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

Republic of South Africa

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

Case No. 17549/2022

Before: The Hon. Ms Acting Justice Hofmeyr

Date of hearing: 1 August 2023
Date of judgment: 10 August 2023

REPORTABLE

In the matter between:

R A A Applicant

and

DIRECTOR GENERAL, HOME AFFAIRS Respondent

JUDGMENT

Judgment handed down electronically by circulation to the parties' legal representatives on email and released to SAFLII

HOFMEYR AJ:

1 This is an application to review, set aside, and substitute the decision of the Director General of Home Affairs not to lift the applicant's prohibited person status.

2 The applicant was flagged as a "prohibited person" after he submitted an application to the Department of Home Affairs for permanent residence and it was discovered that he had been issued with a fraudulent temporary retired person's visa in May 2017.

3 The discovery that he had a fraudulent visa meant that he became a prohibited person under section 29(1)(f) of the Immigration Act 13 of 2002. The section reads as follows:

> "*The following foreigners are prohibited persons and do 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*"

4 Prior to this discovery, the applicant had been living in South Africa on the retired person's visa and had been travelling to and from South Africa. He holds Canadian and British citizenship. Since the discovery of his fraudulent visa, the applicant has been prohibited from re-entering South Africa from abroad. He therefore took steps, after he received notification of his prohibited status, to apply to the Director General to "lift" his prohibited status in terms of section 29(2) of the Immigration Act. The section provides that:

"*The DirectorGeneral may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person*"

5 The applicant says that he was entirely ignorant of the fact that he had been supplied with a fraudulent visa and that he had been using the services of an immigration agency. Despite this explanation, the Director General rejected his application under section 29(2). The question in this review is whether the Director General's decision not to lift his prohibited person status was lawful, reasonable and procedurally fair. In order to place the Director General's decision in its proper context, it is necessary to set out the salient facts.

The application under section 29(2)

6 After the applicant was notified that he was a prohibited person, he obtained the assistance of a firm of attorneys specializing in immigration matters in order to make an application to the Director-General. The application was submitted on 16 May 2022. The application, itself, is somewhat confused because, at times, it reads as though it is an appeal against the decision to refuse his permanent residence application and, then on other occasions, it is framed as an application in terms of section 29(2) of the Immigration Act.

7 Despite this ambiguity, the Director General approached the application on the basis that it was brought in terms of section 29(2) of the Immigration Act. Counsel for the applicant, Ms Ristic, confirmed that this how the applicant intended his application to be treated.

8 The application explained that the applicant had enlisted the services of an immigration agency called *Ecclesia Global* in Cape Town to assist him in making an application for a retired person's visa in mid-2017 and then with submitting an application for permanent residence in December 2017. He said that he had found out about their services online and visited their offices. He then said that he instructed the agency to assist him with his South African immigration affairs.

9 The section 29(2) application set out the particulars of the agency, its contact details and website address. The applicant explained that the agency had assisted him in obtaining his retired person's visa in 2017 but that he no longer had a record of the application. He said that had paid the agency R80,000 for his retired person's visa and his permanent residence applications and then the application went on to record the following:

> "*We attach hereto as annexure "F" proof of payments made to Ecclesia Global by our client*."

10 It is common cause between the parties, however, that the proof of payments attached to the application were incomplete. In fact, the only payment proof that was attached to the application related to the applicant's payments to Ecclesia Global for his permanent residence application in late 2017. The application therefore did not contain proof of the payments that the applicant said he had made to Ecclesia Global for his temporary retired person's visa.

11 This deficiency in his application to the Director General appears not to have been appreciated by the applicant, himself, because when he launched his review, he stated

positively in his founding affidavit that he had submitted proof to the Director-General that he had paid Ecclesia Global for this retired persons visa. That was not, in fact, correct.

12 The applicant also claimed in the founding affidavit that he could not understand how the Director General "in the face of express evidence that [he] had paid Ecclesia Global … to organise [his] temporary visa", could have rejected his application under section 29(2) of the Immigration Act. But this statement overlooked the fact that it was the applicant who had failed to place this "express evidence" before the Director General.

13 The application also did not contain any further evidence substantiating the applicant's claim that he had instructed Ecclesia Global to assist him with his retired person's visa. There was simply no evidence provided of any correspondence between the parties or other exchange of documents for the purposes of submitting the application.

14 All that the Director General had before him, when he decided the section 29(2) application, was the applicant's assertion that he was innocent of the fraud and an incorrect claim that, attached to the application, was the proof of payments to Ecclesia Global for his retired person's visa.

The Director General's decision

15 The Director General did not grant the application. He notified the applicant on 6 July 2022 that his section 29(2) application had been unsuccessful. He gave three reasons for his decision.

15.1 The first reason was that the applicant was in the country on a visitor's permit and so was not permitted to change the conditions of his visa.

15.2 The second reason was that there was no proof of payment to Ecclesia Global prior to receipt of the retired persons visa as evidence that he was a victim of fraud perpetrated by the immigration agency.

15.3 The third reason, which the Director General recorded as an aggravating reason, was that the retired person's visa had been issued to the applicant on a passport for which the Department had no record in its system.

16 The applicant's founding papers proceed from the premise that the Director General's decision was unreasonable because the Director General rejected his explanation of innocence despite the fact that proof of it had been placed before the Director General.

17 However, as Ms Ristic for the applicant fairly conceded in argument, that was not so. The applicant had not, in fact, presented any proof to the Director General of his interactions with Ecclesia Global that related to his temporary retired person's visa.

18 In his answering affidavit, the Director General highlighted this point. He said that the problem with the applicant's section 29(2) application was that there was no proof that the applicant had in fact instructed Ecclesia Global to assist him with his retired person's visa. The Director General made it plain that he did not require any particular form of proof. He said that he was not insisting on proof of payment. On the contrary, proof could have been in the form of a letter of appointment, a signed document or even an email indicating that the applicant had appointed the agency to assist him in making the application. But none of this was included in the section 29(2) application.

19 Although the applicant had attached a proof of payment to Ecclesia Global for the retired person's visa to his founding papers in the review, that information was not before the Director General when he made the decision to reject the 29(2) application. The Director General therefor defended the review on the basis that the applicant had not made out a proper case for lifting his prohibited status when he applied to the Director General.

Evaluation of the decision

20 The applicant's main ground of review was that the Director General did not properly understand what section 29(2) of the Immigration Act required of him and therefore failed properly to exercise his discretion under the section.

21 In support of this review ground, the applicant relied on three previous decisions dealing with section 29(2) of the Act: one from the Johannesburg High Court - *Gbedemah*,[1] and two from this Court – *Najjemba*[2] and *AK*.[3]

22 There are two aspects of these judgments that are pertinent in this review. The first is the approach taken in those judgments to whether an appeal lies against a negative decision from the Director General under section 29(2) of the Immigration Act and the second is the appropriate test that should be applied by the Director General under section 29(2) of the Act.

Sections 29(1) and (2) of the Immigration Act

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1 *Gbedemah & Another v Director-General: Department of Home Affairs and Others* (Case No, 2011/07479)

2 *Najjemba v Minister of Home Affairs and Another* 2022 JDR 3050 (WCC)

3 *AK and Others v Minister of Home Affairs and Another* 2023 (3) SA 538 (WCC)

23 There is some uncertainty that emerges from the High Court cases as to the proper interpretation of section 29(1) of the Immigration Act and its effect in law. The result of this uncertainty has been that the parties, in matters such as *Gbedemah* and *Najjema,* have adopted the approach that a negative decision from the Director General under section 29(2) of the Immigration Act is capable of appeal or review to the Minister under section 8(6) of the Immigration Act.

24 In the present case, a different approach was taken. The applicant framed his review on the basis that the Director General's decision under section 29(2) is a decision of first instance, and not a review or appeal of a prior decision under section 29(1).

25 As a Full Bench of this Court previously held in *Link*,[4] where the Director General takes a decision at first instance, no appeal lies to the Minister against that decision under section 8(6) of the Immigration Act. Although *Link* dealt with the Director General's decision in an application for permanent residence, and not section 29(2) of the Immigration Act, the principle remains the same.

26 An appeal to the Minister under section 8(6) of the Immigration Act is an appeal against a decision of the Director General that has been taken in a review or appeal to the Director General against another official's decision.[5] In other words, the appeal to the Minister under section 8(6) of the Act lies against decisions of the Director General *when he is, himself, deciding a review or appeal*. The appeal under section 8(6) of the Immigration Act does not lie against decisions of the Director General when he takes the decision at first instance.

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4 *Director General, Department of Home Affairs and Others v Link and Others* 2020 (2) SA 192 (WCC)

5 *Link* paras 49 and 50

27 Section 29(1) of the Immigration Act is a section that deems certain people to be prohibited persons by operation of law. It does not require a separate decision to be made by any official before the person concerned is prohibited. Their prohibited status arises by operation of law when they fall into one of the categories of persons listed as prohibited under the section.

28 This means three things:

28.1 First, where a person is notified that they are a prohibited person under section 29(1) of the Immigration Act, their remedy is to apply to the Director General to declare that they are not prohibited under section 29(2).

28.2 Second, because the section 29(2) decision by the Director General is a decision of first instance, it is not appealable under section 8(6) of the Immigration Act to the Minister.

28.3 Third, the remedy for a person aggrieved by the Director General's refusal to declare them not prohibited under section 29(2) is to bring a review application in the High Court.

29 In this case, the Director General originally raised a point *in limine* that the applicant had failed to exhaust internal remedies before approaching the court because he ought to have appealed the negative section 29(2) decision to the Minister. However, this point was correctly abandoned by counsel at the hearing of the matter. The correct approach is the one set out above. There is no requirement under the Immigration Act that an applicant, who receives a negative decision under section 29(2) from the Director

General, must first appeal to the Minister against that decision before approaching the courts to review the Director General's decision.

30 It appears from the facts set out in the judgments of *Gbedemah* and *Najjemba* that in both cases, there had been an appeal or review to the Minister against a decision of the Director General under section 29(2) but the cases did not raise for the court's consideration whether that appeal/review was competent. *AK* also appears to have proceeded on the basis that the decision before the Director General under section 29(2) was a decision *on appeal*.[6] It, too, did not consider whether that was the correct characterisation of the Director General's powers when deciding an application under section 29(2) because that issue appears not to have been raised. All three cases therefore proceeded on the assumption that, when the Director General decides section 29(2) application, he is deciding an appeal.

31 In this case, however, the issue was raised pertinently on the papers because the Director General initially opposed the review on the basis that Mr Arthur had failed to exhaust his internal remedies by failing to appeal to the Minister. For the reasons I have set out above, there was no merit in this point and it was, in the end, correctly abandoned at the hearing of the matter.

The test under section 29(2) of the Immigration Act

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6 *AK* para 31

32 The applicant contends in the review that the three High Court cases of *Gbedemah*,[7] *Najjemba*[8] and *AK*[9] support his main review ground that the Director General failed to understand his powers under section 29(2) correctly and therefore did not properly exercise his discretion under the section when he considered the applicant's 29(2) application.

33 In my view, the three cases do not establish that the Director General, in this case, approached his powers incorrectly.

34 In *Gbedemah*, the Johannesburg High Court held that it is for an applicant under section 29(2) to "satisfy" the Director General that he was entirely ignorant of the unlawfulness that resulted in his prohibited person status under section 29(1) of the Act. The Court set the test under section 29(2) as being whether the Director General "is satisfied that the applicant in question was truly innocent".[10]

35 On this articulation of the test, a burden is placed on the person, who has been prohibited under section 29(1)(f) of the Act, to provide an explanation of why he is innocent of the circumstances that resulted in his prohibition under section 29(1). In exercising his power under section 29(2), the Director General will assess the adequacy of that explanation.

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7 *Gbedemah & Another v Director-General: Department of Home Affairs and Others* (Case No, 2011/07479)

8 *Najjemba v Minister of Home Affairs and Another* 2022 JDR 3050 (WCC)

9 *AK and Others v Minister of Home Affairs and Another* 2023 (3) SA 538 (WCC)

10 *Gbedemah* para 33

36 There will be a range of factual circumstances in which an applicant's explanation will be given and what amounts to good cause will differ, depending on the facts of each case. At a minimum, however, the explanation would likely have to include the circumstances in which the fraud arose, the level of involvement of the applicant in the events that resulted in the fraud, and where, possible, support for these assertions with any documents that demonstrate the applicant's innocence. Merely asserting that the applicant was innocent of the fraud, without doing more, is unlikely to meet the burden that showing good cause places on an applicant under section 29(2).

37 The Director General did not depart from the test set in *Gbedemah*. On the contrary, he understood that he was required to evaluate the sufficiency of the applicant's explanation of his innocence.

38 In *Najjemba*, this Court held that section 29(2) requires an applicant to "put forward any reasons that might constitute good cause as to why he or she should not be a prohibited person".[11] The Court further held that the Director General must 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".[12]

39 In *Najjemba*, the Court set aside the decision to refuse to lift the applicant's prohibited status because it found that the applicant had provided all the evidence at her disposal, including various payments to the immigration agency she had utilised, and her

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11 *Najjemba* para 25

12 *Najjemba* para 34

communications with the agency.[13] In the light of this evidence, which appeared not to have been properly considered, the Court held that the Minister (on appeal) had not answered the right question. The Minister had focussed on the fact that the applicant was prohibited under section 29(1)(f) of the Act and did not consider her explanation, together with all its supporting documents, for why, despite the fact that she had been in possession of a fraudulent work visa, there was good cause to declare her not to be prohibited.[14]

40 In *AK*, this Court reviewed and set aside the Director General's decision under section 29(2) of the Act because the applicant had provided "all the evidence at her disposal" and it was difficult to ascertain what more she could or should have done to show good cause for her prohibited status to be lifted.[15] Key to the Court's decision was also the fact that the Director General had failed to take into account the impact that a refusal to lift the applicant's prohibited status would have on her minor children. As a result, the Court reviewed, set aside and substituted the Director General's decision.

41 In the present case, the Director General did not misunderstand the question before him. He knew that he was required to assess whether the applicant had provided reasons that would qualify as good cause for lifting his prohibited status. The difficulty that the Director General had with the applicant's reasons is that the applicant merely asserted that he was innocent of the fraud and then said had used a third party to process his application for the temporary retired person's visa, but he did not provide any proof that he had actually instructed the agency to assist him.

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13 *Najjemba* para 39

14 *Najjemba* paras 40 and 43

15 *AK* para 32

42 There was no evidence before the Director General that the applicant had enlisted the assistance of Ecclesia Global beyond his say-so. In this respect, the case is distinguishable from *Najjemba* and *AK*. In both those cases, the courts found that there was no more that the applicants could have done to support their claims of innocence. In the present matter, it was clear what more should have been done. The applicant ought to have provided the Director General, at a minimum, with the documentary proof that he had engaged Ecclesia Global to assist him with this retired persons visa.

43 The applicant's own founding papers reveal that he knew this was relevant material to place before the Director General. But, as it so happens, the applicant erroneously thought he had placed it before the Director General when, in fact, he had not.

44 If this had been the applicant's only ground of review, the review would not have succeeded. However, there were two other reasons given by the Director General for his refusal of the application under section 29(2).

The Director General's other reasons

45 In addition to the inadequacy of the applicant's reasons for lifting his prohibited status, the Director General had two further reasons for refusing the application. The first was that the applicant ought to have known that he could not change the conditions of his original visitor's visa. The second was that the fraudulent retired person's visa had been issued on a passport number that was different to the number on the applicant's passport and the Department had no record of the applicant's actual passport in its records.

46 According to the Director General this last reason, “aggravated the fraud” because the applicant’s retired person’s visa had been issued on a passport for which the Department had no record.

47 This reason appears to have been material in the Director General’s assessment of the application under section 29(2) because, as Ms Ristic highlighted during argument, this was a reason that the Director General himself added when he finally decided the applicant’s application. In other words, it was a reason beyond those given to him in the recommendation he received from his departmental officials.

48 It is, however, common cause between the parties that the Director General was wrong. The number on which the Director General ran a check through the Department’s system is not the applicant’s passport number. It is another number that appears on the passport but is not the actual passport number. So the Director General therefore thought he was dealing with a person whose passport number did not appear on the Department’s system when, in fact, he had checked the wrong number in the system.

49 The legal question that arises is what significance this error holds for the attack on the Director General’s decision.

50 The law is clear: once a bad reason plays a material role in the decision under attack, it is not possible to conclude that there is a rational connection between the decision and its reasons. In *Westinghouse*, the Supreme Court of Appeal described the position as follows:

"*It is a wellestablished principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated*."[16]

51 In this case, the Director General refused the applicant's section 29(2) application in part because he thought he was dealing with someone who had been issued a fraudulent visa on a passport that did not even appear on the Department's system. But he was wrong in this because he checked the incorrect number through the system. As a result of the error, it is not possible to conclude that the Director General's reasons are rationally connected to the decision to refuse the applicant's application. The Director General approached the application on the basis that he was dealing with someone who had obtained a fraudulent visa in a passport of which the Department had no record. The Director General clearly thought that this fact was linked to the fraud when, in fact, the Director General had been searching for the wrong passport number. To the extent, therefore, that the decision was based on this reason, the decision was irrational.

52 The decision ought, accordingly, to be reviewed and set aside. The only remaining question is one of remedy: ought the decision to be remitted to the Director General or should the Court substitute his decision?

Remedy

53 The parties were agreed that substitution is an exceptional remedy in reviews. Two of the key considerations, when a court is asked to substitute its decision for that of an

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[16] *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* 2016 (3) SA 1 (SCA) para 44

administrative functionary, is whether the decision is a foregone conclusion and whether the court is in as good a position as the functionary to make the decision.[17]

54 I am not satisfied that either of these criteria is met in this case.

55 On the issue of a foregone conclusion, there are a number of aspects of the applicant's dealings with Ecclesia Global that, in my view, require further explanation. For example,

55.1 The applicant explained in his section 29(2) application that he no longer had a copy of his application for a temporary retired person's visa because it was made in 2017. However, it appears that he did have the copies of the ATM receipts from when he deposited R35,000 in cash into the bank account of Ecclesia Global on 31 May 2017. Why the applicant retained copies of the ATM slips, but not the application itself, has not been explained.

55.2 The applicant's temporary retired person's visa was issued for five years when the Immigration Act only permits such visas to be issued for four years. What advice the applicant had been given about the period for which he could obtain a retired person's visa would be relevant to understanding whether the fact that the visa had been issued for five years ought to have raised an alarm for the applicant.

55.3 The applicant paid for the temporary retired person's visa in two cash deposits on one day in May 2017. However, his payments for the permanent residence permit were not once off. They were paid as follows: in late 2017, shortly after the permanent residence permit application had been submitted, the applicant paid R30,000 in three cash deposits of R10,000 each to Ecclesia Global on a single

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[17] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) para 47

day. But then his next payment to Ecclesia Global was almost three years later in November 2020. This payment was in an amount of R20,000 but then was followed by smaller payments of R3,000 R5,000, R2,500, R2,000, R1,000, R2,000, R15,000, R1,500 over the next nine months. The papers before the court do not explain why the applicant had this type of payment arrangement with Ecclesia Global and why he paid the bulk of what he owed for the permanent residence application three years after it was submitted.

55.4 Finally, the applicant stated in his 29(2) application that he had paid Ecclesia Global a total of R80,000 for his retired person's visa and his permanent residence application. However, if one adds up the amounts reflected in the applicant's proofs of payment attached to his founding papers, the total comes to R117,000 – an amount appreciably more that the stated R80,000 in his section 29(2) application. If the applicant paid only R80,000 for his temporary retired person's visa and his permanent residence application, then there remains an amount of R37,000 that the applicant paid to Ecclesia Global for which there is no explanation on the papers.

56 The ultimate question that needs to be answered under section 29(2) is whether the applicant has provided sufficient reason for the Director General to conclude that there is good cause to lift the applicant's prohibited person status. Relevant to that assessment is a fuller understanding of the applicant's relationship with Ecclesia Global. Those facts are not before me. So I am not in as good a position as the Director General would be if the matter is remitted and the applicant is given an opportunity to supplement his application. It is also evident, from the issues I have raised above, that the outcome of that application is not a foregone conclusion.

57 For these two reasons alone substitution would not be an appropriate remedy.

58 At the hearing of the matter, I canvassed with counsel what an appropriate order on remittal would be if I were minded to grant such an order. The parties were agreed that the applicant should be afforded an opportunity to supplement his application, the Director General should be given time to consider it and there should be a deadline by which the Director General's decision should be made.

59 I called for further submissions from the parties on the period to be given for supplementing the application and for the Director General to decide the matter. It was agreed between the parties that the applicant should be given 10 days to supplement his application and the Director General should be given 60 days thereafter to decide the application.

60 On the issue of costs, the applicant initially sought costs on a punitive scale against the Director General but once the deficiencies in his own application had been canvassed at the hearing of the matter, counsel for the applicant indicated that he would only be seeking costs on a party and party scale. Given that the applicant has been successful in his review of the Director General's decision, it is appropriate that he be awarded the costs of the application. No compelling reasons to depart from this usual rule were advanced by the Director General.

Order

61 I therefore make the following order:

(a) The decision taken by the Director General on 6 July 2022 to refuse the applicant's application under section 29(2) of the Immigration Act 1 of 2002 is reviewed and set aside.

(b) The decision is remitted to the Director General as follows:

(i) The applicant shall be afforded 10 days from the date of this order to supplement his application under section 29(2) of the Immigration Act 13 of 2002.

(ii) The Director General shall consider the supplemented application and give his decision within 60 days of receipt of the supplemented application.

(c) The Director General is directed to pay the costs of the application.

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K HOFMEYR

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicant’s counsel:	Adv N Ristic
Applicant’s attorneys:	Eisenberg Attorneys Inc
Respondent's counsel:	Adv M Ebrahim
Respondent's attorneys:	State Attorney, Cape Town