IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 21573/2021

In the matter between

[redacted] **First Applicant**

[redacted] **Second Applicant**

and

THE MINISTER OF HOME AFFAIRS **First Respondent**

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS **Second Respondent**

JUDGEMENT DELIVERED ELECTRONICALLY ON

18 APRIL 2023

Van Heerden AJ

[1] The Applicants applied for orders reviewing and setting aside the

decision by the Director-General of the Department of Home Affairs rejecting their application for permanent residence in terms of s26(b) of the Immigration Act 13 of 2002 (**"the Act"**). The Applicants also sought the setting aside of the decision by the Minister of Home Affairs (**"the Minister's Decision"**) rejecting the Applicants' applications for permanent residence in terms of s27 of the Act. The Applicants also seek additional relief by way of an order directing the Minister of Home Affairs (**"the Minister"**) and the Director-General of the Department of Home Affairs (**"the DG"**), cited as the First- and Second Respondents, to issue to the Applicants the permanent residence permits which they have applied for within fifteen (15) days of such an order (**"Substitutional Relief"**), in the alternative that the Respondents be directed to take a decision on the Applicants' application for permanent residence and to deliver a decision thereon within thirty (30) days from date of a court order.

[2] The administrative record of proceedings required in terms of Rule 53 of the Uniform Rules of Court (**"the Record"**) was delivered and filed by the Respondents on 15 September 2022 pursuant to the demand in the Notice of Motion.

HISTORY

[3] The Applicants made applications for permanent residency on 12 June 2017 which applications were ultimately rejected on 17 August 2021, more than 4 (four) years later. The Applicants brought this Application in terms of s6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 (**"PAJA"**) to have the decisions reviewed and set aside. In addition the Applicants sought the Substitution Relief directing the Respondents to issue

the permanent residency permits in terms of s8(1)(c)(ii)(aa) of PAJA on 15 December 2021. The matter was initially enrolled for 11 May 2022 when it was removed from the roll in order to allow the Respondents' legal representative to take instructions. As at 11 May 2022, no notice of opposition was delivered by the Respondents.

[4] The matter was subsequently re-enrolled for 27 July 2022 and again postponed under the order of Nziweni AJ (as she was at the time) (**"the Nziweni Order"**) to the semi-urgent roll of this division to be heard on 16 February 2023. The Nziweni Order directed:

- The Respondents to file the Record by no later than 8 September 2022;
- the Applicants to file their Supplementary Founding Affidavit(s), if any, by 29 September 2022; and
- the Respondents to file their Answering Affidavits by no later than 17 November 2022.

[5] The Record was filed seven (7) days late. Notwithstanding the Applicants receiving the Record late, the Applicants still filed its Supplementary Affidavit timeously by delivering same to the Respondents on 28 September 2022. Notwithstanding the Nziweni Order, no Answering Affidavits were forthcoming from the Respondents. On 8 February 2023 the office of the Acting Judge President enquired from the Respondents pertaining to the filing of their Answering Affidavits and required an explanation for their failure to file their Answering Affidavit(s). It appears from an e-mail, in response to the letter from the Acting Judge President's office dated 8 February 2023, that the State Attorney only instructed counsel on 10 February 2023, thus after receipt of the aforesaid communication from the

Acting Judge President's Office.

[6] On 15 February 2023, the Respondents filed an unsigned Answering Affidavit, deposed to by the Second Respondent, thus one (1) day before the hearing of this application, i.e. almost three (3) months late in term of the Nziweni Order. No affidavit, either in support of the Second Respondent's or independently, was received from the First Respondent.

[7] The Respondents failed to bring a substantive application for condonation for the lateness of its Answering Affidavit and merely dealt with its reasons for the delay in the filing of its papers in the Answering Affidavit delivered. An explanation advanced by the Second Respondent was that it is well documented in previous court cases and in the media that the Department of Home Affairs experience a backlog in the manner in which it deals with its litigation.

[8] Secondly the Second Respondent submitted that an application for permanent residency is multifaceted and therefore requires input from different departments prior to taking any decisions to oppose or consent to the relief applied for. No real detail were provided pertaining to the aforesaid decision-taking process.

[9] Thirdly the Respondents blamed the Covid-19 pandemic for slowing the entire system down exacerbating the Second Respondent's prior insufficiencies, again without any detail or explanation for its failure to comply with the Nziweni Order.

[10] No explanation was provided or evidence in support of any steps taken since the Nziweni Order until 15 February 2023 when the Second Respondent's answering affidavit was eventually filed.

[11] Mr. Mayosi (**"Mayosi"**), appearing for the Respondents, had to

concede that the Respondents failed to provide a sufficient and satisfactory explanation for the delay in the filing of an Answering Affidavit(s). In addition, Mayosi could not explain why the First Respondent failed to file any affidavit.

[12] The Applicants filed a provisional Replying Affidavit shortly before the hearing commenced in response to the Respondents' unsigned Answering Affidavit received at 17h30 on 15 February 2023, indicating Applicants' intention to oppose the condonation sought by the Second Respondent for the lateness of its Answering Affidavit. The Applicants allege in its Replying Affidavit that the Respondents have developed a pattern of dilatory- and contemptuous behaviour, which regularly results in court papers being filed late, or not at all, frustrating the finalisation of pending court matters. However, when the application came before me on 16 February 2023, the Applicants did not pursue, wisely so in my view, their opposition for the Answering Affidavit to be allowed, subject thereto that this court may, and should according to the Applicants, take into consideration the most lacklustre- and slothful approach adopted by the Respondents in taking further steps to finalise the application. Counsel for the Applicants submitted that it is of the utmost importance to the Applicants to have this matter finalised instead and the Applicants cannot assume the risk of further delays in the finalisation of this application which may be consequent to their further opposition of the condonation sought by the Respondents.

[13] It was loath to proceed with the matter excluding the Answering Affidavit by the Respondents. It was confirmed by Mayosi that he was only instructed shortly before the hearing of the matter, notwithstanding the Second Respondent's representative confirming in court that she attended court on 27 July 2022 when the timeline for the filing of further pleadings

were agreed between the parties, incorporated in the Nziweni Order. It is trite that the State Attorney acts for the Respondents in various similar cases of this type, which come before this court regularly. It all too frequently happens in these matters that the Respondents in the relevant sector of the Department of Home Affairs do not comply with their obligations both in respect to produce records in terms of Rule 53 and by delivering their affidavits and other necessary notices timeously and/or at all, for example

- **Director-General, Department of Home Affairs and Others v Link and Others [20200] (2) SA 192 (WCC);**
- **Geske and Another v Minister of Home Affairs and Another (WCD 1885/18) (unreported judgment of 20 June 2018);**
- **Link & Another v Director-General of the Department of Home Affairs [2022] ZAWCHC 177 (9 September 2020); and**
- **Maier and Another v Minister of Home Affairs and Another [2022] ZAWCHC 264 (15 December 2022)**

[14] I have no doubt that further judgments with a similar history and lethargy adopted by the Respondents exist. It is not in dispute that there is a systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which the Respondents advanced as a reason for the lateness of their Answering Affidavit and instructions to counsel.

[15] The aforesaid dysfunctionality within the Second Respondent has resulted in numerous judicial reprimands to the Department and Minister to comply with their legal obligations in matters in which its decisions are taken on judicial review. The consequences of the Department of Home Affairs and its officials are prejudicial to the proper administration of justice, to our country's economy and the general public for reasons which I will refer to

herein below.

[16] The Immigration Act aims at setting a system of control which ensures that visas and permits are issued as expeditiously as possible, and on a basis of simplified procedures without assuming excessive administrative capacity. The Act further describes the purpose thereof in its pre-amble as follows:

> ***"In providing for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith, the Immigration Act aims at setting in place a new system of immigration control which ensures that-***
>
> ***(a) visas and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, and without consuming excessive administrative capacity;***
>
> ***(b) .....***
>
> ***(c) .....***
>
> ***(d) economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated and tourism is promoted;***
>
> ***(e) .....***
>
> ***(f) .....***

(g) immigration laws are efficiently and effectively enforced, deploying to this end significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration;

(h) the South African economy may have access at all times to the full measure of needed contributions by foreigners;

(i) .....

(j) .....

(k) .....

(l) .....

(m) .....

(n) .....

(o) the international obligations of the Republic are complied with; and

(p) ....."

[emphasis added]

[17] The concerns regarding skilled labour emigrating from this country has been widely published upon and one would imagine that the Department of Home Affairs would, in particular, aim at satisfying the purposes of the Act pertaining to the economic growth by facilitating the entry of exceptionally skilled or qualified people, especially in circumstances as in *casu* where the First Applicant is employed as a key individual in a company who employs numerous employees and have made substantial investment in South Africa.

[18] The point I wish to illustrate is that the Respondents' failure to procedurally comply in judicial review applications of this nature undermines the proper administration of the Act. This is not a concern raised by this

Court for the first time and has been continuously recorded in numerous judgments at least since 2015.

[19] In this matter, the Applicants have also suffered prejudice at the hands of the Department as I have partly dealt with herein above. The Applicants are citizens of the United States of America and the First Applicant has worked in South Africa since 2015, initially as the Regional Director and Vice-President of [redacted], a global development organisation. The First Applicant subsequently became employed by an associated company with [redacted] known as [redacted]), a company specialising in data collection. The First Applicant holds a senior position in [redacted], in particular in South Africa based on his experience in management holding a Master's degree in Public Policy and Public Administration from the North Western University of Chicago, Illinois, US.

[20] The Applicants are married citizens and made application for permanent residence since June 2017 as mentioned above. The Department of Home Affairs' officials at the time, refused to accept the application contending that the First Applicant held an Intra-Company Transfer work visa (**"ICT Work Visa"**) and his application is to change the First Applicant's status by applying for a permanent residence permit which is not allowed.

[21] This refusal by the Respondents was found to be unlawful on 27 November 2017 by this Court (per Davis J) directing the Respondents to forthwith accept and process the applications in terms of the Act, including to ensure that the applications are properly and timeously transferred to the relevant functionary with the Department of Home Affairs.

[22] The Applicants filed their applications for permanent residency on

3 September 2018 pursuant to the Davis J Order. The Applicants' application for permanent residency was rejected in terms of a decision dated 20 November 2018. On the basis that the ICT Work Visas are not regarded as work visas for the purpose of an application for permanent residence, in essence the same reason relied upon by the Department of Home Affairs when their officials initially refused to accept the applications. The Applicants received the aforesaid decision to reject their application on 7 December 2018 and on 14 December 2018 filed an appeal in terms of s8(4) of the Act to the Second Respondent.

[23] The appeal was also rejected by the Second Respondent in a decision delivered on 8 August 2019, almost ten (10) months later, stating the following reasons for the rejection:

> ***"My decision is based on the fact that the purpose of an Intra-Company Transfer work visa is to conduct an international assignment in the country by training and transferring skills to the South African citizens and/or permanent resident [s]. At the end of the assignment, you are expected to leave the country"***

[24] The decision by the Second Respondent to reject the appeal caused the Applicants to appeal to the First Respondent, the Minister of Home Affairs, in terms of s8(6) of the Act on 22 August 2019. The Applicants persisted in their interpretation that nothing in the Act or the regulations thereto prohibit the Applicants from changing their status, as ICT Work Visa holders, whilst in the country. The Applicants contend that such a restriction to the change of their statuses only applies to holders of visitors' visas or medical treatment visas and not to the holders of ICT Work Visas. Seven (7) months after the appeal to the Minister, the Applicants made application to

this court to compel the Minister to take a decision on their applications for permanent residency under case number 5164/2020. Due to the National Lockdown this application was delayed and eventually set down on the unopposed motion court roll of this court on 12 October 2021. Before the hearing of the application to compel the Minister, the impugned decision in this application was delivered on 17 August 2021.

[25] It is not in dispute that the Applicants made a further attempt to resolve the matter without further litigation by making a written request to the Respondents on 20 October 2021 for them to reconsider the impugned decision on the same grounds as set out in this application. No response was received by the Applicants to this request which caused the applicants to bring this application.

[26] The Applicants seek in this application the review and setting aside of the Minister's decision dated 17 August 2021 when the Minister found that:

- Firstly ***"the purpose of the Intra-Company Transfer work visa was to enable you to transfer your special skills or expertise to your South African counterpart"***;
- Secondly ***"you are attempting to retain your current position"***;
- Thirdly ***"there is no indication that you have transferred your skills and/or expertise to a South African"***;
- Fourthly ***"you have therefore failed to adhere to the purpose of the above-mentioned visa"; and***
- Lastly ***"Departmental records indicate that you are currently not a holder of a valid temporary residence visa"***

[27] The Applicants submit that the reasons are invalid as discussed below.

[28] It is not in dispute that the Applicants had not committed any offence in terms of the Act under any previous visas held.

First reason

[29] Mr. Simonsz, appearing on Applicants' behalf, submitted, correctly so, that an application for permanent residency does not require from an applicant to demonstrate compliance with other visas he/she currently holds and is only required to meet the prescribed requirements for the visa he/she applies for.

[30] I agree with the approach by Cloete J in ***Link and Others v Director-General : Department of Home Affairs and Others***[1] when she held that a list of requirements generated by officials of the Department, or any other requirement as such, can never override the provisions of the Act or the regulations issued thereunder. Cloete J further held that any reliance placed, in rejecting an application, on a requirement not prescribed by the Act or the regulations thereunder, shall be misplaced. It is uncontested that the Applicants are not excluded or exempted under s29 of the Act as prohibited persons and/or persons who do not qualify for permanent residence permits. Neither do they fall within any category described in s30 declaring certain persons as undesirable for permanent residence permits.

Second reason

[31] It is not in dispute that the First Applicant has commenced employment with [redacted] since the initial application for permanent residency was made in June 2017, which render this point moot.

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[1] 2018 [1] All SA 542 (WCC)

Third reason

[32] I agree with the Applicants that regulation 89 places an obligation on the employer of a person holding an ICT visa to indicate a plan developed for the transfer of skills to a South African citizen or permanent resident. This obligation does not fall on the employee or holder of the ICT visa and can therefore not be a lawful reason to reject an application for permanent residency, even if there is non-compliance with its undertaking to transfer such skills to a local resident. It is in any event undisputed that the Respondents were indeed provided with [redacted] development plan in terms of s19(5) of the Act.

Fourth reason

[33] The Applicants argued that the Minister's concern appears to be that the First Applicant attempt to change his status from his ICT work visa with his application for permanent residence, notwithstanding the Department of Home Affairs having issued the First Applicant subsequently with a critical skills visa on 2 August 2021. The Respondents argued that an ICT visa holder may only be employed for a specific position and for a specific time by a specific employer to protect the local labour market. The holder of such an ICT visa may therefore not move from one employer to another as it is a breach of such ICT visa, and according to the Respondents, an abuse of South African Labour Laws and the Act. The First Applicant, together with [redacted], had prevented a South African citizen or permanent resident the opportunity of being employed in the position that the First Applicant took up with [redacted] so the Respondents argued. The Respondents further submitted that such conduct of the First Applicant and [redacted] is offensive to

the Act. There is no basis for such an argument in the Act or Regulations.

Last reason

[34] As mentioned above, a further Critical Skills Work Visa was issued to the First Applicant on 2 August 2021, which has subsequently expired in August 2022. The fact that a further Critical Skills Work Visa was issued to the First Applicant axiomatically renders this ground also moot.

[35] I also agree with the submissions by Applicants' counsel that the requirements for a permanent residency and that of a Critical Skills Visa are identical as set out in the Skills or Qualifications Determined to be critical for the Republic of South Africa in relation to an Application for Critical Skills Visa or Permanent Residence Permit as published in the Government Notice 459 in Government Gazette 37716 of 3 June 2014. Having been issued by the Department of Home Affairs with these Critical Skills Visas in the past, must be regarded as confirmation that the First Applicant satisfies these requirements for permanent residency as it appears in the skills or qualifications determination gazetted. Furthermore all requirements necessary to satisfy an application for permanent residency are attached to the First Applicant and not to a particular position or employment held or to be held. The fact that the First Applicant's skilled visa had subsequently expired, in any event, does not exclude him from applying for a permanent residence seeing that Regulation 23(2)(k) provides that such an application made in the RSA can only be made when a valid visa for temporary sojourn must accompany the application for permanent residence. The First Applicant held a valid visa at the time when the application was made which only expired on 3 November 2019. This is more than a year after the filing of

his permanent residency application in September 2018.

[36] A decision must stand or fall on the grounds given at the time when the decision was taken and it is in any event not for the decision-maker available to add any new ex-post facto reasons for his decisions subsequent to the decision.[2]

The Substitution Relief sought

[37] Counsel for the Respondents conceded at the hearing of this matter that the Respondents' opposition to this application is not primarily aimed at the main relief sought herein, being the setting aside of the Respondents' decision to reject the application, but rather at the Substitution Relief. The Respondents being confronted with the difficulties they face with the grounds upon which the application was refused, proposed that this court affords the Respondents a further opportunity to reconsider their decision, subject to a reasonable time for such reconsideration.

[38] The Respondents' only submission in this regard was that it may require a further opportunity to investigate the re-employment of the First Applicant to [redacted]. The Respondents' counsel however, again, had to concede that even if this Court grant the Substitution Relief sought, that the Act provide sufficient measures for further investigations and actions to be taken, if necessary, in circumstances where this Court grants the Substitution Relief.

[39] Section 8(1) of PAJA stipulates that:

"the Court or tribunal, in proceedings for judicial review in terms

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[2] National Lottery's Board and Others vs South African Education and Environment Project 2012(4) SA 504 (SCA) at para 27;

Minister of Defence and Military Veterans vs Motau and Others 2014(5) SA 69 (cc at para 55)

of section 6(1) may grant any order that is just and equitable, including orders –

.....

(c) setting aside the administrative action and –

(i) ....

(ii) In exceptional cases –

(aa) substitution or varying the administrative action or correcting a defect resulting from the administrative action"

[40] It is trite that the test to be applied by a court faced with a request to grant substitution relief is to adjudicate if it is in as good a position as the administrator to make such a decision. The ultimate consideration however remains whether the granting of the Substitution Relief is just and equitable in each matter.

[41] Similar to the finding of Sievers AJ in an unreported judgment of 20 June 2018 at para 29[3], I can also see no reason why the substitution order should not be granted.

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[1] [3] Geske and Another vs Minister of Home Affairs and Another (WCD) 1885/18 at para 29-30 ***"29. the Applicants have been waiting years to get these visas, with their lives and plans in South Africa in a state of limbo. The court is in as good a position as the Minister to make a decision. All of the Applicants' relevant information, including their full appeals and related documentation is before the court. The Minister had only one concern, namely that the First Applicant's pension would only accrue on 30 November 2018. This concern has been fully addressed and even the concerns raised impermissibly in the Answering Affidavits by the DG have been rebutted.***

30. There is no reason why the Applicants should have to wait any longer for finality on their applications. It is a foregone conclusion that, with the Minister's doubts having been resolved they are deserving of the visas for which they have applied. No prejudice will thus come to the Department, or to any other person, if the court makes the substitution order sought by the Applicants."

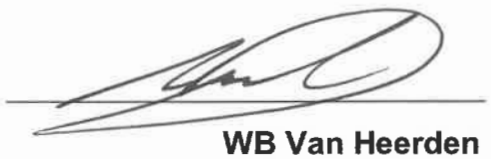
For the above reasons it is ordered that:

a) The First Respondent's decision to reject the First Applicant's application for permanent residence in terms of Section 27(b) of the Immigration Act, 13 of 2002 (**"the Act"**) is reviewed and set aside;

b) The Second Respondent's decision to reject the Second Applicant's application for permanent residence in terms of Section 26(b) of the Act is reviewed and set aside;

c) The Respondents are directed, within twenty (20) days from the date of this Judgment, to issue to the Applicants permanent residence permits;

d) The Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the Applicants' costs;



WB Van Heerden

Acting Judge of the High Court