

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

**Case No: 4145/2022**

In the matter between:

**J M**

First Applicant

**M L-M**

Second Applicant

And

**THE MINISTER OF HOME AFFAIRS**

First Respondent

**THE DIRECTOR GENERAL, HOME AFFAIRS**  
Respondent

Second

**Coram:** Justice V C Saldanha

**Heard:** 3 November 2022

**Delivered electronically:** 15 December 2022

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**JUDGMENT**

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**SALDANHA J:**

[1] On 3 November 2022 I made the following order in the above matter:

1. The decisions purportedly taken on 17 September 2021 and 4 October 2021 respectively, rejecting the applicants' respective permanent residence applications lodged on 30 September 2016, are reviewed and set aside.
2. The decisions described in paragraph 1 are substituted and the second respondent is directed to issue a permanent residence permit in terms of Section 27(e)(ii) of the Immigration Act 13 of 2002, as amended, to each applicant within 10 (ten) days of the granting of this Order.

[2] The respondents are directed to pay the costs of the application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

[3] These are the reasons for the order.

[4] The respondents, the Minister of Home Affairs and the Director General of Home Affairs, literally threw in the towel on the day before the hearing of the application, through their counsel's filing of belated heads of argument in which they conceded the substantive merits of the review application. The only issue that remained for determination was whether this court should, in terms of Section 8(1)(c)(ii)(aa)<sup>1</sup> of the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA"), substitute its own order in place of the decisions of the respondents that were to be set aside, and to direct that they issue permanent resident permits to each of the applicants within ten days of the granting of the order. Respondents also resisted an order of costs against them on an attorney and client scale, as they tendered no more than costs on a party and party scale

[5] It is therefore necessary to set out the background to the application, and in particular to highlight what was no less than egregious conduct on the part of the second respondent in the application, that led to the punitive order of costs. I might at this stage state that the court had seriously considered making an order of costs *de bonis propriis* against the second respondent, for the manner in which he had conducted this litigation and in the handling of the applicants' application for permanent resident status.

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<sup>1</sup> '(ii) In exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;..'

[6] The applicants (“the Mas”) are elderly German citizens who had wished to retire in South Africa in the remaining years of their lives. The first applicant, Mr M, reached 80 years in November 2022, while the second applicant, Mrs M, is 78 years old. They are described as euro millionaires, and between the two of them have a wealthy asset base on which to live out their retirement.

[7] In the application they sought, in terms of Section 6(1)<sup>2</sup> of the PAJA, to have reviewed and set aside the decisions made by the second respondent on 17 September 2021 and 4 October 2021 respectively, in which he rejected the first and second applicants’ permanent residence applications which they had lodged on 30 September 2016, in terms of Section 27(e)(ii)<sup>3</sup> of the Immigration Act 13 of 2002 (“the Act”) and its attendant Regulations and government notices. They also requested of the court to substitute its decision for those of the second respondent, and to direct him to issue to them permanent residence permits in terms of Section 27(e)(ii) of the Act within ten days of its order. The application was initially brought on an urgent basis, but by agreement between the parties was postponed to the semi-urgent roll.

## THE LEGAL FRAMEWORK

### The Immigration Act and Regulations

[8] Section 27(e) of the Act provides as follows:

**‘Residence on other grounds** - The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who –

. . .

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<sup>2</sup> ‘(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

<sup>3</sup> **‘27. Residence on other grounds** - The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who –

. . .

(e) intends to retire in the Republic, provided that such foreigner proves to the satisfaction of the Director-General that he or she –

(i)....

(ii) has a minimum prescribed net worth; . . .’

(e) intends to retire in the Republic, provided that such foreigner proves to the satisfaction of the Director-General that he or she –

(i) has the right to a pension or an irrevocable annuity or retirement account which will give such foreigner a prescribed minimum payment for the rest of his or her life; or

(ii) has a minimum prescribed net worth . . .’

[9] Immigration Regulation (“IR”) 24(11) of the Immigration Regulations published on 22 May 2014 (GN R413, GG 37679) and as amended on 29 November 2018 (GN R1328, GG 42071) (“Regulations”) provides as follows:

‘The payment contemplated in section 27(e)(i) of the Act shall be, per month, the amount determined from time to time by the Minister by notice in the *Gazette* and the net worth contemplated in section 27(e)(ii) of the Act shall be a combination of assets realising, per month, the amount determined by the Minister by notice in the *Gazette*.’

[10] The notice published in Government Gazette 37716 (GN R451) of 3 June 2014 provides as follows:

**‘MINIMUM AMOUNTS AS PAYMENTS PER MONTH FROM PENSION OR IRREVOCABLE ANNUITY OR RETIREMENT ACCOUNT IN RELATION TO RETIRED PERSON VISA OR PERMANENT RESIDENCE PERMIT**

I, Mr MKN Gigaba, Minister of Home Affairs, hereby, in terms of sections 20(1)(a) and (b) and 27(e) of the Immigration Act, 2002 (Act No. 13 of 2002) determined the following minimum amounts as payments per month from a pension or irrevocable annuity or retirement account:

Minimum Payment Per Month	R 37 000.00
Minimum Net Worth	R37 000.00’

**BACKGROUND FACTS**

[11] The applicants claimed that for many years it had been their dream to retire in South Africa. During October 2011 they purchased Erf [...] [...], for an amount of R2 600 000, situated at [...] [...] Avenue, Table View, wherein they resided when in South Africa. They attached a copy of the Deed of Transfer, no. T3399/2012, to their founding affidavit.

[12] On 30 September 2016, and at the same time, they both applied for permanent residence ("PR") permits in terms of Section 27(e)(ii) of the Act, as the basis on which they intended to retire in South Africa, with the prescribed minimum net worth of R37 000 per month as prescribed by the Regulations. They attached a copy of their PR applications to the founding affidavit, and contended that they had submitted all the necessary documentation and were fully compliant with the Act and its regulatory requirements.

[13] Inasmuch as they applied in terms of Section 27(e)(ii) of the Act, they both had to prove in their PR applications that they had a minimum net worth of R37 000.00 per month. In this regard they stated:

- (i) Mr M had a one hundred per cent ownership of a company in Germany, Papillon GmbH, that develops, manufactures and sells silicone moulds. The nominal stock and capital value was €38 000. Attached to the application was a letter, dated 29 April 2016, headed "Certification" by a Mr Thomas Keller, a 'Steuerberater', in which he certified that they were preparing his income statement as well as his financial accounting and the annual financial statements of his companies. Mr Keller stated that, based on the numbers, they were able to certify that the first applicant received a monthly income in excess of R30 000 from the shares he owns in the company Papillon GmbH. The original documents in the German language in the application in respect of both applicants were translated into the English language by a certified translator.
- (ii) The second applicant confirmed that she owned a property in Germany, situated in [...], Schelmengriesstrasse, which yielded a monthly rental income of €12 782.29, which equalled about R195 644.30, depending on the current exchange rate. She attached a copy of the relevant documentation in respect

of the lease agreement with the application, and which likewise included a certified letter, dated 29 April 2016, from Mr Thomas Keller. He confirmed that she received a monthly income in excess of R37 000 from the lease of commercial and private real estate which belonged to her.

[14] The applicants also claimed that they held a joint account in Germany, with a balance in excess of R3 522 000. They also attached a letter, dated 14 April 2016, from the bank Sparkasse Memmingen-Lindau-Mindelheim, addressed to both of the applicants, in which it was confirmed that the credit balance in the account was in excess of R3 522 000.

[15] The applicants claimed that at the time they lodged their PR applications, they had both owned assets that yielded more than the minimum prescribed nett worth of R37 000 per month and were therefore compliant with the provisions of Section 27(e)(ii) of the Act.

[16] On 17 September 2021 the DG rejected the application of the first respondent, and on 4 October 2021 likewise rejected the application of the second respondent. That was almost 4 years after they had submitted their applications.

[17] In the letter of rejection, the DG did so for the same reason in respect of both applicants. The rejection notices read:

‘You failed to produce adequate proof that you have a right to a pension or an irrevocable annuity or retirement account which will give you a prescribed minimum payment for the rest of your life. Therefore you do not qualify for permanent residence in terms of section 27(e) of the Immigration Act.

You may, within 10 working days from the date of receipt of this notice, make written representations for a review or appeal of the decision to the Director-General through [www.vfsglobal.com/dha/southafrica](http://www.vfsglobal.com/dha/southafrica).’

[18] The applicants claimed that they were surprised by this rejection letter, as it appeared that the DG had conflated the requirements of Section 27(e)(i), ‘has the right to a pension or an irrevocable annuity or retirement account’, with the requirements of Section 27(e)(ii), ‘has a minimum prescribed net worth’.

[19] In the circumstances and given the lack of any meaningful content for the reason for rejection, they sought legal assistance from their attorneys of record Eisenberg and Associates. On 22 December 2021 the attorney sent a letter of demand to the second respondent, on their behalf, in which they requested adequate reasons for the rejection of their PR applications. The letter of demand stated that the reasons given for the rejection in the respective notices were 'not adequate' in terms of Sections 5(1)<sup>4</sup> and 5(2)<sup>5</sup> of the PAJA, and requested that the second respondent provide them with adequate reasons within the next ninety days. Before the ninety days were up, on 22 March 2022, their attorney sent a follow-up letter of demand to the second respondent, indicating that they had still not received a reply to their earlier letter of demand, and that 'with no adequate reasons forthcoming from you within 90 days of our request therefor, we will ask the Court to presume that your rejections were taken without any good reason and on such basis we will ask the Court for an Order of Substitution, together with a Cost Order against you'. The letter again requested the reasons for the rejection of their PR application.

[20] The applicants claimed that at the time they deposed to the founding affidavit, on 14 April 2022, which was more than ninety days since the original letter of demand, the second respondent had still not provided any response. They therefore had no choice but to institute the review application. They also placed on record that they continued to reside in South Africa on valid visas. They initially had a retired person visa, in terms of Section 20 of the Act, which had long since expired on 28 February 2021, and they now have to obtain 90 day tourist visas, which means they can only remain in South Africa for a period of three months at a time. They pointed out that there was a lot of administration time and costs involved in continually having to renew their retired person's visas. More importantly, they stated their lives were in a state of constant uncertainty, never knowing when their next visa may not be renewed. They had certainly not envisaged that situation in their retirement years. They pointed out that, as they have chosen South Africa as the country in which they sought to enjoy their retirement, the constant concerns with regard to

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<sup>4</sup> 'Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.'

<sup>5</sup> 'The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.'

their visa causes them much anxiety and unnecessary stress. Their lives have literally remained in flux; despite wanting to retire in South Africa they are never fully certain that they can build their retirement in this country.

[21] The applicants also attached to their founding affidavit the required records and documentation for their applications, which included amongst others copies of their passports, their marriage certificate (a certified translation from the German language), and proof of their payment of the required fees. They also attached the letter from their attorneys of record in respect of the application for permanent residence, dated 29 September 2016, together with the necessary Power of Attorney, in which the basis of the application was set out and motivated. A copy of the medical certificate on the pro forma form of the Department of Home Affairs, filled in by a medical practitioner in respect of both applicants, and likewise a radiological report on the pro forma form likewise filled in by the radiologist, and copies of the birth certificates of both applicants were also attached to the application. The applicants also attached certificates of conduct, in respect of both of them, from Germany, and clearance certificates by the South African Police Services in respect of both of them. The first applicant attached the Memorandum of Association of the company Papillon GmbH, and in respect of the second applicant, a letter dated 11 July 2014 headed 'A record of Land Parcel and ownership', an excerpt from the land surveyor registrar Türkheim, Germany. A certified translation from the German language of the rental contract between second applicant and Siliconform Vertriebs GmbH and Co. KG, was also attached.

[22] Inasmuch as the applicants sought an order of substitution by the court, they attached to their founding affidavit further proof that they still met the financial requirements in terms of Section 27(e)(ii) of the Act and its Regulations. They stated that, given that more than five years had passed since their initial application to the second respondent, they attached current evidence that they still met the prescribed minimum net worth requirement of R37 000 per month respectively. Their current financial position was declared as:

- (i) They are the owners of Erf [...] (purchased for R2 600 000 in 2011).



- (ii) They have a South African Cheque Account at Absa with account number [...], and a current balance of R191 684.67 (as reflected on 12 April 2022). A copy of a bank letter confirming the current balance and that the cheque account is in the name of the first applicant was annexed and marked "JM18".
- (iii) The first applicant also has a South African savings account at Absa, with account number [...], and a current balance of R326 393.32 (as reflected on 12 April 2022). A copy of the bank letter confirming the current balance and that the savings account is in his name was annexed and marked "JM19".
- (iv) In Germany, first applicant has four bank accounts with a total balance of €797 732.57 (which according to the exchange rate on 12 April 2022, of R15.81 per Euro, equalled approximately R12 612 151). One of these accounts is the Papillon GmbH business account. Copies of the bank statements were annexed and marked "JM20".
- (v) In Germany, the second applicant has seven bank accounts with a total balance of €337 484.20 (which according to the exchange rate on 12 April 2022, of R15.81 per Euro, equalled approximately R5 335 636.20). Copies of her bank balances were annexed and marked "JM21".

[23] The applicants contended that there was sufficient evidence on the papers before the court to prove that they currently still met the financial requirements for permanent residence permits, in terms of Section 27(e)(ii) of the Act and the Regulations. They submitted that there was no further information, or any factual or technical enquiry, that was needed by this court to arrive at a conclusion that they met all of the requirements to be awarded permanent residence permits.

[24] They contended further that there was no question of the exercise of any outstanding discretion by any functionary, or any policy issue by an immigration official being at play, as much as the requirements were clearly set out in the Act and Regulations and that they had clearly met all of them. They further contended that this court was in as good a position as the second respondent to make a determination on the merits of their PR application. They submitted further that if the court was to resubmit the matter to the Department of Home Affairs, it would be nothing more than an unnecessary waste of time and resources and would expose

them to further frustration of their rights, and further delays in obtaining their permanent residence, which they claimed they undoubtedly qualified for. They further claimed that it would be nothing more than unnecessary and a lengthy period of delay and carried with it further personal and financial costs.

[25] The applicants claimed that, inasmuch as the decision may be set aside, it should not be remitted to the second respondent or the Department of Home Affairs, for the following reasons:

- (i) It was no more than a single narrow ground of rejection.
- (ii) The court is in as good a position as the DG to make the decision to direct that permanent residence permits be issued to them.
- (iii) The DG was not being called upon to exercise any unique expertise in considering their PR applications. That the court had all the pertinent information before it and that nothing had changed in the circumstances to make a reappraisal of the matter necessary. They further contended that the decision for the approval of their permits was a foregone conclusion and that a further delay would cause them unjustifiable prejudice.

## **GROUND OF REVIEW**

[26] In their founding affidavit they also alluded to the grounds of review on which they sought the setting aside of the respondent's decision.

[27] They pointed to the various decisions of the Constitutional Court that as a whole the Constitution provides for constitutional rights available to 'everyone', that 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. They correctly pointed out that the courts have also confirmed that foreigners are as entitled as citizens to the protection of the fundamental human rights which are entrenched in the Bill of Rights, save where those rights are specifically reserved for citizens only.

[28] They contended that the DG's consideration of their PR application and the rejection thereof constituted administrative action. Inasmuch as Section 33(1)<sup>6</sup> of the Bill of Rights provides that everyone is entitled to just administrative action, even though they are foreigners they have a constitutional right to demand that such action be carried out in a lawful, reasonable and procedurally fair manner. They also contended that, inasmuch as the decision to refuse to grant them permanent residence adversely affected their rights, they also have a constitutional right in terms of Section 33(2)<sup>7</sup> to be provided with written reasons for the decisions. They contended that a decision to reject their application constituted 'administrative action' and fell to be set aside on the basis of the provisions of the PAJA. In this regard they claimed that the determination of their PR applications took more than four years, which was unreasonable and an unlawful period of time. Secondly, they claimed that the decisions to reject their PR applications has materially and adversely affected their rights and accordingly should have been accompanied by adequate reasons. Thirdly, they contended that the rejection notices simply stated that their PR applications had been refused because they had failed to 'produce adequate proof' and that that statement was not accompanied by any facts or reasons which were intelligible and informative. The DG simply stated the conclusions that he had arrived at without providing any reasons for such conclusion. Fourthly, the rejection notice, as already indicated, conflated the requirements of Section 27(e)(i) with that of 27(e)(ii). Inasmuch as they had applied in terms of Section 27(e)(ii), they did not need to provide adequate proof of 'an irrevocable annuity or retirement account'.

[29] They claimed that as a result of the lack of intelligibility and information in the rejection letters and the manifest confusion displayed therein, they were unable to determine whether the reasons were based on an incorrect factual premise or an error of law, and accordingly were not in a position to launch a meaningful and rational appeal or review against the respective decisions.

[30] They also pointed out that, given that it was the second respondent who was the decision maker who had rejected their PR applications, there was no internal

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<sup>6</sup> 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

<sup>7</sup> 'Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

remedy available for them, as the second respondent cannot review himself on appeal or review and they cannot directly approach the Minister, in terms of the Act. They also pointed out that, in the circumstances, to proceed with any internal remedy in terms of the PAJA was not only a futile pursuit (for without adequate reasons they did not know the case which they had to meet) but also an impossible one (as there was no internal remedy available to them in terms of the Act). They claimed that the second respondent, in having rejected their PR applications, had failed the peremptory statutory requirements to furnish adequate reasons, despite the demand and 90 days' notice. The DG has simply not responded. Furthermore, in reliance on the decision of the Full Bench of this division in *Director-General, Department of Home Affairs and Others v Link and Others* 2020 (2) SA 192 (WCC), they contended that they did not have any internal remedy or appeal and therefore they were justified in having brought the application directly to this court for the necessary relief.

[31] In the opposition to the relief sought by the applicants, the Director-General, Mr Livhuwani Tommy Makhode, deposed to an answering affidavit on behalf the respondents. In his affidavit he spent several paragraphs challenging the urgency of the application. He dismissed it as there being no likelihood of any prejudice that they would suffer as their preferred retirement which he claimed was driven by nothing more than 'sentiment'.

[32] The second respondent also challenged the applicants for their failure to have exhausted their internal remedies. He claimed that the facts in the matter of *Links*, above, were incongruent to this matter and in particular that the exceptional circumstances referred to in that matter related to the fact that there were also contempt of court proceedings. He therefore dismissed the applicants' reliance on the decision of *Link* as being misplaced.

[33] With regard to the financial requirements that the applicants were required to demonstrate, the second respondent contended that the applicants had only 'furnished the department with a list of assets and no mention was made of any liabilities or debts that they may be currently servicing or may service in future'. He also contended that the applicants 'assets only reflected their financial position at the given time and provided no guarantee that the status quo would be maintained, given that these assets are liquid and that it was likely to change form overtime, eg

cashing up investments, sales of properties, relinquishing company ownership thus losing equity shareholding, and depletion of savings'. He contended that the applicants have not provided his department with any such guarantees and contended that their livelihood would be better attended to 'if they remain in their country of origin'. He contended that the applicants had fallen 'short of producing adequate proof to the effect and thus found wanting in satisfying the Section 27(e)(ii) requirements'.

[34] In his challenge to the substitution order sought by the applicants, he simply referred to *University of the Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C), and also the oft quoted *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC). He contended that it could not be concluded that this matter warranted substitution, as it was not a foregone conclusion that the remittance of the matter back to the administrator would yield the same results as before, and as a reconsideration may lead to close scrutiny of other relevant facts.

[35] In the replying affidavit filed on their behalf by their attorney of record, the applicants dealt with each of the contentions raised by the second respondent. The applicants, correctly in my view, lamented the dismissive tone and content of the second respondent's answering affidavit. It was apparent that he had simply failed to apply his mind, not only to the contents of the PR applications submitted by the applicants as far back as five years ago, but also to the founding affidavit and its contents. He, in my view, failed to demonstrate any appreciation that he was dealing with elderly persons and, more importantly, human beings who had elected, as they were in terms of the laws of this country entitled to do, if they so qualified, to live out the remainder of their lives in retirement in South Africa. His conduct is deprecated by this Court.

[36] In their reply to the second respondent's opposition, they pointed out that the Rule 53 record, which they received, contained nothing more than the applicants' application and its annexures, and it was apparent from the second respondent's answering affidavit there was no new information or insights into when or how the impugned decisions were made, who made them on behalf of the DG, and on what

basis the applications were rejected. All they had to work with were vague assertions, which were nothing more than a bald repetition of the reasons cited by the second respondent in the rejection notices that they had failed to provide adequate proof of their net worth for the rest of their lives. They claimed that they remained very much in the dark as to the exact details and processes that were followed by the Department of Home Affairs, and the DG, when the impugned decisions were taken. They contended that the inference to be drawn was that there was nothing more to their version, and that no process was followed and no administrator had properly applied her or his mind to the impugned decisions, which meant that their review was justified. The second respondent had simply failed to provide any factual insights of any substance.

[37] In respect of the second respondent's attack on the urgency of the application, he incredulously failed to appreciate that the matter had been postponed by agreement between the parties to the semi-urgent roll.

[38] In respect of the contentions by the second respondent about the failure to exhaust internal remedies, the applicants pointed in detail to the decision in *Link*, above, and that the DG had simply misconceived the *ratio* therein or had simply failed to understand it. To assist the respondents to properly interpret the *Link* judgment, they referred at length to the decision in paragraphs 49, 50, 51 and 52 thereof<sup>8</sup>. For the benefit of the DG his attention is drawn thereto.

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<sup>8</sup> '[49] As far as second and fourth respondents are concerned, the decision to refuse their applications for permanent residence was taken by the DG and not the DDG, and reasons were provided to them in respect thereof. The difficulty which I have is that, on my reading of s 8, no domestic or "internal" remedy of review or appeal is provided for in respect of decisions which are taken *at first instance* by the DG, and the DG is obviously not in a position to hear an appeal or review against his own decision, so the provisions of s 8(4) cannot find application in instances where the decision was taken by him/her. Logic dictates that if there is to be an internal remedy of review or appeal from the decision of the DG it can only lie to the Minister.

[50] Although s 8(6) provides for a right of appeal or review to the Minister, it is one which can only be exercised in regard to a decision by the DG "as contemplated in terms of s 8(5)", ie in respect of a decision on appeal or review to the DG in terms of ss (4), which in turn is piggybacked onto ss (3). Thus, as I read the section as a whole, no internal right of appeal or review lay in respect of the decision which was taken by the DG, to refuse the applications for permanent residence by second and fourth respondents. The only right of appeal or review which lay to the Minister in regard to their applications was a secondary one which would have accrued had the original decision been taken by a functionary of a rank lower than the DG. In a nutshell, had the DDG given adequate reasons in regard to the rejection of the applications of first and third respondents, they would have had a right of appeal to the DG and thereafter to the Minister, in the event that the decision on appeal or review to the DG had gone against them, but second and fourth respondents did not have the option of a ministerial review or appeal open to them. In the circumstances I do not agree with the view expressed by the court a quo that an appeal in terms of s 8(6) was available to the respondents.

[39] The third ground raised by the second respondent in opposition to the application related to that of the inadequate proof. The applicants pointed out that the second respondent had done nothing more than merely rehash and restate the reasons in his rejection letters, in stating, 'no mention is made of liabilities or debts, provide no guarantee that the status quo will be maintained and that the applicants have fallen short of producing adequate proof'. The applicants, in my view, correctly pointed out that the position adopted by the second respondent was not logically sound, and was a classic example of circular reasoning commonly known as a fallacy. More importantly, it was clear that the second respondent, in his answer, failed to make any proper distinction between the provisions of Section 27(e)(i) and (ii), and had completely failed to appreciate that the requirements prescribed therein were disjunctive, with the use of the word 'or'. This basic distinction, and the application of the principles of statutory interpretation, was simply lost on the second respondent.

[40] In respect of the substitution relief sought, the applicants pointed out that the second respondent, in his answering affidavit, had not disputed the accuracy or veracity of any part of the applicants' financial information as provided in the initial application or in the founding affidavit. The applicants had taken the trouble of providing updated financial information and statements in the founding affidavit, and none of it was disputed, nor were any facts put up by the second respondent to have challenged its veracity.

[41] The applicants also referred to the recent decision in this division in *Ling and Another v The Director-General of the Department of Home Affairs and Another* (6928/2022) [2022] ZAWCHC 177 (9 September 2022), in which an order of substitution was made by the court where the DG had failed to place any facts before the court which could persuade it that it was not in as good a position as the DG to make a decision related to a permanent residence application. The applicants contended that that matter was similar to the one before this court, where the DG

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[51] In the result, the point of law which was taken by the appellants in terms of rule 6(5)(d)(ii), namely that the respondents should be non-suited for failure to exhaust their domestic remedies, was, in my view, without merit.

**(iii) Ad exceptional circumstances**

[52] Even if I were to be wrong in regard to the interpretation which I have adopted in respect of the relevant subsections of s 8, and the respondents did have recourse to a domestic appeal or review remedy before they approached the court, I am of the view that there were exceptional circumstances present which, in the interests of justice, merited exempting them from exhausting such remedies.'

had placed no facts before the court to persuade it why a substitution order was not appropriate.

[42] The applicants also referred to the oft quoted authority of the Constitution Court in *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources and Others* 2019 (3) SA 621 (CC), where it confirmed that where there was evidence of ‘a high degree of institutional incompetence’ a court was justified in awarding a substitution order as a ‘finding of gross incompetence may make it unfair to require a party to resubmit itself to the administrator’. They contended that if anything that was exactly what the second respondent had demonstrated in this matter. I share that view. The applicants contended that the respondents had dismally failed to demonstrate any credible grounds of opposition to the application.

### **THE PROCEEDINGS BEFORE THIS COURT**

[43] It was therefore not surprising that the respondents threw in the towel prior to the hearing before this court. In the heads of argument filed belatedly by counsel for the respondents, in seeking condonation, he claimed that it had ‘become apparent that an out of court settlement be negotiated’. He then indicated that the parties had engaged with one another, but that on the eve of the court proceedings had not agreed to a proposal made by the respondents, therefore, the late filing of the respondents’ heads of argument. Clearly that was no basis for the failure on the part of the respondents to have timeously filed their heads of argument.

[44] Nonetheless, in the heads of argument, he set out what he regarded as the issues which were common cause between the parties. More importantly, under the heading ‘Concessions made by the Respondents’, he disclosed: (i) that it was conceded that there was an unreasonable delay between the lodging of the applications and the rejection decisions taken. A further concession made by the respondents was that the reasons advanced for the rejection ‘were not in sync with their empowering provisions in terms of which the applications were made, that is sections 27(e)(ii) of the Immigration Act (sic)’. The respondents conceded that the provisions of Section 27(e)(i) and (ii) were disjunctive, or ‘non-cumulative and that they should be treated as such and not be conflated as it appears to have been done in this matter’.



[45] The respondents' counsel, in the heads of argument, then set out what the settlement proposal was that they had proposed to the applicants:

- (i) That the 'Department of Home Affairs be allowed 60 working days from the date of settlement/court order to verify the information submitted in the 2016 application due to the amount of time that has elapsed';
- (ii) That the Department of Home Affairs approves the applicants' permanent residence applications on condition that they pass the verification process of their local and foreign bank statements and meet the minimum requirements;
- (iii) That the Department of Home Affairs tenders the wasted costs on a party and party scale.

[46] In respect of the substitution relief sought by the applicants, the respondents opposed it on the basis of the decisions they had simply listed as *The University of the Western Cape* and *Trencon*, referred to by the DG in his opposing affidavit.

[47] The respondents contended that a substitution order would not be warranted in this matter based on the following:

- (i) 'That both respondents are competent and have the requisite experience to adjudicate on the matter in the event of the applicant passing the verification test as envisaged;
- (ii) It is not a foregone conclusion that the applicants would be granted permanent residence permits as the decision would be arrived at after 'considering all relevant factors (including exceptional circumstances) and come to a fair, just and equitable decision; and
- (iii) The granting of a substitution order would be tantamount to usurping the powers of a functionary by the empowering legislation and that would not be in sync with the interests of justice(sic).'

## **THE PROPOSED VERIFICATION PROCESS**

[48] In the exchange between the court and counsel for the respondents with regard to the proposed verification process, it was apparent to the court that there

appeared to be some uncertainty and confusion as to exactly what such process would entail. Initially counsel for the respondents stated that it was no more than to verify that the applicants had the bank accounts they asserted in their application and founding affidavit. When given an opportunity to consult with his client during an adjournment on exactly what was meant by the verification process, he informed the court that it was a process by which the staff of the respondents would undertake to verify the bank balances of the applicants in their various bank accounts.

[49] Counsel for the applicants pointed out that what counsel for the respondents had failed to disclose to the court, was that there was an existing class application pending before a court in this division, set down for hearing in March 2023, in which the issue of the verification processes raised by the respondents in various other matters were being challenged. Neither counsel for the respondents nor his attorney disclosed that to the court in the heads of argument or in a Practice Note. Moreover, this court has not had sight of the details of the proposed class application and does not want to pre-empt the outcome of that matter. Counsel for the respondents claimed that he had no knowledge of it, but it appeared that the state attorney of record for the respondents in this matter is also involved in those proceedings.

[50] This court does not wish to undermine what is being sought or contended for by the respondents in a verification process that is the subject matter in litigation before another court. The issue of verification in this matter can nonetheless be dealt with on the very facts before this court. In respect of the bank accounts in Germany and the financial status of both of the applicants, this was verified in letters by Mr Thomas Keller as far back as 29 April 2016. Moreover, copies of the bank statements from the German banks were also attached to the initial application. The applicants, through an abundance of caution and to assist this court to grant an order of substitution, furnished the court with their updated financial circumstances and attached copies of their bank accounts. The respondents have, for close on to five years, not raised any dispute with regards to the correctness, authenticity and accuracy of the financial statements placed before this court. The respondents have, through their officials, literally just sat on their hands for all of this time and on the last minute have come to this court pleading that it be given a period of 60 days to conduct a verification exercise. The exact process of that verification exercise is

not even clear to this court. I was more than satisfied that the financial information placed before this court has been adequately verified in order for this court to make a decision, in terms of Section 8(1)(c)(ii)(aa) of the PAJA, on the applicants' application for permanent residence permits in South Africa.

[51] What is disconcerting to the court, is the respondents' contention, in its proposal referred to above, that the applicants will only be granted permanent residence permits 'on condition that they pass the verification process of their local and foreign bank statements and meet the minimum requirements'. There is no indication as to what further minimum requirements the applicants have not already met in this matter, other than the respondents' contention that they need to verify bank statements.

[52] Moreover, it is even more disconcerting that the respondents' counsel stated in the heads of argument that the respondents would have to consider 'all relevant factors (including exceptional circumstances) and come to a fair just and equitable decision' (my emphasis). It is not at all clear to this court what is meant by 'exceptional circumstances' that the applicants need to demonstrate as a relevant factor for their applications, other than those clearly described by the Act and the Regulations. These assertions by the respondents clearly indicate the failure to properly understand and appreciate the confines of the statute and Regulations which they themselves are bound by.

[53] The Constitutional Court in *Trencon* confirmed the test for the substitution of a decision as follows:

'[47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.' (Internal footnote omitted.)

[54] It is apparent that the applicants have attached multiple financial documents both in 2016 and now in 2022, and it is obvious that they have always had more than the prescribed minimum net worth of R37 000 per month.

[55] Importantly, the respondents' answering affidavit does not dispute the accuracy or the veracity of the updated financial statements, and given that there is no dispute of fact on this issue, it must be the applicants' version of their financial situation that this court must take into account in exercising its discretion in granting the remedy of substitution. Likewise, the court is particularly mindful of the Constitutional Court's comments in *Aquila Steel*, above, and has already indicated that the second respondent, in particular, has displayed a high degree of institutional incompetence in having dealt with the applicants' initial application and in his response to these review proceedings.

[56] For all the reasons stated, and importantly the fact that there is no evidence contrary to that put before the court in respect of their financial circumstances, and that there is no information of a factual or technical enquiry (or any issue of policy), this court is well able to arrive at a conclusion that the applicants are entitled to the relief sought by way of substitution.

[57] I am moreover satisfied that the process of verification sought in this matter will be nothing more than a time-consuming exercise, will fulfil no better purpose than the information already provided to this court, and in the circumstances appears aimed at no more than to cause an unnecessary delay to the applicants. They have clearly demonstrated exceptional circumstances for such an order.

[58] As already indicated costs have been awarded on a punitive scale against the respondents in this matter. The conduct of the second respondent, in particular, has demonstrated the necessity for such an order. He has displayed a complete disdain for the applicants in the way he has treated them, has been dismissive of their pleas for the matter to be dealt with expeditiously after all of these many years of undue delay by his department, and has simply dismissed as sentiment their expressed preference to retire in South Africa. I seriously considered that an appropriate costs order in this matter would not be for the taxpayers to be unnecessarily saddled with the costs incurred because of the manner in which the second respondent has dealt

with the matter. I have no doubt that such conduct on the part of the second respondent in other matters of a similar nature, and with an equal display of such a dismissive attitude by him, may be met with an appropriate order of costs against him *de bonis propriis*. For all of these reasons a punitive order of costs against the respondents was warranted in this matter.

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**V C SALDANHA**

**JUDGE OF THE HIGH COURT**