C of A (CIV) No. 22/07

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

DIRECTOR OF IMMIGRATION	**1ST APPELLANT**
MINISTER OF HOME AFFAIRS	**2ND APPELLANT**
COMMISSIONER OF POLICE	**3RD APPELLANT**
COMMISSIONER OF LABOUR	**4TH APPELLANT**
ATTORNEY-GENERAL	**5TH APPELLANT**

AND

PHOLOANA ADAM LEKHOABA	**1ST RESPONDENT**
MALICHABA LEKHOABA (MOSHOESHOE)	**2ND RESPONDENT**

Heard: 31 March 2008
Delivered: 11 April 2008

CORAM: STEYN, P
GROSSKOPF, JA
SMALBERGER, JA
MELUNSKY, JA
GAUNTLETT, JA

SUMMARY

(a) Dual citizenship - Failure to renounce South African citizenship - Section 41 of the Constitution of Lesotho -Sections 22 and 23 of the Citizenship Order 1971 -Whether the first respondent ceased to be a citizen of Lesotho in terms of the Constitution.

(b) The first respondent was a citizen of Lesotho by birth. His parents took him to South Africa at an early age, he lived in that country for almost all of his life and he still lives there. In 1987, at the age of seventeen he acquired citizenship of South Africa. When the Constitution came into effect in 1993, the first respondent was obliged to renounce his South African nationality by the specified date, i.e. when he reached the age of twenty-six, in terms of section 41(1) of the Constitution. This he did not do. Accordingly he ceased to be a citizen of Lesotho.

(c) There is no conflict between section 41 of the Constitution and section 22 of the Citizenship Order 1971. The respondents'

submission that the first respondent could lose his citizenship only by renunciation under section 22 is incorrect.

(d) Moreover the first respondent was not deprived of his citizenship in terms of section 23 of the Citizenship Order.

(e) The harassment of the first respondent by functionaries of the Government is deplored. It appears to be obvious that the question of his dual citizenship was raised by the authorities only because he allowed free expressions of opinion to take place over the airwaves of a local radio station. His deportation order, which was set aside by the Court a quo, was issued by the second appellant for the same political reason.

(f) In the view of the members of this Court Parliament should give urgent consideration to the desirability of enacting legislation to permit citizens of Lesotho who acquire citizenship of South Africa to hold dual citizenship in appropriate circumstances.

6. In view of the conclusions expressed in paragraphs 1, 2 and 3 above, the majority judgment (Hlajoane and Mahase JJ) on the question of citizenship is wrong and the dissenting judgment of Peete J is correct.

Appeal accordingly allowed.

JUDGMENT

MELUNSKY, JA

[1] This appeal raises the question whether a citizen of Lesotho who is also a citizen of some other country ceases to be a citizen of Lesotho within five years of attaining the age of 21 unless he has renounced his citizenship of that other country and has taken the oath of allegiance. The matter is one of considerable importance and grave concern not only to the respondents but, we were informed, to many other citizens of this Kingdom who have acquired dual citizenship. Many Lesotho citizens migrate to the Republic of

South Africa not only because of the geographical situation of the two countries but, quite probably, due to the perception that the pastures in Lesotho's larger and wealthier neighbour are immeasurably greener. It is when this results in the acquisition of South African citizenship by a Lesotho citizen that nationals of this Kingdom might face difficult choices.

[2] We are therefore only too well aware of the effect that the outcome of this appeal might have on the lives and welfare of many Lesotho citizens. We are concerned that the result might cause great anxiety to the holders of dual citizenship and we are most certainly not insensitive to their plight. What we have to do, however, is to apply the law not only as it exists today but, as I will show, as it has existed in this country since independence in 1966. I commence the review of the merits of the appeal by referring to the relief claimed by the respondents, the applicants in the Court a quo.

[3] The respondents aver that they were married to each other in Lesotho on 3 March 2007. They applied in the High Court, sitting as a Constitutional Court, for an order in the following terms, *inter alia:*

"(b) Declaring that 1st applicant herein [the first respondent on appeal] to be a citizen of Lesotho and not subject to all the impediments and restrictions [on] residence in Lesotho as are imposed on the alien.

(c) Declaring the Minister of Home Affairs' order of deportation of the 1st applicant from Lesotho as unlawful, null and void."

The majority of the Court (Hlajoane and Mahase JJ) granted both the aforesaid prayers but Peete J, while supporting the grant of prayer (c), favoured the dismissal of prayer (b). No order was made as to costs. The appellants appeal only against that part of the order which declared the first respondent to be a citizen of Lesotho and it is within this narrow ambit that the appeal is confined. Furthermore the material facts are no longer in issue and the question which we have to resolve depends largely, if not entirely, on the proper interpretation of certain provisions of the Constitution of Lesotho ("the Constitution") and the Lesotho Citizenship Order, 16 of 1971 ("the 1971 Citizenship Order").

[4] The first respondent was born in Lesotho in 1970. His parents were Lesotho citizens. He acquired Lesotho citizenship on his birth. At a very early age he and his parents moved to Senekal in the Republic of South Africa. He has lived in South Africa ever since but he paid monthly visits since 2005 to Lesotho where he was engaged by a local radio station. That the first respondent is a South

African citizen is also not in dispute in these proceedings although his counsel submitted that his citizenship of that country was held precariously, an aspect that will be referred to later. He acquired a South African identity document in October 1987 and was issued with a South African passport in 1997. This has since expired but he was subsequently granted a temporary South African passport which, too, has lapsed. He says that he acquired South African citizenship when he was seventeen years of age (presumably at about the time when he obtained his identity document) but he emphasizes that he never intended to renounce his Lesotho citizenship and avers that he only retained South African citizenship "out of necessity" and due to his "economic and financial ties" with that country.

[5] The appellants' contention in this appeal is based on the provisions of section 41 (1) of the Constitution. As the majority of the Court a quo seem to have relied on section 41 (2) (a), it would be convenient to reproduce the whole of sections 41 (1) and (2). These read:

> "Dual Citizenship
>
> 41 (1) Any person who, upon the attainment of the age of twenty-one years, is a citizen of Lesotho and also a citizen of some country other than Lesotho, shall cease to be a citizen of Lesotho upon the specified date unless he has renounced

his citizenship of that other country, taken the oath of allegiance and, in the case of a person who is a citizen of Lesotho by descent, made and registered such declaration of his intentions concerning residence as may be prescribed by Parliament.

(2) A citizen of Lesotho shall cease to be such a citizen if -

(g) having attained the age of twenty-one years, he acquires the citizenship of some country other than Lesotho by voluntary act (other than marriage); or

(h) having attained the age of twenty-one years, he otherwise acquires the citizenship of some country other than Lesotho and has not, by the specified date, renounced his citizenship of that other country, taken the oath of allegiance and made and registered such declaration of his intentions concerning residence as may be prescribed."

[6] Counsel for the respondents did not rely on appeal on the provisions of section 41 (2). In my view he was correct in so doing. Sub-section (1) applies to a person who, on attaining the age of twenty-one years holds dual citizenship at the time when the Constitution became operative, while section 41 (2) (a) and (b) cover the case of a person who, being a Lesotho citizen aged twenty-one, acquires the citizenship of another country after the coming into force of the Constitution. Moreover the argument raised - and apparently relied upon by the majority in the Court a quo -that the first respondent did not acquire South African citizenship by voluntary act, is not borne out by the facts before us. The first respondent's move to South Africa, while still an infant,

and his initial residence there were obviously not voluntary but his acquisition of South African citizenship seems to have come about because he, or someone on his behalf, held out to the South African authorities that he was born in that country. This was indeed conceded by the respondents' counsel. The first respondent says that he acquired South African nationality not out of choice but because, in his words

> "... I found myself living in South Africa with my parents who were Lesotho citizens."

Counsel for the respondents before us did not contend, however, that the first respondent's acquisition of South African nationality was involuntary. He was correct in not attempting to argue this point. The first respondent did not allege that he obtained South African citizenship against his will or even without his knowledge. Moreover, when he applied for a South African passport, the first respondent was already 26 or 27 and at that time - 1997 - he clearly accepted his status as a South African national.

[8] As I indicated in par [1], the law with which we are now concerned has been in existence since the independence of Lesotho. Sections 28 (1) and (2) of the Lesotho

Independence Order 1966 and the provisions of the subsequent statute, sections 8 (1) and (2) of the 1971 Citizenship Order, are, in all material respects, no different from sections 41 (1) and (2) of the Constitution. Section 8 of the Citizenship Order was in Part II of that statute which was repealed when the Constitution came into operation. It is also appropriate here to refer to the Lesotho Citizenship Act (15 of 1967) as sections 17 and 18 of that Act are identical to sections 22 and 23 respectively of the 1971 Citizenship Order which were relied upon by the respondents' counsel and will be referred to later. It is only necessary to add that the 1971 Citizenship Order repealed the 1967 Citizenship Act.

[9] When the Constitution came into force in 1993 the first respondent was 22 or 23 years old. He was then a citizen of Lesotho by birth and also a citizen of South Africa. The "specified date" both in terms of the Constitution and in terms of the 1971 Citizenship Order was the date on which he attained the age of 26 years (Section 20 (1) (a) of the latter statute). The first respondent, on a proper reading of section 41 (1) of the Constitution, was therefore obliged to renounce his South African citizenship by 1996 if he wished

to retain his Lesotho nationality, according to the argument of the appellants' counsel. Counsel for the respondents sought to avoid this result by submitting that section 41 (1) did not apply to a Lesotho citizen by birth. His arguments are dealt with below.

[10] While emphasizing that birth in Lesotho has always conferred citizenship on the person concerned, counsel pointed out that a citizen by birth or descent could not be deprived of his citizenship rights by a ministerial order in terms of section 23 of the 1971 Citizenship Order (corresponding to section 18 of the now repealed Citizenship Act of 1967). He also put particular stress on the provisions of section 22 of the 1971 Citizenship Act which was not repealed by the Constitution and remains in force. This section, against the marginal note "Renunciation by reason of dual citizenship", reads:

"22. (1) If a person satisfies the Minister that he -

(i) is a citizen of Lesotho; and

(j) is or will become a citizen of some country other than Lesotho; and

(k) has attained the age of twenty-one years or is, or has been, married; and

(l) is not suffering from mental incapacity;

and if he has made a declaration, as in the appropriate form prescribed in

the Second Schedule, renouncing his citizenship of Lesotho and has lodged that declaration with the Minister, the Minister may, subject to the other provisions of this section, cause that declaration to be registered by the Registrar-General, and unless otherwise provided by or under subsection (3) or subsection (4), that person ceases to be a citizen of Lesotho upon registration of that declaration by the Registrar-General.

(m) If a person has made a declaration renouncing citizenship of Lesotho and has consequently ceased to be a citizen of Lesotho under this section, neither the renunciation nor the consequent loss of citizenship of Lesotho shall affect the liability of that person for any offence committed by him before that renunciation or loss of citizenship of Lesotho.

(n) If a person who has made a declaration of renunciation in accordance with the provisions of this section does not become a citizen of any other country as aforesaid within three months or within such further period as the Minister or the Registrar-General may allow, from the date on which he made that declaration of renunciation, he is deemed to be, and to have remained a citizen of Lesotho notwithstanding that he has made that declaration of renunciation.

(o) The Minister may refuse to cause the registration of a declaration of renunciation of citizenship of Lesotho -

(a) if in his opinion it is not conducive to the public good that the person who has made the declaration should cease to be a citizen of Lesotho; or

(b) if it is made during a war in which Lesotho may be engaged."

[11] It was argued that section 22 was inconsistent with section 8 of the same Order (now with section 41 of the Constitution) and that the conflict was due to the fact that whereas section 41 provided for a Lesotho citizen to lose his citizenship by the operation of law, section 22 required him to renounce his citizenship. The inconsistency could only be resolved, it was argued, in the following way: by excluding citizens of birth from the operation of section 41 and by limiting the application of section 22 to such citizens only. Put differently, a Lesotho citizen by birth would not lose his

nationality if he acquired dual citizenship: such citizenship could be lost only by renunciation. On the other hand it would follow that citizens of Lesotho who acquire citizenship otherwise than by birth would have no right of renunciation under section 22 of the Order but they *would* be liable to lose their Lesotho nationality under section 41 of the Constitution.

[12] Interesting as counsel's aforesaid argument might be, it is fatally flawed for two compelling reasons. The first is that where there are conflicting statutes or provisions in the same statute which appear to conflict it is the duty of a court to reconcile the inconsistencies if at all possible. This has been consistently applied as it is clearly necessary to interpret the provisions so as to give full force to each (see **Sedgefield Ratepayers' and Voters' Association and Others v Government of the Republic of South Africa and Others** 1989 (2) SA 685 (C) at 700J to 701 A). I am of course aware of the fact that a constitution is to be interpreted according to principles differing from those that apply to other statutes and, moreover, that an express provision in a constitution cannot be contradicted by the terms of an ordinary statute (cf. Premier Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC) at pars [12] and [13]). Be

that as it may, on a proper construction of the two sections now in issue there is no inconsistency or conflict between them. The second reason is that the respondents' argument is contrary to the clear and unambiguous language of both sections and would require us to make radical modifications to both sections, a process which is permitted only in exceptional circumstances. I will deal with each of these grounds in turn, although, it may be noted that in the instant case they overlap.

[13] In Mokoena v Mokoena and Others C of A (CIV) No.2 of 2007, (par 10) the apparent inconsistency between sections 8 and 22 of the 1971 Citizenship Order was raised but not decided. I use the word "apparent" advisedly for in my view the submission made by the appellants' counsel in relation to section 22 disposes of the matter. What section 22 envisages is renunciation of Lesotho citizenship by a Lesotho national who, for instance, wishes to become or remain a citizen of another country which prohibits dual citizenship. This section has no application in the present appeal. In terms of section 41 of the Constitution, however, a Lesotho citizen who is also a citizen of another country ceases to be a citizen of Lesotho unless he renounces his

citizenship of the other country by the specified date.

[14] Moreover to accede to the respondents' argument would require this Court to modify the language used in both section 41 and section 22. Section 41 (1) in clear and explicit words applies to

"any person who is a citizen of Lesotho and also a citizen of some [other] country".

The respondents' counsel urges us to read into the section the words "other than by birth" after the phrase "a citizen of Lesotho". Furthermore we would have to modify the language of section 22 (1) (a) by inserting the words "by birth" after the words "is a citizen of Lesotho". It is only in exceptional cases that a court may alter the unambiguous words of a statute and a fortiori of a constitution. As Corbett JA remarked in Rennie NO v Gordon and Another NNO 1988(1)SA1 (A) at 22 E:

"Over the years our Courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands".

As I have explained in par [13] above effect can and should

be given to both sections now in issue without tampering with the words actually used. In this regard it should also be noted that where the relevant provisions of the Constitution and the Order seek to distinguish between various forms of citizenship (birth, descent, registration and naturalization) they do so in clear and specific terms. The effect of this conclusion is that the first respondent falls squarely within the provisions of section 41 of the Constitution, a view also held by Peete J in the Court a quo.

[15] It was also submitted on the respondents' behalf that as section 23 of the 1971 Citizenship Order does not entitle the Minister to deprive a citizen by birth of his citizenship, section 41 of the Constitution by implication cannot apply to such a citizen. In my view there is no substance in this submission. It is so that in terms of section 23 it is only citizens by naturalization or registration who may be deprived of Lesotho citizenship. Section 41 of the Constitution, however, deals with a different aspect. It is concerned with the automatic *cessation* of Lesotho nationality under certain circumstances. The first respondent has not been *deprived* of his citizenship by the Minister or anyone else. He lost it because he acquired South African citizenship which he

failed to renounce by the specified date.

[16] As mentioned earlier, counsel for the respondents submitted that the first respondent's South African citizenship was held precariously. This submission was based on the fact that in his applications for a South African identity document and passport, it was falsely represented to the South African authorities that the first respondent was born in that country. Counsel did not argue that the first respondent had thereby lost his South African citizenship and in my view he was correct in not pressing that submission. We cannot speculate on what action, if any, the South African authorities might take as a result of the incorrect information given to them. In particular we do not know whether or not this will lead to the cancellation of the first respondent's South African citizenship at some future time. All that needs to be said - and this is not in dispute on the affidavits before this Court - is that the first respondent is at present a South African citizen.

[17] To sum up:

(a) When the Constitution became operative in 1993 the first respondent held dual citizenship. In order to retain

his Lesotho nationality he had to renounce his South African citizenship by the specified date.

(b) As he failed to renounce his South African citizenship, he ceased to be a citizen of Lesotho by the operation of law. As Peete J put it in the Court a *quo*:

> "It is not ..... [the first respondent's] failure to renounce Lesotho citizenship but [his] failure to renounce citizenship of [South Africa] within five years after attaining majority that [resulted in the loss of his Lesotho citizenship]".

[18] It therefore follows that the majority judgment was wrong and that the appeal must succeed. It is only necessary to add at this stage that the appellants do not seek a costs order against the respondents.

[19] Before concluding this judgment, there are two matters which need to be stated. The first concerns the circumstances that led to the respondents launching the application. The first respondent was a presenter on a local radio station. During the run-up to the most recent general election he permitted members of the public to express their views over the airwaves. Some of these views were critical of the government. Although this was denied by the

appellants, it seems to us that such criticisms led to the harassment of the first respondent by government functionaries and eventually to the issue of an order purporting to deport him from Lesotho. The second appellant, who issued the order, did not refute the first respondent's contention that the decision to deport him was due to political considerations. For this reason the deportation order was set aside by the court a *quo* and rightly so, and, as has been mentioned, there was no appeal against that decision. I have had regard to the possibility and perhaps even the likelihood - that the first respondent might have made false and harmful allegations about certain cabinet Ministers. If so, this should have been dealt with by those affected under the ordinary laws of the land and not by executive action.

[20] The second aspect concerns a matter to which I adverted in par [1] of this judgment - the fact that many citizens of this country might also hold South African citizenship. Dual citizenship is not permitted in many other jurisdictions, including Botswana and South Africa. However it occurs to us that Parliament should consider enacting legislation to permit citizens of Lesotho who acquire

citizenship of South Africa to hold such dual citizenship in certain defined circumstances, e.g. where the person concerned was born in this Kingdom. This suggestion, it would seem, is well worth careful consideration having regard to the geographical situation of Lesotho as an enclave surrounded by South Africa, the economic interdependence of the two countries and because so many Lesotho citizens seek employment in South Africa and apparently acquire citizenship of that country. Peete J in the court a quo referred to the hardships that may be faced by many Basotho citizens who formally acquire citizenship in South Africa. He said:

> "The Constitution of Lesotho and Lesotho Citizenship Act solemnly declare that dual citizenship is not allowed - you either retain your Lesotho citizenship by renouncing the foreign citizenship or you cease being a Lesotho citizen ex lege 5 years after reaching the age of majority. That is the law as [it] should be administered by the courts of law in Lesotho"

He added:

> "The only remedy to this hardship can only be brought about through a constitutional/legislative amendment changing the relevant provisions in Chapter IV of the 1993 Constitution of Lesotho and in the Lesotho Citizenship Act of 1971.
>
> Whilst inevitable absurd results or undue hardships must always be avoided when interpreting the law, no benevolent interpretation should be allowed to supercede otherwise clear constitutional or statutory provisions which the courts of law must enforce".

I agree with the remarks of the learned Judge.

following order is made:

1. The appeal is allowed with no order as to costs;
2. The order of the Court a *quo* is set aside and is replaced with the following:

"(a) The order of deportation dated 12 March 2007 issued by the second respondent in respect of the first applicant is declared to be null and void and is set aside;

(b) For the rest the application is dismissed;

(c) There is no order as to costs."

L.S. MELUNSKY
JUDGE OF APPEAL

I AGREE: J. H. STEYN
JUDGE OF APPEAL

I AGREE: F.H. GROSSKOPF
JUDGE OF APPEAL

I AGREE: J.W. SMALBERGER
JUDGE OF APPEAL

I AGREE: J.J. GAUNTLETT
JUDGE OF APPEAL

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