

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.: 9940/2022

In the matter between:

N[...] B[...]

First Applicant

T[...] M[...]

Second Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR-GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

Date of hearing: 22 February 2024

Date of Judgment: 6 March 2024

Before the Honourable Ms Justice Meer

JUDGMENT DELIVERED THIS 6TH DAY OF MARCH 2024

MEER, J

[1] The Applicants, a married couple from the Democratic Republic of Congo ("DRC") apply in terms of the Promotion of Administrative Justice Act 3 of 2000

("PAJA") to review and set aside the decisions of officials of the Department of Home Affairs ("the Department"), and subsequent appeal decisions by the Director General and Minister of Home Affairs ("the DG and Minister"). The decisions determined that the First and Second Applicants were prohibited persons in terms of Section 29(1)(f) of the Immigration Act 13 of 2002 ("the Act"), for being in possession of fraudulent visas. The decisions collectively have the effect of prohibiting the Applicants from South Africa. The Applicants also seek a declaration that they are not prohibited persons under section 29(1)(f) of the Act. A condonation application by the First Applicant for the late filing of her judicial review application was unopposed and granted at the hearing.

[2] In support of their case, the Applicants contend *inter alia*, that:

2.1 They have a right to a prior fair hearing before being declared prohibited persons in terms of section 29(1)(f) and they were denied such right.

2.2 They were not complicit in fraudulent activities in obtaining the visas. The provisions of section 29(1)(f) thus could not have been invoked against them. For section 29(1)(f) to have been invoked, the Respondents had to prove that they were guilty of fraud which the Respondents did not do.

[3] In opposing the application the Respondents contend, *inter alia*, that:

3.1 The Applicants had no legal right to prior hearings by the Department's officials before the invocation of the provisions of section 29(1)(f) of the Act declaring them to be prohibited persons;

- 3.2 The decision of the Department's officials is not an administrative act susceptible to review;
- 3.3 The appeal decision of the DG has been superseded by the decision of the Minister on appeal, is no longer operational and is not susceptible to being reviewed by this court;
- 3.4 The Minister's decision on appeal is lawful and rational.

LEGAL FRAMEWORK

[4] The relevant provisions of the Act are contained in sections 29(1)(f) which lists who are prohibited persons, and sections 8(4) and (6) of the Act which provide for appeals by prohibited persons to the DG and Minister respectively.

[5] Section 29 of the Act states:

"29. Prohibited persons

(1) *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:*

- (a) *Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;*
- (b) *anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;*
- (c) *anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;*
- (d) *a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;*
- (e) *anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends; and*
- (f) *anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.*

(2)The Director-General may for good cause, declare a person referred to in subsection (1) not to be a prohibited person.”

[6] The Immigration Regulations (published in Government Notice R413 in Government Gazette 37679 of 22 May 2014, provide at Regulations 26(6)-(7) that:

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

- (a) The reasons for the prohibition;*
- (b) The seriousness of the offence committed;*
- (c) Representation made 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.”

[7] The relevant parts of section 8 of the Act provide:

“8. Review and appeal procedures

(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and -

- (a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or*
- (b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision.”*

(2) a person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision –

- (a) in a case contemplated in subsection (1)(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or*
- (b) in a case contemplated in subsection (1)(b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.*

(3) Any decision in terms of this Act, other than a decision contemplated in subsection

(1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10

working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.

(5) The Director-General shall consider the application contemplated in subsection (4),

whereafter he or she shall either confirm, reverse or modify that decision.

(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.

(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.

[8] In terms of the legislation thus, a prohibition under section 29 bans a foreigner from entering or remaining in South Africa. The ban is permanent, unless and until the ban is uplifted by the Director-General for good cause in terms of section 29(2). Moreover a decision that a person is a prohibited person may be appealed to the DG and thereafter to the Minister in terms of sections 8(4) and (6).

BACKGROUND FACTS

The First Applicant

[9] On 18 April 2016, the First Applicant was granted a temporary asylum seeker's permit authorizing her to work in South Africa. She obtained employment

and thereafter obtained a work visa through an agent recommended by work colleagues. Her employer queried the legitimacy of the work visa as the date of issue was reflected as 2015. After verification, on 16 August 2016, the Department reported that the work visa was not issued by it and was a fraudulent document.

[10] The First Applicant did not mention the 2015 work visa in her founding papers, because, she says, this document was only in her possession for a few days, she forgot about it, and it was promptly superseded by her renewed asylum seeker's visa. The visa was never raised again by any Department official or in any correspondence and was never seen again by her. At no stage was there ever any evidence, investigation or finding that she was aware of or complicit in any fraud committed by the agent who obtained the visa for her, she adds.

[11] Although in their answering affidavit the Respondents sought to defend their decisions by emphasizing the dubious nature of the 2015 visa and the fact that the First Applicant did not mention it in her founding affidavit, none of the impugned decisions referred to the 2015 visa as a factor on which the decisions were based, and as pointed out by the Applicants it was not even included in the Rule 53 record. It cannot, contend the Applicants be relied upon to validate the decisions *ex post facto*.

The First Applicant's 2016 visa:

[12] The First Applicant then engaged an agent, Mr Mosenga, based in Lubumbashi, DRC to assist her with another work visa application and paid him 1 500USD for his services. According to the Applicant, the application and Mr Mosenga appeared to be legitimate and proper in all respects. Mr Mosenga informed her that her application had been granted, whereafter she relinquished her asylum

visa at OR Tambo International Airport, and departed from South Africa for the DRC to collect her work visa.

[13] She met Mr Mosenga at the South African Consulate General office in Lubumbashi, gave him her passport and he obtained her work visa for her. This, according to the Applicant was not unusual as many people in the DRC use agents to enter public offices in order to avoid waiting in queues. Her work visa was valid until 2 May 2019. According to the First Applicant, she was never aware of any impropriety or irregularity regarding the 2016 visa. She states that for years she travelled on this visa and never encountered any difficulty with it from immigration or custom officials.

The First Applicant's 2018 visa:

[14] On 28 November 2017, an application by the First Applicant for a critical skills visa was rejected by the Department on the following basis:

“(1) Comments: 1. You have submitted a fraudulent visa according to our records a visa with control number [...] and trp number [...] was issued to someone else. In terms of section 49(14) of the immigration act any person who for the purpose of entering or remaining in, or departing from, or of facilitation or assisting the entrance into, residence in or departure from, the republic, whether in contravention of this act or not, commits any fraudulent act or makes any false representation by conduct, statement or otherwise, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding eight years.”

[15] This rejection is referred to by the Applicants as the initial decision by Department Officials and is the first decision sought to be set aside on review. It would appear to be on the basis that the 2016 work visa obtained for her by Mr Mosenga, was fraudulent. According to the Applicant this was the first time she

learnt that the 2016 visa was problematic. She queried this with Mr Mosenga who advised her that there was a mistake and she should return to Lubumbashi to resolve the problem. She also emailed the Department to query the finding and engaged a firm, Penguin Immigration to assist her. According to her the Department never reverted in substance to any of her enquiries. On 3 November 2018, she left South Africa for the DRC where she met Mr Mosenga who assisted her in obtaining a new visa which she refers to as the 2018 visa. When she went to the airport in Lubumbashi, the officials there told her that this visa too was fake. The First Applicant then filed criminal charges against Mr Mosenga. At the request of the police in Lubumbashi, she asked Mr Mosenga to meet her near the Consulate and when he did, he was arrested in her presence.

[16] As thanks for her assistance, she states, the station commander assured her that he would personally arrange for her to receive a new visa at the Consulate in Lubumbashi, and to have any restriction against her name withdrawn. The Consulate assisted the First Applicant with a new visa application and removed the 2018 visa from her passport. However, they claimed not to be able to assist her with removing any restrictions against her name. The First Applicant was granted a new visa on 19 February 2019, one she refers to as the 2019 visa.

[17] The First Applicant then sought the services of a Mr Kajombo in the DRC to assist her with an application in terms of section 29(2) of the Act to uplift the prohibition against her. He informed her that her application was successful and the First Applicant flew to OR Tambo International Airport on 24 February 2019. She was however refused entry and informed that prohibitions against her name remained on the Department's Movement Control System.

[18] The First Applicant complained to Mr Kajombo who reiterated that the prohibitions against her had been uplifted and that the Department records had probably not yet been updated to reflect this. The Applicant then returned to South Africa via Zimbabwe overland, because, according to her, the Applicants had run out of funds to pay for another flight. She was permitted to re-enter the country without difficulty on 13 March 2019.

[19] Once in the country she engaged the services of Le Roux Attorneys, who, on 4 February 2020 brought a second application in terms of section 29(2) of the Act to have the prohibition against her name uplifted. The application, which sets out fully the above history and emphasizes that she was not complicit in any fraud, was rejected.

[20] The First Applicant then appealed to the Director General in terms of Section 8 (4) of the Act. Her appeal was dismissed by the Director-General on 4 January 2021. The Director-General's reasoning in refusing the appeal was as follows:

"You submitted a fraudulent work visa in support of your application."

Your fraudulent work visa was issued on 2016-05-03 while you were on asylum permit in South Africa and you were not the ordinary resident in Lubumbashi at the time of its issuance."

[21] The First Applicant thereafter appealed to the Minister in terms of section 8(6) of the Act on 18 April 2021. This appeal was dismissed on 29 April 2021. The Minister's reasons were:

"The representation in respect of your request to review your prohibition has been considered and was unsuccessful based on the following reason:

- *Your husband's Permanent residence permit does not exist on our Departmental system, and therefore he cannot be recognized as legal in the country.*

- *At the time of the issuance of your visa, you were on an Asylum seekers permit in the Republic. You never submitted your application in person or interviewed and you were not an ordinary resident in your country of origin, as required in terms of regulation 9 of the Immigration Act.*
- *As a person on an Asylum seekers permit you should have renounced your status, and departed from the country to have an opportunity to apply for a visa in the country of your origin.”*

[22] The first Applicant's comprehensive appeal submissions overlapped substantially with her Section 29 (2) application, setting out her history and innocence in relation to any fraud. The First Applicant's history and background as related above were not disputed by the Respondents albeit their implying that she was complicit in obtaining the fraudulent documents.

The Second Applicant's history and background:

[23] The Second Applicant, also a national of the DRC was studying in Cape Town in 2013. He applied for a permanent resident permit through a friend, Mr Nzakomba, and obtained it. The visa was allegedly issued by the Department's official, one Mr Mabaso. The Second Applicant paid Mr Nzakomba, R13 000-00 for the permit. According to the Second Applicant, at no stage was he aware that there was anything irregular about the application. Once he obtained the permit, the Second Applicant travelled internationally many times without difficulty and also presented the permit without difficulty to the Department when registering the birth of the Applicants' minor daughter.

[24] The Second Applicant of his own accord, repeatedly, according to him, attended on the Department and on the Immigration Inspectorate in pursuit of, *inter alia*, a South African identification document. It was never suggested to him that the permanent residence was irregular.

[25] Also of his own accord, the Second Applicant briefed his current attorneys to have his permanent residence verified. On 19 May 2021, a letter from the Department was received stating:

“This office has no record that he applied for or received permanent residence in this country.”

[26] Further enquiries revealed on 4 June 2021, for the First time that the Second Applicant had been declared a prohibited person in terms of section 29(1)(f) of the Act. As with the First Applicant he was afforded no hearing, notice or reasons prior to his prohibition. On 22 July 2021, the Second Applicant applied to the DG in terms of Section 29 (2) to overturn his prohibition. His application set out his history and innocence as referred to above. The application was rejected on 1 September 2021. The DG’s reasons for the rejection were as follows:

“There is no evidence in your representation to prove that you were a victim of fraud. The fact that you travelled in and out of the country with your permanent residence permit uninterrupted does not exempt you from the provisions of section 48 of the Immigration Act 13 of 2002, which provides that:

‘No illegal foreigner shall be exempt from a provision of this Act or be allowed to sojourn in the Republic on the grounds that he or she was not informed that he or she could not enter or sojourn in the Republic or that he or she was admitted or allowed to remain in the Republic through error or misrepresentation, or because his or her being an illegal foreigner was undiscovered.’”

[27] Thereafter, the Second Applicant appealed to the Minister in terms of section 8(6) of the Act. His comprehensive submissions on appeal overlapped substantially with the Section 29 (2) application. This appeal was dismissed on 14 December 2021 for the following reasons as set out by the Minister:

“Your stay in the country was on the basis of deception, you were found in possession of a fraudulent Permanent Residence Permit.

You cannot claim that you had the bona-fide belief that you possessed a lawful permanent residence status after failing to provide proof to confirm that the alleged person (friend "Mr.Nzakomba") did exist. Your claims that you dealt with Mr Mabaso are also lacking veracity with no such name corresponding with the dates of your claims.

Your family members are also in the country illegally.

You have not presented any new facts to justify the upliftment of your prohibition. You are therefore a prohibited person and do not qualify for a port of entry visa, admission into the Republic, a permanent residence permit of any other visa."

I note that as with the First Applicant, the Second Applicant's history and background as related above, were not disputed by the Respondents albeit their accusation that he was complicit in obtaining the fraudulent documents.

FINDING

Review of the Initial Decisions by officials within the Department of Home Affairs prohibiting the Applicants from South Africa in terms of section 29(1)(f) of the Immigration Act 13 of 2002:

[28] The first question for consideration is whether the initial decisions of officials within the Department under Section 29 (1) (f) of the Act declaring the Applicants to be prohibited persons, constitute administrative actions under PAJA , in respect of which the Applicants were entitled to prior fair hearings before being declared prohibited persons and to adequate reasons. If the answer to this enquiry is in the affirmative, then the initial decisions against both Applicants fall to be reviewed and set aside. Should this happen, as was contended by Mr Simonz for the Applicants and not contested by Mr Titus for the Respondents, it would follow that the appeal decisions, which are based upon and replicate the initial decisions, would also fall to be set aside.

[29] Section 1 of PAJA defines an administrative action and states in relevant part:

1. **“Definition--** *In this Act, unless the context indicates otherwise—*

“administrative action” *means 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 ,...”*

[30] In *Minister of Defence and Military Veterans v Motau and Others*¹, the Constitutional Court distilled the definition of the section into seven elements:

*“The concept of ‘administrative action’, as defined in section 1(1) 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 rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.”*²

[31] In *Koyabe and Others v Minister of Home Affairs and Others*³ which also concerned a challenge to a Section 29 (1)(f) prohibition decision, the Court in effect treated a decision in terms of Section 29 (1)(f) as an administrative decision. The relevant extracts from *Koyabe* which bear this out were aptly noted by this Court in *Najjembe v the Minister of Home Affairs and Another*⁴ :

¹ 2014 [5] SA69 CC.

² Para 33.

³ 2010(4) SA 327 CC

⁴ [2022] ZAWCHC 199 (13 October 2022) at para 23.

[23] In Koyabe and Others v Minister for Home Affairs and Others, 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 8 of the Act read with section 7(2) of PAJA before launching their review application. The significance of Koyabe is that the Court related 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... (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 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 decisions 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)

[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 the relevant actions under the Act constitute administrative actions."

[32] The Court in *Koyabe* found against the Applicants there, on the basis that they had failed to exhaust their internal remedies under Section 8 of the Act before launching the review application. In *Koyabe*, it was not suggested by the Minister that a Section 29 decision was not an administrative action. Indeed, this was a

premise, and a necessary part of the logic of the case is that a section 29 decision is an administrative one.

[33] In *Ndlovu and another v Director General Department of Home Affairs and Another*⁵, a section 29 (1)(f) decision was also categorized as administrative action. At para 22 (iii) it was said:

“The respondents’ failure to provide adequate notice of the envisaged administrative action to Ndlovu is not explained anywhere in the respondents’ answering affidavit. The respondents’ conduct was procedurally unfair, unlawful and falls to be set aside on this basis alone.”

[34] Further support for a Section 29 (1)(f) decision being administrative action can be found in Section 7 (1)(f) of the Act which empowers the Minister to make regulations relating *inter alia* to the conducting of an enquiry of persons suspected of being prohibited persons.

[35] In support of the contention that a section 29 (1) (f) decision is not administrative action, but applies *ex lege* and operates automatically, Mr Titus for the Respondents relied on *Minister of Defence and Military Veterans v Maswanganyi*⁶. There it was held⁷ that section 59(1) (d) of the Defence Act 42 of 2002, which provides that the service of a member of the Regular Force is terminated if he is sentenced to a term of imprisonment by a competent civilian court without the option of a fine, operates as a matter of law and no further decision was required to effect the termination. *Maswanganyi* is clearly distinguishable. Section 59(1) (d) of the Defence Act only comes into effect pursuant to a hearing before a court in a trial. Mr Mawanganyi was discharged from service after he had a full trial during which he

⁵ [2023] ZAGPPHC 2280 (11 July 2023).

⁶ 2019 (5) SA94 (SCA).

⁷ At para 13.

was convicted for rape and sentenced after reasoned findings by a court. Section 59 (1) (d) of the Defence Act, is thus clearly distinguishable from Section 29 (1) (f) of the Immigration Act. If anything, section Section 59 (1) (d) of the former Act, in providing for termination only after a fair hearing, favours the Applicants' stance.

[36] It remains to be said that the initial decisions are imbued with the seven elements of an administration act identified in *Motau supra*. They were decisions of an administrative nature by persons employed in a state department, exercising a public power in terms of Section 29 (1) (f) of the Immigration Act 13 of 2002, that adversely affected rights, decisions which had a direct external legal effect and were not shown to fall under any exclusions.

[37] Thus, and in view of all of the above the question whether the initial decisions of officials within the Department under Section 29 (1) (f) of the Act declaring the Applicants to be prohibited persons, constitute administrative actions under PAJA, must be decided in the affirmative.

[38] In terms of Sections 3(2) and 5 (1) of PAJA, administrative actions must be procedurally fair. A person affected by any administrative action is entitled to adequate notice of the nature and purpose of the proposed action, a reasonable opportunity to make representations, a clear statement of the action, adequate notice of any right of review or internal appeal, as well as adequate notice of the right to request reasons, and reasons in terms of Section 5.⁸ In other words, such person is entitled to a right to be heard. The grounds upon which the Applicants allege the decisions are defective and warrant being set aside under review appear below and must be considered against this standard.

⁸ Section 3 (2) (b) (i)to(v); Section 5 (1).

Absence of notice of the decision and fair hearing

[39] The importance of the *audi* principle has been emphasized by our courts in a number of cases. In *Zondi v MEC for Traditional and Local Government Affairs and others 2005 (3) SA 589 (CC)* it was stated:

“It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations.”

I agree with the Applicants that by not receiving notice or not being afforded an opportunity to make representations before the decision, the process by which the Applicants were declared prohibited persons was unfair and unlawful, being contrary to PAJA.

[40] Disquietingly, there does not even appear to be a prescribed notice in terms of Section 29 (1) (f) notifying persons that they have been declared prohibited, or of their appeal rights under section 8 of the Act. The Applicants certainly did not get such.

Absence of reasons for initial decision

[41] The initial decision was not accompanied by reasons. It is a well-established requirement that adequate reasons must be given for administrative decisions. In *Koyabe supra* the Court said⁹:

“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

⁹ At para 62. See also *Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)* at para 40, *Director-General, Department of Home Affairs and Others v Link and Others 2020 (2) SA 192 (WCC)* at para 29.

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.”

Assumption in initial decision that Applicants were complicit in fraud

[42] A further defect in the initial decision is that it assumed that the Applicants were complicit in obtaining fraudulent documents without more. In *Najjemba supra* it was held that it could never have been the intention of the legislature that section 29(1)(f) should apply to persons who are innocent of wrongdoing. This section, it was said, cannot apply to an innocent party who has been found in possession of a fraudulent visa or to a person who was unaware and not complicit in obtaining such a visa. The court held that it was incumbent for both the Director-General and the Minister to determine whether the Applicant was complicit in the acquisition of the fraudulent work visa.¹⁰ This is apposite in the instant case.

[43] I agree with the Applicants that there is a lack of evidence of the Applicants' complicity in or knowledge of any fraudulent activity. The fact that they paid agents to obtain their visas or that the First Applicant may have fallen prey to agents before, does not in my view, suffice. Nor did the Department gather any such evidence and erred in my view in not so doing.

[44] Mr Simonz referred me to *Goldberg v Director of Public Prosecutions: Western Cape*¹¹ where Rogers J, as he then was, usefully gave consideration to the phrase "found in possession". After stating that possession comprises a physical element of control together with a mental element, he went on to say¹²:

¹⁰ *Najjemba* at para 27.

¹¹ 2014 (2) SACR 57 (WCC).

¹² At para 72.

“A person cannot possess unwittingly, ie without the necessary mental element; but if it is shown that he possessed with the necessary mental element, it may yet appear that he did not have the necessary mens rea (which depending on the form of mens rea required by the statute), might require the state to prove that the accused knew that his possession of the item was unlawful or that he should reasonably have been aware thereof.”

[45] The analysis in *Goldberg*, as Mr Simonz, submitted, illustrates that the meaning of “found in possession”, be it of a fraudulent document as in this case, or of ivory, as in *Goldberg supra* is no simple matter. The Applicants’ state of mind as alleged by them, that they possessed the documents in good faith, was relevant and bore investigation, which did not occur prior to the initial decisions.

Absence of investigation

[46] As is also contended by the Applicants the initial decisions were made without a fair, proper or rational investigation into how the allegedly fraudulent documents came to be issued and who is at fault. There is no evidence of an investigation into the First Applicant’s undisputed participation in a police operation in the DRC in which the agent responsible for her fraudulent visas was arrested. In support of her version the First Applicant has provided receipts for her visa application, emails to the Consulate and affidavits filed with the police in Lubumbashi. It is alleged by the Applicants that even when Department officials contacted the Consulate in 2023 to obtain evidence for their further explanatory affidavits, they simply did not enquire about these events.

[47] These facts, contend the Applicants would strongly support her claims of innocence and may even demonstrate that her 2019 visa was not fraudulent and was in fact issued to her by the Consulate.

[48] With regard to the Second Applicant, it is contended that he has provided whatever evidence he was able to about Mr Nzakomba, the agent he utilized. The Department claims that because the Second Applicant did not provide the passport number of Mr Nzakomba, it could do nothing. The Applicants retort that it is not explained why the Department in its further explanatory affidavits could not obtain Mr Nzakomba's passport details from its own records.

[49] In *AK and others v Minister of Home Affairs and others*¹³ in similar circumstances, a Russian citizen was found in possession of a fraudulent visa and was declared to be prohibited. She successfully challenged her prohibition, blaming an agent named "Aksu" for obtaining a fraudulent document without her knowledge. In upholding her challenge this court stated appositely:

*"Apart from harbouring a suspicion that the first applicant may have been complicit in Aksu's fraudulent conduct, no evidence has been presented by the DG to controvert or gainsay the first applicant's testimony. A mere suspicion, however, even if genuinely held, cannot be elevated to a finding of fact without more."*¹⁴

*"The question that really needs to be asked is why the Department did not pursue Aksu or investigate the circumstances in which she managed to obtain the visa. The Applicant provided all the evidence at her disposal relating to her interactions with Aksu. It is difficult to ascertain what more she could, or should have done."*¹⁵

[50] I agree with the Applicants that similar logic applies here and that a decision which bans the Applicants from a country in which they have built their lives for over a decade, cannot be made without a proper investigation. As the Applicants contend, prohibition is a devastatingly punitive sanction. A prohibited person is rendered unemployable¹⁶, cannot be harboured¹⁷ and cannot remain in South Africa. For such

¹³ 2023 (3) SA 538 (WCC)

¹⁴ para 27.

¹⁵ Para 28.

¹⁶ Section 38 of the Act.

¹⁷ Section 42 (1) (vii) of the Act.

a punishment to be imposed contrary to the PAJA yardstick is patently unjust and unfair.

[51] Disquietingly, an explanatory affidavit of Mr Martins Masilela, an immigration officer in the Department involved in the first decision, asserts incorrectly that the Second Applicant's permanent residence permit was issued in terms of the Aliens Control Act 96 of 1991 and hence must be fraudulent. This is incorrect. It is apparent from this visa which forms part of the papers that it was issued under the Immigration Act. He asserts further that the Second Applicant had been the holder of three study visas. This too is incorrect. The previous study visas, also part of the papers were five in number.

[52] The Respondents contend that because affected persons have rights to appeal in terms of section 29(2) they need no administrative rights under section 29(1)(f). This is no answer. As was aptly said in *Democratic Alliance v Minister of Home Affairs and Another*¹⁸, "No unjust exercise of public power can be condoned merely because one can appeal against it.", and in *Helen Suzman Foundation and Another v Minister of Home Affairs*¹⁹, "fair notice and a lawful hearing should occur before a decision is taken, not afterwards."

[53] In view of all of the above, the initial decisions against both Applicants were administrative actions as defined in PAJA which simply did not pass muster when held up to the standards prescribed at sections 3(2) and (5) of PAJA, referred to above. The Applicants were given neither adequate notice of the decision or the right to appeal, were not afforded an opportunity to make representations nor were they given adequate reasons. The initial decisions thus fall to be reviewed and set aside.

¹⁸ [2023] ZASCA 97 (13 June 2023) at para 26.

¹⁹ [2023] ZAGPPHC 490 (28 June 2023) at para 79-84.

Flowing therefore it would follow that the appeal decisions of the DG and Minister, which are based upon the initial decisions also fall to be set aside. It is therefore not necessary for me to consider those decisions further.

[54] Mr Simonz correctly contended that once the impugned decisions are set aside, it would follow as a matter of logic and law that the Applicants are not prohibited persons. A declaratory order which states in clear and simple terms that the Applicants are not prohibited persons, he submitted would assist the Applicants in their applications to the Department for future visas and /or permits. Absent such a declaration the officials considering those applications may well be unsure of the Applicants' status to their prejudice. It would seem to me in the circumstances that a declaratory order is required.

[55] As the Applicants have succeeded in this application they are entitled to an order that the Respondents pay the costs of this litigation, jointly and severally, the one paying the other to be absolved.

[56] I order as follows:

1. The decision of unknown officials in the employ of the Respondents to determine the First Applicant to be prohibited in terms of section 29(1)(f) of the Immigration Act 13 of 2002 ("the Act") is reviewed and set aside;
2. The decision of unknown officials in the employ of the Respondents to determine the Second Applicant to be a prohibited person in terms of section 29(1)(f) of the Act, is reviewed and set aside;
3. The Second Respondent's decision received on 4 January 2021 to reject the First Applicant's application in terms of section 29(2) of the Act, is reviewed and set aside.

4. The Second Respondent's decision received on 1 September 2021 to reject the Second Applicant's application in terms of section 29(2) of the Act is reviewed and set aside.
5. The First Respondent's decision received on 29 April 2021 to reject the First Applicant's appeal in terms of section 8(6) of the Act read with section 29(2) of the Act is reviewed and set aside.
6. The First Respondent's decision received on 14 December 2021 to reject the Second Applicant's appeal in terms of section 8(6) of the Act read with section 29(2) of the Act is reviewed and set aside;
7. The First Applicant's late filing of her judicial review application in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ("PJA") is condoned.
8. It is declared that the First Applicant is not a prohibited person in terms of section 29(1)(f) of the Act;
9. It is declared that the Second Applicant is not a prohibited person in terms of section 29(1)(f) of the Act.
10. The costs of this application shall be paid by the Respondents, jointly and severally, the one paying to other to be absolved.

MEER, J

Appearances:

Applicant's Counsel: D Simonz

Instructed by: Boshoff Attorneys

Respondent's Counsel: M Titus

Instructed by: State Attorney

