IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

19 March 2024
DATE

SIGNATURE

CASE NO: 2021/476782

In the matter between:

DZMITRY DZENISIUK	1st Applicant
VOLHA YARMAK	2nd Applicant
IBA SOUTH AFRICA (PTY) LTD	3rd Applicant
and	
MINISTER OF HOME AFFAIRS	1st Respondent
DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	2nd Respondent

Coram: **Groenewald, RJ (AJ)**

Heard on: **13 March 2024**

Delivered: 19 March 2023 - This judgment was handed down electronically uploading to Caselines.

JUDGMENT

GROENEWALD AJ

Introduction:

1. The Applicant seeks the review, in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000, of the Respondents respective decisions to reject the renewal of the First Applicant's Critical Skills Visa and the consequent internal appeals of that decision.

2. Section 33(1) of Constitution the provides that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

3. In ***Kiliko and Others v Minister of Home Affairs and Others 2006 (4) SA 114 (C)*** the apex Court held ***in paragraph 28*** that:

> "*The State, under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens (see Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and*

Others; Thomas and Another v Minister of Home Affairs and Others 2000 (1) SA 997 (C) at 1043I - 1044E)."

4. The Full Bench decision in the ***Director General Department of Home Affairs and others v Link and others 2020 (2) SA 192 (WCC)*** aptly summarised the right to adjust administrative action as follows (in paragraph 21 of the judgment):

> "*The Constitutional Court has held that where the Constitution provides that a constitutional right is available to "everyone" the right extends to all persons, not only citizens but also foreigners, including those who may be in the country but have not yet been granted formal permission to remain. And in a number of decisions in the Supreme Court of the Appeal and the Constitutional Court as well as this Court have confirmed that foreigners are as entitled as citizens to the protection of fundamental human rights which are entrenched in the Bill of Rights, save where those rights are specifically reserved for citizens only.*"

5. The constitutionally entrenched right to just administrative action, when dealing with the State, has been given statutory form in the ***Promotion of Administration Justice Act 3 of 2000***, and, relevant to the present application, in terms of the relevant provisions of the ***Immigration Act 13 of 2002***.

The relief sought:

6. The Applicant's notice of motion, which was amended in terms of the provisions of Uniform Rule 28, provided for relief set out in two parts. Part A of the relief was sought and granted on an urgent basis on 28 September 2021 by the Honourable Justice Malindi as follows:

"1. *The application is heard as one of urgency in accordance with the provisions of Rule 6(12)(a) and the usual forms, time limits and procedures as envisaged in terms of Rule 6(5), including the requirements for service via the Sheriff of this court, are dispensed with.*

2. *The First Respondent, alternatively the Second Respondent, are ordered to pend all actions for the deportation or repatriation of the Applicants, pending the relief sought in Part B of the Notice of Motion.*

3. *An order in terms of Section 32 of the Immigration Act 13 of 2002, as amended, directing the Second Respondent to authorise the Applicants to remain in the Republic without being repatriated or deported pending the finalisation of the review sought in Part B.*

4. *An order allowing the First Applicant to remain employed by IBA South Africa (Pty) Ltd pending finalisation of the review sought in Part B of the Notice of Motion.*

5. *That the Applicants are allowed to approach this court for the enrolment of Part B for the review application on these papers, as duly supplemented, and that in the interim Part B of this application is postponed sine die.*

6. *The cost of the urgent application to be reserved.*"

The granting of the relief sought in Part A of the Notice of Motion and the events which followed:

7. The Respondents did not initially oppose the granting of Part A of the Notice of Motion and the order was granted on an unopposed basis.

8. There were certain concerning delays in the enrolment of Part B of the application, but there is an extensive and detailed explanation presented under oath by the Applicants in this regard. The explanation was not challenged by the Respondents and is accepted by the Court.

9. Part B of the Notice of Motion was enrolled on the unopposed roll for 10 July 2023. The Respondent sought a postponement of the matter on the basis that they still intended to deliver an answering affidavit. This resulted in the following order being granted on the 10th of July 2023:

> "*1. The application is postponed sine die;*
>
> *2. The Respondents are to file their answering affidavit and condonation application by 20 July 2023, failing which the application can proceed on an unopposed basis;*
>
> *3. The First and Second Respondents are to pay the wasted costs occasioned by the postponement, preparation and counsel's costs jointly and severally, the one paying the other to be absolved.*"

10. The Answering Affidavit was only delivered on 19 July 2023 followed by a condonation application in August 2023.

11. It is useful to note what was said by our apex court about the duty of state litigants. In **MEC for Health, EC v Kirland Inv (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC) at par 82**:

> "*To demand this of government is not to stymie it by forcing upon it a*

senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly." [1]

12. The issue of condonation was addressed at the onset when the matter was heard together with the issue of the supplementary affidavits. The delay by the Respondents in filing their Answering Affidavit is unfortunate to say the least. It is however, on the facts of this case, in the interest of justice to take cognisance of and to consider what was stated in the Answering Affidavit. Certain important concessions were also made in the Answering Affidavit and the Applicants will suffer no true prejudice if condonation is granted. Therefore, the late filing of the answering affidavit was condoned. The costs of the condonation application, which is to be paid by the Respondents who are seeking an indulgence, will be dealt with in the order below.

13. The Applicants filed three supplementary affidavits before the Answering Affidavit was received. The Respondents only took issue with some of the contents of the third supplementary affidavit and the document which was relied upon therein. Based thereon that the Respondents retained the right to argue as to the relevance of the document, the Respondents' counsel Mr Lebeko did not object to the admission of the respective supplementary

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1 See also: ***Cape Town, City of v Aurecon SA (Pty) Ltd 2017 (4) SA 223 (CC) at par 47***.

affidavits. On that basis the three supplementary affidavits were allowed.

The factual matrix:

14. The First Applicant obtained an Intra Company Transfer Visa during 2014. The First Applicant was then issued with an Exceptional Skills Permit, which contained a Critical Skills Visa valid until the 5th of July 2021. The Second Applicant was issued with an accompanying spouse's Visitors Visa also valid until 5 July 2021.

15. The First Applicant proceeded to apply to renew his Critical Skills Working Visa on 16 February 2021. The Second Applicant also applied for a renewal of her Accompanying Spouse Visitor's Visa on 16 February 2021.

16. On 28 May 2021, the First Applicant received a rejection of his application by the Second Respondent. The ground of the objection was stated to be that "*there is no proof that the Applicant employer is duly registered in terms of the South African Laws.*"

17. The Applicants contend, with merit, that the reason for the Respondent's rejection was patently wrong insofar as the First Applicant's employer is a South African registered company with a registration number which was reflected as part of the application. Albeit that there may be something to be said that it would have been in the best interest of the First Applicant to also submit the company documents of his employer, that does not detract from the duty upon the First Respondent to properly consider the application including the reference to a South African registration number of the employer.

18. The First Applicant launched a formal appeal in terms of the provisions of Section 8(4) of the Immigration Act 13 of 2002 ("the Immigration Act") which provides that:

> "*An Applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision*".

19. In terms of subsection 8(5) of the Immigration Act '*The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.*'.

20. As part of the internal appeal the First Applicant also provided a copy of COR14.3 document which made it plain that his employer is a South African Company.

21. The Second Respondent thereafter proceeded to reject the appeal on the basis that "*according to the company registration provided by you, you are the only listed director, and you are applying as a managing director*". The shifting of the goalpost is apparent from the response to the initial appeal.

22. On 23 July 2021, the First Applicant lodged a further formal internal appeal in terms of the provisions of Section 8(6) of the Immigration Act against the Director General's rejection of the initial appeal. Section 8(6) of the Immigration Act provides that:

> "*An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of*

that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.".

23. In terms of section 8(7) of the Immigration Act, the Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse, or modify that decision.

24. In support of the further appeal to the Minister, the First Applicant provided evidence that made it plain that the First Applicant is one of two directors and that the Fist Applicant does not own any shares in the employer. It was contended on behalf of the Applicants that the reference to a managing director only bears relevance in respect of the internal structure of the company and it doesn't detract from the fact that the First Applicant is a director and not the sole director of the company.

25. On 2 September 2021, the First Applicant received the First Respondent's rejection in terms of section 8(6) of the appeal, citing on this occasion the following reason:

"*You have misrepresented yourself by submitting an invalid offer of employment as according to the information on Companies and Intellectual Property Commission (CIPC), you are the owner of that company IBA South Africa with registration 2013/114909/07. Therefore, you have contravened the Immigration Act by illegally operating a business in the country without a valid business visa*".

26. The Applicants contend that the First Respondent's rejection is wrong, in fact and in law, which is demonstrated with a reference to the share certificate which clearly shows that the IBA Group A.S, being the Czech Public

Company, is the shareholder in the employer company. The failure to properly consider the relevant facts ultimately lead the Respondents to the wrong conclusions. This application is of course a review and not an appeal. It should however be kept in mind what was held in ***Pepcor Retirement Fund v Financial Services Board 2003(6) SA 38 (SCA)*** at ***paragraph 47***:

> "*In my view a material mistake of fact should be a basis upon which a court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in paragraph [10] above) be reviewable at the suit of inter alios the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, SARFU and Pharmaceutical Manufacturers (supra) requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires*".

27. Not only does the decision ignore the distinction between the legal personality of the company and its shareholders, but it also ignores the difference between a director and a shareholder. The Applicants contend with merit that it implies that the decisionmaker failed to take into consideration relevant factors, and further considered irrelevant factors in coming to its conclusion.

28. The finding that the First Applicant had transgressed the provisions of the Immigration Act is not unimportant and it has prejudicial consequences for the First Applicant and potentially also in respect of future applications made within the ambit of the Immigration Act.

29. It was within the above factual matrix that the Applicants launched the urgent application which resulted in the order in respect of Part A.

30. The Applicants contend, *inter alia*, that:

30.1. The Respondents placed unnecessary weight on the fact that the First Applicant is a director of the third applicant, which has no bearing on the renewal of the CSWV application, as his designation as managing director is generally seen only as a descriptive management title;

30.2. The respondents failed to take into consideration the documents submitted by the First Applicant, which clearly demonstrate that the Third Applicant is a South African company and cannot be considered the First Applicant's alter-ego;

30.3. The reasons provided by the Respondents are irrational and unreasonable and based on the incorrect application of an understanding of Company Law and the role of a director in particular;

30.4. The action (by this I assume is meant the decision) is not rationally connected to the information before the decisionmaker; and

30.5. The Respondents failed to properly consider the available documentary evidence or to attach the appropriate weight to the evidence provided. Documentation submitted as evidence should not

be considered in isolation from other pieces of evidence that go towards establishing particular facts. It is not appropriate or sustainable for an adjudicator to attach no weight to a document submitted in support of the application without giving clear reasons for reaching its findings based on the available evidence.

31. Based upon the above, the Applicants contend that the decisions should be reviewed and set aside.

32. The Respondents did not directly challenge the factual averments contained in the founding papers nor do they contend that the decisions were correct. In the Answering Affidavit the Respondents essentially only took issue with: the Applicants' delay in setting Part B of the Notice of Motion down for hearing; in respect of some of the contents of the Third Supplementary Affidavit, and the attempted reliance on a document that was not before the decisionmakers when they consider the respective internal appeals.

33. The Respondents contended that they did not oppose the application relating to Part A of the notice of motion but pertinently, and with merit raised the delay in the setting down of Part B. The delay in setting Part B down is disconcerting, but there was a full and proper explanation of the circumstances, being mostly beyond the control of the Applicants, which led to the considerable delay. Obviously, the court should not countenance a party seeking to disingenuously employ the use of interim relief to substantially extend their stay in the country without compliance with the provisions of the Immigration Act. This, however, is not such a case.

34. The Respondents contend that due to the effluxion of time, the First Applicant's contract of employment in any event came to an end and that the application therefore be rendered academic and would have no practical effect.

35. In the Respondent's heads of argument, they state that they object to the admission of the Applicant's third supplementary affidavit as:

35.1. The affidavit introduces a new document that was never made available to the Respondents when they adjudicated the First and Second Applicants' application for the renewal of their respective visas; and

35.2. The document referred to by the Applicants as an addendum to the initial employment contract extending the employment contract to 2026 was never submitted to the Respondents for consideration when the First and Second Applicants submitted their applications for the renewal of their visas and as such, the Respondents never considered this document.

36. There is merit in the argument that the court should not consider, for purposes of the review of the decisions, documents not considered by the decisionmakers. The inclusion of the further documents, so the Applicants contend, was not for purposes of consideration of the review and setting-aside of the decisionmakers decision, but to demonstrate that, mindful of the effluxion of time, that: the application was not academic and that the Applicants remain eligible for the respective visas. The documents are also

relevant for purposes of the substitution order sought. It is within this limited context that the Applicants seeks to rely upon those documents.

37. Mr Lebeko on behalf of the Respondents correctly contended that a valid contract of employment is a key element required when one makes application for a Critical Skills Visa. The First Applicant however was in possession of such employment at the time when the initial application was made. There is also merit in the contention by the Applicants that the duration of the visa would be intertwined with the date upon which it is granted by the Respondents.

38. The Respondents also presented the following two submissions in their heads of argument:

38.1. Ad paragraph 16 – "*I need to specifically highlight that the Respondents are not oppose* (sic) *to the Review Application in general but their only objection/opposition is based and limited only to the grounds set in paragraphs 3 to 15 above*"; and

38.2. In paragraph 18 in conclusion – "*The Respondents take no issue with the Review Application per se, but humbly request the Honourable Court that, when adjudicating this application, it should take into consideration the objections raised by the Respondent*".

39. The submissions by the Respondents were in fact considered and they are relevant to these proceedings. They should however be considered within context.

Is the review moot?

40. It cannot be contended with conviction that the application has been rendered either academic or moot. This is *inter alia* so because, the decisions include a finding that the First Applicant transgressed the provisions of the Immigration Act. Such conduct could and likely would have a dire impact upon future applications made by the First and potentially the Second Applicant in terms of the Immigration Act. When asked about this Mr Lebeko conceded that such a finding, if left intact, would likely play a role in any future application made by the First Applicant in terms of the Immigrating Act. He further conceded that it, in light of the concession, to contend with conviction that the review is moot.

41. On this point alone the matter cannot be stated to be either moot or academic. The finding impacts upon the rights of the Applicants. The validity period of the visa would run from the date of the issue thereof – and it cannot be said that the time-period applied for has expired. In these particulars circumstances the Court cannot leave clearly flawed decisions to stand. Therefore, the application is neither moot, nor academic.

Conclusion and costs:

42. Considering the facts of the matter, including the shifting of goal posts by the Respondents, as well as the apparent failure to fully consider both relevant circumstances and the apparent oversight in respect of the correct status of the First Applicant's employer, it follows that the decisions must be reviewed

and set aside. Mr Lebeko conceded that if the matter is not moot that the review must succeed. The concession was rightly made.

43. Ms Lipshitz on behalf of the Applicants initially contended that the Court should grant a substitution order in terms of the provisions of PAJA. Exceptional circumstances must exist to justify substitution or variation. During argument Ms Lipshitz abandoned the request for a substitution order and I therefore do not need to deal further with this aspect of the application.

44. Insofar as the decisions are to be referred back to the Respondents for reconsideration, it appears prudent that the First Applicant should be granted the opportunity to supplement their applications to address the impact of the effluxion of time and also that the protection afforded in terms of the interim order should, to a certain extent, remain in place. This was fully debated with both Ms Lipshitz and Mr Lebeko and both agreed that such an order would be prudent.

45. Counsel further agreed that a time limit should set for the Respondents to finalise the application if referred back. Ms Lipshitz proposed 20 days, but Mr Lebeko contended that 30 days would be reasonable. It is important to recognise the important role played by the Respondents in considering applications in terms of the Immigration Act. There are sound reasons why the contents of the applications and supporting documentation should be properly scrutinised. I am inclined, mindful of the prejudice which the Applicants continue to suffer whilst the matter remains pending, to grant the longer period of 30 days to finalise the First Applicant's application. Counsel

agreed that the order should include interim relief to protect the status *quo* of the Applicants and that such relief should be in line with that which was granted in respect of Part A of the Notice of Motion. This is necessary to avoid any doubt as to what the status of the First and Second Applicants is whilst the applications are being considered.

The order:

46. Accordingly, the following order is made:

46.1. The delivery of the Applicants supplementary affidavits, dated 01 July 2022, 19 December 2022 and 03 July 2023 is condoned.

46.2. The late delivery of the Respondents Answering Affidavit is condoned, and the Respondents are ordered to pay the costs of the condonation application.

46.3. The decisions issued by the Respondents dated 26 February 2021, 18 June 2021 and 11 August 2021, rejecting the First Applicant's application for the renewal of his Critical Skills Working Visa and the consequences which followed upon those decisions are reviewed and set aside.

46.4. The applications listed under TRR3199210 and TRR3199232 are remitted to the First Respondent for reconsideration, subject thereto that the Applicants will be entitled to supplement those applications with such additional documents which they deem appropriate within

10 days of this order. The First Respondent should also consider the supplementary documents in respect of the applications.

46.5. The First Applicant is ordered to make an application to the Department of Home Affairs for a renewal of his critical skills work visa in terms Section 19 of the Immigration Act 13 of 2002 ("the Immigration Act") within 10 days of the date of this order.

46.6. The Second Applicant is ordered to make an application to the Department of Home Affairs for a renewal of her visitor's visa in terms Section 11 of the Immigration Act within 10 days of the date of this order.

46.7. A copy of this order and the judgment should form part of the applications referred to above.

46.8. The Respondents are ordered to, within 30 days from the date of receipt of the visa applications as contemplated above:

46.8.1. make a decision in respect of the First and Second Applicants' respective visa applications; and

46.8.2. communicate their decisions in writing to the Applicants or to their attorneys of record.

46.9. Pending the finalisation of the applications referred to *supra* an interim order is made, with immediate effect that:

46.9.1. the Respondents are ordered to pend all actions for the deportation or repatriation of the Applicants;

46.9.2. an order is issued directing the Second Respondent to authorise the Applicants to remain in the Republic without being repatriated or deported pending the finalisation of the above applications; and

46.9.3. the First Applicant be entitled to remain employed by IBA South Africa, pending the finalisation of the above applications.

46.10. The Respondents are ordered to pay the reserved cost of 28 September 2021 in respect of the urgent application and the relief granted in Part A of the Notice of Motion on an unopposed party-and-party scale; and

46.11. The Respondents are ordered to pay the cost of the application.

RJ GROENEWALD (AJ)
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 19 March 2024.

For the Applicant	:	Adv T Lipshitz
Instructed by	:	Cliffe Decker Hofmeyer Inc - Il Mohomed
For the Respondents	:	Adv E Lebeko
Instructed by	:	The State Attorney - Mr NK Caleb
Matter heard on	:	13 March 2024 - Court 8F
Judgment date	:	19 March 2024