

REPUBLIC OF SOUTH AFRICA




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 57494/2021

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

20 Feb 2024
Date



Signature

In the matter between:

IYAMU TIKO

Applicant

and

THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

JUDGMENT

K STRYDOM, AJ

Introduction:

1. This is a review application brought against the decision to withdraw the Applicant's permanent residence certificate. The Applicant seeks an order setting aside the decision and any decision taken in terms thereof (such as the order to depart from South Africa).
2. The Applicant was issued with permanent residence certificate on 27 September 1996. On 13 February 2018, the first Respondent informed the Applicant that a decision had already been taken in 2012 by the Department of Home Affairs to withdraw the permanent residence permit certificate. He was ordered to depart from South Africa on the 18th of April 2018. Perturbed by this decision, allegedly taken six years before it was communicated to

him, he appealed to the second Respondent. However, on 03 June 2018, the second Respondent confirmed the decision to withdraw the Applicant's permanent residence.

3. As a result, the Applicant launched the present review proceedings in August 2021. The Respondents served their notice of intention to oppose on the 28th of April 2022 and emailed the record of proceedings to the Applicant's legal representatives on the 24th of November 2022. The matter was set down on the unopposed roll of the 27th of February 2023. The matter was removed by agreement between the parties to enable the Respondents to file their answering affidavit and the Respondents were ordered to pay the costs. On the 5th of May 2023, the answering affidavit still being outstanding, the Applicant's legal representatives sent a letter to the state attorney representing the Respondents, indicating that if the answering affidavit is not filed within seven days thereof, the applicant will re-enroll the matter on the unopposed roll for hearing. No answering affidavit being forthcoming, the matter was duly enrolled and the notice of set down, for the present unopposed roll date of 23 October 2023, was served on the state attorney on the 6th of June 2023. The Respondents were again warned of the approaching hearing date and the fact that the matter would be heard unopposed by letter from the Applicant's attorneys on the 18th of October 2023.

Proceedings before Court on 23 and 27 October 2023

4. When the matter was called on the 23rd of October 2023, counsel for the Respondents attempted to hand up two unsigned (and resultantly uncommissioned) documents purporting to be the unsigned answering affidavit of the first Respondent and the unsigned confirmatory affidavit of Mr Kruger. These documents were also uploaded to Case Lines on the same date. I refused to accept these documents. Counsel for the Respondents sought clemency on the basis of the tremendous influx of work faced by the Respondents. I granted the Respondents an indulgence and stood the matter down to the 27th of October 2023, to afford them the opportunity to have the affidavits signed and commissioned. In doing so, however, I made it clear that the failure to present a signed and commissioned answering affidavit on the 27th would result in a ruling that the matter remained unopposed and would proceed on that basis.
5. On the 27th of October 2023, I was informed that the answering affidavit, despite my admonitions was still not before Court. Counsel for the Respondents informed me that, save to confirm that the confirmatory and answering "affidavits" remained unsigned, he held no further instructions regarding this application.

6. Given that the Respondents had not filed an answering affidavit and there was no substantive application from the Respondents for a postponement, the matter was accordingly heard on an unopposed basis. I did however allow counsel for the respondents, as an officer of this Court, to assist this Court by citing the relevant statutory provisions that could find application and to which regard should be had. I am grateful for his assistance in this regard.

Background to the review application

7. As already indicated, in 2018 the Applicant was informed that a decision had been made in 2012 to withdraw his permanent residence visa. It is important to note that there is no proof of the 2012 decision on the papers or on the record as filed by the Respondents, save for the reference thereto in the 2018 communication. Despite this irregularity in the record, counsel for the Applicant proceeded to argue the review on the basis that the 2012 decision was made as reflected in the 2018 correspondence received from Mr Kruger, on behalf of the Director General ("Mr Kruger's 2018 correspondence". Unfortunately, as will become apparent forthwith, the lack of the original decision and reason cannot be remedied so easily.

8. Mr Kruger proffered two reasons for the first Respondent's 2012 decision:

"The reason was firstly that you received Permanent Residence in 1996 on grounds of your marriage to a SA citizen. However you divorced her within two years after obtaining Permanent Residence. In terms of the Aliens Control Act (which was valid at the time of the approval of your Permanent Residence) you may have been withdrawn if you divorced your spouse within two years. You divorced her within 8 months after obtaining Permanent Residence". ("marital status")

"And secondly you entered SA claiming to be an Angolan and obtained refugee status. However, it appears that you are a Nigerian and therefore resided in SA and applied for Permanent Residence on a permit issued on incorrect information." ("fraudulent nationality")

9. The second Respondent, in upholding the 2012 decision ("the internal appeal decision") added a third reason:

"You have three convictions in the database of the South African police Service for driving under the influence of alcohol on a public road. The respective dates of these convictions are 30 July 1998, 27 August 1999 and 6 July 2001." ("previous convictions")

10. The second Respondent concluded that:

“In conclusion I wish to inform you that despite your impressive academic record, the result of your fraudulent identity, terminated marriage and criminal convictions are that you are regarded as a person who is not of good and sound character and I prefer that such people are not known to the general public as being permanent residents of this country.”

11. The reasons proffered for the dismissal of the internal appeal differ on two fundamental grounds from those stated in Mr Kruger’s 2018 correspondence. In the first place, the prior convictions are now included. Secondly, whereas Mr Kruger’s 2018 correspondence alluded to the issue of fraudulent identity (*“..it appears that you are a Nigerian...”*), the internal appeal decision deems fraud as having been established (*“...your fraudulent identity...”*).
12. From the record furnished, the basis for these discrepancies can be found in the internal memorandum furnished by Mr Kruger to the first Respondent dated 18th of May 2018 (“the internal memorandum”). The salient paragraphs therein are:

“8. However according to his police certificate he was convicted on 30e July1998 for driving a vehicle on the public road under the influence of alcohol and was sentenced to pay a fine of R1000 or 30 days imprisonment with a further suspended sentence of five years. On 27 August 1999 he was convicted for the same offence and again on 6 July 2001. His application was duly considered and thereafter refused in 2002 due to his criminal convictions. He appealed against the refusal, but it was rejected in 2003.

11. An interview was conducted by inspectorate on 19 February 2016 with Mr, Iyamu and he acknowledged that he indeed committed fraud by presenting himself as an Angolan citizen while trying to obtain Permanent Residence as he was advised that he will only qualify for asylum if he is an Angolan. He also acknowledged that the divorce of his marriage with a South African citizen was already started before his Permanent Residence was approved. (Annexure-C)”

Legal framework

13. It should at this juncture be noted that the Alien’s Control Act, 1991 (“ACA”) was repealed in 2003 when the Immigration Act, 2002 (“the new Act”) came into force.
14. Section 54(2) of the New Act governs the effect the repeal has on permits issued under the ACA as follows:

“Anything done under the provisions of a law repealed by subsection (1) and which could have been done under this Act shall be deemed to have been done under this Act.”

15. Section 8 of the New Act provides for internal administrative review and appeal procedures regarding decisions taken in terms thereof, for those seeking to challenge administrative decisions. The two channels of internal review were succinctly described by the Constitutional Court in *Koyabe and Others v Minister for Home Affairs and Others* (“Koyabe”):¹

“[51] Section 8 thus establishes two channels for review. One route is created under section 8(1) and the other under section 8(4). The procedure applicable in a particular case will depend on the nature of the administrative decision. In section 8(1), a person refused entry into the country or found to be an illegal foreigner must be notified of his or her right to request in writing that the Minister review that decision. If the affected person arrived on a conveyance about to leave the country, the request must be communicated to the Minister without delay. Should the Minister’s response not be obtained by the time the conveyance departs, the person shall leave and await the Minister’s decision outside of the country. In any other case, the affected person has three days within which to lodge a review application and may not be deported unless and until the Minister has confirmed the decision. Presumably the review must occur within a reasonable timeframe.

[52]The procedure established under section 8(1) stands in contrast to that provided for under section 8(4). In all cases other than those contemplated in section 8(1), where a decision has materially and adversely affected a person’s rights, the decision shall be communicated in the prescribed manner and reasons shall be furnished. Under section 8(4), the affected person may, within 10 working days, request a review or appeal to the Director-General. Within a further 10 days of the receipt of the Director-General’s decision, the person may seek a ministerial review or appeal.”

16. The new Act, in section 28 sets out the grounds upon which permits may be withdrawn:

The Director-General may withdraw a permanent residence permit if its holder –

- (a) is convicted of any of the offences- (i) listed in Schedules 1 and 2; or (ii) in terms of this Act;*
- (b) has failed to comply with the terms and conditions of his or her permit;*
- (c) has been absent from the Republic for more than three years, provided that ...; or*
- (d) has not taken up residence in the Republic within one year of the issuance of such permit.*

Evaluation of Respondents’ grounds for withdrawal of permit

¹ *Koyabe and Others v Minister for Home Affairs and Others* (CCT 53/08) [2009] ZACC 23; 2009 (12) BCLR 1192 (CC) ; 2010 (4) SA 327 (CC) (25 August 2009)

First ground: Previous convictions

17. It is evident from the record that the third reason for refusal of the internal appeal, was added pursuant to the internal memorandum. It was not factored as a reason for the withdrawal in 2012. The second respondent, in an internal appeal of an administrative decision, may not, of his own accord, add additional reasons in support of the decision he is to review and decide upon. In any event, those convictions were already expunged from the applicants records in March 2013, well before Mr Kruger penned the internal appeal memo. Insofar as this reason may have been a basis for the decision to withdraw the applicant's permanent residence permit, the reason is based on an error in fact.

Second ground: marital status

18. In relying on the marital status of the Applicant, the withdrawal decision was purportedly based on the provisions of section 30(2) (e) of the repealed ACA:

" The Minister may withdraw an immigration permit issued in terms of section 25 and by notice in writing order the holder of such permit to leave the Republic within a period stated in the notice if- "The said holder obtained the permit on the basis of a marriage entered into less than two years prior to the date of issue of the permit, and such marriage is judicially annulled or terminated within two years subsequent to the said date, unless the Minister is satisfied that such marriage was not contracted for the purpose of evading any provision of this Act."

19. The marital status of the permit holder is however no longer listed as a ground for withdrawal per Section 28 of the New Act. By virtue of S54(2) of the new Act, therefore, the Respondents had had no statutory authority to withdraw permanent residence permits after the ACA was repealed in 2003. The decision taken on this basis in 2012 therefore was not authorised by the empowering provision as per section 6(2) (f)(i) of the Promotion of Administrative Justice Act of 2000 ("PAJA") was procedurally unfair and was materially influenced by an error of law in terms of section 6(2) (c) and (d) of ("PAJA").

Third ground: fraudulent nationality

20. The fraudulent nationality ground must similarly be determined with reference to the provisions of the New Act. S30(2)(a) of the ACA, had previously empowered the Minister to withdraw a permit where "(a) *The application for such a permit contains incorrect information; or (b) The holder of such permit or his or her agent has furnished incorrect information in connection with that application...*"

21. Section 28 of the New Act contains no similar provision. I have, however, also considered to the following provisions of the New Act:
 - 21.1. Section 29(1), under the heading "*Prohibited persons*" lists instances where foreigners would be prohibited persons who would "... *not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit.*"
 - 21.2. One of these instances is listed in subsection 29(1)(f) as: "...*anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.*".
 - 21.3. Section 48 furthermore states that: "*No illegal foreigner shall be exempt from a provision of this Act or be allowed to sojourn in the Republic on the grounds that he or she was not informed that he or she could not enter or sojourn in the Republic or that he or she was admitted or allowed to remain in the Republic through error or misrepresentation, or because his or her being an illegal foreigner was undiscovered.*"
22. The applicant argues that, in terms of the New Act, the applicant should first have been declared a prohibited person before his permit could have been withdrawn.
23. The New Act does not pertinently reference a procedure for declaring someone to be a prohibited person, however, contextually seen, there has to be some form of finding regarding "fraud" before someone can be held to be a prohibited person. To hold otherwise would imply that a person can be found to be illegally in the country or to have committed fraud without any proof thereof.
24. Without a finding, the application of Section 48 of the New Act to the facts *in casu* would result in a 'catch-22' scenario: The provisions of section 48 apply to *illegal* foreigners. The applicant would only be *an illegal foreigner* if his permanent residence permit was withdrawn. Section 28, which governs the instances of withdrawal, does not provide for withdrawal of such a permit in cases of misrepresentation or fraud.
25. Similarly, an application of the provisions of Section 29(1)(f) presupposes a finding that a person is in possession of a *fraudulent* resident permit. It is at this juncture that Counsel's concession in assuming that the reasons of the 2012 decision are as per the communication from Mr Kruger in 2018 becomes problematic.
26. Mr Kruger's 2018 correspondence does not indicate that, when the decision to withdraw was taken in 2012, there had been a definitive finding of misrepresentation or fraud re the applicant's nationality. It is only after being furnished with the internal memorandum which indicated that the applicant allegedly "...*acknowledged that he indeed committed fraud by presenting himself as an Angolan citizen*" during an "...*interview ...conducted by*

inspectorate on 19 February 2016...” that the second Respondent pertinently uses the term ‘fraud’ in the internal appeal decision.

27. Presupposing that the admission of fraud in 2016 is sufficient for purposes of finding the applicant to be a prohibited person per section 29(1)(f), the reliance thereon for purposes of upholding the 2012 decision to withdraw to residence permit is in itself *ultra vires*. The alleged admission having only taken place in 2016, it was not open to the Minister to have regard thereto when deciding the 2012 decision. This would constitute a new reason for the withdrawal, which in turn would trigger the processes for administrative review in terms of section 8 of the New Act afresh. To, on internal appeal, have regard to such allegations made in the internal memorandum, violates the principle of *audi alteram partem* and S3(2), in general, and S3(2)(b)(ii), specifically, of PAJA.
28. In any event, from the procedure followed in the internal appeal, it also does not appear as if there was a finding made on illegality. As per *Koyabe supra*, there are two procedures for review envisioned in the New Act. Where a person is “..found to be an illegal foreigner..”, section 8(1) applies and such a person may not be deported until the decision is confirmed by the Minister. The present matter, however, concerns an internal appeal in terms of Section 8(4)² – which caters for “...all cases other than those contemplated in section 8(1), where a decision has materially and adversely affected a person’s rights..”

Finding

29. The second Respondent’s decision to uphold the 2012 decision to withdraw the applicant’s permanent residence permit therefore stands to be set aside.
30. In considering whether to refer the internal appeal back to the second respondent for reconsideration, I had regard to the timelapse since the original decision was purportedly made in 2012 coupled with the fact that the Respondents, in compiling the record could not provide proof of the 2012 decision or reason given at that time, as well as the reliance on new facts by the first respondent in the internal appeal. In view of all these factors and those listed in the judgment, it would be just and equitable to substitute the second Respondent’s decision to uphold the withdrawal of the applicant’s permanent residence permit, with a decision to withdraw the 2012 decision to do so. Naturally all actions taken pursuant to the withdrawal of the residence permit stand to be set aside as a matter of course.

² See for instance the “purpose” of the internal memo: “1 To provide Minister with a submission regarding an appeal in terms of section 8(4) of the Immigration Act (Act 13 of 2002) regarding the withdrawal of Permanent Residence..”. at CL 011-1

31. The Applicant as part of his prayers has sought a declaration that he be declared a permanent resident. I am disinclined to grant such a specific order given the possible permeations that might have on the investigative and other administrative functions of the Respondents.

Costs

32. Counsel for the Applicant, in argument, also submitted that costs should be awarded on a punitive scale given the Respondents' dilatory conduct in this matter. Even though the notice of motion does indicate that such costs would be sought, given the prejudicial nature of such an order, I allowed counsel for the Respondents to address me on this aspect.
33. Whilst I agree with the applicant that the continued failure by the Respondents to file their answering affidavit is lamentable, their failure to do so, given my finding, has not had any real effect on the aspect of the costs incurred on the 23rd of October 2023. Their previous failure in March 2023, has already been dealt with by a cost order granted at that time and this Court can therefore not revisit that failure. For purposes of the present set down, even if an answering affidavit had been filed, the applicant would still have had to set the matter down for argument (albeit on the opposed roll). As such, it cannot be countenanced that costs have been unnecessarily exacerbated for purposes of the set down of 23 October 2023.
34. However, the proceedings of 27 October 2023 were exclusively for the benefit of the Respondents; they were granted an indulgence to have the matter roll over to the further date to enable them to file the answering affidavit. The failure to do so, again, is deplorable. In this regard, I have taken notice of the previous postponement of March 2023 to enable them to mount their defence. Having been for their exclusive benefit, there is no reason why the Applicant should be out of pocket for the costs of this second day. As was stated in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging 1946 AD 597*:

'[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.'

35. The costs of this second day should be borne by the Respondents.

Order

36. In the result, I make the following order:

1. The decision of the Second Respondent to uphold the second Respondent's decision to withdraw the applicant's permanent residence in terms of section 8(6) of the Immigration Act, 2002 (Act No 13 of 2002) as amended is reviewed, set aside and replaced with the following decision:

"The applicant's internal appeal is upheld and the decision of the Director-General: Department of Home Affairs in 2012 to withdraw the applicant's permanent residence, as communicated on 13-02-2018, is reviewed, set aside and/or withdrawn in its entirety."

2. Any decisions taken as a result of the decision set that has been set aside and/or withdrawn per paragraph 1 above, including those aimed at ordering the applicant to leave the Republic of South Africa, are reviewed and set aside.
3. The Respondents are ordered to re-instate the Applicant's immigration status accordingly.
4. The first and Second Respondents are ordered to pay the Applicant's costs up to and including the 23rd of October 2023 on a party and party scale.
5. The first and Second Respondents are ordered to pay the Applicant's costs for the 27th of October 2023 on an attorney-client scale.



**K STRYDOM
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG
DIVISION, PRETORIA**

Judgment delivered: 20 February 2024

Appearances:

For the Applicant: MR Smart I Nwobi
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For the First and Second Respondents: State Attorney Pretoria