




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
<u>2022-02-17</u>
DATE

SIGNATURE

CASE NUMBER: 43102/20

DATE: 17 February 2022

ALPHONSE MBWEBWE MUKONGA

Applicant

V

MINISTER OF HOME AFFAIRS

First Respondent

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JUDGMENT

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MABUSE J

[1] This is a review application. By his amended notice of motion issued by the Registrar of this Court on 11 March 2021, the Applicant seeks, an order in the following terms:

- "1. Extending the 180-daytime in s 7(1)(b) of the PAJA to include the date of service of this application, such extension being in terms of s 9(1)(b) of PAJA;*
- 2. The First Respondent's decision dated 24 February 2020, in which decision the First Respondent refused an appeal made by the Applicant on 29 January 2019 against a decision by the Second Respondent dated 21 January 2020, is reviewed, and set aside (these decisions constituted a refusal to uplift the Applicant's status as a prohibited person under the Immigration Act, 13 of 2002 and a refusal to uplift an order directing the Applicant to depart South Africa);*
- 3. The Applicant's aforesaid application for Upliftment of Prohibition in terms of s 29(2) of the Immigration Act, supplemented by such additional or further information as may be required for a proper determination thereof, is remitted to the First Respondent for reconsideration within a period of 30 [thirty]*

*calendar days from the date of service of this Order or uploading the Order onto Caselines;*

- 4. The operation of the Respondent's "order to illegal foreigner to depart from the Republic" address to the Applicant and dated 5 March 2020 is suspended pending the reconsideration of the Application in paragraph 2 above;*
- 5. The First Respondent is ordered to pay the costs of the application save in the event of opposing by the Second Respondent, in which case both Respondents are ordered to pay the costs of the application jointly and severally;*
- 6. Granting the Applicant such further and/or alternative relief as the Honourable Court deems appropriate."*

#### BRIEF OVERVIEW

- [2] On 29 January 2019 the Second Respondent refused to uplift the Applicant's status as a prohibited person under the Immigration Act 13 of 2002 (the Act). The Second Respondent had also ordered the Applicant to leave the Republic of South Africa, (the Republic).
- [3] Disgruntled by the refusal of the Second Respondent to uplift the Applicant's status as a prohibited person under section 29 of the Act and his refusal furthermore to uplift an order directing the Applicant to depart South Africa, the Applicant appealed to the Minister of Home Affairs (the Minister) against the decision of the Second Respondent. The Minister dismissed the appeal. The Applicant became even more disgruntled. The Applicant's next step was to launch

this review application against the Minister's decision to uphold the Second Respondent's refusal. Accordingly, the purpose of this review application is to review and set aside the refusal of the Minister to uphold the Applicant's appeal, or to put it otherwise, to review and set aside the decision of the Minister to uphold the decision of the Second Respondent, the Director General (DG).

[4] The Applicant is one Alphonse Mbwebwe Mukonga ("Mr Mukonga"). He describes himself as an adult male with full legal capacity who resides permanently at 6 Palm Avenue, Bryanston, Extension 3, Johannesburg. This Court is still to see proof that the Applicant has a permanent residence visa in this country. The Respondents are as follows:

[4.1] First Respondent is the Minister of Home Affairs in his official capacity ("the Minister"). The current Minister is the Honourable Pakishe Aaron Motsoaledi who has occupied the position since 30 May 2019. The First Respondent is cited in this application due to the powers and duties bestowed upon him under the Act, as amended.

[4.2] The Second Respondent is the Director General of the Department of Home Affairs (the DG), cited herein in his official capacity. The Second Respondent is the administrative head of the Department of Home Affairs (DHA). The Second Respondent's offices are situated at 230 Johannes Ramokhoase Street, Pretoria.

[5]

[5.1] The purpose of this application is to review a decision taken by the Minister.



[5.2] The targets of this application are two interlinked findings made by the DHA against Mr Mukonga. These are that;

[5.2.1] firstly, he has been declared a prohibited person in the Republic;

[5.2.2] secondly, he has been ordered to leave the Republic.

[6.1] Mr Mukonga is a Congolese male who came to the Republic with an Asylum Seeker's Permit;

[6.2] On 12 March 2013 he married a South African woman, a Mrs Long Ilung Mutonji Mukonga (Mrs Mukonga).

[6.3] In 2013 he applied to the DHA for a relative's or spousal visa in terms of s 18 (1) of the Act. This application was based on his marriage to the said South African woman. The application was granted, and a relative's visa was issued to him on 22 May 2013. This relative's visa was valid until 9 May 2015. It stated that the holder of that permit did not become a prohibited or undesirable person.

[6.4] Upon the expiry of this relative's permit or visa Mr Mukonga applied for its renewal. A new relative's visa was issued to him by the DHA on 17 March 2015. This visa was due to expire on 16 March 2017.

[6.5] So, in 2016 he applied for the renewal of the said visa. On this occasion the application for renewal was rejected on the basis that in the year 2013 he had committed an offence. This is not in dispute. He certainly was declared a prohibited person in terms of the provisions of s 29 (1) of the Act and was ordered to leave the Republic within fourteen (14) days of the order. He refused to leave the Republic on the basis that his family

still lives here. Mr Mukonga has not attached a copy of the letter from the DHA in which his application was rejected and in which furthermore he was ordered to leave the country. Section 29(1) of the Act states 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 residence permit:*

*(a).....*

*(b).....*

*(c) anyone deported and not rehabilitated by the Director-General in the prescribed manner;*

*(d).....*

*(e).....*

*(f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document."*

At this stage Mr Mukonga was found in possession of a fraudulent driver's licence, which is an identification document.

#### THE OFFENCE

[7] Mr Mukonga explains how he committed the offence of fraud in 2013 as follows:

[7.1] his wife had given birth to twins. He was ill-prepared to raise twins as he had budgeted for one child;

[7.2] he was approached by a strange man, with whom he no longer has any contact, and advised to collect a package from DHL. He had no idea what that package was or what it contained or where it came from;

[7.3] the strange man told him that he would need to show an identification to collect the package. The strange man dictated to him the name he should use.

[7.4] I wish to pause here and point out that Mr Mukonga does not explain why he did not use the passport or his name as it stood in his passport. He did not enquire from the strange man why he dictated the name that he had to use or where the parcel was from. He did not try to get more information about the parcel from the strange man. Nowhere did he say that he had been expecting a package from somewhere or from someone.

[7.5] he was told, he does not indicate by whom, to go to an internet café where he told the person who assisted him there that he needed a driver's licence with his picture on it with the name that he had been given. The driver's licence was printed and handed to him.

[7.6] He failed to disclose:

[7.6.1] the name of the Internet Café or its location;

[7.6.2] the name that he gave to the person at the Internet Café;

[7.6.3] the name of the country on his driver's licence;

[7.6.4] the details of the identity number that appeared on the driver's licence;

[7.6.5] the documents that he handed to the person at the internet café and whether the name that he used at the internet café was the same name that had been given to him by the strange person;

[7.7] after presenting the forged driver's licence when he went to collect the package from DHL the police arrived and arrested him. It is not known



where he went to collect the parcel from. He never explained earlier that he was directed to collect the parcel at a certain place;

[7.8] he was charged, prosecuted, and convicted of fraud and fined R50, 000,00- or two-years imprisonment, plus a further three years imprisonment which was suspended for five years on condition that he was not again convicted of fraud or theft committed during the period of suspension. He paid the fine in instalments until he finished it. His explanation of how he committed the offence of fraud he was convicted of is not reasonable. It is illogical and lacks essential details.

[7.9] He now contends that he knows that what he did was wrong and deeply regrets it. He contends furthermore that his commission of the offence was motivated by his desire to provide financially for his family and that he acted out of sheer desperation.

[7.10] It is not clear how committing an offence of fraud would have enabled him to provide financially for his family. In my view, he could still have provided financially for his family without having to commit an offence to do so. There is no merit in this statement. This statement exposes him as a man who of crooked ways.

[7.11] Moreover, he does not even work in South Africa but, on his own version, works in DRC. He does not explain how his fraud conviction in South Africa would have impacted on his employment chances in the DRC. I am of the view that he could have continued to work in DRC and to provide for his family notwithstanding his conviction in South Africa. His family lives in the Republic. He does not want to be separated from it. According to him it would be



extremely traumatic for the family to have to leave the Republic and go live in the DRC. All his children attend school in the Republic.

### CONSEQUENCES OF HIS FAILURE TO LEAVE THE COUNTRY AFTER

#### THE HE HAD BEEN SO ORDERED TO LEAVE

[8] He had been told to leave the country in 2016 after he had himself undertaken to leave the country on his own. In terms of Regulation 30(4) of the Immigration Act Regulations, *"An illegal foreigner who has satisfied an immigration officer that he or she will depart from the Republic as required by section 32(1) of the Act, shall be ordered by that immigration officer on Form 21 illustrated in Annexure A to depart the Republic within a period of 14 days of having so been ordered: Provided that such period may, for good cause, be extended."* This is the primary reason why Mr Mukonga was not summarily arrested and deported. He refused to leave the country because his family was in the Republic. He failed to inform the DHA that he had decided not to leave the country. It is not clear what he was hoping for by his conduct. S 32 of the Act provides that:

*"32.1 Any illegal foreigner shall depart unless authorised by the Director General in the prescribed manner to remain in the Republic pending his or her application for a status".*

*32.2 Any illegal foreigner shall be deported."*

[8.1] His refusal to leave the Republic after he had been so ordered is a criminal offence; a violation of s 34(5) of the Act, which provides that:

*"[34(5)] Any person other than a permanent resident who having been ...*

*(a) removed from the Republic or while being subject to an order issued under law to leave the Republic ... fails to comply with such order; shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and pending his or her removal be retained in the manner and at the place determined by the Director General. (My own underlining)*

[8.2] secondly, Mr Mukonga is in the Republic illegally;

[8.3] thirdly, his status as a prohibited immigrant does not change. He does not automatically become legal in the country simply because he has a family in this country and furthermore simply because he defied the order of the DHA to leave the country;

[8.4] fourthly, in the eyes of the DHA he will always be dishonest and unreliable.

He failed to leave the country after he had undertaken to and after he had been given chance to do so in terms of Regulation 30(4) of the Regulations

[8.5] fifthly, having decided to defy the DHA's order to leave the country, he failed to inform the DHA that he has decided not to leave the country but to remain in it. Now the biggest question is, in the circumstances, what was Mr Mukonga hoping for? Stay illegally in the country?

[8.6] sixthly, he has shown no respect at all for the Immigration Laws of this country.

[8.7] Here I must put the whole blame on the DHA. The Department failed to make a follow up. It gave the applicant an opportunity to leave this country on a particular

date but failed to ensure that he does so. The DHA should have diarised the last date of his departure and should have gone to check if he has left. It looks like that the DHA regrettably has no system in place in terms of which to monitor such people as Mr Mukonga who have been ordered to leave the country but defy the order to leave.

[9] HE HIRES AN IMMIGRATION OFFICER TO ASSIST HIM WITH THE APPLICATION FOR RELATIVE'S VISA.

[9.1] Following the disappointment of his application for the renewal of his relative's visa, he then decided to hire an Immigration Agent whose details he does not know to assist him to obtain that visa. It was a woman, a strange woman. He met this strange woman at the offices of Visa Facilitation Services ("VFS") in Pretoria. This woman has since disappeared and despite diligent search he was unable to locate her. Mr Mukonga believes that the relative's visa that this woman obtained for him was valid. However, he furnishes no reasons for his belief. He says he personally accompanied this woman to VFS offices when and where he submitted his visa renewal application.

[9.2] Mr Mukonga does not describe the VFS offices. He does not explain whether the VFS office is the DHA or part of the DHA; whether it has any authority to issue any of the Visa mentioned in the Act or whether it is an agent of the DHA.

[9.3] He contends that he firmly believes that this woman who assisted him dealt with the issue of his criminal record. But he gives no facts upon which his belief is based. He does not tell the court what this woman did not make



him believe that he was dealing with his criminal record. He makes a general claim that his family had a constitutional right to have him in the Republic but fails to refer the court to any section of the Constitution on which he bases such a claim.

[9.4] Whether he personally applied for any visa or used the services of an Immigration Agent, Mr Mukonga was barred by the provisions of s 29 (1) of the Act, from applying for any visa. He had been found to be a prohibited person. He had been ordered to leave the country and had been furnished with reasons why he had to leave the country. The order in terms of which he had been ordered to leave the country was still in place. It has not been set aside.

[10] According to him the outcome was positive as the espousal visa was issued in his favour on 5 September 2017. That espousal visa was valid from 4 September 2017.

[11] In 2017 he and his family travelled to the United States of America (USA). An immigration officer at the ORT International Airport informed him, after scanning his passport, that the sticker on his passport was fraudulent, in other words, his relative's visa that was issued to him with the assistance of the Immigration Agent on 5 September 2017 was fraudulent. He does not deny, nor can he deny that the espousal visa given to him on 4 September 2017 was obtained fraudulently. All that he can contend is that he was not involved in the fraud perpetuation, and he properly applied for it through the VFS assisted by the agent. This is not the issue.





The issue is whether the visa so obtained by him was fraudulent or not. It was therefore not valid. It is not his case that VFS was the DHA or part of it.

[12] Mr Mukonga's approach is that the 2017 visa was not applied for through any fraud on his part. According to him he properly applied for it through VFS assisted by an agent:

[12.1] he relies, for its authenticity on a letter dated 8 August 2019 from the DHA in which it was stated that his 2017 visa, Visa Control Nr: AA00676414 was issued by it.

[13] In January 2018 he and his family returned from the USA. He was refused entry into the Republic by reason of the fact that his 2017 visa was regarded as having been fraudulently obtained. He was instructed by the Immigration Officer at ORT International Airport to return to DRC, which he did. So, he was informed that he had an invalid visa; that with that visa he could not enter the country. He had no valid documents in his possession through which to enter South Africa.

[14] Re-entry

He testified that he used the same visa that had been rejected at ORT International Airport unlawfully to re-enter the country, this time by road, the same year. He then continued to stay in this country unlawfully since then.

[15] In the year 2018 he obtained a new passport. He was compelled to transfer his relative's visa to his new passport. He had to apply for a new relative's visa. This

time he approached another Immigration Agent by the name of Vivian to assist him for that purpose. He accompanied the agent to the offices of VFS and submitted his application. The application was successful. He personally collected the outcome of his application at the offices of the VFS. This espousal visa was due to expire on 4 September 2019. Still Mr Mukonga was not entitled to apply for any visa.

[16] By using the transferred visa he was able to travel to DRC via ORT International Airport. Upon his return he was informed that there was something wrong with his transferred visa and that it had been cancelled. Mr Mukonga was, nevertheless, allowed into the country even when he had no valid documents in his possession.

[17] The DHA has not filed any papers. This Court does not know why Mr Mukonga was allowed into the country while there was a problem with his visa, and secondly, why he was allowed into the country without proper papers and when he had been declared a prohibited person. This matter must be investigated. Mr Mukonga himself knew that he had been ordered home.

[18] CRITICISM

[18.1] In 2017 his passport was scanned by an immigration officer who thereafter told him that the sticker on his passport indicated that the espousal visa in his passport, Annexure 'E' to "FA1" was fraudulent. From this date he knew or ought to have known that his 2017 relative's visa

was invalid and not acceptable for any purpose. It does not matter what he thought about it thereafter.

[18.2] His reliance on the letter of DHA to his attorneys dated 8 August 2019 in which the DHA had stated that his 2017 visa with control number AA00676414 was issued by it was not helpful because when in January 2018 he and his family returned from the USA the Immigration Officers at the airport refused him entry on the basis that his 2017 relative's visa was fraudulent. He was informed for the second time that his 2017 relative's visa was fraudulent. This was a confirmation of what he had already been told in 2017 when he and his family left the country. He knew that the visa was not valid and furthermore that he could not lawfully use it to enter the country. If he used it successfully to enter the country well-knowing that it was fraudulent, he would be committing fraud. He testified that he used the same visa to re-enter South Africa by road and relies on the fact that the DHA confirmed that it had issued the espousal visa of 2017 although it retracted this admission later.

[19] THE LEGAL CONSEQUENCES OF MR MUKONGA'S RE-ENTRY INTO SOUTH AFRICA BY ROAD

Mr Mukonga's re-entry into South Africa by road was not without legal consequences:

[19.1] it was a clear demonstration that he had very little respect for the immigration laws of this country;



- [19.2] he knew that he had been ordered out of the country by the DHA but notwithstanding, was determined by hooks or crooks to re-enter the Republic of South Africa by using fraudulent documents;
- [19.3] he knew, as he had been told that the visa that he used to re-enter South Africa by road was fraudulent. This he had been told at the ORT International Airport when he was refused entry;
- [19.4] the fact that he used the same visa to re-enter the Republic does not help his cause. It only supports the notion that he committed fraud and he has admitted it. He came into the country by knowingly using fraudulent documents;
- [19.5] he contravened the provisions of s 10(A) (1) of the Act which provides that:

*"10(A)(1) Any foreigner who enters the Republic shall, subject to the subsections (2) and (4) on demand provide a valid port of entry visa, granted under (3), to an immigration officer."*

It is not his case that he produced to the immigration officer when he re-entered South Africa by road any valid port of re-entry visa or any visa. His case is that he got into this country by using a fraudulent visa;

- [19.6] the provisions of s 48 of the Act make it unequivocally clear that his testimony that *"I used the same visa to enter South Africa by road that year"* does not in any way help his cause. It still does not prove that he re-entered the country with a valid visa, nor does it prove that he did not use a fraudulent visa to enter the Republic;

[19.7] from the date on which he re-entered the country illegally by using a fraudulent visa, he has been committing an offence under s 49(1)(a) and (b) of the Act. Section 49(1) (a) of the Act provides that:

*"Anyone who enters or remains or departs from the Republic in contravention of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years."*

He has been ordered to leave the Republic. He has defied the said order and has remained unlawfully in the country. Section 32(1) of the Act provides that:

*"Any illegal foreigner shall depart unless authorised by the Director General in the prescribed manner to remain in the Republic his or her application for a status."*

Ss (2) provides that:

*"Any illegal foreigner shall be deported."*

Section 49(1) (b) provides that:

*"Any illegal foreigner who fails to depart when so ordered by the Director General shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding 4 years."* It is not his case that he has been authorised by the DG in the prescribed manner to remain in the Republic.

[19.8] He should have known that when he re-entered the country by road he was, in terms of the provisions of s 49(1)(c) and (4) already a prohibited person who did not qualify for a port of entry visa admission into the

Republic or visa or a permanent residence permit by reason of the fact that:

[19.8.1] he had previously been deported and had not been rehabilitated by the Director General in the prescribed manner;

[19.8.2] he was someone who was found in possession of a fraudulent visa or identity document.

[19.8.3] more importantly in terms of s 29(1) of the Act, Mr Mukonga was not entitled to apply for any type of visa.

[19.9] He made himself guilty of contravention of s 34(5) of the Immigration Act. This section provides that:

*"Any person other than a citizen (the applicant is not a citizen) or a permanent resident (the applicant has not provided any proof that he is a permanent resident) who having be refused admission whether before or after the commencement of this Act has entered the Republic shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without a warrant and deported under a warrant issued by a Court and, pending his or her removal, be detained in the manner and at a place determined by the Director General."*

[19.10] So according to S 34(5)(b) Mr Mukonga, who is neither a citizen of the Republic nor a permanent resident and who was refused admission into the Republic in the year 2017 committed an offence in terms of s 34(5)(b) of the Act when he re-entered the Republic in 2017. Based on this entry



he may be and should be arrested without a warrant, just for contravention of this section, deported under a warrant issued by a Court. Pending his deportation, he may be detained in a manner and at a place determined by the Director General.

[20] So, he was in the country illegally since his return to it with a fraudulent visa in 2018. Section 48 of the Immigration Act provides as follows:

*"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 a legal foreigner was undiscovered."*

[21] For inexplicable reasons the immigration officer allowed him into the country without him presenting any valid documents to enter the country. This conduct by the immigration officer constitutes an offence in terms of s 49(2) of the Act. The duty of the immigration officer is only to make sure that any foreigner who enters the country does so with proper DHA documents. Such an official has no power or authority to allow any foreigner who has no valid documents to come into the country. This conduct of an immigration officer who allowed the Mr Mukonga to enter the Republic without a valid visa or documents, was unlawful and irresponsible and ought to be investigated by the DHA. No immigration officer should be allowed to be a law unto himself or herself.



- [22] Mr Mukonga's re-entry into the country was therefore unlawful and against the requirements of the Act. Equally his continued presence in this country is unlawful. The conduct of the immigration officer is inconsistent with the provisions of s 2 of the Constitution of the Republic of South Africa Act NO. 108 of 1996 (the Constitution). This section provides that:

*"This Constitution is the supreme law; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

- [23] *"One of the objectives of the Immigration Act is to ensure that security considerations are fully satisfied, and the State retains control over the immigration of foreigners into the Republic."* This objective is vulnerable and easily defeated by immigration officers who act unlawfully by allowing undocumented foreigners to enter the Republic. This conduct is also a manifestation of the absence of any patriotism and lack of respect for one's work.

- [24] Section 9(4) of the Act provides that:

*"A foreigner who is not the holder of a permanent residence permit as contemplated in section 25 may only enter the Republic as contemplated in this section if –*

*(b) issued with a valid visa as set out in this Act."*

- [25] This conduct by an immigration officer in which undocumented foreigners are unlawfully allowed into the country emasculates the objectives of the DHA to make sure that:

*"g. Immigration laws are efficiently and effectively enforced, deploying to their insignificant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration."*

[26] Neither of the Respondents has filed any papers in this matter. It is therefore unclear as to whether either of the Respondents had, in terms of s 3(1) or (2) of the Act, delegated any of his or her powers to the immigration officer who, while he was aware that Mr Mukonga's transferred relative's visa had been cancelled and who being aware that in order to enter the Republic of South Africa Mr Mukonga required a visa or permit as set out in s 9(4) of the Act and who was aware that Mr Mukonga did not have any such a visa or permit, unlawfully allowed him into the country. S 10A of the Act provides that:

*"A foreigner who enters the Republic shall subject to (2) and (4) on demand produce a valid port of entry visa granted to him under (3), to an immigration officer."*

[27] Mr Mukonga then approached his attorneys of record to establish the circumstances surrounding his visas. On 16 July 2019 the attorneys wrote a letter to the DHA. This letter is attached to the founding affidavit as Annexure 'FA1'. The Acting Director General replied on 8 August 2019 to the said FA1 as follows to the said letter, Annexure 'F' to FA1.

*"According to our records, relative visa with reference number TRR1539580, control number AA00676414, valid until 22 September 2019 was issued by the Department of Home Affairs."*

*According to Departmental records, relative visa with reference nr REC2651896 control Nr B00347601 valid until 04 September 2019 was not issued by the Department of Home Affairs.*

*Having been found in possession of a fraudulent Temporary Residence visa rendered Mr Mbwebwe Alphonse Mukonga (B0779901) a prohibited person in terms of s 29(1) of the Immigration Act No. 13 of 2002(Act 13 of 2002) and as such does not qualify for admission in the Republic, a port of entry, a visa or a permanent residence permit."*

- [28] On 26 August 2019 Mr Mukonga's attorneys brought an internal application for the review of the decision of the DG. That document in which they challenged the decision of the DG is Annexure 'FA1' to the founding affidavit. It is titled "*Application for the Upliftment of the Prohibition in terms of S 29(2) of the Immigration Act 13 of 2002 as amended*". S 29(2) of the Immigration Act states that:

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

- [29] In the said 'FA1' the attorneys admitted that the Applicant was a prohibited person as envisaged by the provisions of s 29(1) (c) of the Act. A prohibited person does not qualify for a port of entry visa, admission into the Republic or a visa or a permanent resident permit. It means that once he was in the country without a port of entry visa or with a fraudulent visa or he was in the country unlawfully and



was an illegal immigrant. It means that he had no right to be admitted into the Republic. If he entered South Africa by any means contrary to the Act, he was an illegal immigrant with no right to remain in the country. He was not entitled to any visa or to permanent residency.

[30] The Applicant's attorneys correctly pointed out that the relevant regulation of the Act that deals with this type of matter is Regulation 26(4) which provides as follows:

*"(4) If a prohibited person in s 29(1)(c) of the Act –*

*(a) has deposed to an affidavit illustrating to the satisfaction of the Director General that he or she shall comply with the provisions of the Act;*

*(b) has been absent from the Republic for a minimum period of 4 years; and*

*(c) has provided a police clearance certificate the Director General may rehabilitate that person by granting him or her a status after having considered his or her application for status."*

[31] His appeal to the DDG was dismissed because the DDG found no good cause to uplift his prohibition. He furnished the following reasons:

[31.1] Good cause is a legal term denoting adequate or substantial grounds;

[31.2] Your client acquired two fraudulent temporary resident visas, control nr AA00676414 and control nr B00347601. These visas were verified, and it was discovered that they were fraudulent as they were not issued by the Department of Home Affairs.

[31.3] He was convicted of fraud-related charges in terms of s 29(1)(b) of the Immigration Act 13 of 2002.



[31.4] His criminal record has not been expunged.

[31.5] The attention is drawn to s 48 of the Act. I already have referred to these sections somewhere *supra*.

[32] He was again presented with Form 21 on 5 March 2020 in which he was ordered to leave the Republic of South Africa by 19 March 2020. It was because of this order that he appealed to the Minister.

[33] On 29 January 2020 Mr Mukonga's attorneys brought an internal appeal to the Minister against the decision of the DG ordering him to leave the country and in which furthermore the DG refused to uplift his prohibition. This appeal was brought in terms of s 8(2) of the Act. The reasons for the appeal were set out as follows:

33.1 the Applicant has been declared an illegal foreigner in terms of s 8(1) of the Immigration Act but was never informed of his rights to appeal the said decision as requested by the Regulation of the Immigration Act. Proof of failure to comply with s 8 is found in the absence of Part B of the deponent's order;. Mr Mukonga was never declared an illegal foreigner. He was instead declared a prohibited person in terms of s 29 (1) of the Act. He only became an illegal foreigner because he has been declared a prohibited person an unknown to the DHA he remains in the Republic.

33.2 the Applicant has been married to a South African woman. Together they have three minor children;

33.3 after being ordered to leave the country the Applicant was unable to do so due to his South African family being in South Africa. The use of the words "*unable to leave*" is a euphemism. He refused to leave. Even after he had refused to leave, he did not approach the Department of Home Affairs.

[34] On 24 February 2020 the Minister dismissed the Applicant's appeal on the following grounds:

*"Your presentation in respect of your client, Mr Alphonso Mbwebwe Mukonga requesting the upliftment of his prohibition has been considered and was unsuccessful based on the following reasons:*

- 1. Your client acquired two fraudulent temporary resident visas, control nr AA00676414 and control nr B00347601. These visas were verified, and it was discovered that they were fraudulent as they were not issued by the Department of Home Affairs.*
- 2. His claim that he was defrauded lacks credibility as there is no sufficient evidence to prove that indeed he was a victim of a fraudster. He was convicted of fraud-related charges in terms of s 29(1)(b) of the Immigration Act 13 of 2002.*
- 3. His criminal record has not been expunged.*
- 4. He has not presented new facts or additional information to substantiate his appeal.*

*Kindly note that your client has exhausted all the channels of the Department and no further appeals would be considered in this regard.*

*Yours sincerely*

*A Motswaledi\*\**

*Minister of Home Affairs."*

[35] THE BASIS OF THE REVIEW

[35.1] According to him the decision to refuse his application falls to be reviewed under PAJA;

[35.2] The reasons for the decision make no reference to his wife and family. It is unreasonable both legally and morally under the circumstances of his case to separate him from his family. The omission of any reference to his wife and his children in the decision demonstrates a failure to take relevant factors into account. The Applicant's argument is somewhat skewed. In my view, it is based on no valid grounds. The duty is equally on the foreigners to respect the laws of this country. This duty applies equally to citizens of the country. It is no valid excuse to disrespect and disobey the laws of your host country and claim that you are married to that country's subject or citizen. One should not break the laws of a country and when one is confronted with the breach of such laws then one claims that *"but I am married to a citizen of your country. I have a family with your citizen."* As you made your bed you must lie on it. There are consequences for breaching the laws of any country. The decision of the Minister to turn down the appeal is based on law and facts. There was nothing wrong in it. It is the Minister's duty to apply the law without fear or favour. It his Constitutional duty to enforce compliance with the Act. It is also his duty in terms of the Act to make sure that the provisions of the Act are adhered to and vigorously applied. There should be



no complaint when such happens. He must apply the law without fear or favour. There is no provision of the law that prohibits the Minister from applying the provisions of the Act to a prohibited person simply because that prohibited person is married to a South African citizen and has a family in South Africa. Such a person should have known the risks involved in disobeying the law. He should appreciate the consequences of his conduct. When the full might of the law is brought to bear on him, he has no right to complain. As matters stand Mr Mukonga is in this country unlawfully. He knows it and is subject to be arrested and deported.

[36] As correctly pointed out by Mr Mukonga, the decision of the Minister, being an administrative action, is subject to be reviewed in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 [PAJA]. The Minister's powers to dismiss Mr Mukonga's appeal are found in the Act. It is the implementation of national legislation. In the *Minister of Defense v Modau 2014 (5) SA 69CC at page 82 paragraph C-D* the Court stated that:

*"This Court has held that the implementation of legislation by a senior member of the executive ordinarily constitutes administrative action."* In making that statement the court confirmed what it had already stated in *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Edu-college (PE) Section 21 Inc: 2001 (2) SA 1CC paragraph 18 at page 12*.

[37] Mr Mukonga contends that the reasons for the Minister's decision make no reference to his wife and family.



He states that it is unreliable both legally and morally under the circumstances of this case to separate him from his family. There is no merit in this argument. Firstly, I have already pointed out that the Act does not prevent someone who is married to a South African woman from being deported. The fact that under the Act one can be deported automatically means that one can be separated from his family in South Africa. Secondly, I have pointed out that when one has committed an offence referred to in the Act, one may be deported and when one is deported one cannot refuse to go simply because one is married to a South African. Being married to a South African offers no one a protection against being deported. One must always respect the laws of one's host country.

[38] The decision appears to have been materially influenced by an error of law.

S 29 (1) (f) finds application on this aspect. In my view, the Minister applied the law correctly. Mr Mukonga does not deny that he was found in possession of the fraudulent visa or fraudulent identification document.

[39] There is no sufficient evidence to prove that he was a victim of a fraudster.

This is the allegation was made by Mr Mukonga himself. Therefore, he must prove it by placing all the facts before the Minister to enable the Minister to make an informed decision. In our law, he who asserts proves and, not he who denies, for a denial cannot be proved. The duty was on Mr Mukonga to explain fully how he was defrauded. In my view, he failed dismally in this task. The Minister was unable to make any finding that he had been a victim of fraudster because of lack of essential details.

- [40] The decision of the Minister seems to rely on the previous decision by the Second Respondent.

The Minister never dealt with Mr Mukonga, in the first place. He deals with the officers in the DHA. The Second Respondent receives reports from his junior staff members and acts on them. The Minister acts on the advice he receives from the DG. He is entitled to rely on such advice. At any rate Mr Mukonga does not dispute the fact that he was convicted of fraud.

- [41] The fact that my criminal record has not been expunged is not a valid reason to deport me.

There is no merit in this claim argument. Section 29(1)(b) makes it plain that: "*Anyone against whom a conviction has been secured in the Republic*" is a prohibited person who does not qualify for a port of entry visa, admission into their public, a visa, or a permanent resident permit. Mr Mukonga falls into this category and is therefore a prohibited person. He is therefore subject to deportation. Such a person is however not without a remedy. S 29 (2) of the Act provides that: "*the Director General may, for good cause, declare such a person referred to in 29(1) not to be a prohibited person*".

- [42] The question now is whether in dismissing Mr Mukonga's appeal, the Minister was required to take considerations of the Constitution into account. The Minister was obliged to give reasons for his decision to dismiss the appeal. He has done so. He has complied with the judgment of *National Lottery Board v African South African*

Education and Environment Project 2012(4) SA 504 [SCA]] where in paragraph [27] it was stated that:

*"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which include proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England, the Courts have said that such a decision would ordinarily be void and cannot be validated by different reasons afterwards, even if they show that the original decision may have been justified. For in truth, the latter reasons are not the true reasons for the decision but are rather an expost fact or realization of a bad decision."* In my view, the Minister acted fairly and rationally in dismissing Mr Mukonga's appeal.

[43] The principle of legality requires fairness to be observed before a decision is taken. This process by which an administrative decision is taken, and the resultant decision must be rational. I am of the view that the Minister has satisfied the requirements of legality.

[44] THE APPLICANT'S STATUS IN THIS COUNTRY

[44.1] Because of the crime of fraud that Mr Mukonga committed in the year 2013, which he has admitted, and for which he was sentenced to a fine of R50,000.00 or two years imprisonment plus a further three years imprisonment suspended for five years on certain conditions, Mr Mukonga was, in terms of the provisions of s 29(1)(c) of the Act, regarded as a prohibited person.



[44.2] In addition, he was ordered to leave the country within 18 days or by 23:59 on 7 February 2020. He was advised that if he failed to leave the country by the said time and date he would be arrested and detained pending his deportation. This order was handed personally to Mr Mukonga. Upon being served with the order, seemingly Mr Mukonga undertook, on his own, to leave the Republic.

[44.3] Again on 5 March 2020, according to annexure FA7 to FA1, Mr Mukonga was again notified that he was a prohibited person. He was informed that as he had undertaken voluntarily to leave the country, he was ordered to leave the Republic by 23:59 on 19 March 2020 and was warned that if he failed to do so he would be arrested and detained pending his deportation. The *"Order to Illegal Foreigner to Depart from the Republic"* was issued to him in terms of s 7(1)(g) of the Immigration Act read with Regulation 30(4) of the Regulations.

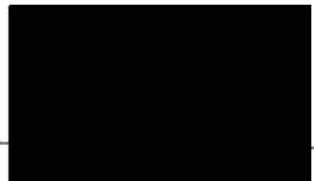
[44.4] The finding that Mr Mukonga is a prohibited person has not been purged by the Director General in terms of s 29(2) of the Act. He has continuously contravened the provisions of s 49(1) (a) and (b) of the Act.

[45] In its letter dated 8 August 2019 the DHA initially stated that Mr Mukong's relative visa with reference number TRR1539580 control number A00576414 valid until 22 September 2017 was issued by it. In a subsequent letter dated 31 October 2019, the DHA confirmed that the said transfer visa was not issued by it. Annexure 'F' attached to 'FA1' declared Mr Mukong a prohibited person. Mr Mukonga is therefore in the Republic unlawfully.



[46] In my view, no valid grounds exist upon which to find fault with the Minister's decision to dismiss Mr Mukonga's appeal. The application can therefore not succeed.

Accordingly, the application is hereby dismissed.



PM MABUSE J

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv. Mabuza
Instructed by:	McMenamin van Huyssteen & Botes
Counsel for the Respondent:	RESPONDENTS HAVE NOT OPPOSED
Instructed by:	
Date heard:	20 May2021
Date of Judgment:	17 February 2022