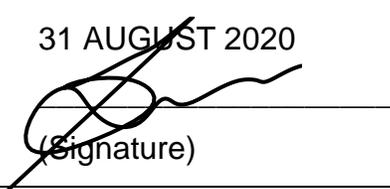




IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO 19/27099

1. Reportable: ~~Yes~~/ No
2. Of interest to other judges: ~~Yes~~/ No
3. Revised: Yes/ ~~No~~, on date reflected below
31 AUGUST 2020

(Signature)

In the matter between:

NGATCHOU DOMINIQUE ARNAUD

Applicant

AND

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL DEPARTMENT

Second Respondent

OF HOME AFFAIRS

JUDGMENT

REYENEKE AJ

1. The applicant is a Cameroonian national, who is a South African permanent resident and holder of a South African ID document. He is the holder of a passport issued by the Republic of Cameroon numbered 00499931, issued on 19 August 2016 and valid until 19 August 2021.
2. The applicant has brought an application against the first and second respondents to have the “V-listing” of his special skill visa, permanent resident status and South African identity document by the Department of Home Affairs reviewed and set aside. The Minister and Director General are cited in their official capacities on behalf of the Department.
3. He first arrived in South Africa during 2010 and obtained a visa for the purposes of studying. After completing a course in English language skills he enrolled for B Tech Engineering at the Vaal University of Technology and completed his course and obtained his engineering degree at the University of Pretoria. He obtained accreditation from the Engineering Council of South Africa and was employed as intern with LOCHROUX Consulting Engineers.
4. To allow him to be employed, he personally applied in Pretoria and was granted a critical skills visa in terms of the Immigration Act 13 of

2002 on 12 September 2016 with an expiry date of 11 September 2018.

The visa's control number is AA0076038 and it was issued in Pretoria against passport number 00561009. He subsequently applied for an was granted permanent residence in terms of section 27(b) of the Immigration Act on 5 April 2017 ("the Act"). A South African ID document (for a non-citizen) was issued in June 2017.

5. On 13 February 2019 the applicant had to travel to Cameroon to attend a family function. When he presented his travel documents to the immigration official at OR Tambo Airport he was informed that his special skill visa, permanent resident status and South African identity document were "V-listed", that his passport was red flagged and that he could not travel. He was further informed that if he left South Africa, he would not be granted entry back into South Africa. He was advised to approach the head office in Pretoria of the Department of Home Affairs. The effect of the V-listing is that his special skill visa, permanent resident status and South African identity document were null and void.
6. The applicant instructed an attorney to address a letter in terms of which the Department was required to cancel the V-listing. No response was received from the Department, as a consequence of which this application was launched.
7. The respondents opposed the relief and alleged that the critical skill visa was fraudulent and false. According to the answering affidavit the Department's Cameroon mission was informed by the mission in Lubumbashi on 29 June 2017 that a critical skill visa number A00531543, purportedly issued in Lubumbashi, was fraudulent and false, which rendered the visa null and void. On 4 July 2017 a request

was made and confirmed to place the applicant on visa on “entry stop”. It also had the consequence that applicant’s status was red flagged and him being V-listed.

The further consequence of this is that the applicant would have been declared a prohibited person in terms of section 29(1)(f) of the Act and his permanent resident permit be regarded as null and void.

8. The Department inferred that the critical skill visa was obtained in a fraudulent manner, because the control number was no longer in use in Lubumbashi at the time when the visa was issued on 8 July 2014.
9. In the response on behalf of the respondents it appears that Department during June 2017 sought to verify the authenticity of the applicant’s critical skill visa and assessed to have been fraudulently obtained under number A00531543 on 8 July 2014. The visa number which was regarded to have been fraudulently obtained does not correlate with any of the visa numbers referred to in this application and was ostensibly issued at a time when the applicant would still have been studying.
10. The allegations of fraud are confusing, contradictory and does not support the inference that the present critical skill visa issued to applicant was obtained in a fraudulent manner. No affidavits were filed by the officials who investigated the matter. On the face of it the Lubumbashi embassy referred to a visa bearing a different number to the one issued to the applicant. Furthermore, the critical skill visa relied on by applicant was issued on September 2016 whereas the so-called fraudulent visa was issued in July 2014.
11. This confusion could have been avoided if the Department had acted efficiently and timeously. On its own version it was already aware in

June 2017 of the allegations of fraud and had in July 2017 V-listed the applicant. Notwithstanding this, no steps were taken to give effect to the decision or to further investigate the matter beyond V-listing the applicant.

12. In argument the respondents did not seek to address the lawfulness of the V-listing but, by way of a point *in limine*, sought to argue that the application should be dismissed because the applicant failed to exhaust the internal remedies available to him as provided for in section 8 of the Act.
13. Clause 8(3) of the Act requires that any decision in terms of the Act that materially and adversely affects the rights of any person, should be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.
14. In terms of clause 8(4) a person aggrieved by a decision may within 10 working days apply to the second respondent (the Director General) for a review or appeal of the decision and may in terms clause 8(6) apply to the first respondent (the Minister) for a review or appeal, if dissatisfied with the decision of the Director General.
15. The decision of July 2017 to V-list the applicant is a decision as contemplated in clause 8(3). The Department failed to communicate the decision to the applicant or provide reasons for its decision at the time when the decision was made or in 2019 when the applicant tried to leave the country. The Department also did not notify the applicant of his remedies in terms of the Act. The Department had a further opportunity to provide reasons for the decision and to notify the applicant of the available review/appeal procedures but persisted in its failure notwithstanding the applicant's attorney's letter.

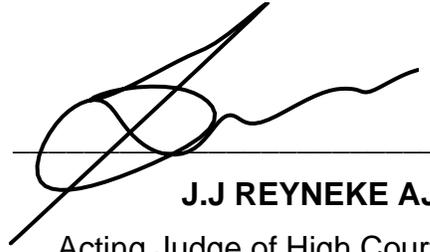
16. The failure to comply with the requirements of clause 8(3) left the applicant with a decision devoid of reasons and no practical choice but to approach the Court for relief. Any review or appeal as contemplated in section 8(4) is premised on the basis that reasons are made available prior to lodging a review or appeal.

The respondents cannot insist on compliance with the internal remedies provided for in the Act in circumstances where itself has failed to do so. The applicant was therefore entitled to approach this Court directly.

17. The conduct of the Department is not only in breach of the Act but also constitutes a breach of the Constitutional rights to administrative action that is reasonable and procedurally fair.
18. The applicant is entitled to have the v-listing set aside having regard to the Department's failure to provide a proper justification for the V-listing backed up by supporting affidavits and documents. The Department also did not advance any argument in support of the decision at the hearing of the matter.

The following is made an order of this Court:

- 1 The decision by the Department of Home Affairs to V-list the applicant's special skill visa, permanent resident status and South African identity document is reviewed and set aside;
- 2 The First and Second Respondents, in their official capacities, are directed to pay the applicant's costs on the High Court scale as between attorney and attorney.



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

J.J REYNEKE AJ

Acting Judge of High Court

Gauteng Local Division, Johannesburg

APPEARANCES:

Heard : 20 May 2020

Delivered : 31 August 2020

Applicant : Adv. Shomane Mothiba
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Respondent : Adv. JMV Malema
State Attorney Johannesburg
advocate.malema@gmail.com