REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO: 2190/2015
Date heard: 5 November 2015
Date delivered: 15 December 2015

In the matter between

JOACHIN CHUKWUELOKA EMERIBE	**Applicant**
And	
VFS GLOBAL VISA FACILITATION CENTRE, PORT ELIZABETH	**First Respondent**
MINISTER OF HOME AFFAIRS	**Second Respondent**
DIRECTOR GENERAL OF HOME AFFAIRS	**Third respondent**

And in the matter between

CASE NO: 2458/2015

MOHAMMAD ALAUDDIN JABED	**Applicant**
And	
VFS GLOBAL VISA FACILITATION CENTRE, PORT ELIZABETH	**First Respondent**
MINISTER OF HOME AFFAIRS	**Second Respondent**
DIRECTOR GENERAL OF HOME AFFAIRS	**Third Respondent**

JUDGMENT

ROBERSON J:

[1] The above applications were argued simultaneously as they involve largely the same issue. The applicant in case number 2190/2015 (Emeribe) is a Nigerian national, presently residing in Uitenhage. He seeks the following order:

1. That the First Respondent is directed forthwith to accept the Applicant's internal review application made in terms of Section 8 of the Immigration Act no 13 of 2002, against the decision of the Third Respondent refusing him permanent residence permit.
2. That the First Respondent is directed to dispatch the Applicant's internal review application to the relevant functionary of the Department of Home Affairs for adjudication.
3. That the First Respondent is ordered to pay the costs of this application on an attorney own client scale.

[2] The applicant in case number 2458/2015 (Jabed) is a Bangladeshi national presently residing in Pearston. He seeks a similar order, except that the application in question is one for the renewal of a visitor's visa.

[3] No relief is claimed against the second and third respondents, except for costs in the event of opposition. All three respondents opposed the applications, the second and third respondents stating in their notice of opposition that they aligned themselves with the papers filed on behalf of the first respondent.

[4] The correct name of the first respondent (VFS) is VFS Visa Processing SA (Pty) Ltd. It is a member of the VFS Global Group of Companies, which specialises in outsourcing and technological services for governments, diplomatic missions, embassies, and consulates worldwide. The Group manages on behalf of its clients administrative and non-judgmental tasks related to the issue of visas and passports.

[5] Following a public sector procurement process, the Department of Home Affairs (the Department) selected VFS to provide a visa facilitation service to manage visa and permit applications at various centres in South Africa. A services agreement between the Department and VFS was subsequently concluded on 2

December 2013. The services to be provided by VFS are set out in clause 4 of the agreement as follows:

"4.1 For the purposes of this Agreement, "**Services**" shall mean the provision of visa application processing services to be provided by VFS in the provinces pursuant to this Agreement and includes, but is not limited to –

4.1.1 receiving applications, processing and dispatching such applications to the relevant HUB in Pretoria and then to DHA office in Pretoria South Africa. It being recorded specifically herein that photographs and fingerprints of Applicants shall be taken by duly appointed DHA officials;

4.1.1 establishing and operating 11 (eleven) VFC around South Africa as per Appendix A. Receiving and verifying whether each visa application provided to it by Applicants is in the manner and format as is defined by the DHA;

4.1.2 collecting the Charges from Applicants and remitting the Visa Processing Fees to the DHA office in Pretoria on a daily basis;

4.1.3 transporting received visa applications from the VFC to the DHA office in Pretoria;

4.1.4 collecting of processed visas from the DHA office in Pretoria;

4.1.5 arranging for collection of processed visas by Applicants from the VFC;

4.1.6 operating and maintaining an online, electronic tracking systems (sic) that can be accessed by Applicants for the purposes of determining the status of their visa application;

4.1.7 establishing a dedicated Centralised call centre in Pretoria to address queries by Applicants;

4.1.8 providing information to Applicants in respect of the visa application requirements and procedure in respect of DHA, Pretoria;

4.1.9 establishing and maintaining a website to facilitate Applicants' access to relevant visa application information and to respond to queries by Applicants via such website and/or email; and

4.1.10 all activities described in this Agreement (particularly in Appendix "B" hereto) and together with any other steps and tasks reasonably required for VFS to perform the Services, even if such steps or actions

are not specifically listed in or described in this Agreement or Appendix "B".

4.2 The Services shall be provided during normal business hours as indicated by DHA.

4.3 VFS shall be entitled to procure the performance of the Services through (i) its primary subcontractors in the provinces (namely, Mosefuwa Administrators for Immigration Consultation and F V Trading enterprise as facility management company and (ii) courier, bank and security as secondary subcontractors. Such subcontracting shall, however, not relieve VFS of its obligations under this Agreement.

4.4 VFS shall not provide any other service in the premises, other than those services (including Value Add Service indicated in clause 5.1 below), provided for in this Agreement."

[6] Emeribe arrived in South Africa during 2008 and applied for refugee status, following which he was issued with an asylum seeker temporary permit which allowed him to remain in the country pending finalisation of his refugee status application. In 2010 he married Ms Noluthando Mzondi, a South African citizen, and the marriage still subsists. On 9 September 2011 a child was born of the marriage between Emeribe and his wife. The child is a South African citizen by birth. On 6 March 2012 Emeribe lodged an application for permanent residence in South Africa in terms of s 27 (g) of the Immigration Act 13 of 2002 (the Act) which provides that the Director General may issue a permanent residence permit to a foreigner of good and sound character who is the relative of a citizen or permanent resident of South Africa within the first step of kinship. The application was based on the applicant's relationship to his child.

[7] In February 2013 Emeribe was issued with a visitor's visa in terms of s 11 (6) of the Act, which provides that a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in terms of ss 13 to 22 of the Act. A further visa was issued on 11 December 2013, which was valid until 9 October 2015.

[8] By letter from the third respondent (the DG) dated 18 February 2015, received by Emeribe on 7 April 2015, Emeribe was informed that his application for a

permanent residence permit had been refused. Briefly, the reason for refusal was that Emeribe's child was not in a position to support and maintain him, as required in terms of regulation 23 (7) of the Act. The letter informed Emeribe that he had ten working days from the date of receipt of the letter to make written representations for a review or appeal of the decision. The letter indicated that the written representations should be submitted to Emeribe's nearest VFS office. Emeribe duly prepared an application in the prescribed manner to review the decision to refuse his application for permanent residence.

[9] On 2 June 2015 he presented his application at VFS's offices and was told by a staff member that his application had to be accompanied by a bank statement. The staff member refused to accept his application. Emeribe expressed the view that VFS had no legal basis to refuse to accept his application and that VFS's primary duty was to receive the application and thereafter to forward it to the Department's head office for adjudication. VFS was not empowered by law to act as it did and therefore acted ultra vires. Its conduct fell within the ambit of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in that VFS's refusal to accept his application was a failure to take a decision as provided for in s 1 of PAJA.

[10] Jabed gave a similar account. He arrived in South Africa in 2009 to seek asylum. He was issued with an asylum seeker temporary permit. On 13 September 2012 he married Ms Lungiswa Nel, a South African citizen, and the marriage still subsists. He was issued with a visitor's visa in terms of s 11 (6) of the Act on 24 January 2013 which was valid until 31 January 2015. During November 2014 he attempted to apply at the Department's Port Elizabeth office for a renewal of the visa but was told by an official there that such applications should be submitted via VFS. He was also advised that his application had to be accompanied by a police clearance certificate. He applied for such certificate but he received it after his visa had expired. At this stage he was an illegal foreigner in South Africa. He was advised by his attorney to apply for authorisation to remain in the country in terms of s 32 (1) of the Act which provides:

> "Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her

application for a status."

[11] It seems that although he stated that he made a request for such authorisation, he did not pursue this request and did not claim to have received such authorisation.

[12] He thereafter attempted to lodge his application for a renewal of his visitor's visa at VFS's offices. His application was accompanied by a letter to the DG in which he explained why he had not applied for a renewal of his visa prior to its expiry on 31 January 2015. An employee of VFS declined to accept his application and told him that his visa had already expired. His attorney informed him of the provisions of regulation 30 (1) of the Act which provides:

> "Upon requesting authorisation as contemplated in section 32(1) of the Act, an illegal foreigner who has neither been arrested for the purpose of deportation nor been ordered to depart and who wishes to apply for status after the date of expiry of his or her visa, shall –
>
> (a) Demonstrate, in writing, to the satisfaction of the Director-General that he or she was unable to apply for such status for reasons beyond his or her control; and
>
> (b) Submit proof to the Director-General that he or she is in a position to immediately submit his or her application for status."

Jabed expressed the view that the letter he submitted with his application was compliance with regulation 30 (1).

[13] The applicants objected to the admissibility of VFS's answering affidavits because they were delivered out of time. I decided to admit the affidavits in the interests of justice. Both applicants delivered replying affidavits.

[14] The deponent to the answering affidavit in both applications, Mr Rishen Mahabeer, is the head of operations of VFS. According to Mahabeer VFS merely provides a service to the Department by facilitating the application process. VFS does not decide applications and it does not issue visas or permits. It is the Department which decides every application and exercises its discretion in terms of

the Act. VFS, so Mahabeer stated, is an agent of the Department and is contractually bound only to act on the instruction of the Department, its principal, and has no discretion to do otherwise.

[15] He stated that VFS has been expressly instructed by the Department not to accept any incomplete applications. Mahabeer referred to a notice issued by the Department which is displayed in VFS's offices and which reads as follows:

> "NOTICE
> VISA AND PERMIT APPLICATIONS
> This Notice serves to notify all clients that the Visa Facilitation Service Centres ("VFS") will only accept "COMPLETE" applications for temporary residence visas, permanent residence permits, waivers, exemptions, proof and verification of permanent residence permits and proof and verification of exemptions.
> Please be advised that the decision is in line with regulation 9(1) of the Immigration Regulations, which provides, amongst other requirements, that visas to temporarily sojourn in the Republic in terms of section 11 up to and including sections 20 and 22 of the Immigration Act, 2002 (Act no 13 of 2002), as amended shall be submitted with ALL supporting documents."

The logos of the Department and VFS appear at the foot of the notice.

[16] In the case of Emeribe Mahabeer said that it is a requirement of the Department that bank statements be submitted with an internal review application. It is not for VFS to question whether or not this requirement is correct or not. In terms of the agreement with the Department VFS has to obey the instruction of the Department in order to ensure that all documents required by the Department are submitted, prior to the Department accepting the application. Emeribe has not submitted a bank statement and VFS, in accordance with the instructions of the Department, cannot accept his application. If it does it will be in breach of its contractual obligations.

[17] Mahabeer stated that when Emeribe's court application was served on VFS it approached the Department to enquire if an exception could be made in the case of Emeribe but the Department instructed VFS not to accept the application.

[18] In the case of Jabed, Mahabeer stated that the Department directed VFS not to accept the application. He added that Jabed's application was fatally defective because he applied for a visa without first obtaining the required permission from the DG in terms of s 32 (1) of the Act. Even if the court ordered VFS to accept the application, it would be rejected by the Department. As was the case in Emeribe's application, if VFS was to accept Jabed's application, it would be in breach of its contractual obligations to the Department.

[19] According to Mahabeer VFS's conduct in refusing to accept their applications did not amount to administrative action. The applicants should have sought an order against the Department directing the Department to instruct VFS to accept their respective applications or an order reviewing the Department's instruction to VFS not to accept their applications.

[20] In the Jabed case, an affidavit was filed by Ms Mpho Seotlela, who is employed by the Department as a legal administration officer. Seotlela stated that the Department made common cause with the averments contained in Mahabeer's affidavit.

[21] The applicants' cases were founded in PAJA and Mr Moorhouse who appeared for the applicants presented his argument on the basis that the refusal by VFS to accept the applications amounted to administrative action which was reviewable on certain grounds. During his argument I raised certain questions about the terms of the services agreement. At that stage only a few pages of the agreement were available, having been annexed to the answering affidavit. These pages consisted mostly of clause 4 mentioned above. I was concerned that the services to be provided by VFS, as contained in clause 4 of the agreement, did not appear to include the processing of applications to appeal or review a decision. Nor were appeals or reviews mentioned in the notice displayed at VFS's offices. Before commencing his argument, Mr de Vos, who appeared for VFS, requested an adjournment in order to obtain a copy of the full agreement.

[22] The full agreement arrived and revealed terms which were at odds with the respondents' basis of opposition. Clause 2 of Appendix B to the agreement is

headed “Overview of Services” and provides for the services to be performed by VFS. The following clauses are significant:

Clause 2 (e) provides that VFS shall:

> “receive and verify whether each visa application provided to it by Applicants is in the manner and format as is defined by the DHA and, in respect of those visa applications which VFS has verified to be in the manner and format as is defined by the DHA, provide Applicants with a unique identification number for use at the call centre and e-mail response centre and respond to all calls within three (3) to five (5) rings of the applicant placing its call with the call centre and within one (1) working day of an email enquiry.”

Clause 2 (j) provides that VFS shall:

> advise Applicants of those prescribed application requirements which have not been fulfilled or completed at no extra cost to the Applicant. Should the Applicant insist on submitting an incomplete application despite VFS indicating to the Applicant that his or her application is incomplete VFS shall (i) not be entitled to refuse submission of the incomplete application; and (ii) shall notify DHA in writing that it has accepted the application and that the minimum prescribed application requirements have not been met.”

[23] The effect of this latter clause negated the grounds of opposition of the respondents. It meant that VFS’s refusal to accept the applications was in breach of its obligations in terms of the agreement, and that the Department’s instruction to VFS not to accept the applications was unlawful. It was a breach of a term of its agreement with VFS but more importantly was a breach of its obligations in terms of the Act and the applicants’ right to lawful, reasonable, and procedurally fair administrative action. Effectively the Department used a private third party to prevent the applicants from exercising their rights in terms of the Act. When I first read the papers in this application, my reaction was that a third party was a barrier between an individual seeking to exercise a right in terms of the Act, and the State. What if, for example, an employee of VFS made a mistake about what documents were required to accompany a particular application? If they refused to accept the

application, and the Department endorsed such refusal, the result would be that an individual was completely barred from access to the Department in order to exercise and enforce his or her rights. The State cannot abdicate its constitutional and other statutory obligations when it outsources certain functions to private parties, and use that third party to shield itself from accountability. The following passage in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para [40] is apposite:

> "Section 8(1) of our Constitution renders the Bill of Rights applicable to the Judiciary, the Executive, the legislature and organs of State. An organ of State is, among other things, an entity that performs a public function in terms of national legislation. The applicability of the Bill of Rights to the Legislature and to the Executive is unconditional as to function; the Bill of Rights is applicable to it regardless of the function it performs. Our Constitution ensures, as in Canada and the United States, that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity."

[24] The discovery of clause 2 (j) of Appendix B was some alleviation of my concern. It is alarming, to say the least, that the respondents initially conducted their cases either in ignorance of this clause or as if it did not exist, and even more alarming that VFS and especially the Department have actually conducted themselves in breach of this clause. One wonders how many people have been wrongly turned away with potentially severe consequences.

[25] The notice displayed in VFS's offices is cause for concern. It is misleading because it does not tell prospective applicants that they can insist on acceptance of their application. It gives the impression that VFS has the final say before an applicant can even have access to the Department. Even if clause 2 (j) was not contained in the services agreement, an instruction by the Department to VFS to refuse to accept applications would be unlawful for the reasons stated above. If the notice is enforced, it does not remove the danger that VFS might make a mistake about what documents are required, and an applicant would be turned away and prevented from exercising his or her rights in terms of the Act. The services agreement provides for training of employees of VFS by the Department but such

training cannot exclude the possibility of mistakes. A mistake may have happened in the case of Emeribe. None of the respondents were able to refer me to the statutory or regulatory source of a requirement that a bank statement should accompany an application to review a decision. Yet the door was closed to Emeribe, without him managing to achieve access to the Department at all.

[26] Mr Gajjar, who appeared for the second and third respondents, submitted that the notice post-dated the services agreement and in effect was an additional term, in that it was issued jointly by VFS and the Department. He relied on clause 5 of the services agreement which deals with the provision of additional services by VFS. In order to incorporate such additional services in the agreement, clause 5 provides that VFS would first have to provide the Department with a proposal. If the Department accepted such proposal an appendix to the agreement would be concluded, and the terms of the agreement read with such appendix would govern the contractual relationship between the parties. There is no appendix to the agreement which bears any relation to the notice. The notice in any event does not deal with additional services and effectively only contains a warning to applicants to submit complete applications.

[27] In my view the notice should be removed or at least redrafted not only because it is in conflict with the terms of the agreement but because it potentially creates a barrier between an individual seeking to exercise his rights in terms of the Act and the State, and potentially allows the State to avoid its constitutional obligations.

[28] Mr de Vos submitted that the agreement did not apply to appeals or reviews but that if he was wrong in this regard then the refusal of Emeribe's application for permanent residence was correct and the relief sought by him was academic. I cannot accept such a submission. Emeribe was still entitled to apply for a review of the decision, regardless of the merits of that decision. In addition, so it was submitted, a bank statement was required to accompany the review documents. Mr de Vos supported this submission by reference to a document issued by the Department when Emeribe lodged his application for permanent residence. This document contained a checklist of documents which were submitted, one of which

was referred to as “financial resources”. Mr de Vos referred to a definition of “financial resources” in the Act. I could not find such a definition but in the regulations “Proof of sufficient financial means” is defined as meaning proof by means of, *inter alia*, “a three months bank statement”. The prescribed form with which to lodge an appeal or review informs an applicant that the form must be accompanied by the relevant documents in support of the appeal. Mr de Vos accepted that one cannot tell from the form what the relevant documents are but that they would include the documents which accompanied the initial application for permanent residence. I think this argument is speculative and underscores the inability of the respondents to identify a statutory or regulatory authority in terms of which a bank statement must accompany an application to appeal or review a decision. In any event, even if it was a requirement, VFS was not entitled to refuse to accept the application. Mr de Vos conceded as much.

[29] Mr de Vos also submitted that Jabed’s application for an extension of his visa was defective in that he should first have obtained authority in terms of s 32 of the Act, as stated by Mahabeer in the answering affidavit. Again, even if this submission was correct, VFS was not entitled to refuse to accept the application.

[30] Both Mr de Vos and Mr Gajjar submitted that the relief sought by Jabed was moot. They relied for this submission on the letter addressed to the DG which accompanied his application for renewal of his visa and in which he explained why he had not been able to apply for an extension of his visa before it expired. He ended the letter by stating “Please Director General accept that it was not my fault and accept my application. My application is together with this letter.” This last sentence meant, so it was submitted, that the DG was already in possession of Jabed’s application for an extension of his visa. I do not agree. In his founding affidavit Jabed said that the application which he tried to lodge with VFS was accompanied by the letter and that he had misplaced the letter but would try to ensure that a copy would be available at the hearing of this application. The letter was annexed to Mahabeer’s affidavit under cover of a letter from the applicant’s attorney to VFS’s Johannesburg attorneys. According to Mahabeer it had been provided pursuant to a notice in terms of rule 35 (12). I can find no reason for concluding that Jabed’s application has now reached the DG. It is clear from

Jabed's affidavit that the letter was attached to his application which he tried to lodge with VFS. Merely because it was addressed to the DG does not mean that it was sent to the DG directly. The point of mootness cannot succeed.

[31] I am not convinced that the services agreement covers appeals and reviews. Mr de Vos's main submission was that it does not and accordingly VFS cannot be ordered to accept Emeribe's application for a review and forward it to the Department. Mr Gajjar submitted that the agreement was silent with regard to the processing of reviews and appeals and suggested, without being able to submit with certainty, that it was implicit that reviews and appeals should lie directly to the Department instead of via VFS. The notice displayed at VFS's offices mentions all kind of applications except for appeals and reviews. However, as already stated, in the DG's letter to Emeribe advising him that his application for permanent residence had been refused, he was advised to lodge his appeal at his nearest VFS office. Emeribe therefore had no choice but to submit his application at VFS's office and VFS conducted itself as though it was one of the applications covered by the agreement and opposed the application accordingly. Alternatively it certainly seems that there is an arrangement between VFS and the Department that applications to appeal or review a decision should be lodged at a VFS office. Emeribe was therefore entitled to bring this application against all three respondents.

[32] The orders the applicants seek can be granted on the simple basis that VSF was, in terms of its agreement with the Department, not entitled to refuse to accept their applications. It is common cause between the respondents that the Department instructed VFS not to accept the applicants' respective applications. If the applicants had sought an order reviewing and setting aside the decision to issue such an instruction they would have succeeded. However this was not the case the second and third respondents had to meet. They however did oppose the application on the same grounds as VFS and risked a costs order.

[33] Mr de Vos submitted that VFS had been in a difficult position because it was instructed by the Department not to accept the applications and that the costs should be borne by the second and third respondents. He informed the court that if there had not been a prayer for attorney and client costs, VFS would have abided the decision of the court. I am not persuaded that VFS should escape a costs order. It

persisted in its opposition to the applications. It is part of a global organisation. It has entered into an agreement with the State in terms of which it has assumed great public responsibility and operates on a large scale. It recovers a fee from applicants and in appendix B of the agreement it is stated that the expected volume of visa and permit applications annually provided by the Department is 100 000. It conducted its case as though it was helpless in the face of the Department's instructions. That was not correct. It should have known the terms of the agreement. The second and third respondents are even more responsible for the predicament in which the applicants found themselves. They aligned themselves with VFS's grounds of opposition, effectively maintaining that they were entitled to instruct VFS not to accept the applications. I need not repeat my view of the Department's conduct.

[34] The applicants sought costs on the attorney and client scale. The submission was made that such an award should be made to mark the court's disapproval of the respondents' conduct. I am of the view that a punitive costs order is not warranted. While the respondents' conduct was regrettable in view of the terms of the agreement and the Department's constitutional obligations, I cannot find that those involved were deliberately obstructive. One of the recorded objectives of the agreement is to ensure that the Department and applicants benefit from VFS's services. It may well be that applicants in many cases benefit from greater efficiency in the processing of visa applications, provided of course that VFS and the Department carry out their duties correctly. I strongly recommend that the DG and Mahabeer bring the provisions of clause 2 (j) of Appendix B to the attention of their respective staff throughout the country. In view of the respondents' uncertainty, which emerged during their counsels' argument, about the applicability of the agreement to applications for the appeal or the review of a decision, I also recommend that this aspect be clarified between the parties without delay.

[35] The following orders will issue:

Case no 2190/2015

1. The first respondent is directed forthwith to accept the applicant's internal review application made in terms of Section 8 of the Immigration Act 13 of

2002, against the decision of the third respondent refusing him a permanent residence permit.

2. The first respondent is directed to dispatch the applicant's internal review application to the relevant functionary of the Department of Home Affairs for adjudication.
3. The respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved, on the scale as between party and party.

Case no 2458/2015

1. The first respondent is directed to accept the applicant's application for the renewal of his visitor's visa.
2. The first respondent is directed to deliver the applicant's application for the renewal of his visitor's visa to the relevant functionary of the Department of Home Affairs for adjudication.
3. The respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved, on the scale as between party and party.

_____

J.M. ROBERSON

JUDGE OF THE HIGH COURT

Appearing on behalf of Applicants: Adv. Moorhouse
Instructed by: Maci Incorporated, Port Elizabeth

Appearing on behalf of First Respondent: Adv. De Vos
Instructed by: Edward Nathan Sonnenbergs, c/o BLC Attorneys, Port Elizabeth

Appearing on behalf of Second and Third Respondents: Adv. Gajjar

Instructed by: Office of the State Attorney, Port Elizabeth