21 years of age. Ms Mathe, a citizen of Botswana, was also a Norwegian citizen. Her son and daughter were dual citizens who held both Botswanan and Norwegian citizenship. Ms Mathe and the other applicants in the case argued that the requirement for their children to choose one nationality over another – an emotional and daunting process – denied them their right to equal protection (section 3 of the Constitution of Botswana), freedom of association (section 13), freedom of movement (section 14), anti-discrimination based on place of origin (section 15), and the right to vote (section 67).

[62] The Botswana High Court upheld these arguments. It held that to require children to renounce one citizenship in favour of the other violated sections 3, 13, 14, 15 and 67 of the Constitution of Botswana, as well as a general implied right to human dignity. The Court held that choosing one citizenship over another can be a gruelling and painful choice, generating a strong sense of deprivation. Such a requirement of renunciation would, on a general scale, affect the individual more than it affects the state.[42]

[63] The European Court of Human Rights and the Court of Justice of the European Union require deprivations of citizenship to occur only after a careful, consequential, and case by case proportionality assessment. This assessment must consider:

(a) the length of time one has already had and enjoyed their citizenship;[43]

(b) whether there are perfectly legitimate or wholly innocuous reasons for taking out a second citizenship;

(c) the economic, social, or psychological impact citizenship-stripping might have on a person, including any direct effect on the usual or normal development of their private or professional life as well as the effect citizen-stripping might have on the person's family;[44] and

[42] Id at para 30.

[43] *Usmanov v Russia*, Application No. 43936/18, ECtHR Third Section, 22 December 2020 at para 77.

[44] *JY v Wiener Landesregierung*, C-118/20, CJEU, 18 January 2022 at para 59.

(d) whether the person might subsequently have grave difficulties obtaining identity documents such as a passport or identity document from the second country whose citizenship they have acquired or local identity documents needed to credibly engage in the full social and economic life.[45]

[64] 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.[46] But, as legal commentators state, the concept of loyalty has undergone fundamental change. As Spiro observes:

> "Today the loyalty objection to dual citizenship is flimsy. Competition among nation-states may once have been zero-sum. In that context, there was at least a possible theoretical foundation for the loyalty objection: what was good for one country of nationality would necessarily be bad for the other. But that is hardly a sustainable perspective on interstate relations today. There are few issues on which a win for one state represents a loss for another. On the contrary, global issues are now mostly common issues, in which coordinated international action results in aggregate gains for all states."[47]

Conclusion and remedy

[65] In sum then, the impugned provision is unconstitutional as it infringes 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. As stated, there was no dispute regarding the suspension and limitation of the retrospectivity of the declaration of invalidity.

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[45] *Hashemi v Azerbaijan,* Application No. 1480/16, ECtHR Fifth Section, 13 January 2022 at paras 48-9.

[46] *Janko Rottman v Freistaat Bayern*, C-135/08, CJEU, 2 March 2010 at para 51.

[47] Spiro *Citizenship: What Everyone Needs to Know* (Oxford University Press, New York 2020) at 98. See also: Bilchitz and Ziegler above n 23 at 102: "[I]t is increasingly recognised that loyalty to one political community in no way precludes loyalty to another".

[66] Careful consideration was given in the Supreme Court of Appeal regarding the remedy that would grant the most effective relief. Again, that Court cannot be faulted for the conclusion it reached based upon its unassailable reasoning. As that Court stated, section 172(1) of the Constitution requires that, where legislation fails to pass constitutional muster, a declaration of constitutional invalidity must be made, including any order that is just and equitable.[48] That Court thus 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.

[67] Effective relief as envisaged in section 38 of the Constitution is the remedy that would be suitable and just, that would not only vindicate the rights of the aggrieved individual, but also uphold and protect the Constitution. As this Court stated in *Fose*,[49] "the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial".[50] In *Steenkamp*,[51] this Court explained:

> "In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law."[52]

[68] The Act came into effect on 6 October 1995, when the interim Constitution was still in force. The interim Constitution was repealed by the final Constitution which came into effect on 4 February 1997. The Act was inconsistent with the interim

[48] Supreme Court of Appeal judgment above n 4 at para 39.

[49] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

[50] Id at para 95.

[51] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

[52] Id at para 29.

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.[53] There is 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.

[69] The DA is entitled to its costs. What remains is to acknowledge the helpful written submissions of the amicus curiae, Dr Spadijer, particularly with regard to international law.

Order

[70] I make 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.

[53] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) at para 47 and *Gory v Kolver N.O.* [2006] ZACC 20; 2007 (3) BCLR 249 (CC); 2007 (4) SA 97 (CC) at para 39.

For the Applicants:	A Katz SC and D Simonsz instructed by Minde Schapiro and Smith Incorporated
For the Respondent:	W R Mokhare SC and M Zondo instructed by Office of the State Attorney, Johannesburg
For the Amicus Curiae:	E Cohen instructed by Ian Levitt Attorneys