



CASE NO: 59251/2007

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

PRETORIA 18 JUNE 2008

BEFORE THE HONOURABLE MR JUSTICE PRETORIUS

In the matter between:

CHINESE ASSOCIATION OF SOUTH AFRICA
VICTOR CHONG
ALBERT PETER FUNG

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

AND

THE MINISTER OF LABOUR

1ST RESPONDENT

THE MINISTER OF TRADE AND INDUSTRY

2ND RESPONDENT

THE MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT

3RD RESPONDENT

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

IT IS ORDERED

1. THAT it is declared that South African Chinese people:
 - (a) fall within the ambit of the definition of "black people" in section 1 of the Employment Equity Act 55 of 1998;
 - (b) fall within the ambit of the definition of "black people" in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003;
2. THAT the first and second respondents are directed to pay the applicant's costs including the costs of occasioned by two counsel on a joint and several basis, the one paying the other to be absolved.

BY THE COURT

REGISTRAR

☐ Att: WEAVIND
HIGH COURT TYPIST: V.V. SKOSANA

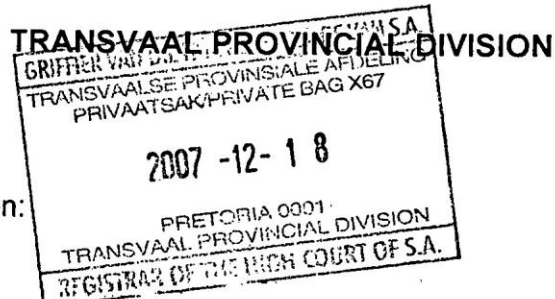
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HIGH COURT APPLICATION

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59251/07

IN THE HIGH COURT OF SOUTH AFRICA



VERITAS DIGITAL



CASE

In the matter between:

CHINESE ASSOCIATION OF SOUTH AFRICA

First Applicant

VICTOR CHONG

Second Applicant

ALBERT PETER FUNG

Third Applicant

and

THE MINISTER OF LABOUR

First Respondent

THE MINISTER OF TRADE AND INDUSTRY

Second Respondent

THE MINISTER OF JUSTICE AND

Third Respondent

CONSTITUTIONAL DEVELOPMENT

NOTICE IN TERMS OF UNIFORM RULE 16A

BE PLEASED TO TAKE NOTICE that the abovementioned Applicants intend to make application to the above Honourable Court, which application will raise issues of a constitutional nature.

TAKE NOTICE FURTHER that the constitutional issues raised will include the following:

1. Declaring that South African Chinese people:
 - (a) fall within the definition of "black people" in section 1 of the Employment Equity Act 55 of 1998;
 - (b) fall within the definition of "black people" in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003;
2. In the alternative, and only in the event that the order sought in prayer 1 is refused:

2.1

- (a) declaring that the definition of "black people" in the Employment Equity Act 55 of 1998 is inconsistent with the Constitution and invalid by virtue of its failure to include Chinese people within its ambit;
- (b) reading the following words into the definition of "black people" in the Employment Equity Act 55 of 1998 at the end of the current definition: "*and Chinese people*";

2.2

- (a) declaring that the definition of "black people" in the Broad-Based Black Economic Empowerment Act 53 of 2003 is inconsistent with the Constitution and invalid by virtue of its failure to include Chinese people within its ambit;
- (b) reading the following words into the definition of "black people" in the Broad-Based Black Economic Empowerment Act 53 of 2003 at the end of the current definition: "*and Chinese people*";

TAKE NOTICE FURTHER that any interested party, having an interest in the aforementioned constitutional issues to be raised in these application proceedings, may apply to be admitted as *amicus curiae* in the proceedings on terms agreed upon by the parties to these proceedings, *alternatively*, on such terms and conditions as may be permitted on application to the above Honourable Court.

Dated at Pretoria on 20th day of December 2007.

We agree that you are black, South African court tells Chinese

By Jonathan Clayton in Johannesburg

They have already taken over much of the continent's economy. Now they have gone one step farther. The Chinese in South Africa were officially declared "black" yesterday.

In a landmark ruling the Pretoria High Court accepted the Chinese as a "previously disadvantaged" group. This means that – at least in legal terms – Chinese South Africans will now be included in the definition of black people in legislation covering lucrative black economic empowerment (BEE) deals.

The controversial BEE policy, under which large companies have to surrender a percentage of their equity to black-run entities, is aimed at reversing decades of apartheid bias. It covers Africans, Coloureds (mixed-race people) and Indians but has been criticised widely as a politically correct form of theft by ruling party cronies.

Under white minority rule the Chinese were classified as Coloureds. In a decision that illustrated the difficulty of applying racial segregation Japanese people were given "honorary white" status – partly because they were wealthier and fewer in number than the Chinese.

When the Broad-Based Black Economic Empowerment Act and the Employment Equity Act, the two BEE legislative pillars, were adopted, the Chinese were left out and claimed that they had been discriminated against twice – first by the whites, now by the blacks.

The ruling yesterday is the culmination of an eight-year struggle by the Chinese Association of South Africa (Casa) to obtain clarity from the Government as to the status of Chinese people since the end of white rule in 1994. Patric Chong, the chairman of Casa, said: "As Chinese South Africans we were officially classified as 'Coloured' and suffered under the same discriminatory laws prior to 1994. The logical inference was thus that Chinese South Africans would automatically qualify for the same benefits as the 'Coloured' group, post1994. This was not the case and Chinese South Africans suffered a second round of unfair discrimination."

None of the government departments, cited as respondents in the case brought by CASA, opposed the application.

The first Chinese came to South Africa in the 1870s after gold was discovered. They remain one of the most politically marginalised and separate communities in South Africa today. Critics maintain that the community, which numbers several thousand, wanted to use a legal loophole to board the BEE bandwagon.

Suspicion of China has grown in the past decade as its influence on the continent has increased. Trade between Africa and China has risen to more than £20 billion since 2000. South Africa is China's largest African trading partner. In 1990 bilateral trade was worth £750 million. Today it stands at more than £3 billion.

Many commentators fear it is a one-way relationship, in which China takes advantage of corrupt leaders to clinch deals that are not in the long-term interests of Africa. Others point to the willingness of China to sell arms and overlook human rights abuses.

The lawyers for Casa welcomed the court ruling, saying that for the first time in years Chinese South Africans had a firm legal status in society.

Chinese in South Africa

47 million Population of South Africa

20,000 Estimated number of people with Chinese origins

63,000 Chinese labourers who were sent to revive the South African gold mines in 1904

SOUTH AFRICAN CHINESE “BECOME BLACK”

The High Court in South Africa has ruled that Chinese South Africans are to be reclassified as black people.

It made the order so that ethnic Chinese can benefit from government policies aimed at ending white domination in the private sector. The Chinese Association of South Africa took the government to court, saying its members had been discriminated against.

An estimated 200,000 ethnic Chinese live in South Africa. The association said their members often failed to qualify for business contracts and job promotions because they were regarded as whites.

The association said Chinese South Africans had faced widespread discrimination during the years of apartheid when they had been classified as people of mixed race.

The BBC's Mpho Lakaje in Johannesburg says the Broad-Based Economic Empowerment and the Employment Equity Acts were designed to eradicate the legacy of apartheid which left many black people impoverished. The laws give people classed as blacks, Indians and coloureds (mixed-race) employment and other economic benefits over other racial groups. The Black Economic Employment concept was initiated by the governing ANC to help previously disadvantaged individuals - to start their own businesses or become part of existing companies - thus redressing the country's historic inequalities.

Whites still on top

Our correspondent says the ruling provides clarity for corporations in South Africa on the rights of their Chinese staff - who were declared "coloured" under apartheid but are generally regarded as white today.

An example cited in court papers includes an oil company that disqualified Chinese citizens from getting a slice of its biggest empowerment transaction to date. The company says the group is not catered for in the Black Economic Empowerment codes. Another example includes a Chinese national who was refused an opportunity to buy shares from the Johannesburg Stock Exchange two years ago. None of the three government departments cited as respondents in the court case opposed the application.

In South Africa, Chinese is the New Black

A high court in South Africa ruled on Wednesday that Chinese-South Africans will be reclassified as “black,” a term that includes black Africans, Indians and others who were subject to discrimination under apartheid. As a result of this ruling, ethnically Chinese citizens will be able to benefit from government affirmative action policies aimed at undoing the effects of apartheid.

In 2006, the Chinese Association of South Africa sued the government, claiming that its members were being discriminated against because they were being treated as whites and thus failed to qualify for business contracts and job promotions reserved for victims of apartheid. The association successfully argued that, since Chinese-South Africans had been treated unequally under apartheid, they should be reclassified in order to redress wrongs of the past.

This is not the first time the classification of Chinese in South Africa has changed. In fact, the racial status of Chinese-South Africans has often shifted with the nation’s political climate and its international relations.

The first significant group of Chinese came to South Africa in the early 20th century, before a formal system of apartheid existed, to work in the gold mines. They were not encouraged to settle permanently and by 1910 almost all the mine workers had been repatriated. Those who remained struggled with racism and lived in separate communities based on language, culture and socio-economic status.

As apartheid became enshrined in law with the ascendancy of the Afrikaner government in the late 1940s, the Chinese were classified as “colored,” forced to live apart from whites, and were denied educational and business opportunities along with the right to vote. But after South Africa established an economic alliance with Taiwan in the 1970s, Taiwanese immigrants were welcomed as “honorary whites,” and other Chinese in South Africa began to be treated more like whites. Although they never attained the formal “honorary white” status of Taiwanese, Koreans and Japanese in South Africa and couldn’t vote, Chinese-South Africans were no longer required to use segregated facilities, and in the early 1980s they were exempted from some of the discriminatory laws that applied to other non-whites.

After apartheid ended in the early 1990s, the legal status of Chinese has remained in a gray area, though they’ve generally been lumped together with whites and denied the post-apartheid benefits available to other non-white groups.

South Africa has seen waves of immigrants and investment from China since 1994, and today there are as many as 300,000 Chinese living in the South Africa. But the new court decision is unlikely to benefit most of them or trigger another mass migration— it applies only to those Chinese who were South African citizens before 1994 (and their descendants), a much smaller number of around 10,000 to 12,000.

Court rules Chinese South Africans can now be called black

(AFP) – Jun 18, 2008

JOHANNESBURG (AFP) — A court on Wednesday issued a landmark ruling classifying Chinese South Africans as black, making them eligible for benefits for those discriminated against under the former apartheid regime. The ruling from the Pretoria high court came after the Chinese Association of South Africa (CASA) challenged their exclusion from laws aimed at redressing economic imbalances under white-minority rule, which ended in 1994.

CASA argued that Chinese citizens continue to be marginalised under the country's black economic empowerment and affirmative action legislation. Both laws benefit the country's black, Indian and mixed-race communities. **Patrick Chong, CASA leader, described the ruling as a victory.**

"Under the apartheid rule we were classified as coloured -- a term used to describe a mixture of black and white race," he said. "After the democratic government came into power, our status was no longer recognised as coloured, so we were in between." The organisation has pressed the government on the matter since 2000 in order to seek clarity on their racial classification. The dawn of the new democratic government in South Africa saw the passing of legislation such as the black economic empowerment and employment equity act, which seeks to redress the economic and social imbalances under apartheid.

The measures have afforded blacks access to discounted share schemes offered by large companies listed on the Johannesburg Stock Exchange. The schemes excluded the participation of the Chinese. Under affirmative action policy, blacks are also given preference for top business positions. "We have unjustly suffered a second round of unfair discrimination by not being sure of our status under the two acts," added Chong.

According to CASA, South African citizens of Chinese descent make up less than 10,000 of the country's 47 million population. Like their racial classification, the early arrival of Chinese in the country has been unclear. Karen Harris, a historian based at the University of Pretoria, said the history of South Africa's Chinese population was scantily recorded. She has pinned down their first arrival in the 1650s, as labourers for Dutch settlers in the Cape area. Other groups arrived later to work in the mines of Johannesburg after the discovery of gold in 1886. The South African War between 1899-1902 forced many Chinese to move away from what is now Johannesburg to coastal towns such as Port Elizabeth and East London.

But the largest concentration of Chinese remains in the Johannesburg region. "The Chinese have suffered discrimination long before the introduction of the country's discriminatory laws. They have always been kept on the periphery of the country's social landscape," said Harris. In his book "All Under Heaven", Darryl Accone described fellow South Africans of Chinese descent as classified non-white in the old South Africa but not deemed previously disadvantaged in the new. Sipho Seepe, an academic who specialises in African issues, said the Chinese's low profile was in part to blame for the predicament.

"The Chinese have always existed in their own small close-knit communities, but that does not justify denial for recognition," said Seepe.
