**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 32581/19**

(1) REPORTABLE: **NO.**
(2) OF INTEREST TO OTHER JUDGES: **NO.**
(3) REVISED: **16 SEPTEMBER 2020**

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In the matter between:

**Y Y (born C)** Applicant

and

**MINISTER OF HOME AFFAIRS** First Respondent

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

**VFS VISA PROCESSING (SA) (PTY) LTD t/a VFS GLOBAL** Third Respondent

**JUDGMENT**

**[HEARD REMOTELY VIA ZOOM PLATFORM ON 1 SEPTEMBER 2020]**

**FA SNYCKERS AJ:**

**INTRODUCTION**

1 In this application the applicant seeks a mandamus that the second respondent ("DG") issue to her a relative's visa under section 18(1) of the Immigration Act 13 of 2002.

2 Section 18(1) reads as follows:

> *"A relative's visa may be issued for the prescribed period by the Director-General to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance."*

3 The matter arises because, when the applicant applied to the third respondent ("VFS Global"), through which such applications are processed, she was advised that her application could not be processed and that she should present herself to the Department of Home Affairs for deportation as she was *"V-listed as a prohibited person"*. The Minister and the DG adopt the attitude that, as the applicant is *"V-listed"*, no relative's visa could be issued to her and that her appropriate relief, if any, would be to bring proceedings to set aside the decision to have her *"V-listed"*.

**FACTUAL CONTEXT**

4 There is some uncertainty in the papers arising from what appears to be a divergence between the applicant's version in the founding and replying affidavit, on the one hand, and, on the other hand, what the Deputy DG deposes appears from the Department's records.

5 The applicant's husband is a permanent resident of South Africa and their child a South African citizen. According to the applicant, she initially entered South Africa somewhere before 2011 and was granted asylum by the Department.

6 Given the centrality to this application of the applicant's alleged asylum, with respect to the *"V-listing"* at issue in this application, it is disconcerting that the applicant gives no particulars at all in relation to the granting to her of asylum, whether in her founding affidavit or in her replying affidavit. This the more so in light of the fact that according to the respondents' version, said to be derived from the Department's records, no extracts from which are attached to the papers, there is no record of the applicant's original entry into South Africa prior to her marriage in February 2011, and her first recorded entry was in October 2011.

7 Be that as it may, the applicant proceeds to relate that in February 2011 she got married, and she attaches the marriage certificate. At the time her husband was already a permanent resident of the Republic.

8 The applicant was then issued with a relative's visa (in terms of section 18(1)) on 1 October 2012 – in terms of the regulations promulgated for the purposes

of section 18(1) of the Act, regulation 17(3) determines that such a visa shall be issued for a period of two years maximum. The relative's visa was therefore scheduled to expire on 30 September 2014.

9 In February 2014 a minor son was born to the applicant and her husband – an unabridged birth certificate is attached.

10 The child was then issued with a South African identification number, which is provided, as the husband was a permanent resident. The child is also possessed of a South African passport, a copy of which was attached to the papers.

11 The applicant states that this is not a marriage of convenience but that the family lives together and has always done so. The applicant then gives evidence with reference to extracts from passports of some of her travels (although stating that a previous passport was lost). She says that in May of 2014 she travelled to China to look after her ill mother and attempted to return in August 2015, but was advised by the Chinese authorities that South African immigration advised that *"there was something wrong with her relative's visa"*. She said she could only be advised on enquiry that her relative's visa was *"not valid"*.

12 The relative's visa had expired on 30 September 2014.

13 It may be noted that section 30(1)(h) was introduced into the Immigration Act effective 2014, in terms of which the expiry of any visa was a sufficient reason for which a foreigner may be declared *"an undesirable person"*. This is was so

even if an application for an extension was pending – see *Johnson v Minister of Home Affairs* 2014 JDR 1320 WCC.[1]

14 The applicant then says that *"my husband and my minor son could not be in my absence"* and that in desperation she entered the Republic illegally through Swaziland. It may be noted that her husband and minor son had been in her absence for over a year. Nevertheless, I accept fully that it was critical for the applicant to be reunited with her family as soon as possible – but the fact remains that the applicant's current presence in the Republic was the result of illegal entry, on her version, in April 2015.

15 The applicant says that she then wanted to regularise her status in the country and *"explained her predicament"* to the Department and that she received some assistance from an unknown person with empathy. The precise facts surrounding the interaction with the Department are not furnished.

16 The upshot was another application for a relative's visa which was issued on the 14th of July 2016 expiring on 14 June 2018. The applicant says that she travelled extensively after this new relative's visa was issued without experiencing any immigration issues – this is corroborated with extracts from her passport.

17 The next event in the history was the need to apply for a *"renewal"* of the relative's visa that was to expire in June 2018.[2] Application was made a week before the expiry date on the 7th of June 2018, *"through the correct channels"*

[1] An application for leave to appeal against interim relief granted in this case was dismissed in the Constitutional Court – *Minister of Home Affairs v Johnson* 2015 JDR 0576 CC.

[2] It was accepted by counsel for the applicant in argument before me that the prerequisites of section 18(1) (financial assurance) and regulation 17(3) (prescribed documentation) needed to be fulfilled for purposes of a "renewal" – but submitted that in practice these were accepted and required for the initial grant only.

with VFS Global. The applicant says that was advised that it could take up to a year for her application to be processed and followed up with VFS Global at the beginning of 2019. The applicant says that she *"was informed by the third respondent that I was not entitled to an extension of my visa at it appeared from the system of the Department of Home Affairs that I was V-listed as a prohibited person and could therefore not sojourn in the Republic of South Africa. I was informed that I was an illegal immigrant and should immediately hand myself over to the authorities to be deported".*

18 The applicant says that she tried to explain about her being married to a permanent resident and that her son was a citizen, but was referred to the Department.

19 She contacted the Department and was apparently advised that she should hand herself over for deportation.

20 On this basis this application was brought in terms of which the court is asked to direct the DG to issue a relative's visa in terms of section 18(1) and that *"the applicant is immediately upon granting of this order issued a Form 20 authorisation in terms of section 7(1)(g) read with section 32(1) and regulation 26(2) of the Immigration Act 13 of 2002 as amended to remain within the Republic of South Africa pending the applicant's receipt of the relative's visa as envisaged in prayer 1 above"*.

21 The reference to regulation 26(2) appears to be an error and appears to have been intended to be a reference to regulation 30(2).

**THE DEPARTMENT'S POSITION AND ISSUES**

22 The deponent to the answering affidavit is the Deputy Director-General. He tells the court that the computer records of the Department on its so-called *"movement control system"* contained records that were irreconcilable with the applicant's version as to her movements in and out of the country. One is told *inter alia* that the airport stamp dated 22 May 2018 *"cannot be authentic as the movement was not captured and they would have refused her entry at a port of entry as she was already V-listed"*.

23 This allegation is difficult to reconcile with the following critical allegation in paragraph 25 of the answering affidavit:

> *"Ms Y Y was placed on the visa entry and stop list on 4 June 2018 because of the fraudulent asylum seeker permit which she had. She rendered herself to become a prohibited person in terms of section 29(1)(f) of the Immigration Act".*

24 The deponent to the affidavit does not indicate where he got the information from to which he testified in paragraph 25. He does not say that he personally accessed the system, nor is any detail provided as to how the entry came to be made, nor which *"fraudulent asylum seeker permit"* was at issue, nor when and how somebody within immigration made a determination that section 29(1)(f) of the Immigration Act was at issue. I revert to this below.

25 In essence, the Department's submissions and case before me amounted to the following: there were two decisions at issue in this case. The first was a refusal to grant the applicant the *"renewal"* of her relative's visa in terms of section 18(1). The second was the *"V-listing"* that, apparently according to the departmental system, was entered as a note on the system on the 4th of June

2018, with reference to a *"fraudulent asylum seeker permit which she had"*. Neither decision was being reviewed by the applicant; instead the applicant was simply applying to court for a *mandamus* that powers under section 18(1) should be exercised in her favour. This, counsel submitted, was incompetent in circumstances at the very least where the V-listing decision was not being challenged on review and stood until set aside, on the well-known principle in *Oudekraal.*[3] With respect to the decision to decline to grant a visa, Counsel urged that the present application could not be regarded as an application to *"review"* that decision, and that the Department was not afforded the *"opportunity"* to provide an explanation with reasons and the record in regard to such decision, as would ordinarily flow pursuant to a review.

26 The Department also submitted that it was inappropriate to grant the *mandamus*, in circumstances where the applicant, on her own version, had entered the country illegally, and this was the first that the Department became aware of such fact.

27 It is important to distinguish two potential decisions and two potential *"reviews"*. The first is the asserted refusal to issue the relative's visa. The second is whatever decision is embodied by the *"V-listing"*.

28 As for a *"decision"* to decline to issue a relative's visa, on the assumption that there was such a decision, the ordinary remedy in relation to such a decision would be to seek to have it set aside on review and then to seek whatever appropriate relief accompanied such review such as, in exceptional circumstances, an assumption (substitution) of the power granted to the

[3] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* 2004 (6) SA 222 (SCA).

official by the court. In the instant case, on the assumption that such a decision to refuse existed, the applicant proceeded straight to seeking mandatory relief, without asking that any particular decision be reviewed or set aside.

29 Judicial review need not occur pursuant to the provisions of Rule 53, but should, at the very least, be directed at an identifiable decision, before relief, particularly in the form of a *mandamus*, is formulated and sought. This, by itself, might however not necessarily be fatal to an application that recognisably challenges a decision and simply neglects to ask that the decision be set aside as part of the relief and remedy sought.

30 In the instant case, however, it does appear as though it is highly questionable whether there is a *"decision"* with respect to the exercise of the powers under section 18(1), that would be the target of any review. The applicant's contention in this regard is that VFS Global did not purport to make any such decision, nor was any such decision made by the DG or any duly delegated person; the applicant was simply advised by those tasked to process applications, namely VFS Global, that the application could not be processed because of the V-listing.

31 The Act provides for mechanisms of communicating adverse decisions to the persons concerned. This is governed by section 8(1) and section 8(3) and (4) of the Act. It is an interesting question whether a decision made somewhere within the Department by some unnamed official, but not communicated to the person concerned in terms of section 8, is even a decision capable of review, or becomes a decision only once "issued" to the person concerned. Certainly,

the actions of VFS Global do not in the circumstances appear to me to amount to a decision for the purposes of being susceptible to judicial review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[4]

32 In my view, there has not as yet been a decision on the part of the DG or any duly delegated person declining to grant a relative's visa in terms of section 18(1).

33 As for the *"V-listing"*, the first difficulty is to identify precisely what *"decision"* is at issue here. *"V-listing"* is the term employed to refer to the entry on the Department's system of a note to the effect that someone is a prohibited person as contemplated in section 29 of the Immigration Act or has been declared undesirable by the Director-General as envisaged by section 30(1) of the Act.

34 It is interesting to note that section 30(1) specifically envisages an official decision, by an identified official, namely the Director-General, to declare someone undesirable for any one of the reasons stated in the section. Section 29 for its part, however, does not charge any particular official with the power to determine or declare whether someone is a prohibited person; instead it provides that *"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 resident's permit"* and proceeds to list people in relation to which certain facts exist (apparently objectively).

[4] See *Kuzwayo v Representative of the Executor in the estate of the late Masilela* [2011] 2 All SA 599 SCA, para 28.

35 Counsel for the Department submitted that the effect of section 29 was to render someone prohibited *"by operation of law"*. Literally speaking, and on the theory of objective legality, this may well be so, but one still requires some official to exercise some power adverse to the foreigner in question to trigger this provision. The answer appears to rest in section 8(1) which reads as follows:

> *"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 …"*

*36* It appears from this section and from its interaction with section 8(3), which sets out a procedure in relation to any decision in terms of the Act *"other than a decision contemplated in sub-section (1)"*, that decisions with respect to being deemed *"prohibited"* in terms of section 29 outside the ambit of being refused entry to a port are at issue in section 8(1). Once an immigration officer *"finds any person to be an illegal foreigner"*, this then triggers the procedure in section 8(1). With respect to being declared undesirable under section 30, however, the provisions of section 8(3) would apply. I am fortified in this conclusion by my reading of the decision of the Constitutional Court in *Koyabe.*[5]

*37* As we have seen, the terse and uncorroborated apparently hearsay evidence of the Deputy DG contained in paragraph 25 of the answering affidavit refers to a note having been made of a V-listing because of a fraudulent asylum seeker permit that rendered the applicant prohibited in terms of section

[5] *Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as amicus curiae)* 2010 (4) SA 327 (CC).

29(1)(f). It does not help that paragraph 31.2 of the answering affidavit states the following:

> *"The applicant is not entitled to the relief which he sought as he (sic) is V-listed as an undesirable person in the country".*

38 Whether the reference to *"an undesirable person"* was loose in the context of the earlier reference to being prohibited in terms of section 29(1)(f) is difficult to say in light of the absence of any material to assist the court in relation to the decision with respect to which the alleged *"V-listing"* would be evidence.

39 The response from the applicant to reliance on the V-listing was to say that it was inexplicable that there could be reference to a *"fraudulent asylum seeker permit"*, especially on the 4th of June 2018, as the only asylum seeker permit that was ever at issue was the original asylum seeker permit on the strength of which the applicant had entered the country. In this regard, as already remarked, the applicant for some reason provides no detail, not even a date, in relation to this original asylum seeker permit. Be that as it may, the submission is to the effect that the subsequent marriage of the applicant and subsequent visas were subsequent administrative decisions that would have superseded and purged any unlawful act relating to the asylum seeking or any decision that pertained to such unlawful act.

40 Although not couched in these terms, I considered the applicant's position to be a collateral challenge to whatever decision was hinted at by the hearsay evidence in the answering affidavit relating to the V-listing said to have been entered on the 4th of June 2018. Counsel for the Department submitted that

this was not an appropriate case for a collateral challenge such as addressed and canvassed in the decision in *Merafong*.[6]

41 It was also submitted that any subsequent decisions on which the applicant seeks to rely would have been issued in ignorance of the alleged fraud, and also in ignorance of the now admitted illegal entry in April of 2015.

42 It is unfortunately entirely unclear from the papers what decisions would have been made when, and which would have superseded which, on the basis of what.

43 It is not tenable for the Department to submit that it did not have the *"opportunity"* to justify or set out the reasons for any decisions that may have been the subject of review – in answer to an application such as the instant, whatever the Department's views as to its merits or prematurity, the Department had every opportunity, and duty, to set out the facts fully with respect to whichever decisions were at issue.

44 One thing is clear, on these papers, nobody suggests that a decision was duly communicated or issued in terms of section 8(1) or in terms of section 8(3) such as to trigger the domestic remedies provided for in these two sub-sections.

45 Nevertheless, the power granted by section 18(1) is a power couched in discretionary terms and, although I am prepared to accept that the bases upon which refusal could properly be granted would necessarily be restricted, it appears inappropriate to me for this court simply to substitute the functions of

[6] *Merafong City v Anglo Gold Ashanti Ltd* 2017 (2) SA 211 (CC).

the DG in terms of section 18(1) with respect to this applicant, despite the woeful evidence relating to the existence of the relevant decision on which the alleged V-listing was based. As already noted, any order directing that a relative's visa be issued would in any event have needed to have been made subject to compliance with the financial assurance requirement of s18(1) and the documentary prerequisites of Regulation 17(3), in relation to which there was no evidence in the papers.

46 I take my guidance from the *Koyabe* decision. It seems to me that what is at issue, on the papers, is potentially a decision in terms of section 29(1)(f) which, if the Department believes it to exist and can vouch for it, needs to be formally issued in terms of section 8(1). As confirmed in *Koyabe,* the issuing of such a decision must be accompanied by reasons. Given the provisions of section 8(2)(b), in terms of which a person who has requested a review of a decision issued in terms of section 8(1) (and who is not one arriving by means of a conveyance on the point of departing), *"shall not be removed from the Republic before the Minister has confirmed the relevant decision",* it is not appropriate to grant the ancillary relief sought by the applicant, but rather to confirm the operation, pending the outcome of any internal remedy the applicant wishes to follow, of section 8(2)(b).

47 In my view, in the present circumstances, it is not appropriate to make any costs order.

**ORDER**

48 The following order is made:

1. The second respondent, personally or through any duly delegated immigration officer, is directed, in respect of any finding that the applicant is a prohibited person, to act in terms of the provisions of section 8(1) of the Immigration Act 13 of 2002 with respect to the applicant and any such finding.

2. The act of informing on the prescribed form in terms of s8(1) shall be accompanied by reasons.

3. The act of informing and reasons referred to in 1 and 2 above shall be served on the applicant through electronic service by email to the applicant's attorneys of record at all three of the following email addresses:

   peterjay@jayattorneys.com;

   zaskiabooysen@jayattorneys.com;

   legal@hswartattorneys.com.

4. The period of three days referred to in section 8(1)(b) of the Immigration Act shall commence upon the service to the last of the email addresses referred to above, in the event that such service occurs on different days.

5. Any confirmation of the relevant decision by the Minister as contemplated in section 8(2)(b) shall be served on the applicant in the same way as directed in 3 above.

6. The applicant shall not be removed from the Republic before the Minister has confirmed the relevant decision.

7. There shall be no order as to costs.

**FA SNYCKERS AJ**

**16 September 2020**

**Date of Hearing: 31 August 2020**

**Judgment Delivered: 16 September 2020**

**APPEARANCES:**

| | |
|---|---|
| **On Behalf of the Applicants:** | **AJ Swanepoel** |
| Instructed By: | Jay Inc |
| | Pretoria |
| **On Behalf of the Respondents:** | **FH Mhambi** |
| Instructed By: | State Attorney |
| | Johannesburg |