

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE:
CASE NO: 84727/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	<input checked="" type="radio"/> YES <input checked="" type="radio"/> NO
(3) REVISED	
10/4/2018	
DATE	SIGNATURE

10/4/18

In the matter between:

IDA OOSTHUIZEN IMMIGRATION PRACTITIONER CC

(Registration Number 2004/010081)

1st Applicant

THE APPLICANTS LISTED IN ANNEXURE "A"

2nd to 57th Applicants

and

THE DIRECTOR GENERAL OF THE DEPARTMENT

OF HOME AFFAIRS

1st Respondent

THE MINISTER OF HOME AFFAIRS

2nd Respondent

JUDGMENT

INTRODUCTION:

1. The application consisting of 293 pages, seeks relates mandatory relief on behalf 56 applicants, who applied for permanent residency permits as far back as March 2015 to December 2016. The present 56 applicants applied for permanent residency permits as far back as March 2015 to December 2016 and are, as yet, to receive any form of response from the present respondents. This application is the result of this apathy from the Department of Home Affairs. The main relief sought is that the respondents are to consider and decide these applications within 30 days from date of service of this order.
2. McMenamin Van Huyssteen & Botes Inc. acts as attorney of record for all the applicants.
3. At the hearing of this matter, I raised concerns regarding the 1st applicant's *locus standi*/legal standing, the attorney's mandate to act on behalf of all the applicants and the impartiality of the commissioner of oaths.

LOCUS STANDI AND AUTHORITY:

4. For an attorney and client relationship to be established, the attorney must

accept a mandate from his/her client. The mandate need not be in writing. Once the attorney accepts the mandate from the client, the attorney is then bound to give the client the benefit of his/her skills and to continue to act until the matter is finalised or the attorney/client relationship is terminated.¹ It is trite that an applicant must indicate in his/her founding affidavit that he has the right to apply for the relief sought², that he must have a direct and substantial interest in the right which is the subject matter of the litigation outcome.³ The party approaching the Court bears the onus pertaining to his/her legal standing.⁴

5. In the present application the 1st applicant is Ida Oosthuizen Immigration Practitioner CC. The deponent on behalf of the 1st applicant is Gertruida Oosthuizen (Mrs Oosthuizen). Mrs Oosthuizen states the following in her founding affidavit:

5.1. she is the executive member of the applicant and as such authorised to depose to the affidavit on behalf of the 1st applicant;

5.2. the 1st applicant renders immigration services to foreigners and the general public. It specialises in assisting foreigners with applications for

¹ Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa (5th Edition) (Juta), Vol. 1 at 284 to 285 and the authorities cited in footnote 144 to 145.

² Erasmus Superior Court Practice, (2nd Edition) (Juta), Vol. 2 at D1-54

³ Harms Civil Procedure in the Superior Court (LexisNexis) at B-34 and B-38

⁴ Harms, Civil Procedure in the Superior Court at A-54 to 55 and the authorities cited in footnotes 1, 2, 6 and 9 to 12

the issuing of temporary and/or permanent residency permits;

5.3.the 2nd to 57th applicants are all foreigners, who have submitted different applications in accordance with the provisions of the **Immigration Act**, 13 of 2002;

5.4.the 1st applicant also assists and advises about internal review/appeal and remedies which may be available to persons whose applications are not successful;

5.5.over the period 2015 to 2017, the 1st applicant assisted the 2nd to 57th applicants with the preparation and submissions of different applications to the Department of Home Affairs (1st respondent);

5.6.the representatives of the 1st applicant regularly enquired with the 1st respondent about the status of the various applications. The 1st respondent had failed, refused or neglected to consider and decide the applications;

5.7.a letter of demand was directed to the 1st respondent in an attempt to acquire its cooperation.

5.8.She is an "*experienced immigration practitioner*"⁵.

6. In the letter of demand attached to the founding affidavit, dated the 2nd of

⁵ paragraph 22 of the founding affidavit

November 2017, the attorney writes as follows:

"We refer to the above matter and herewith confirm that we are acting on behalf of our client, IDA IMMIGRATION.

Our client is a duly incorporated company specialising in assisting foreigners with various applications for Visas and permits with the Department of Home Affairs.

We hereby request the outcomes of the various applications submitted through the utilisation of our client, specifically, the outcomes of the applications mentioned in the client list attached hereto and marked as "A". (own emphasis added)

7. Neither the letter, nor the client list attached and marked as "A" confirms that the 1st applicant has the necessary authority to act on behalf of the 56 applicants listed in "A". The 56 confirmatory affidavits are also of no assistance. They merely contain a blanket averment that the deponent has read the "founding affidavit" and confirms the correctness thereof. No reference is made to the deponent to the founding affidavit or the 1st applicant.
8. Mrs Oosthuizen states that she has been duly authorised to take all steps on behalf of the 2nd to 57th applicants, which may be necessary to ensure the final determination of the application. She states that her authority includes, but is not limited, to the making of affidavits on their behalf and that, if challenged thereto, she shall supply the Honourable Court with copies of the written mandates which were given to her by the applicants.

The Court indeed challenged the mandates not only of Mrs Oosthuizen acting on behalf of the 1st applicant and the 1st applicant acting on behalf of the 2nd to 57th applicants, but also the authority of McMenamin Van Huyssteen & Botes Inc. to act on behalf of the all the applicants. The matter stood down until 14h00 to give the attorney time to come to Court with her office files and to provide the Court with the necessary mandates.

9. All the affidavits were attested before Henry William Oosthuizen. His stamp indicates "*Commissioner of oaths, 23 Power Street, Germiston, Ref: 9/1/8/2*". I enquired regarding the similarities between the surname and geographical area of the commissioner of oaths and Mrs. Oosthuizen.
10. I found it odd that the surname of the commissioner of oaths and the surname of the deponent of the 1st applicant as well as their addresses were very similar. I therefore requested counsel on behalf of the 1st applicant to do a CIPC search.
11. After the lunch adjournment the attorney was present in Court and she provided counsel with instructions. Counsel confirmed that the attorney does not have a mandate to act on behalf of the 2nd to 57th applicants and her client is the 1st applicant. Counsel confirmed that the commissioner of oaths was also a member of the 1st applicant and that he and Mrs. Oosthuizen were married. I shall deal with this aspect in due course.

12. The matter stood down further to the 28th of March 2018 to give the attorney an opportunity to file an affidavit to explain on whose mandate she is acting and whether she was aware of the fact that the commissioner of oaths was married to Mrs. Oosthuizen and that he was also a member of the 1st applicant, together with his wife.

FURTHER AFFIDAVITS:

13. On the 28th of March 2018 an affidavit from Ms. Elria McMenamin was handed up. In her affidavit she states that she has dealt with Mrs. Oosthuizen from approximately 2006/2007 and that her firm has successfully brought numerous applications against the Department of Home Affairs in similar circumstances as the present application and that they were always mandated by the 1st applicant and its clients. It is also stated that at no stage did the firm have any doubt that they were mandated to proceed with any of the applications or for the application *in casu*. However, no explanation is provided why the instruction to counsel on the 26th of March 2018 was very specific in that the firm only had a mandate to act on behalf of the 1st applicant.

14. Ms. McMenamin further states that Mr. Alwyn Vogel was involved with the preparation of the application. He resigned and his last day of employment was 16 March 2018. Reference is also made to attached emails between

Mr. Vogel and Mrs. Oosthuizen confirming the instruction to proceed with the applications. However, the emails attached do not indicate or confirm that the 1st applicant is acting with the necessary mandate as the agent on behalf of the 2nd to 57th applicants.

15. Pertaining to the commissioning of the affidavits, Ms McMEnamin states that she was aware that the commissioner of oaths was the husband of Mrs. Oosthuizen but that many years ago she canvassed this aspect and was satisfied that as long as Mr. Oosthuizen had no interest in the 1st applicant's business, he was entitled to commission affidavits to be used in any of the 1st applicant's applications. It would seem that it was never considered by the attorney that the intimate relationship between the Oosthuizens may taint the independence and impartiality of the process envisaged by Act 16 of 1963.⁶

16. It is trite law that it is the duty of every legal practitioner to acquaint him/herself with the Rules of Court and by implication this also places a duty on the practitioner to be acquainted with the relevant case law relating to the Rules.

17. I therefore find it peculiar having regard to all the relevant case law, that indicates the requirement of attorneys from the same firm may not attest

⁶ Justices of Commissioner of Oaths Act

each other's affidavits or each other's client's affidavits in order to avoid an suggestion of impropriety, that the attorney had no concerns pertaining to the involvement of Mr Oosthuizen. The mere fact that Mrs. Oosthuizen and the commissioner of oaths are married, irrespective of whether it is in- or out of community of property, implies as spouses they owe one another a reciprocal duty of support. In any normal marriage spouses generally have an interest in the wellbeing of the other's finances. Therefore whether or not the attorney was aware of the fact that since February 2015, Mr. Oosthuizen, was a member of the 1st applicant, and that according to his affidavit he is not involved in the business of the 1st applicant or derives any interest or benefit thereof, is irrelevant. The fact that the Oosthuizens' are married should be enough to raise the first alarm bells. How can it be that a husband and wife, who share the same house, the same bed, and contribute towards the same household expenses, do not share with one another the benefits from their various business enterprises as part and parcel of the duty of support.

18. Furthermore, the affidavit provided by Mr. Oosthuizen on the 28th of March 2018, states that he is a commissioner of oaths duly appointed by the Minister of Justice and Constitutional Development on 20 November 2006. From the attached certificate of appointment, it is evident that his appointment was conditional on the fact that he holds the office as

“Manager at Ida Oosthuizen Eiendomme”. Even in the highly unlikely event of Mr. Oosthuizen not receiving any direct or indirect benefit from the 1st applicant or his wife, the question remains whether he still fulfils the condition of his appointment. Nothing was placed before me to demonstrate that he does.

19. During argument on the 28th of March 2018, I was referred to Erasmus, Superior Court Practice and in particular the commentary regarding Regulation 7 to the **Justices of the Peace and Commissioner of Oaths Act**, 16 of 1963 and the authorities cited by Erasmus.⁷ Regulation 7(1) provides that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.

20. The authorities are clear that the provisions of Regulation 7(1) are peremptory and not merely directory. In this regard I refer to Radue Weir Holdings Ltd v Galleus Investments CC 1998 (3) SA 677 (ECD) which confirms that a commissioner of oaths who attests to an affidavit is required to be impartial, unbiased and entirely independent of the office where the affidavit is drawn. The commissioner of oaths should have no interest in the particular matter. The judgment confirms that the *“interest”* referred to in Regulation 7(1) framed in terms of Section 10 of the Act, was not only pecuniary or proprietary. In the Radue-matter the Court found that the

⁷ At D3-3 to D3-4 and in particular the discussion on Tambay v Hawa 1946 CPD 866

requirement of complete independence was *prima facie* lacking where two attorneys were practising in association with one another, as an attorney practising in association with another attorney had an interest such as would have precluded him or her from functioning as a commissioner of oaths in respect of an affidavit drafted by the other attorney. The rule is extended to exclude not only attorneys acting for a litigant but also clerks and partners of such an attorney as well as attorneys employed by such an attorney as professional assistants and attorneys acting as correspondents for the attorney of record.

21. In Louw v Riekert 1957 (3) SA 106 (T) at 112A-B it was confirmed that the Court requires the security of an independent commissioner of oaths. In Papenfus v Transvaal Board, Perry Urban Areas 1969 (2) SA 66 (T) at 70 B-D, Marais J stated that he was in agreement with the view that: "*the commissioner of oaths should be independent of the office of which the affidavit to be attested by him is drawn. He cannot be regarded as independent if his partner, employee or employer is the draftsman or deponent... It is clear that both the solemnity of the occasion and the need for complete understanding by the deponent of the import of his act require that an independent party should administer the oath and ensure compliance with the requirements of an oath.*"

22. If the Court has concerns regarding the independence of the commissioner,

it taints the integrity of the whole process. It is the duty of the attorney to ensure that the attestation complies with the requirements and that as in the present application, foreigners understand what they are confirming under oath. Some of the confirmatory affidavits deposed to by the Chinese's applicants are signed in Chinese. The 2nd to 56th applicants range in nationality from Chinese, Ugandan, Ukrainian, Nepales, Indian, Mauritian, Botswanean, Zimbabwean and German.

23. Furthermore the 2nd to 56th applicants reside all over South Africa, from Kempton Park, Witbank, Pretoria, Graigavon, Elsberg, Vaalwater, Malelane, Riverlea to Table View, Cape Town. I raised with counsel how it was possible that 18 confirmatory affidavits were signed on the 4th of December 2017 by applicants who live all over the country, including the 56th applicant who resides in Cape Town. His affidavit indicates that it was signed in Cape Town. The other 17 affidavits, deposed to the 4th of December 2017 in front of Mr. Oosthuizen, were all signed in Edenvale. I requested an explanation from Mr. Oosthuizen in this regard.

24. Mr Oosthuizen explained that it is not his handwriting on the specific affidavit with reference to the part where it is filled in that the deponent appeared in the presence of the commissioner of oaths in "*Cape Town*". The Court was also provided with an affidavit by the 56th applicant, Mr. Mundecke. Mr. Mundecke confirms that he appeared before Mr.

Oosthuizen on the 4th of December 2017. Conveniently he also confirms that he mandated Mrs. Oosthuizen to instruct the attorneys to bring a High Court application due to his long outstanding permanent residency application. Mr. Mundecke then proceeds to explain why his confirmatory affidavit was signed and commissioned in "*Cape Town*". According to him he is busy with a project in Cape Town which is running until the 30th of March 2018. He states that "*we*" (without stating who the other party to the "*we*" is), leased a property in Cape Town as well as in Germiston. According to him he decided to stay on in Cape Town and commute regularly to Gauteng to visit "*my family*" until the project ends on 30 March 2018. In his affidavit deposed to on a Tuesday (27 March 2018) in Sea Point, he states that on 4 December 2017 (a Monday) he was in Germiston to visit his family and that he signed the previous affidavit but unfortunately wrote *Cape Town* instead of *Edenvale* due to a habit when completing forms.

25. On 28 March 2018, I was also extensively addressed during argument that the provisions of Rule 7(1) do not require a formal mandate. Having regard to the provisions of Rule and the conflicting versions placed before the Court, I am not satisfied that the attorney had the authority to act on behalf of the 2nd to 56th applicants.⁸ The instruction to counsel in Court on the 26th

⁸ Erasmus, Superior Court Practice, Vol. 2 at D1-94 and the authorities sited in footnote 4 and D1-

of March 2018 differs from subsequent affidavit filed.

26. Furthermore, having regard to the papers and the arguments before me, I am not satisfied that the requirement of complete independence, impartiality and lack of bias of Mr. Oosthuizen as the commissioner of oaths is present.

RE-ATTESTATION OF AFFIDAVITS:

27. During argument on the 28th of March 2018 the Court was informed that subsequent to the launching of the application, the 5th, 7th and 19th applicants' applications for residency were successful and that they no longer require the Court's assistance. It was also indicated that the attorney ensured to the re-attestation of all the supporting affidavits and that they are available should the Court require same. The re-attestation does not negate the concerns raised by this Court as the manner in which the application was approached is riddled with procedural irregularities. Furthermore, the requirements for final mandatory relief that need to be established with specific reference to the circumstances of each individual applicant and the prejudice that they suffer, are not properly addressed.

28. Applications such as these should be handled on an individual basis and not in the form of a "*group application*" as each applicant's circumstances and in particular the prejudice that they suffer, is distinguishable from the

59 and the authorities cited in footnote 7; Harms, Civil Procedure in the Superior Court at B-37 and B-38

other applicants. This is more so in the case of the fourteen minors involved. Their legal guardians should be the applicants approaching the Court on behalf of their minor children. The legal guardian of the minor child will be in the best position to adequately inform the Court pertaining to the circumstances of the minor child and in particular how the undue delay in finalising the minor child's residency application is affecting the rights and interests of the child.

COMPLIANCE WITH THE REQUIREMENTS FOR MANDATORY RELIEF:

29. It is trite that the three requirements for a final interdict are that the applicant has a clear right, that an injury is actually committed or reasonably apprehended and the absence of another adequate remedy. The 1st applicant has no clear right. Furthermore, the requirement of "*injury*" is interpreted to mean an infringement of the rights which has been established by the applicant which results in prejudice. The application lacks particularity regarding the circumstances of the 2nd to 56th applicants particularly regarding the prejudice that they suffer. A general blanket statement is made pertaining to each of the 56 applicants. The catch-all paragraph pertaining to every applicant merely states that the particular applicant suffers prejudice as a result of the indecision of the 1st respondent in that, since the time of the submission of the application, the specific applicant remains uncertain about his/her future in South Africa.

30. The Court is not satisfied with the vague and bold statements pertaining to prejudice. Each and every applicant's situation is different. For example the 5th, 6th, 11th, 14th, 15th, 20th, 21st, 23rd, 25th, 35th and 38th to 40th applicants are all minor children. Only the 31st, 32nd and 38th applicant's legal guardians were also applicants. The 30th applicant is the mother of the 31st and 32nd applicants and the 37th applicant is the mother of the 38th applicant, a minor male Zimbabwean child. Surely the Court, as upper-guardian, to comply with its constitutional duties in terms of Section 28(2) of our Constitution, should be properly informed regarding the circumstances of these minor children and how the failure of the respondents to timeously consider their applications, impacts on their wellbeing.
31. Due to the procedurally flawed process and the fact that affidavits are not before this Court that comply with the provisions of Regulation 7 as referred to above, I am not inclined to entertain the applications.
32. The application constitutes an abuse of the process. It is quite clear that the attorney merely put the proverbial rubberstamp on these applications and in my view thereby neglected her duty towards the Court. The Court is disappointed in the manner in which these applications have been dealt with by the attorney as well as the commissioner of oaths. I intend referring them to their respective governing bodies.

33. In these circumstances it seems to be fair and equitable that an appropriate order is made pertaining to the costs of the application. The Oosthuizen couple cannot hide behind ignorance of the law to justify their conduct of abusing the convenience of their relationship to side-step procedure and gaining an advantage for Mrs. Oosthuizen as the driving force behind this application, so that her 56 clients' applications are considered.

34. It would also not be fair that the 2nd to 57th applicants be burdened with the costs of a procedurally flawed and tainted process. The 1st applicant is not a non-profit organisation. The 1st applicant derives an income from providing services as an immigration agent. As an "*experienced immigration agent*" the Court would have expected that Mrs Oosthuizen would ensure that the necessary averments, especially once required, is provided that each of the 2nd to 57th applicants have mandated the 1st applicant to approach the Court on their behalf and sufficient detail pertaining to each and every applicant's individual circumstance in order for the Court to grant the relief sought. The fact that it is stated that numerous similar applications have been successfully brought by the attorney and the 1st applicant is irrelevant as the papers before me are clearly not in order.

ORDER:

35. I therefore make the following order:

1. The application is dismissed.
2. The 1st applicant, Ida Oosthuizen Immigration Practitioner CC, may not charge any fees and/or costs pertaining to this application in relation to the 2nd to 57th applicants and insofar as the 1st applicant has received any fees pertaining to this application from any of the 2nd to 57th applicants, such fees are to be repaid.
3. The attorney of record may not charge any fees and/or costs pertaining to this application in relation to the 2nd to 57th applicants and insofar as the attorney has received any fees pertaining to this application on behalf of any of the 2nd to 57th applicants, such fees are to be repaid
4. The attorney of record Ms. E McMenamin of McMenamin Van Huyssteen & Botes Inc. shall ensure that a copy of this judgment is:
 - 4.1 to be brought to the attention of the 2nd to 57th applicants;
 - 4.2 served on the Law Society of the Northern Provinces' offices relevant disciplinary committee for consideration whether or not the attorney transgressed her duties as an officer of this Court with reference to the concerns raised in this judgment;
 - 4.3 served on the Offices of the Department of Justice and Constitutional Development for attention of the relevant officials

pertaining to the appointment of commissioner of oaths, in order to consider whether Henry William Oosthuizen (Ref nr. 9/1/8/2 Germiston) is fit and proper to further act as commissioner of oaths given the concerns raised by the Court in this judgment.



HAUPT L.C
ACTING MADAM JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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