REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **049991/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

19 June 2023 _____
DATE SIGNATURE

In the matter between:

PETER IAN DE BEER	First Applicant
SANDRA KERSTEN OSHEA (nee KOHLER)	Second Applicant
and	
DIRECTOR GENERAL: HOME AFFAIRS	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent

JUDGMENT

Introduction

[1] This is an application on an urgent basis in two parts. Part A, the applicants seek relief from this court to urgently suspend the conduct of the respondents which declared the second applicant a prohibited person- in terms of the Immigration Act 13 of 2002 as amended (the Act). The intended effect is to

reunite the applicants who stated that they have been separated against their will. They seek Part A to operate as an interim interdict until Part B is heard which seeks to determine the Constitutionality of section 29(1)[1] of the Act. The respondents opposed the application disputing urgency and indicating that the applicants had alternative remedies that they had not exhausted.

[2] The first and second applicant (the applicants) are in a relationship for seven years and regard each other as life partners. In March 2016, the applicants purchased property together in Kwazulu-Natal, South Africa. The first applicant is a South African national residing at 47 Shongweni Road, Hillcrest, Pinetown, Kwazulu Natal. The second applicant is a German national. The two are the joint owners of 101 Plantations, Registrations Divisions Ft, Kwazulu Natal. The first respondent is the Director General of Home Affairs cited in his official capacity, for the determination of foreigners who are prohibited persons in terms of the Act. The first respondent was served on 12 floor North State Building, 95 Market Street, Johannesburg. The second respondent is the Minister of Home Affairs, who has the power to issue regulations in terms of the Act, delegated by section 7 of the Act. The Minister was served care of the State Attorney's Offices at New Government Building, Harrison and Plein Streets, Newtown. The first and second respondents (the respondents) oppose this application.

Background Facts

[1] Section 29(1) provides Prohibited persons are:

(1) The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit:

(a) Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;

(b) anyone against whom a warrant is outstanding, or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;

(c) anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;

(d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;

(e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends; and

(f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document

[3] In 2017, the applicants visited the German Embassy. Whilst at the Germany Embassy they engaged in conversation with an individual by apparent coincidence before they were due to travel abroad, which led them to utilise the services of an agent to secure a permanent residence visa for the second applicant. The latter, at that time, had a work visa which permitted her to live and work in South Africa until 1 February 2021. They paid the agent R5000 for the services and received a document purporting to be a permanent residence visa.

[4] They believed they applied through the "correct" channels and that their application was above board. They received a receipt from VFS in the amount of R1850 and believed that it was correct. They were shocked when they received the VFS receipt for R1850 but did not do anything about it or check the authenticity of the document.

[5] She left South Africa on 16 October 2022 and returned on 22 October 2022. Upon her return, and entering OR Tambo International Airport, she was taken aside and questioned about her passport. It was established that the document was fraudulent. She was informed of the status of her residence visa and received a form 37 notice which informed her that she is refused entry because she is in possession of a fraudulent residence visa or passport or identification document. The notice afforded the second applicant three days to review the decision if she disputed the decision. She was required to leave on the aircraft if it was about to depart and await the outcome of the review outside of the Republic of South Africa. The interpreter's certificate is deleted.

[6] In his application, the first applicant alleges that English is not the second applicant's mother tongue. She was shocked when she was issued a section 37 Form and made to sign it. The form informed the second applicant that she was refused entry because she was the bearer of a fraudulent passport. Consequently, she was refused entry into the country. He subsequently called the officials and explained what had occurred. The applicants wish to be reunited urgently and indicate that the second applicant has been plagued by

panic attacks and severe mental instability. She has also been deprived of access to her property in Kwazulu Natal. The second applicant was denied services of an interpreter when the form was furnished, and she signed it. The administrative action was improperly taken. The applicant contends that it is just and equitable to grant urgent relief in terms of section 172 of the Constitution.[2]

[7] The applicants seek the suspension of the section 29 of the Act[3] on an urgent basis. On the basis of the relief they seek, they submit that the second applicant be permitted to enter South Africa on her visa-exempt status whilst part B is to be heard. They also seek that the decision of the respondents to refuse the second applicant entry into the country be suspended.

[8] In their opposition, the respondents raised four points *in limine*:

8.1 Lack of urgency;

8.2 Failure to exhaust internal remedies;

8.3 Lack of jurisdictional factors to sustain a cause of action in the form of an interim interdict;

8.4 Failure to comply with Rule 16A of the Uniform Rules of Court.

Lack of Urgency

[9] As alluded to already, the second applicant arrived in South Africa, at OR Tambo airport, on 26 October 2022 and was interviewed regarding her passport. It was ascertained that her passport was fraudulent, she was immediately informed of the consequences thereof. The interview was conducted in English as the second applicant furnished her address details in English, according to the second respondent. The content of the confirmatory affidavit of the second applicant is written in English, although the portion after the commissioner of oaths is in German. It is not clear what is intended by this. Whether it is a notary, or whether the person is verifying the person

[2] Constitution of South Africa, Act 1996.

[3] Section 29 provides: "(2) The Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person.

attesting to the document is unclear. It is not in English and is not translated, and it is not clear what the notary intended. If it is the second applicant who attested to the affidavit, it is in English, and it is deduced from the affidavit that she is conversant in English. If she required an interpreter at the border at OR Tambo International Airport, she ought to have informed the authorities accordingly. It is clear that she communicated in English and was ordered by the officers responsible to return to her country. The application herein was lodged on 24 November 2022, approximately a month later. The applicants seek relief that despite the fraudulent manner in which the passport was sourced, as alleged by the respondents to have been in contravention of the laws[4] of the Republic, the second applicant should be permitted to return forthwith.

[10] The first applicant only lodged an appeal in terms of section 29(2) of the Act on 10 November 2022 after the three days as prescribed by the Act. According to the second respondent, this appeal lodged by the applicants is still being considered. No decision in relation to the appeal has been made yet. This means that the internal appeal is still pending. Thus, the applicants have not made out a case for urgency such that the laws of the Republic should be set aside to allow for the entry of a foreign national where prima facie, there has been a disregard for the proper application of the laws of the Republic including the Constitution. The steps taken against such an attack must be commensurate with the attack on national security. This impacts the country's safety and security and how the country is perceived by other countries with regard to its ease of accessibility and safety and security internationally. In any event, the applicants have not shown that they will not obtain substantial redress in due course, having lodged their appeal with the relevant Department. This ought to be dispositive of the matter. However, I address the remainder of the issues for the sake of completeness.

Interim Interdict

[4] S 29 of Act 13 of 2002

[11] The factors to be satisfied before an interim interdict can be granted are trite and set out in the decision of *Setlogelo v Setlogelo*[5]. In *Simon NO v Air Operations of Europe AB and Others*[6] the Court set out the test as follows:

> "The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."

[12] The evidence on record suggests that the applicants have not made out a case that there is a well-grounded apprehension of irreparable harm. This is so especially in light of the internal review pending.

[13] The medical certificate is in German and not comprehensible. It is speculative to attribute her anxiety and mental insecurity to one particular issue without more information. In any event, the second applicant being away from the property is not indeterminate whilst the internal review is pending. There is no indication that the property belonging to the applicants requires the second applicant's attention in particular. No case was made out in this regard.

[14] It is unnecessary to veer into the sphere of the exercise of executive power by granting an interim interdict. Our Courts have held that this should only occur in exceptional circumstances and when a strong case is made out.[7] This is not an exceptional circumstance nor has a strong case been made as I have indicated the internal review is still pending and lies with the executive.

Internal Remedies

[15] The applicants were cognisant of the opportunity to review the declaration made when the second applicant received the notice of prohibition. They were required to apply for a review of the respondent's decision in terms of section

[5] *Setlogelo v Setlogelo* 1914 AD 221.
[6] *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA).
[7] National Treasury and Others v Opposition to Urban Tolling Alliance and Others ("OUTA") 2012 (6) SA 223 (CC)

29(2) of the Act. Therefore, it is premature to review the respondents' decision as no decision has been made with regard to the decision to be taken by the Director General in terms of section 29(2) of the Act. There is no right which is to be protected in the interim and where irreparable harm will ensure. This is not ascertainable on the facts herein.

[16] The Court in *Koyabe and Others v Minister for Home Affairs and Others*[8] the Court said

> "[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.
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> [36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function."

[17] The applicants should exhaust the internal remedies prior to approaching any court. The respondents should be permitted to make the decisions they are entrusted with, with deference accorded to them prior to a judicial review. Fraudulent travelling documents, particularly passports and visas, attack the national security of any country and so too South Africa. The only way the respondents can address the issue of rogue agents and fraudulent passports is to prosecute the agents and discourage persons who utilise such agents. The legislation does have a process which affords unsuspecting persons who have fallen prey to rogue agents to review their declarations of prohibition.

[18] On Part B, which is to be postponed *sine die*, it is appropriate that the parties approach the Deputy Judge President for an appropriate date for an allocation.

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[8] *Koyabe and Others v Minister for Home Affairs and Others* 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC)

[19] For the reasons above I am satisfied that the applicants have not made out a case for urgency or an interim interdict for the relief they sought in Part A. Apart from this, taking into account that the respondents may delay finalising the appeal, I deem it appropriate to state that the applicants are well advised to approach the Deputy Judge President for an expedited date, for a date for the hearing of Part B. I accordingly make the following order:

ORDER:

1. The application in Part A is dismissed with costs.
2. The application in Part B is postponed *sine die*.

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JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant:	Adv. M Arroyo instructed by Smiedt & Associate
For the Respondent:	Adv. A M Masombuka instructed by State Attorney
	Heard: 15 December 2022
	Delivered: 19 June 2023