



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

Case No: 18762/2021

FLORENCE MUSANA NAJEMBA

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR-GENERAL: HOME AFFAIRS

Second Respondent

Date of hearing: 4 August 2022

Date of judgment: 13 October 2022

JUDGMENT (HANDED DOWN ELECTRONICALLY)

HOCKEY, AJ

INTRODUCTION

[1] The applicant, a Ugandan national, brought this application to review and set aside the decision of the first respondent, the Minister of Home Affairs (“the Minister”). The impugned decision was made on an appeal to the

Minister in terms of section 8(6) of the Immigration Act 13 of 2002 (“the Act”), to the effect that the applicant is a prohibited person in terms of section 29(1)(f) of the Act. In the alternative, the applicant seek a declaration that she is not a prohibited in terms of section 29(1)(f).¹

[2] Section 29(1) of the Act lists certain categories of foreigners who “*are prohibited persons [who] do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit*”. The list, in subsection (f) thereof, include “*anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.*”

[3] In terms of section 29(2) of the Act, “[t]he Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person.”

[4] Section 8(6) and (7) of the Act provides for a decision of the DG to be taken on review or appeal to the Minister, who shall consider the application, whereafter the Minister shall either confirm, reverse or modify that decision.

[5] The Department of Home Affairs (“the Department”) determined that a work visa (“the impugned visa”) obtained by the applicant was fraudulent. Thereafter the applicant applied to the Director General of the Department (“the DG”) to have her prohibition uplifted in terms of section 29(2) of the Act. The DG however, turned down her application. She thereafter unsuccessfully appealed the DG’s decision to the Minister in terms of section 8(6) of the Act. It is the latter decision which is under scrutiny in the present matter.

¹ At the onset of the proceedings counsel for the applicant clarified that the declarator in clause 2 of the Notice of Motion was asked for in the alternative to the relief set out in clause 1, namely a review and setting aside of the Minister’s decision.

BACKGROUND FACTS

[6] The applicant initially visited South Africa in 2009 accompanying her sister on a short-term visitor's visa. She subsequently successfully applied for a relative's visa which was valid for two years.

[7] During 2011, the applicant applied for an extension of her relative's visa which was refused and she accordingly left South Africa for Uganda.

[8] During 2013, the applicant returned to South Africa on a visitor's visa to attend a church conference. Whilst in the country, she applied for a work visa with the assistance of a Pastor Clive Ssenyange ("the pastor").

[9] The Department alleges that the applicant was issued with a relative's visa on 31 May 2013, but did not produce a copy of this visa. The DG who deposed to the answering affidavit on behalf of the respondents, alleges that it is due to the fact that this visa could not have been extended which motivated the applicant to commit fraud by obtaining a fraudulent visa. The applicant, on the other hand, contends that she remained in South Africa after the expiry of her visitor's visa by virtue of an Immigration Directive 43 of 2010 ("the Directive") which was issued as a result of the Department's inability to decide applications timeously. A copy of the Directive is attached to the applicant's replying affidavit.

[10] In May 2014 the Directive came to an end. The applicant avers that she feared returning to Uganda due to statements she made in favour of sexual minorities and LGBTQI persons (which is criminalised in Uganda). She therefore submitted an application for asylum on 30 May 2014, and was subsequently granted a visa in terms of section 22 of the Refugees Act 130 of 1998 (“the section 22 visa”). This visa is valid for six months at a time. She periodically renewed the section 22 visa and sojourned in South Africa on the basis of this visa ever since.

[11] The applicant received no outcome in respect of her application for a work visa and avers that she eventually lost faith in the pastor. On her version, she followed up with the Department herself. She recorded some of the reference numbers she was given and noted these numbers in her founding affidavit along with the names of officials from the Department with whom she had spoken to on several of these occasions. The DG denies these allegations, without reference to the reference numbers of the queries noted by the applicant. In terms of the Plascon-Evans rule, and because of these blank denials, the version of the applicant should be accepted in relation to her queries with the Department.

[12] The applicant further states that a work colleague informed her that a Mr Masondo, who also worked with the applicant at the time, knew of a reputable immigration agent who had helped him and others to acquire visas. The applicant approached Mr Masondo for help and on his advice re-submitted her work visa application via the agency. The applicant initially did not know the identity of the immigration agent, but subsequently, through sms

communication, learnt that the agent was one named “Jason” from SA Migration, a specialist immigration firm.

[13] The applicant paid Mr Masondo R12 000.00 for the services of the immigration agency and submitted all the necessary documentation via Mr Masondo.

[14] During early 2015, Mr Masondo indicated that the applicant’s work visa had been favourably decided. He took the applicant’s passport and returned it with the work visa embossed therein.

[15] Months later, a work colleague who had also obtained a visa via Mr Masondo, advised the applicant that her (the colleague’s) visa had irregularities. The applicant became concerned and engaged an immigration advisory firm to verify her visa. The firm advised her that her visa did not reflect on the Department’s system, but this could have been because it was not yet uploaded.

[16] The applicant took various further steps to verify her visa, including attending the Department’s head office where she was first referred to a Ms Elzabe Fisher, who in turn referred her to Ms Duduzile Mgidi. She did not receive any further outcome in response to her queries.

[17] The applicant was declared a prohibited person on 20 September 2017 when her placement on the Visa Entry and Stop List (“the v-list”) was approved by the Director of Deportations within the Department. The applicant was not contacted, or consulted before her name was placed on the v-list, neither was

she provided with any reasons for this at the time. The department's internal document which contains the request for recording the details of the applicant on the v-list, contains the following statements which seems to be the rationale for recording her name on the v-list:

“DISCUSSION

3. On 03 July 2015 a request was received from Ms Musana to verify a Work visa endorsed in the passport of Ms Najjemba. The Work visa with control number A00374101 endorsed in the passport number B1108898 does not refer to Department of Home Affairs.

...

LEGISLATIVE/REGULATORY FRAMEWORK AND IMPLICATION

7. In terms of section 29(1) of the Immigration Act, 2002 a foreigner is declared a prohibited person and does not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit: anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.

RECOMMENDATION

8. Given the fact that Ms Najjemba Florence Musana has a fraudulent Work visa, it is recommended that the particulars of the above mentioned applicant be recorded on the Visa and Entry Stop List.”

[18] The applicant, on her version, only became aware that her passport “was flagged” during 2019 when she was informed by a border official when she wanted to travel to Botswana. She thereafter made enquiries with the Department and was given the number for Vivian Koadi, an official at VFS Global (Pty) Ltd (“VFS”), the company to which visa applications were outsourced in 2014. It was Ms Koadi who told the applicant for the first time that she had been “v-listed”.

[19] The applicant made an application to the DG in terms of section 29(2) of the Act for the reversal of her prohibited person status declaration under subsection 29(1). When her application was unsuccessful, she appealed to the Minister to reverse the DG’s decision, but this appeal was also unsuccessful. In the letter to the applicant communicating his decision, the Minister gave the following reason for rejecting the applicant’s appeal:

“You obtained a fraudulent work visa in the country and as a result you contravened the Immigration Act.”

DISCUSSION

[20] The respondents contend that the prohibition under section 29(1) occurs by operation of law, whereas it is the applicant’s case that it is an administrative decision. Counsel for the applicant argued that it is a decision of a characteristically administrative nature as it is taken by a government official, in fulfillment of a public function, in terms of empowering legislation, which directly, externally and adversely affects the legal rights of the person concerned. Furthermore, it does not fall within any of the exclusions listed in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

[21] Section 1 of PAJA defines administrative action as meaning:

“...any decision taken, or any failure to take a decision, by—

(a) an organ of state, when—

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect...”

[22] In **Minister of Defence and Military Veterans v Motau and Others**² the Constitutional Court aptly described administrative action and set out the seven elements which makes up such action, as follows:

“The concept of ‘administrative action’, as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects

² 2014 (5) SA 69 (CC)

rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.”³

[23] In **Koyabe and Others v Minister for Home Affairs and Others**⁴, the Constitutional Court had the occasion of dealing with applicants in respect of whom an investigation by the Department revealed that they had previously obtained South African identity documents through fraudulent means, and they were accordingly declared prohibited persons in terms of section 29(1)(f) of the Act, resulting in their disqualification for permanent residency. The Court found against the applicants on the basis that they had failed to exhaust their internal remedy under section 8 of the Act read with section 7(2) of PAJA before launching their review application. The significance of **Koyabe** is that the Court treated the prohibition by the Department in terms of section 29(1) of the Act as administrative action. This is borne out by the following paragraphs from the judgment:

“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. . . .”⁵ (My underlining)

And also paragraph 62, where it was held:

“Further, in our constitutional democracy, officials are enjoined to ensure that the public administration is governed by the values

³ Ibid at para 33.

⁴ 2010 (4) SA 327 (CC).

⁵ Ibid para 51

enshrined in our Constitution. Providing people whose rights have been adversely affected by administrative decisions with reasons, will often be important in providing fairness, accountability and transparency. In the context of a contemporary democratic public service like ours, where the principles of batho pele, coupled with the values of ubuntu, enjoin the public service to treat people with respect and dignity and avoid undue confrontation, the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners. It is excessively over-formalistic and contrary to the spirit of the Constitution for the respondents to contend that under section 8(1) they were not obliged to provide the applicants with reasons.” (My underlining) (Internal references were removed).

[24] The dictum in paragraph 50 of **Koyabe**, namely that “section 8 of the Act provides for internal administrative review and appeal procedures regarding decisions taken in terms thereof, for those seeking to challenge administrative decisions”, puts it beyond doubt that that the relevant actions under the Act constitute administrative actions.

[25] After the applicant was informed that she was “v-listed,” she applied, on 4 December 2019, for her prohibition to be uplifted in terms of section 29(2) of the Act. This section empowers the DG, “for good cause, declare a person referred to in subsection (1) not to be a prohibited person.” The import of this subsection is that even where a person was correctly held to be a prohibited person, the DG, “for good cause”, may declare such person not to be a prohibited person. The subsection markedly allows for a person prohibited in

terms of section 29(1) to be declared to be not so prohibited “*for good cause*”. Axiomatically, this allows for the prohibited person to put forth any reasons that might constitute “*good cause*” as to why he or she should not be a prohibited person. This also entails that the DG must duly consider such reasons put forth as “*good cause*” when making a decision as to whether to declare the prohibited person not prohibited or not. The same applies to the Minister when considering an appeal of the DG’s decision.

[26] The Minister’s decision on the appeal is reflected in his letter dated 10 May 2021, wherein he stated:

“The appeal representation in respect of your request for the upliftment of your prohibition has been considered and was unsuccessful. You obtained a fraudulent work visa in the country and as a result you contravened the Immigration Act.

I hereby confirm your prohibition upliftment rejection letter dated 30 June 2020 and you will remain a prohibited person in terms of section 29(1)(f) of the Immigration Act (No 13 of 2002) as amended in 2014.

As a prohibited person you do not qualify for any visa or permit from the immigration permitting mainstream, and your asylum seekers application will be dealt with separately under the Refugees Act.”

[27] On the surface, it appears that the Minister's decision is solely based on the finding and conclusion that the applicant obtained a fraudulent work visa. Counsel for the applicant argued that section 29(1)(f) cannot rationally or lawfully be held to apply to persons who are innocent of wrongdoing. In other words, it cannot apply to an innocent party who has been found in possession of a fraudulent visa or to a person who was unaware or not complicit in obtaining such a visa. I agree that this could never have been the intention of the legislature. Therefore, it was incumbent for both the DG and the Minister to determine whether the applicant was complicit in the acquisition of a fraudulent work visa.

[28] In her appeal to the Minister, the applicant set out in detail how she obtained the impugned visa, and submitted that she had no knowledge that her visa was fraudulent as all her interactions with her co-worker who assisted her seemed proper and lawful at all stages.

[29] She also set out additional grounds and justifications for her appeal, amongst other, that she had entered into a life partnership with a South African citizen which was formalised by way of cohabitation agreement which was included in her appeal documentation. In support of her and her partner's right to live together, the applicant referred the Minister to the judgment of the Constitutional Court in **Dawood and Another v Minister of Home Affairs and Others**⁶, where it was held:

"The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a

⁶ 2000(3) SA 936 (CC) at para 37

relationship impairs the ability of the individual to achieve personal fulfillment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.”

I pause to mention that the applicant's life partner deposed to an affidavit in support of her appeal, wherein he also stated he and the applicant intended to enter into an African customary law marriage as well as a “*Western civil union marriage*”, but the current predicament with the applicant's visa made it difficult for them to travel to Uganda to conclude Lobola negotiations.

[30] In **Littlewood and Others v Minister of Home Affairs and Another**⁷ The Supreme Court of Appeal had the opportunity to consider whether the Minister exercised his discretion correctly in terms of section 28(2) of the Aliens Control Act 96 of 1991, which authorised the Minister to exempt any person who would otherwise be subject to deportation under section 23 of that Act for failure to be in possession of valid permits, if the Minister was satisfied that there were “special circumstances” which justified his or her

⁷ (160/2004) [2005] ZACSA 10 (22 March 2005)

decision. The Littlewoods had applied for exemption under section 28(2) and proffered the circumstances which led to them being in possession of invalid permits, which according to them, was due to no fault of their own.

[31] The Minister declined to exercise his discretion in favour of the Littlewoods and recorded his reasons to their attorney, pointing out that “*possession of a fraudulent permit was a serious offence and that it was the responsibility of a visitor to this country to adhere to the law*”. The letter continued:

“The Department of Home Affairs also cannot be held responsible for actions between private individuals, which has now resulted in the predicament in which your client finds himself.”

[32] In respect of the Minister’s letter, the SCA held as follows⁸:

“First, there is no suggestion in his letter that the Littlewoods’ explanation for their presence in South Africa was false and that their application was turned down on those grounds. (A false explanation might, by itself, have justified a refusal, but the veracity of the explanation is not material to this appeal.) Secondly, it is apparent from the passage from the letter that I have quoted that the explanation was not weighed at all before the application was turned down. The application was turned down for no reason but that the Department of Home Affairs saw the possession of a fraudulent permit as a serious offence that had caused a predicament for which it was not responsible. But that

⁸ Ibid at para 16

begs the question whether the circumstances that had arisen – albeit that it was not attributable to fault on the part of the department – constituted ‘special circumstances’ justifying the granting of an exemption. It is apparent from the reasons advanced in the letter that the Minister – on the advice of his officials – failed to apply his mind to that question at all. (The departmental memorandum that accompanied the recommendation to the Minister, and the affidavits that have been filed in these proceedings, take the matter no further.)”

[33] The SCA further held⁹:

“The Minister was not called upon to decide whether his department was at fault but rather whether ‘special considerations’ existed justifying an exemption. The effect of his failure to apply his mind to that question was that he failed altogether to exercise the discretion conferred upon him by the Act and his decision must be set aside.”

[34] According to section 29(2) of the Act, the DG, and the Minister must on appeal take into account factors, other than those that resulted in the prohibition under section 29(1), in order to determine whether there exists good cause to declare an otherwise prohibited person not to be prohibited. In other words, even where a person is prohibited in terms of section 29(1), section 29(2) envisages that such persons may still be deserving, “for good cause”, of having their prohibition uplifted.

⁹ Ibid at para 17

[35] It is trite that decision makers must furnish adequate reasons for their administrative decisions.¹⁰ The Immigration Regulations, 2014¹¹ also provides for this. Regard should be had to the sub-regulations 26(6) and (7) which provide follows:

“(6) The Director General shall, in declaring a person not to be a prohibited person, consider the following factors:

- (a) the reason for the prohibition;*
- (b) the seriousness of the offence committed; and*
- (c) representations by the prohibited person, which should include a police clearance certificate.*

(7) The Director-General shall, upon making a decision as contemplated in section 29(2) of the Act, provide written reasons for such decision.”

[36] What the above entails is that the DG as well as the Minister on appeal, must have regard to the full set of facts placed before him or her by way of representations in exercising his or her discretion under section 29(2) of the Act. This principle is similar to that under section 31(2)(b) of the Act which provides that the Minister may, upon application, grant a foreigner the right of permanent residence for a specified or unspecified period *“when special circumstances exist which would justify such a decision.”* In considering the Minister’s discretion under section 31(2)(b), the court in **Kuhudzai and Another v Minister of Home Affairs**¹² held:

¹⁰ Koyabe at para 62.

¹¹ Published under GN R1238 in GG of 22 May 2014

¹² (11034/16) [2018] ZAWCHC 103 (24 August 2018)

“In the circumstances it is clear from the reasons which the Minister gave for rejecting the application that he failed to apply his mind to the full panoply of facts and circumstances which had been put forward in the application, and thereby failed to consider whether there were special circumstances present which justified the grant of permanent residence rights to the first applicant, and whether in consequence thereof good cause existed to waive the prescribed requirements. By doing so he failed to properly exercise the discretion which was conferred upon him by the Act, and his decision falls to be set aside.”¹³

[37] The sub-regulations quoted above requires written reasons to justify a decision contemplated in terms of section 29(2) of the Act. It reinforces the trite principle that those making administrative decisions must provide adequate reasons and justifications. Such reasons, depending on the circumstances, need not always be “*full written reasons*”, but brief reasons which are succinct and informative may suffice as long as they are sufficient in the sense that they convey what the decision maker thinks why the administrative decision is justified.¹⁴

[38] In the present matter, the reasons for the Minister’s decision is that the applicant “*obtained a fraudulent work visa in the country and as a result contravened the Immigration Act*”. The Minister furthermore confirmed the

¹³ Ibid at para 17

¹⁴ **Koyabe** (supra) at para 64.

applicant's "*prohibition upliftment rejection letter dated 30 June 2021*¹⁵". It can safely be assumed that the letter referred to by the Minister is the undated letter which the applicant received from the DG, and which the applicant undisputedly avers she received on 20 July 2021. In this letter, the DG advised the applicant as follows:

"You fraudulently obtained a work visa in the country.

You claim to have used an Immigration Agent's service to obtain a work visa with no substantial evidence.

You contravened immigration laws of the country and you are therefore a prohibited person in terms [of] section 29(1)(f) of the Act."

[39] To the extent that the Minister intended to include in his reasoning those reasons contained in the letter from the DG as his reasons for rejecting the applicant's prohibition, in my view, the reasons of the DG do not contain anything more significant at all. The only additional reason seems to be that the DG concluded that the applicant claimed that she had employed the services of an immigration agent to obtain a work visa with no substantial evidence. The applicant provided all the evidence at her disposal, including various communications with Masondo. It is difficult to ascertain what more the applicant should have done.

[40] The justifications provided and contained in both letters from the DG and the Minister respectively, which in my view were inadequate as required

¹⁵ It can safely be assumed that the letter referred to is the undated letter received by the applicant from the DG, and which the parties agree was received by the applicant on 20 June 2021.

by law, focuses only on the alleged transgression of section 29(1) (f) of the Act and ignore the other pertinent reasons put forth by the applicant as to why her prohibition should be lifted. I agree with counsel for the applicant that section 29(2) is broader than a mere internal appeal of a previous (the DG's or the Department's) decision. It empowers the Minister, to lift a declaration of prohibition "*for good cause*". Section 29(2) therefore requires the consideration of a different question to that of section 29(1)(f).

[41] It is regrettable that the Minister did not depose to an affidavit in these proceedings. Such an affidavit would have detailed the information that he took into account and explained what information he considered in coming to the conclusion that he did. What is even more disconcerting, is that the Rule 53 record filed in these proceedings indicate that the Minister did not have all the documentation filed by the applicant before him when he made his decision. A number of documents filed by the applicant with her appeal is absent from the Rule 53 record filed by the respondents. These are:

(41.1) Annexure "C", being the applicants financial statement bank statements and proof of payment to Mr Masondo for the immigration agent's fees;

(41.2) Annexure "D", being communications with Mr Masondo;

(41.3) Annexure "E", being an affidavit by the applicant wherein she set out her version of events as to how she came in possession of the impugned work visa;

(41.4) Annexure “F”, being the co-habitation agreement between the applicant and her life partner; and

(41.5) Annexure “G”, being an affidavit by the applicant’s life partner.

[42] The claim by the DG that the Minister considered all the pertinent information relating to the applicant’s family, the submissions made on her behalf as well as the annexures attached thereto before he made his decision, is untenable. It begs the question as to why the abovementioned documents were not part of the Rule 53 record filed by the respondents. In any event, the DG cannot make the factual assertion as to what the Minister considered. Only the Minister himself can do so.

[43] The Minister was not called to consider whether the applicant obtained a fraudulent visa, but rather whether good cause exists why her prohibition should be lifted. For this consideration, I cannot see how the Minister could have applied his mind properly to the question before him without the missing documents as listed above. The applicant relies, amongst other, on the contents of the missing documents in her case for the liftment of her prohibition. For this reason alone, the Minister’s decision should be set aside.

[44] The applicant also claims that her impugned visa is in fact legitimate. Her argument is that no proper basis had been laid for the assumption that the work visa is indeed fraudulent. The argument advanced in this regard is that the visa is not reflected on the Department’s records. The Department prepared a submission to the Minister dated 10 May 2021 (“the submission”)

wherein it was stated that “*the applicant’s fraudulently obtained work permit does not exist on permit track and trace system but it is captured on in MCS comments*”. The applicant avers that the Minister’s decision was based on the submission.

[45] The applicant further argues that the contents of the submission does not constitute *ipso facto* proof of fraud since it may simply be a case of poor record-keeping, or administrative failures by the Department. In his heads of argument, counsel for the applicant refers to a number of cases¹⁶ which illustrate dysfunctional and erroneous record-keeping by the Department. It does appear from the evidence put up by the applicant, as also illustrated in the cases mentioned, that the Department track and trace record keeping system is unreliable. In my view, the Department has not sufficiently investigated the validity of the applicant’s visa. The fact that the visa cannot be found on the track and trace system is not conclusive evidence that it is fraudulent.

Appropriate relief

[46] I have already indicated that the Minister’s decision should be set aside. This leads to the question whether it is appropriate for this court to grant the declaration sought by the applicant, namely that she is not a prohibited person in terms of section 29(1)(f) of the Act.

¹⁶ See Eisenberg & Associates and Others v Director-General of the Department of Home Affairs and Others 2012 (3) SA 508; Director-General, Department of Home Affairs and Others v De Saude Attorneys and Another [2019] 2 All SA 665 (SCA); Chen and Another v Director-General Home Affairs and Others (18985/2014) [2014] ZAWCHC 181 (2 December 2014); Ye v Minister of Home Affairs and Others (32581/19) [2020] ZAGP JHC 350 (16 September 2020); Pinzirai and Others v Minister of Home Affairs and Another (1794/2020) [2022] ZAECPEHC 2 (18 January 2022); and Arnaud v Minister of Home Affairs and Another (19/27099) [2020] ZAGPJHC 333 (28 August 2020).

[47] In **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another**¹⁷ the Constitutional Court indicated that the administrative review context of section 8(1) of PAJA, makes it perspicuous that substitution remains an extraordinary remedy, and remittal is still always the prudent and proper course.¹⁸ It is well established that it is only in very rare cases that a court will substitute its own decision for that of the functionary to whom the decision has been entrusted. This is not such a case, in my view.

Additional issue to be considered

[48] Counsel for the appellant contends that the Minister disregarded the applicant's constitutional right to be with her family as well as the best interest of the applicant's minor child. It appears from the papers before me, however, that at the time when the Minister considered the applicant's appeal, she was in a life partnership arrangement, but had no children. By the time that this application was launched, she was pregnant. The Minister could therefore, at the time, not have considered the best interest of a minor child. If the applicant did in fact give birth to a minor child, this is certainly a factor that the Minister should consider in his re-consideration of this matter. The applicant should be allowed to supplement her application with such information, such as the birth of a child, as may be relevant for a proper consideration of her appeal.

Costs

[49] As for the issue of costs, there is no reason why costs should not follow the result.

¹⁷ 2015 (5) SA 245 (CC)

¹⁸ Ibid para 42

ORDER

[50] In the result, I make the following order:

- (a) The first respondent's decision in terms of section 8(6) of the Immigration Act 13 of 2002 ("the Act") as per his letter 10 May 2022 to the effect that the applicant is a prohibited person in terms of section 29(1)(f) of the Act is set aside.
- (b) The applicant's appeal against her prohibition in terms of section 29(1)(f) of the Act, supplemented by such information as may be necessary for the proper re-consideration of the appeal, is remitted to the first respondent for a re-consideration.
- (c) The respondents shall jointly and severally pay the applicant's costs of this application on a party and party scale.

HOCKEY, AJ

Appearances:

For the applicant:	Adv David Simonsz
Instructed by	Boshoff Attorneys (Ms Marli Theunissen)
For the Respondents:	Adv Lezandre Manuel
Instructed by	State Attorney (Ms Sachin-Lee Sampson)

