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b/b. 155/87

IN THE SUPREME COURT OF SOUTH

APPELLATE DIVISION

In the matter between

STEPHEN VUKILE TSHWETE ..... Appellant

and

THE MINISTER OF HOME AFFAIRS

OF THE GOVERNMENT OF THE

REPUBLIC OF SOUTH AFRICA ..... Respondent

Coram: JOUBERT, HEFER, NESTADT, VIVIER JJA

et KUMLEBEN AJA

Date of Hearing: 16 February 1987, 24 August 1987

Date of Delivery: 2 December 1987.

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J U D G M E N T

JOUBERT, JA :

/On .....

On 30 May 1985 JONES A J in the Eastern Cape

Division dismissed with costs the appellant's application

for an order :

- "(i) Declaring that Applicant has the right, privilege or benefit of being permanently resident in the Republic (of South Africa) without any permit or exemption, and the right, privilege or benefit of entering the Republic without a visa;
- (ii) Interdicting Respondent from prohibiting or preventing Applicant from entering the Republic of South Africa without a visa or being permanently resident therein without any permit or exemption."

The judgment of the Court a quo is fully reported in 1986

(2) SA 240 (ECD). With leave of the Court a quo the

appellant now appeals to this Court against its judgment and order.

/The .....

The facts material to the appeal are undisputed.

They are briefly as follows. In 1938 the appellant, who is Xhosa speaking, was born in Springs, Transvaal. He was at all relevant times until December 1981 a citizen of the Republic of South Africa by birth. He returned with his parents to Nkqonkqweni, a portion of Peelton location near East London, where he was permanently resident and domiciled since 1979. Nkqonkqweni, is situated in the Republic of South Africa and outside the Republic of Ciskei when the latter came into existence on 4 December 1981 by virtue of the provisions of the Status of Ciskei Act No 110 of 1981 (the "Act").

/In .....

In terms of sec 6(1) of the Act, read with Schedule B

thereto, the appellant on 4 December 1981 became a

citizen of the Republic of Ciskei and ceased to be a

citizen of the Republic of South Africa.

On 22 December 1981 the then Minister of Internal Affairs issued two notices both with retrospective effect as from 4 December 1981. The one notice was issued under sec 7 bis (1) of the Aliens Act No 1 of 1937, exempting citizens of the Republic of Ciskei as a class of persons from the requirement of being in possession of temporary residence permits subject to his right to revoke such exemption in terms of sec 7 bis (3) of Act No 1 of 1937 in respect of a class of persons or a single person. The other notice issued under sec 40 (2)(a) of the Admission of Persons to the Republic Regulation Act No 59 of 1972 exempted citizens

of the Republic of Ciskei as a category of persons from visa requirements as laid down in sec 40(1)(c) of Act No 59 of 1972 subject to his right of revoking such exemptions in terms of sec 40(2)(c)(i) of the said Act in respect of a category of persons or a single person.

On 8 November 1984 the appellant received a letter from the Director-General, Department of Home Affairs, which contained the following notifications:

"I have to inform you that your exemption from the visa requirements as laid down in Section 40(1)(c) of the Admission of Persons to the Republic Regulation Act, 1972 (Act 59 of 1972) has been withdrawn. This means that before you can again enter the Republic of South Africa you will have to be in possession of a visa. Application for such a visa may be made to the nearest South African Diplomatic or Consular Representative abroad or to the Director-General for Home Affairs, Pretoria.

/Should .....

Should you in future arrive at a South African port of entry without a visa you will not be permitted to enter.

Furthermore your exemption from the requirements to be in possession of a temporary residence permit in terms of section 2(b) of the Aliens Act, 1937 (Act 1 of 1937) has also been withdrawn."

The purported effect of these notifications was that the appellant would from then onwards require a temporary residence permit to reside at Nkqonkweni or elsewhere in the Republic of South Africa. If he moved across the borders of the Republic of South Africa he would require a visa to enter it.

As a matter of urgency the appellant applied in the Court a quo against the respondent for the relief set out supra.

/Relying .....

Relying on the provisions of sec 6(3) of the Act the appellant maintained that his existing right of residence without a permit in the Republic of South Africa and his existing right to move to and from the Republic of South Africa without a visa were preserved with the coming into operation of the Act on 4 December 1981 when he was deprived of his South African citizenship. He also maintained that he could not be deprived of his preserved existing rights by administrative action as the Director-General purported to do by his notifications on 8 November 1984.

Sec 6(3) of the Act provides as follows :

/"No .....

"No citizen of the Ciskei resident in the Republic at the commencement of this Act shall, except as regards citizenship, forfeit any existing rights, privileges or benefits by reason only of the other provisions of this Act."

(My italics).

Read in the context of the Act as a whole the words "the other provisions of this Act" in sec 6(3) undoubtedly refer to the provisions of sec 6(1) which reads as follows:

"Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of Ciskei and shall cease to be a South African citizen."

The effect of sec 6(1) was that on 4 December 1981 South African citizens, who fell within the categories of persons defined in Schedule B to the Act, by operation

/of .....



of law ceased to be South African citizens, in lieu of which they became citizens of Ciskei. Loss of South African citizenship resulted in the acquisition of the status of an alien or foreigner (peregrinus) by becoming a citizen (civis) of Ciskei. Moreover, in terms of sec 1(1) of the Act Ciskei was declared a sovereign independent state which ceased to be constitutionally and geographically part of the Republic of South Africa. The latter ceased to exercise any authority over Ciskei (sec 1(2)). Sec 3(1) empowered inter alia the Legislative Assembly of Ciskei to enact laws (including a constitution) for Ciskei in the manner prescribed by the National States Constitution Act No 21 of 1971. The

/Republic .....

Republic of Ciskei Constitution Act No 20 of 1981,  
duly enacted by the Legislative Assembly of Ciskei and  
signed by the chairman of that body in accordance with the  
provisions of the Republic of Ciskei Constitution Act No 20  
of 1981, was published on 4 December 1981 in a Government  
Gazette of Ciskei and came into operation on the same day.  
Sec 67 (1) of the Republic of Ciskei Constitution Act No  
20 of 1981 provided for the acquisition of Ciskeian citizen-  
ship. The constitutional evolution of Ciskei in consti-  
tutional law as a sovereign and independent state with its  
own state territory was thus finally completed on 4 December  
1981. The recognition of Ciskei in international law  
as a sovereign and independent state is an entirely  
different matter which does not concern us in the present

/appeal .....

appeal. Until now the sovereign independence of Ciskei has not been recognized by members of the world community of states.

To understand the provisions of the Act it is necessary to have regard to the important pre-independence legislation which directed the various stages of Ciskei's constitutional evolution in its transition to sovereignty and independence. For present purposes the relevant pre-independence statutes and proclamations are broadly speaking the following :

- (i) The Glen Gray Act No 25 of 1894 (C) provided for the creation of locations and the control of them by location

/boards ...

boards as well as the establishment of district councils for the administration of local affairs in the district of Glen Gray (i.e. a portion of the Ciskeian territory).

This system of local government was also introduced by proclamation in an adapted form in the Transkeian territories.

- (ii) The Black Authorities Act (original title : Bantu Authorities Act) No 68 of 1951 abolished the Native Representative Council and amended the Representation of Natives Act No 12 of 1936. It provided a framework for the establishment of Black tribal, community and territorial authorities in respect of Black tribes or communities in Black areas. See M.P. Olivier's unpublished doctoral

/thesis .....

thesis, h Juridiese Evaluering van Soewereiniteits-  
vestiging en die Oordrag van Owerheidsgesag met besondere  
verwysing na die Suid-Afrikaanse Situasië (June 1986,  
 University of South Africa), at p 303-304 :

"Die Wet op Swart Owerhede 68 van 1951 het die instelling van h hiërargiese struktuur van stam- of gemeenskapsowerhede, streeks- owerhede en gebiedsowerhede voorsien in gebiede waarvan die territoriale basis reeds deur vroeëre wetgewing verskaf is. Hierdeur is erkenning verleen aan die stamkonsep en tradisionele gesagstrukture onder die swartes, asook aan swart beheer oor swart gebiede. So byvoorbeeld het bestaande stam- of gemeenskapsregerings die basis van die statutêre stam- of gemeenskapsowerhede gevorm en moes sodanige owerhede hulle funksies ooreenkomstig inheemse reg uitoefen. Waar die stam- of gemeenskapsowerhede oor advies- en bestuursfunksies beskik het, is die streeks-

/en .....

en gebiedsowerhede met adviesbevoegdhede asook met wetgewende en uitvoerende bevoegdhede ten opsigte van plaaslike aangeleenthede beklee."

By Government Notice R496 of 1961 the Ciskeian Territorial Authority was established in respect of certain areas for which Black Regional Authorities had been created. The Paramount Chief of the Rarabe section of the Xhosa tribal complex was designated as chairman of the Ciskeian Territorial Authority.

- (iii) The Promotion of Black Self-Government Act (original title: Promotion of Bantu Self-Government Act) No 46 of 1959 divided the Black peoples of South Africa into certain separate national units on the basis of language and

/culture .....

culture (sec 2). Its object was to provide for the gradual development of Black national units within their own areas to self-governing units on the basis of Black systems of government. See Olivier, op.cit., p 306-307:

"Gevolglik is die Wet op die Bevordering van Swart Selfbestuur in 1959 aangeneem. Aan- gesien daar ingesien is dat swartes nie slegs in stamverband nie, maar ook in breër volks- verband georganiseer is, is daartoe oorge- gaan om die swart bevolking in 'n aantal volks- eenhede in te deel. - - - - Hierdeur is 'n etniese grondslag vir die (latere) skepping van onafhanklike swart state gelê. Die betrokke wet het ook die instelling van die amp van kommissaris-generaal vir elke volks- eenheid gereël, waardeur verteenwoordiging van die Suid-Afrikaanse regering by die volks- eenhede teweeggebring is. Voorts is die bevoegdheids- en funksies van 'n gebiedsowerheid ingevolge die Wet op Swart Owerhede deur

die .....

die 1959-wet heromskrywe. en uitgebrei, en is die oordrag van trustgrond en bevoegdhede daaromtrent aan 'n gebiedsowerheid voorsien."

(iv) The National States Citizenship Act (formerly the Bantu Homelands Citizenship Act) No 26 of 1970 introduced a rather strange concept of so-called citizenship in respect of every Black territorial authority area. It provided that every Black person in South Africa not a so-called citizen of a Black self-governing territory in South Africa (which included the Transkei) and not a prohibited immigrant became a so-called citizen of the Black territorial authority area in which he was born, or domiciled, or spoke a Black language used in such area, or was related

/to ....



to any member of the Black population of such area.

Such a Black person retained his South African citizenship

but had to exercise his franchise rights in such area.

Prior to its amendment in 1986 sec 2 of Act 26 of 1970,

as originally enacted, provided as follows:

"(1) There shall be citizenship of every territorial authority area.

(2) Every Bantu person in the Republic shall, if he is not a citizen of any self-governing Bantu territory in the Republic and is not a prohibited immigrant in the Republic, be a citizen of one or other territorial authority area, in accordance with the provisions of section 3.

(3) Every person who is by virtue of the provisions of section 3 a citizen of a territorial authority area shall,

/subject ...

subject to the provisions of this Act, exercise such franchise rights in that area and enjoy all other rights, privileges and benefits and be subject to all the duties, obligations and responsibilities of citizenship of that territorial authority area as are accorded to or imposed upon him in terms of any law.

- (4) A citizen of a territorial authority area shall not be regarded as an alien in the Republic and shall, by virtue of his citizenship of a territory forming part of the Republic, remain for all purposes a citizen of the Republic and shall be accorded full protection according to international law by the Republic.
- (5) No person who is a citizen of a territorial authority area shall by reason only of the provisions of this Act be relieved of any duties, obligations or responsibilities or forfeit any existing rights, privileges or benefits which but for the said provisions would have been applicable in his case."

/See .....

See Olivier op.cit., p 314-315. It should be borne in mind that, unlike Bophuthatswana, Ciskei and Venda, the Transkei progressed directly from Black territorial authority status to self-government according to the provisions of the Transkei Constitution Act No 48 of 1963 without having acquired the intermediate status of responsible government. Chapter III of the Transkei Constitution Act No 48 of 1963 which deals with citizenship is in condensed form unmistakably the precursor of Act 26 of 1970. The relevant provisions of sec 7 of the Transkei Constitution Act No 48 of 1963 provide as follows :

/" (1) There .....

"(1) There shall be a Transkeian citizenship and every person who is a citizen of the Transkei by virtue of the provisions of sub-section (2) shall, subject to the provisions of this Act, exercise franchise rights in the Transkei and enjoy all other rights, privileges and benefits and be subject to all the duties, obligations and responsibilities of citizenship in the Transkei as are accorded to or imposed upon him in terms of this Act.

(2) - - - - -

(3) The Republic shall not regard a citizen of the Transkei as an alien in the Republic and shall by virtue of his citizenship of a territory forming part of the Republic of South Africa regard him for all external purposes in terms of international law as a citizen of the Republic and afford him full protection according to international law.

/ (4) No .....

- (4) No person who is a citizen of the Transkei shall by reason only of the provisions of this section be relieved of any duties, obligations or responsibilities or forfeit any existing rights, privileges or benefits which but for the said provisions would have been applicable in his case."

This concept of so-called Transkeian citizenship in 1963, before the Status of the Transkei Act No 100 of 1976, declared the Transkei a sovereign and independent state, was really the precursor of the so-called citizenship referred to in Act 26 of 1970.

- (v) The National States Constitution Act (formerly the Bantu Homelands Constitution Act) No 21 of 1971 provided the framework within which the State President could, after

/consultation .....

consultation by the Minister of Plural Relations and Development (subsequently the Minister of Bantu Administration and Development) with a territorial authority, by proclamation in the Gazette transform a territorial authority into a legislative assembly for the Black area for which such territorial authority had been established (sec 1(1)). Provision was also made for the establishment of an executive council (sec 5). For the sake of convenience the status of the transformed system of government may be called responsible government. Chapter 2 contains the provisions applicable to the transformation of a responsible government into

/a .....

a self- government of a self- governing territory

(secs 26 to 36 A inclusive). Self- government of a

Black area would constitute the last pre- independence

stage of constitutional development before the attain=

ment of sovereignty and independence by such Black area.

By Proclamation R118 of 1971 the State President, acting

in terms of secs 1, 2 and 5 of Act 21 of 1971, established

with effect from 1 June 1971 a legislative assembly,

to be known as the Ciskeian Legislative Assembly, for

the area described in the Schedule to the Proclamation.

The Ciskei thus acquired the status of responsible

government. Subsequently by the Ciskei Constitution

/Proclamation ....

Proclamation R187 of 1972 the State President, acting in terms of secs 2, 5 and 26 of Act 21 of 1971 and sec 108 of the Republic of South Africa Constitution Act No 32 of 1961 after consultation of the Ciskeian Legislative Assembly by the Minister of Bantu Administration and Development, declared Ciskei to be a self-governing territory within the Republic of South Africa with effect from 1 August 1972 (sec 2(1)). Ciskei as a self-governing territory had reached the last pre-independence stage of its constitutional evolution. Only so-called citizens of Ciskei registered as voters were entitled to vote at any election of members to the Ciskeian Legislative Assembly (sec 6(2) read /with .....



with the definition of "citizen" in sec 1).

It is appropriate to have regard to certain events which immediately preceded the independence of Ciskei. A referendum was held to ascertain the attitude of so-called citizens of Ciskei towards the vexed question of the independence of Ciskei. See Olivier, op.cit., p 403 footnote 184. It was the government of Ciskei that expressed the desire that Ciskei should become an independent state as appears from the preamble to the Act. Moreover, the government of South Africa.. and the government of Ciskei entered into a large number of agreements concerning relationships between South Africa and Ciskei as

/from .....

from the date on which the latter became independent for an initial period of 5 years from that date. Worthy of mention is the "Agreement between the Government of the Republic of South Africa and the Government of Ciskei relating to the movement of citizens of the Republic of South Africa and of Ciskei across the common borders" published in Gazette No 8204 on 14 May 1982. Article 1 of this Agreement provides as follows:

"The movement to and the sojourn in the Republic of South Africa of citizens of Ciskei and the movement to and the sojourn in Ciskei of citizens of the Republic of South Africa shall, subject to the provisions of this Agreement, be governed by the laws and regulations regulating the admission to,

/residence ....

residence in and the departure from the country in question."

This Agreement is an executive act which is binding between the governments of South Africa and Ciskei but inasmuch as it was not adopted or ratified by a legislative act of our legislature it does not form part of our municipal law. See Pan American World Airways Incorporated v S A Fire and Accident Insurance Co Ltd, 1965(3) SA 150 (AD) at p 161 B-D.

To revert to the provisions of sec 6(1) and (3) of the Act. I have indicated supra that on loss of their South African citizenship Ciskeian citizens became foreigners (peregrini) in the Republic of South

/Africa .....

Africa. On reading sec 6(1) in conjunction with sec 6(3) it is clear that the word "citizenship" in sec 6(3) refers to South African citizenship. The latter concept as used in sec 6(3) is not defined in the Act.

"Citizenship may be distinguished from nationality: whereas citizenship identifies a person internally, i.e. as against foreign states, as being part of the structure of a state, nationality identifies a person internationally, i.e. as against foreign states, as being under the protection of his particular state." The Constitutions of Transkei, Bophuthstswana, Venda and Ciskei,

1985, edited by M P Vorster, M Wiechers and D J Van Vuuren at p.11). In my judgment it is clear from the provisions

of the Act as a whole that the legislature intended South African citizenship to encompass the legal status of a person internally as a subject of the Republic of South Africa. To suggest that Ciskeians by the loss of their South African citizenship merely lost the "higher category of political rights", viz the rights of franchise, is wholly untenable in the light of Ciskei's constitutional evolution in its transition to sovereignty and independence. I already indicated supra that when Ciskei acquired the status of responsible government the Ciskeians in consequence of their so-called citizenship of Ciskei had franchise

/rights .....

rights to elect members of the Ciskeian Legislative Assembly. At that stage they had no franchise rights as citizens of the Republic of South Africa to elect members of the South African House of Assembly.

On the proper construction of sec 6(3) it consists of two provisions which I shall for convenience call the "exception phrase" and the "recording clause". The exception phrase refers to South African citizenship viz. "except as regards citizenship" whereas the "recording clause" refers to the dominant provision of sec 6(3) viz : "No citizen of Ciskei resident in the Republic at the commencement of this Act shall - - - - -

/forfeit .....

forfeit any existing rights, privileges or benefits  
by reason only of the other provisions of this Act."

(My italics). In my judgment the Legislature had  
 no intention to preserve or entrench any existing rights,  
 privileges or benefits <sup>dependent on South African citizenship</sup> of Ciskeians resident in the  
 Republic of South Africa on 4 December 1981, that is  
 to say, it had no intention to raise them to the status  
 of privileged aliens. Had that been the Legislature's  
 intention it could very easily have enacted that they  
 were not to be regarded as aliens in the Republic of  
 South Africa. Compare sec 7(3) of the Transkei Con=  
 stitution Act No 48 of 1963. By means of the recording

/clause .....

clause the Legislature intended to affirm that Ciskeian citizens who were resident in the Republic of South Africa on 4 December 1981 would not forfeit any existing rights, privileges or benefits by virtue of the other provisions of the Act ("by reason only of the other provisions of this Act") - the only qualification being the exception phrase relating to South African citizenship.

The reference to "resident in the Republic" in section 6(3) was necessitated by reason of the fact that as on 4 December 1981 the South African Legislature could not - even for recording purposes - legislate extraterritorially for Ciskeians not resident in the Republic of South Africa.



I have already pointed out that it was common cause that the appellant was on 4 December 1981 domiciled and permanently resident in Nkqonkqweni, i.e. in the Republic of South Africa. The acquisition or continuance of domicile or permanent residence in South Africa is according to our common law not dependent on South African citizenship. Our common law clearly distinguishes between domiciled or permanent resident foreigners and non-domiciled or non-permanent resident foreigners. See Magida v Minister of Police, 1987(1) SA 1(A) at p8 J-9A, I-J. I shall hereinafter investigate the position whether the appellant on the loss of

/his .....

his South African citizenship lost or retained his right to be domiciled and permanently resident in the Republic of South Africa. That necessitates a careful scrutiny of the relevant provisions of the Aliens Act No 1 of 1937.

I now turn to consider the relevant provisions of the Aliens Act No 1 of 1937. Sec 2 thereof which places a restriction on alien immigration reads as follows:

"Subject to the provisions of section 7 bis and 12 no alien shall -

- (a) enter or be in the Union for purposes of permanent residence therein, unless he is in possession of a permit to enter the

/Union .....

Union for the said purpose, issued to him in terms of section 4; or

- (b) enter or be in the Union or any particular portion of the Union for the purpose of temporary sojourn therein, unless he is in possession of a temporary permit issued to him in terms of section 5(1) or unless he has been permitted to enter under section 7."

An alien is defined by sec 1 as "a person who is not a South African citizen". That is to say, a peregrinus.

Sec 7 bis (1) empowers the Minister in his discretion to grant exemptions from the provisions of sec 2 while sec 7 bis (3) empowers him in his discretion to withdraw any exemption granted by him. Sec 4, which deals with the application for permits for permanent residence in the then

/Union .....

Union (now the Republic of South Africa) and with the grant of such permits, is not relevant for purposes of this appeal. The same holds for sec 5 which deals with the application for and the grant of temporary residence permits. The relevant portion of sec 12 provides as follows:

"(1) The provisions of section two shall not apply -

(a) to an alien who has lawfully acquired a domicile in the Union or who, prior to the first day of February 1937, lawfully entered the Union for purpose of permanent residence therein; or

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(My italics).

/ At.... ..

At all relevant times before 13 June 1986 the word "domicile" according to sec 1 of the Aliens Act No 1 of 1937 had the meaning ascribed to it in sec 30 of the Admission of Persons to the Union Regulation Act No 22 of 1913, the gist of which (for purposes of this case) was "the place in which a person has his present permanent home or present permanent residence, or to which he returns as his present permanent abode, and not for a mere special or temporary purpose". As from 13 June 1986 the word "domicile" according to sec 1 of the Aliens Act No 1 of 1937 acquired the meaning ascribed to it in sec 1 of the Admission of Persons to the Republic Regulation Act No 59 of 1972. Sec 1(1) of the latter Act added "subject to the provisions of /subsections .....

subsections (2), (3) and (4)" to the gist of the definition of domicile as found in sec 30 of the Admission of Persons to the Union Regulation Act No 22 of 1913, as quoted supra. Sec 1 (3) of the Admissions of Persons to the Republic Act No 59 of 1972, however, introduced inter alia the following new qualification viz :

"For the purpose of this Act a person shall be deemed to have lost his domicile within the Republic, in the case of any person who was or is a South African citizen, on the day on which he ceased or ceased to be a South African citizen - - - - -"

This new qualification, which as from 13 June 1986 formed part of the word "domicile" according to sec 1 of the Aliens Act No 1 of 1937, is for purposes of this case

/irrelevant .....

irrelevant inasmuch as we are concerned with the meaning of the word "domicile" in the said Act before the introduction of the said qualification. Mr Hugo, on behalf of the respondent, contended that the word "acquired", as used in sec 12(1)(a), according to its ordinary meaning involved a personal effort on the part of the acquirer and that the appellant did not lawfully acquire a domicile in the Republic of South Africa. This contention overlooks the fact that the appellant acquired ex lege a domicile by birth in the Republic of South Africa and that he subsequently acquired a domicile by choice at Nkquonkweni where he was permanently resident. It also overlooks the fact that the word "domicile" in sec 12(1)(a) has the

/meaning .....

meaning ascribed to it in sec 30 of the Immigrants

Regulation Act No 22 of 1913, the gist of which I quoted

supra as appertaining to "present permanent residence".

There is therefore no merit in this contention. Because

the appellant was lawfully domiciled and permanently

resident in the Republic of South Africa when he became a

peregrinus on 4 December 1981 he falls, in my judgment,

within the provisions of sec 12(1)(a) of the Aliens Act

No 1 of 1937. It follows accordingly that the provisions

of sec 2 of the latter Act are inapplicable to the appellant

who is therefore unaffected by the ministerial notice of

22 December 1981, by which the respondent exempted citizens

of Ciskei from the requirement of being in possession of

temporary .....



temporary residence permits, and the subsequent withdrawal on 8 November 1984 of the conferred exemption. The appellant is therefore entitled to an order that he has the right of being permanently resident in the Republic of South Africa without any permit or exemption.

I now turn to deal with the question whether the appellant has a right to move to and from the Republic of South Africa without a visa. The position at common law prior to the Departure from the Union Regulation Act No 34 of 1955 when there existed no statutory provision restricting citizens of the Union of South Africa from leaving it was considered by this Court in Sobukwe and

/Another .....

Another v Minister of Justice, 1972(1) SA 693 (AD) at

p 703 C-G. According to sec 2 of Act No 34 of 1955

"no person shall leave the Union for the purpose of  
proceeding to another country -

- (a) unless he is, at the time when he leaves the Union,  
in possession of a valid passport or a permit;
- (b) except at a port, unless his passport or permit  
bears an endorsement - - - - - "

According to sec 1 of Act No 34 of 1955 the word "port"

has the meaning ascribed to it by section 30 of the

Admission of Persons to the Union Regulation Act No 22

of 1913. It follows that prior to 4 December 1981

the appellant as a citizen of the Republic of South Africa

/had .....

had no unqualified right to leave this country. He

had to comply with the provisions of sec 2 of Act 34 of

1955. From 4 December 1981 he as a peregrinus has

likewise to comply with the provisions of sec 2 of Act 34

of 1955 in order to leave this country.

Nor is there an unqualified right to

enter or return to the Republic of South Africa. According

to sec 32(1) of the Admission of Persons to the Republic

Regulation Act No 59 of 1972 "no person shall enter the

Republic at any place other than a port of entry".

Moreover, sec 40(1) of the said Act provides as follows:

"Any .....

"Any person entering the Republic who fails on demand by an immigration officer to produce to him an unexpired passport or other document of identity of a class recognised by the Minister -

- (a) which was issued to him on behalf of the Government of the Republic or on behalf of another government recognised by the Government of the Republic; and
- (b) which contains a personal description of him, the name of the country in which he was born and the date of his birth, and to which is attached a photograph of him, wherein his features are clearly and correctly depicted; and
- (c) which bears a valid visa or an endorsement by a person authorized thereto by the Government of the Republic to the effect that authority to proceed to the Republic for the purpose of being examined under this Act has been granted by the Minister or a person acting under his authority, or is accompanied by a document containing a statement to that effect together with particulars of such passport or other document of identity, /shall .....

shall be a prohibited person, unless he is proved to be a South African citizen by birth or descent."

(My italics).

Furthermore, any person who entered this country without complying with the requirements of sec 40(1) is according to the provisions of sec 40(4) a prohibited person "unless it is proved that such person is a South African citizen by birth or descent". (My italics). Should such a prohibited person nonetheless enter this country he would be liable to be arrested and removed from this country under a warrant issued under Act No 59 of 1972 (Sec 40(5)). Since the appellant ceased on 4 December 1981 to be a South African citizen by birth or descent he cannot at the /moment .....

moment of entering the Republic of South Africa claim to be a South African citizen by birth or descent, as required by the exception provided for in sec 40(1).

It follows that the appellant on entering this country must comply with the provisions of sec 40(1) such as having a valid visa. Failure to do so would cause him to become a prohibited person subject to the consequences of arrest and removal from the Republic of South Africa. The right which the appellant had prior to 4 December 1981 to enter this country without a valid visa was wholly dependent on and related to his status as a South African citizen by birth or descent.

/Loss .....

Loss of this status deprived him of this right of entering this country without a valid visa. It follows, in my judgment, that this right was not an existing right, which was not dependent on and unrelated to his South African citizenship. It cannot therefore be said to have been preserved by sec 6(3) of the Act. The appellant is therefore not entitled to an order that he has the right to enter the Republic of South Africa without a valid visa.

The appeal accordingly succeeds partially to the extent that the appellant is entitled to be permanently resident in the Republic of South Africa without any official permission such as a permit or an exemption.

/In .....

In the result the following orders are granted:

- 1(a) The appellant is entitled to be permanently resident in the Republic of South Africa without any permit or exemption.
  - (b) The appellant is not entitled to enter the Republic of South Africa without a valid visa.
  - (c) The appellant is entitled to the costs of appeal which are to include the costs of two counsel.
2. The following order is substituted for the order of the Court a quo :

"The relief sought in prayer (c)(i) of the Notice of Motion is granted to the extent that the applicant has the right to be permanently resident in the Republic of South Africa without any permit or exemption. Save as aforesaid the other relief sought in prayer (c)(i) of the Notice of Motion is refused. The applicant is awarded his costs which are to include the costs of two counsel".

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C.P. JOUBERT JA.

HEFER J A )  
VIVIER J A ) Concur.



Bib

155b/87

STEPHEN VUKILE TSHWETE

APPELLANT

and

THE MINISTER OF HOME AFFAIRS OF THE  
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

RESPONDENT

KUMLEBEN, AJA

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

STEPHEN VUKILE TSHWETE

APPELLANT

and

THE MINISTER OF HOME AFFAIRS OF THE  
GOVERNMENT OF THE REPUBLIC OF SOUTH  
AFRICA

RESPONDENT

CORAM: JOUBERT, HEFER, NESTADT, VIVIER JJA  
et KUMLEBEN AJA

DATE HEARD: 16 FEBRUARY 1987 and 24 AUGUST 1987

DATE DELIVERED: 2 DECEMBER 1987

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J U D G M E N T

KUMLEBEN, AJA:

I have had the privilege of reading

the/ .....

the judgments of my Colleagues. As they indicate there are two issues to be determined: whether appellant is entitled permanently to reside in the Republic of South Africa ("the Republic") without any permit or exemption; and whether he may enter the Republic without a visa.

I agree that the first issue ought to be decided in favour of the appellant, not only on the grounds stated in the judgment of JOUBERT JA but also, and primarily, by virtue of the provisions of sub-section 6(3) ("the subsection") of the Status of Ciskei Act, 110 of 1981 ("the Act"). In fact in my view the subsection is decisive of both issues in favour of appellant.

The subsection has been quoted in both judgments but for easy reference I repeat its terms. It reads as follows:

"(3) No citizen of the Ciskei resident in the Republic at the commencement of this Act shall, except as regards citizenship, forfeit any rights, privileges or benefits by reason only of the other provisions of the Act."

The subsection was plainly intended to meliorate, in the case of certain persons, the consequences of loss of South African citizenship. This is achieved by the preservation of the rights, privileges and benefits such persons formerly exercised and enjoyed. (For convenience, I shall refer, on the one hand, to that portion of the subsection which preserves rights, etc as the "preservation clause" and, on the other hand, to the qualification - "except as regards citizenship/.....

citizenship" - as "the exception").

I respectfully agree with JOUBERT JA.

that the words "the other provisions of this Act"

appearing in the subsection refer to sec 6(1) of the

Act; and that the phrase "as regards citizenship" in

the exception relates to South African citizenship.

I also accept that "residence" means permanent resi-

dence. It is not clear why "only" was used in the

subsection. Its purpose may be to state or affirm

ex abundanti cautela that such rights are not en-

trenched and may be revoked or altered by subsequent

legislation in which event the preservation clause

could no longer be relied upon. Be that as it may,

for the purposes of the present enquiry, the use of the

word "only" does not appear to be of any significance.

It/.....

It was common ground that the sub-section (whatever its meaning and effect) applies to the appellant in the sense that he falls within the category of persons for whose benefit it was enacted: he was permanently resident in the Republic on 4 December 1981, the date on which the Act was promulgated. At that time he was a South African citizen by birth. As such, as my Brother NESTADT points out, he was neither an alien for the purposes of sec 2 of the Aliens Act, 1 of 1937, nor a prohibited person under sec 40 (1), (4) or (5) of the Admission of Persons to the Republic Regulation Act, 59 of 1972. He was therefore, up until the time that the Act came into force, entitled to the rights he now claims in the declarator.

The/ .....

The controversial and critical question, on which the fate of this appeal depends, is whether the preservation clause read with the exception preserves such rights. In this enquiry it is of cardinal importance to appreciate that the Legislature intended both the preservation clause and the exception to have efficacy: not that one should eviscerate the other.

It follows - and this conclusion cannot be avoided - that in interpreting the subsection one is obliged to reconcile them by assigning an appropriate meaning to each. The issue cannot be resolved by relying upon one without determining the meaning, purpose - and intended impact - of the other.

Although/ .....

Although the meaning of the subsection is to be ascertained from an examination of all its provisions, it is convenient in the first place to consider the language of the preservation clause.

The Act, as a whole, and sec 6 (1) in particular, brings about no diminution or change of status other than loss of South African citizenship. Therefore, had the subsection (subsec 6 (3)) not been inserted, it is the rights etc attaching to such citizenship - not any others - which would have been forfeited. It follows that the rights, etc referred to in the subsection are, and can only be, those derived from such status, that is, by virtue of having been a South African citizen. The language preserving such rights

is/ .....



is explicit and is cast in the widest possible terms:

not only legal rights but also "privileges" and "benefits"

(all three of which I shall for convenience refer to as

"rights") are preserved and there is nothing in the

subsection which suggests that they ought to be given a

restricted meaning. On the contrary, the use of the word

"any" confirms that they were intended to have a wide

connotation.

The inference is therefore inescapable

that, for those who qualify, the status quo ante as regards

the rights derived from or acquired by virtue of South African

citizenship are to be maintained, notwithstanding the fact

that in terms of sec 6(1) such persons are henceforth no

longer/ .....

longer South African citizens. (This does of course not mean that subsequent South African legislation could not alter their legal position, an aspect to which I shall return.) Thus the terms of the preservation clause, one must conclude, preserve the rights in issue.

The further question is whether the inclusion of the exception gives the subsection as a whole a different meaning which results in the forfeiture of such rights.

Mr HODES, who appeared for the appellant, submitted that the preservation clause and the exception taken at face value are contradictory since both refer to rights derived from citizenship and

that/ .....

that therefore to reconcile them one must give the word "citizenship" in the exception a narrow or more restricted meaning. In effect the contention is that of the rights preserved some are nonetheless excluded by virtue of the exception. On this line of reasoning, and with reference to certain authorities, counsel submitted that the exception referred to "political rights" or "higher political rights", which were therefore excluded whilst the residuum of rights of citizenship are protected by the preservation clause which, as he pointed out, is the dominant or main component of the subsection. The flaw in this argument lies in its first premise. If the word "citizenship" in the exception is understood as "rights derived from citizenship" and, as I have indicated, the preservation/ .....

preservation clause must be taken to have the same meaning, a contradiction does arise which is insurmountable. Any attempt to do so by distinguishing between different categories of such rights on the lines of counsels' argument, or on any other basis, is artificial and any line of demarcation umbrageous.

In my view the exception does not subtract from or contradict the provisions of the preservation clause. It says something else and was intended to serve another purpose. It refers to the status of citizenship and was inserted to reconcile as far as is necessary, or was thought to be necessary, the subsection with sec 6(1), that is, to affirm that, notwithstanding the preservation of all rights derived from citizenship, the loss of South

African/ .....

African citizenship brought about by the provisions of sec 6(1) stands. The same result could have been achieved had the Legislature, rather than insert the exception, pre-  
faced the subsection with the words "Without derogating from the provisions of subsec 6 (1), no 'citizen of the Ciskei resident' ...., etc." or with words to that effect.

"Citizenship" denotes belonging to a particular political community. It is a status and as such

"is a condition which qualifies a person for the exercise of rights"

"Status, it is submitted, is essentially the fact or condition of membership of a group; it is not the same thing as the actual abilities or disabilities which accompany such membership."

"Status, on the other hand, is a condition. Status is, if the tautology may be pardoned, essentially static. There is no

question/ .....

question of exercising a status."

(C K ALLEN "An Inaugural Lecture delivered before the University of Oxford on 7 March 1930" and published in The Law Quarterly Review XLVI page 277: the quoted passages appear on pages 30, 42 and 47).

These observations of PROF ALLEN pithily reflect the views of other authoritative writers on the subject. (See VOET 1.5.1. & 2; HEINECCIUS "Elementa Juris Civilis" 1.3.76 - "Status est qualitatis cuius ratione homines diverso jure utuntur"; VON SAVIGNY "System des heutigen Römischen Rechts" Bk 3 para 362; DONNELLUS quoted in footnote 4 of page 30 of the published address: "Conditio personae cuiusque - ius, facultas vivendi et faciendi quae velis quae ei conditioni tribuitur"; and see too MAHLUDI v REX 26 N.L.R. 298 at 303-305; and GOVU v STUART 24 N.L.R.

440 at 441.)

Sec 6 is headed "Citizenship" and sec

6(1) reads as follows:

"Every person falling in any of the categories of persons defined in Schedule B shall be a citizen of the Ciskei and shall cease to be a South African citizen."

The manifest purpose of this subsection was thus to bring about a change of status. It is in this same sense, which is its primary meaning, that "citizenship" is used in the subsection (sec 6(3)) because, as I have said, the exception has reference to sec 6(1), not to the preservation clause. This conclusion is supported by the presumption, if it is necessary to rely on it, that the same word bears the same meaning wherever it

appears/ .....

appears in an enactment, unless there is a clear indication to the contrary. See Minister of the Interior vs Machadodorp Investments (Pty) Ltd and Another, 1957(2) S A 395 (A D) at 404; Chetabhai vs Union Government and Another 1911 AD 13 at 24.

Nor can it be said that giving the word its acknowledged meaning strips the exception of substance or purpose. The Ciskei became an independent and sovereign state in terms of sec 1 of the Act simul ac semel with the loss of South African citizenship in the case of appellant and certain other persons. At that stage the newly formed Ciskei had not in the nature of things/ .....



things exercised any legislative powers (cf sec 3 of the

Act). There could be no guarantee (notwithstanding any

treaty, arrangement, supposition or its constitutional

status hitherto when the Ciskei was a National State)

that the Ciskeian Legislature would reciprocally recognise as

its citizens those persons permanently resident in the Re-

public who had lost their South African citizenship on

promulgation of the Act and who were in the Act classified

as Ciskeian citizens. (I use the term "classified"

inasmuch as citizenship of a particular country can

only be conferred on a person by the country concerned -

See Grotius "Inleiding tot de Hollandsche Rechts-

geleertheyd" 1.2.19.) If the Ciskei failed to

recognise/ .....

recognise such persons as citizens of its state, it would follow that they would not be citizens of either country or any other for that matter. One would thus expect that such rights, formerly exercised and enjoyed should be preserved at least until such time as Ciskeian citizenship with attendant rights, privileges and benefits was conferred upon them by the Legislature of the Ciskei. The main purpose of the change of status was to enable the Ciskei to confer its citizenship on the persons involved. It is therefore reasonable, and eminently equitable, that the revocation of citizenship should be accompanied by the preservation of rights derived from South African citizenship permanently or at least for an appropriate period of time. And it must be borne in mind that

the/ .....