

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

CASE NO: 1305/2023

In the matter between:

T[...] O[...]

Applicant

and

DIRECTOR-GENERAL OF THE DEPARTMENT
OF HOME AFFAIRS

First Respondent

MINISTER OF THE DEPARTMENT
OF HOME AFFAIRS

Second Respondent

JUDGMENT

PITT AJ

Introduction.

[1] The applicant was refused a visa application on 14 September 2020 and subsequently declared a prohibited person in terms of section 29 of the Immigration Act No. 13 of 2002 (“the Immigration Act”).

[2] The applicant launched this application to review and set aside two decisions of the respondents, and for the court to substitute these decisions of the respondents. The first decision is the refusal by the first respondent that the applicant is not a prohibited person. The second decision is that of the second respondent to dismiss the applicant’s internal review. The applicant also seeks condonation for the late filing of his application.

Condonation.

[3] The applicant alleged that the application was brought outside of the time frames provided for in terms of the Promotion of Administrative Justice Act No. 3 of 2000 (‘the PAJA’) and applied for condonation. The respondents did not oppose the application for condonation, leaving it up to the court to decide. In the exercise of this court’s discretion, I was satisfied that there were sufficient grounds for condonation for the late filing of the application and granted same from the outset.

Review and setting aside decisions of the respondents.

[4] The relief which the applicant sought to have reviewed and set aside is the decision of the Director General of the Department of Home Affairs dated 14 September 2020 refusing to declare the applicant not to be a prohibited person. The applicant also sought to review and set aside the decision of the Minister of Home Affairs dated 9 September 2022 dismissing the applicant’s internal review lodged in terms of section 8(6) of the Immigration Act. At the commencement of

the hearing of the application, the respondents conceded that their decisions should be reviewed and set aside, and they tendered the costs thereof.

Issues for determination.

[5] The only issue I am called upon to decide is whether the court should substitute the decisions by the respondents.

Whether the court should substitute the decisions by the respondents.

[6] The respondents having conceded that the impugned decisions stand to be reviewed and set aside by the court, I am left to decide whether to substitute the decisions of the respondents with that of the court. The applicant contended that the court is empowered to substitute the decisions of the court in these circumstances as provided for in section 8 of the PAJA.

[7] Section 8(1)(c)(i) of the PAJA provides that the court in procedures for judicial review may set aside the administrative action (the decisions) and may remit the matter for reconsideration by the administrator (the Department), with or without directions in exceptional circumstances. In terms of subsection (1)(c)(ii), the court may substitute or vary the administrative action or correct a defect resulting from the administrative action in exceptional circumstances.

[8] The question that then begs to be asked is: what constitutes exceptional circumstances? It is for me to decide whether to substitute the decisions or not. In doing so, I have had regard to the submissions by both parties. The respondents opposed the suggestion by the applicant that the court should substitute the decisions by the respondents and put up legal arguments from previous court decisions. The applicants relied on some of the same decisions in favour of substitution of the decisions by the court *in hoc casu*.

[9] The applicant submitted that it is established law that once a ground for review has been established, section 172(1)(a) of the Constitution requires that

such decision must be declared invalid. Section 172(b) then requires that the court must exercise its discretion to make an order that is just and equitable. It is in this context, so the applicant submitted, that the court must decide whether to remit the matter or substitute or vary the decisions.

[10] The Supreme Court of Appeal in *Gauteng Gambling Board v Silver Star Development Limited*¹ confirmed the provision in section 8(1)(1)(c)(ii)(aa) of the PAJA instead of remitting the decision to itself decide in exceptional circumstances.

[11] In *Trencon (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*², the court of first instance granted substitution of the administrative action and remarked as follows:

‘It is trite that the general rule in review proceedings is that a Court would, in the event it reviews and sets aside an administrative decision; remit it to the decision-maker for reconsideration, in some instances, subject to conditions. The provisions of Section 8(1)(c)(ii) (aa) of PAJA that the Court, instead of remitting the decision, may itself decide, should only occur in exceptional circumstances. See *Gauteng Gambling Board v Silver Star Development Limited*³.’

[12] It was held further that the underlying test to be applied by the Court in terms of its departure from the general practice of remitting the matter back to the administrator, has its roots in the common law principles stated in the seminal case of *Johannesburg City Council v The Administrator, Transvaal*⁴. The Court continued to say that the *Johannesburg City Council* case established the common law principle that a court will be prepared to substitute an administrative decision where:

‘47.1 the end result is a foregone conclusion, and it would be a waste of time to remit the decision to the original decision-maker;

¹ 2005(4) SA 67 (SCA).

² (58961/2012, 70100/2012) [2013] ZAGPPHC 147 (3 June 2013).

³ *Supra*.

⁴ 1969 (2) SA 72 (T) at 76.

47.2 any further delay would cause unjustifiable prejudice to the Applicant; and

47.3 the original decision maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the Applicant to submit to its jurisdiction again.

48. In *Gauteng Gambling Board supra*, the Court added a further principle that such decision may be taken where the court is as well qualified to make that decision.’

[13] The applicant submitted that in the recent decision of *Mgijima Holdings (Pty) Ltd v State Information Technology Soc limited* the court granted a substitution order after considering the principles as laid down in the *Trencon* Constitutional Court case. In conclusion, the applicant submitted that the above cases support an order of substitution of the decisions of the respondents.

[14] The applicant submitted that the exceptional circumstances in support of substitution of the administrative action are as follows:

- (a) The respondents have taken a perfunctory stance to refuse all the applicant’s applications that have come before them, and that it would be a waste of time to order the relevant functionary to reconsider them.
- (b) To remit the matter to the relevant functionary would delay the matter and cause the applicant unjustifiable prejudice. In this regard, the Minister took more than a year to consider and decide the internal review against the first respondent’s decision, thus forcing the applicant to launch the present proceedings to compel the Minister to make a decision. The applicant has also had to bring contempt of court proceedings because the Minister failed to comply with the order under case number 561/2022.
- (c) The respondents exhibited bias in dealing with the applicant by assisting the NPA to lay criminal charges against him. The reconsidered decision of the first respondent was used to oppose the applicant’s bid to be released on bail, all to form a united front with the NPA to violate the

constitutional rights of the applicant. Based on the conduct of the first respondent, the impugned decision from the applicant's perspective was taken for an ulterior motive and in bad faith or capriciously. In light of this, it would be unfair to require the applicant to submit the decisions to the same respondents again. The applicant's counsel further contended that the then Minister of Home Affairs, Aaron Motsoaledi, commented that an investigation was also underway to determine how another evangelist, Nigerian T[...] O[...] had acquired South African residency. This, the applicant pointed out, suggested bias towards the applicant on the part of the respondents. In response to this, the respondents submitted that the Minister's comment was in the context of another foreign national evangelist having escaped the borders of South Africa to evade arrest and prosecution by the authorities, and that this was not any bias towards the applicant.

- (d) The respondents have demonstrated complete incompetence and bad faith in dealing with his application, and their actions are tainted with procedural unfairness.
- (e) The internal review application contains sufficient information to make a reasonable informed decision in the matter. The extreme unfairness which the applicant was subjected to warrants the substitution by the court in the circumstances.

[15] The respondents disagreed with these contentions and submitted that the court should not substitute the administrative decisions for the above reasons. It was submitted on behalf of the respondents that the common law rule is that courts should be slow to assume a discretion which has been entrusted to another functionary or repository of power by statute. This is based on the principle of separation of powers, and to avoid the unwarranted usurpation of powers entrusted to public authorities by the relevant statutes. The respondents contended

that the court should remit as a matter of course, save for exceptional circumstances. The court was referred to *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape and Another*⁵, by referencing *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others*⁶, in which it was held that:

‘[46] These constitutional principles mean that courts, when considering the validity of administrative action, must be wary of intruding, even with the best of motives, without justification into the terrain that is reserved for the administrative branch of government. These restraints on the powers of the courts are universal in democratic societies such as ours and necessarily mean that there are limits on the powers of the courts to repair damage that has been caused by a breakdown in the administrative process.’

[16] In *University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others*⁷, the learned judge held that the mere fact that a court considers itself as qualified to make the decision as the administrator does not *per se* justify usurping the administrator’s powers and functions.

[17] In *Trencon CC*, it was also held that a case implicating an order for substitution requires courts to be mindful of the need for judicial deference and their obligations under the Constitution. The Constitutional Court held further that even if exceptional circumstances exist, a court must be satisfied that it would be just and equitable to grant an order for substitution.

[18] In *Trencon CC*, it was held that before substituting the court must consider the following factors:

- (a) The court will not be in as good a position as the administrator where the application of the administrator’s expertise is still required,

⁵ 2007 (6) SA 442 (Ck) at paras 45-46.

⁶ 2000 (2) SA 674 (CC) at paras 85-86.

⁷ 1998 (3) SA 124 (C) at 131F-H.

and the court does not have all the pertinent information before it. This will depend on the facts of each case and the stage at which the impugned administrative action was taken.

(b) Only once the above step has been established, does the second consideration whether a decision is a foregone conclusion come into consideration. A foregone conclusion exists only where there is only one outcome of the exercise of an administrator's discretion resulting in remittal being futile. Where an administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult to find that the decision was reached, and such decision is a foregone conclusion.⁸

(c) A court must consider other relevant factors, including delay which can weigh in favour of both remittal and substitution, but delay occasioned by litigation should not cloud a court's decision in reaching a just and equitable remedy. The appropriateness of a substitution order must depend on the consideration of fairness to the impugned parties.⁹

[19] In *Trencon CC* it was also held that the considerations of '*in as good as position*' and '*foregone conclusion*' are interrelated and interdependent. There can never be a foregone conclusion, the respondents argued, unless a court is in as good a position as the administrator. Even if the administrator has applied skill and expertise as well as the court having all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator. The aforementioned being typical in instances of policy-laden and polycentric decisions, such as in the present matter.¹⁰ The respondents further contended that in the administrative review context of section 8(1) of the PAJA, and the wording

⁸ *Trencon CC* at para 49.

⁹ *Trencon CC* at para 53.

¹⁰ *Trencon CC* at para 50.

of ss (1)(c)(ii) (aa), substitution remains an extraordinary remedy, and remittal is still almost always the prudent and proper course.

[20] The respondents submitted that it can be gleaned from the record that no other consideration or whether the applicant has indeed met the requirements for a general work visa has been considered. The applicant does not deny this, but merely states that the task of deciding his application was done with incompetence and relies on the fact that his waiver application as well as previous applications were unsuccessful. The applicant did not deny that the impugned decisions are dependent on one another and that the Minister may not need to consider the applicant's internal appeal. The applicant simply contended that the present Director-General wants 'another bite' in the matter and that the Director-General by virtue of his support not to declare the applicant a prohibited person on account of the wrong premise is incompetent.

[21] It was submitted on behalf of the respondents that the court is not in as good a position as the Director-General or the Minister to determine whether the impugned decisions can be substituted with the orders prayed for by the applicant. The respondents argued that the fact that much time had passed as a result of litigation, the court's judgment must not be clouded not to remit the decisions for reconsideration.

[22] In *Kalisa v Chairperson of the Refugee Appel Board and Others*¹¹, in deciding whether an order for substitution by granting the applicant asylum was justified in applying the principles set out in *Trencon CC*, it was held that –

‘The fact that the delay in the final determination of the applicant's application for asylum might be charged with the potential for unpalatable outcomes should he not be granted refugee status is no basis, by itself, for deciding that he qualifies for such status. If the court cannot be sufficiently satisfied on the evidence it has before it that he does so qualify in terms of the Act, it cannot make a substitution order that it could be

¹¹ 2020 (4) SA 256 (WCC) para 36.

assured was lawful, and thus conformable with the standard to which administrative decisions are bound by s 33(1) of the Constitution.’

[23] The court did not substitute the decision of the Refugee Appeal Board in *Kalisa* but gave directions for the reconsideration of the applicant’s application for asylum by the relevant authorities afresh.

Discussion

[24] In order for a court to substitute the decisions of the respondents, it must be just and equitable in the context of such exceptional circumstances which prevail at the time. The respondents submitted that it would not be just and equitable in the circumstances to remit the decisions to the respondents for consideration afresh. This indicates to me a commitment by the respondents to want to reconsider the decisions afresh. This, together with the concession of the review and setting aside of their decisions at the commencement of the proceedings, indicates a willingness on the part of the respondents to deal with the applicant’s applications fairly.

[25] For the above reasons, I find that the decisions must be remitted back to the respondents for reconsideration. To ensure that the respondents perform their functions and actually decide to the applicant’s applications, it is best to put time frames within which the respondents must make their decisions. I also find that I am not in a better position than the respondents to substitute their decisions *in hoc casu*, that such applications are processed in a polycentric or policy-laden environment, and the respondents will be best suited to consider such applications.

[26] I further hold the view that the respondents’ decisions were not a foregone conclusion, and I believe they will not be a foregone conclusion when reconsidered by the respondents as they are public officials who owe the applicant a duty to consider his applications fairly and objectively. There was no

factual allegation that the respondents' officials acted maliciously or otherwise when dealing with the decisions of the applicant.

[27] I accept that there was a lengthy delay *in hoc casu* occasioned by litigation which does not cloud my decision in reaching a just and equitable remedy. Since the respondents are responsible for the administration of applications in respect of the decisions, they are best placed to reconsider the applicant's applications for work permits such as those applied for by the applicant. It is unfortunate that there was a long delay in the litigation of this matter. However, the matter has now been heard and the relief is in favour of the applicant. Strict time frames will ensure that the respondents act within reasonable time to process the applicant's applications and provide him with their outcomes.

[28] My conclusion is that there does not appear to be an 'exceptional case' put forward by the applicant to justify substitution or correction *in hoc casu*. In the circumstances, it is appropriate to set aside the decisions of the respondents, and to remit the matter back to the respondents for reconsideration of the applications of the applicant within a stipulated time frame.

Costs

[27] The respondents tendered the applicant's costs of the review application since they conceded the review and setting aside of the decisions. This justifies the tender of costs in the circumstances.

[30] The respondents further argued that, since they conceded the review and setting aside of the decisions and tendered the costs thereof, they must not be ordered to pay the costs of the substitution if the applicant does not succeed. I disagree with this point. I believe that the issue of substitution is an integral part of the entire application and must not be separated from it. In my view, the applicant enjoys considerable success on the application as a whole.

Order

1. The decision of the Director General of the Department of Home Affairs dated 14 September 2020 refusing to declare the applicant not to be a prohibited person is hereby reviewed and set aside.

2. The decision of the Minister of Home Affairs dated 9 September 2022 dismissing the applicant's internal review lodged in terms of section 8(6) of the Immigration Act is hereby reviewed and set aside.

3. The first and second respondents' decisions at 1 and 2 above are remitted to the respondents for reconsideration. The first and second respondents are directed to reconsider:
 - 3.1 whether to declare the applicant not to be a prohibited person;
 - 3.2 whether the applicant's particulars are to be removed from the visa and entry stop list of the Department of Home Affairs;
 - 3.3 whether the applicant's general work visa should be extended subject to conditions as may be imposed thereon in terms of the Immigration Act No. 13 of 2002; and to provide the applicant with their decisions in respect of 3.1, 3.2 and 3.3 above within 30 days of this judgment being served on the respondents.

4. The respondents shall pay the costs in respect of the application jointly and severally, the one paying the other to be absolved on High Court scale A.

DV PITT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : *Adv Nyondo*

Instructed by : Maci Incorporated
Gqeberha

Counsel for the Respondents : *Adv Sibeko SC*
Adv Van Schalkwyk

Instructed by : State Attorney
Gqeberha

Heard on : 1 February 2024

Date judgment delivered : 11 June 2024