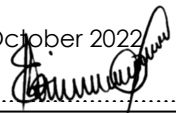




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 25993/2022

| | |
|---|--------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES:NO |
| (3) | REVISED: NO |
| DATE 09 October 2022 | |
| SIGNATURE  | |

In the case between:

YAROSLAVA ROMASHKO

Applicant

and

THE DIRECTOR-GENERAL OF THE DEPARTMENT
OF HOME AFFAIRS
THE MINISTER OF THE DEPARTMENT OF
HOME AFFAIRS
YOGIE TRAVERN DIRECTOR

First Respondent

Second Respondent

Third Respondent

JUDGMENT

KHWINANA AJ
INTRODUCTION

- [1] This is a review application in terms whereof the applicant applies for the following relief:

1.1 That the decision of the respondents dated 31 March 2022, in terms of which they refused the applicant's application for a permanent residence permit exemption certificate in terms of Section 31(2)(b) of the Immigration Act 13 of 2002 as amended under reference number PRE2556732 be set aside.

1.2 That the respondents are ordered to issue the applicant with a permanent residence permit exemption certificate in terms of Section 31(2)(b) of the Immigration Act 13 of 2002 and to make same available at Visa Facilitation Service (VFS) Centre in Brooklyn Pretoria within 30 (thirty) days from date of service of this order.

1.3 Pending the finalization of the applicant's application for a permanent residence permit exemption certificate as well as any further internal and/or legal processes in terms of the Immigration Act, 13 of 2002, as amended and/or legal processes with regard to the status of the applicant and/or the applicant's subsequent application for status, the Respondents:

1.3.1 Are ordered to allow the applicant to reside in the Republic of South Africa.

1.3.2 The respondents are interdicted from taking any steps which may result in the applicant being arrested and/or detained and/or deported.

1.3.3 That the respondents are ordered to pay the costs of this application, on an attorney and own client scale.

1.4 In the alternative to the relief sought as set out in paragraph 1.2 and 1.3 above, the applicant applies for the following relief:

1.5 That the respondents are ordered to review their decision not to issue the applicant with a permanent residence permit exemption certificate in terms of Section 31(2)(b) of the Immigration Act 13 of 2002 as amended submitted under reference PRE2556732 and to notify the Applicant of its reviewed decision within 10 (ten) days of date of service of this order.

1.6 Pending the review of the applicant's application for a permanent residence permit exemption certificate as well as any further internal and/or legal processes in terms of the Immigration Act, 13 of 2002, as amended and/or legal processes with regard to the status of the applicant and/or the applicant's subsequent application for status, the respondents:

1.7 Are ordered to allow the applicant to reside in the Republic of South Africa.

1.8 The respondents are interdicted from taking any steps which may result in the applicant being arrested and/or detained and/or deported.

BACKGROUND

[2] The applicant was married to Jacobus Frederik Smit on this the 22nd of October 2009 in terms of civil rites. The applicant brought an application

for permanent residence on this the 24th of June 2015 in terms of Section 26(b). On this the 04th of September 2017 the applicant was appointed as Interim Administrator in terms of Sec 60(4)(a) of Mental Health Care Act 2002 (Act 17 of 2002).

- [3] The applicant's husband passed on this the 13th of November 2017. The outcome of the application was received on the 25th of May 2018 wherein the permanent residence application was refused. The applicant has been appointed the executrix of her late husband's estate on the 07th of August 2018.
- [4] The applicant in terms of Section 31(2)(b) applied for a permanent residence exemption application and the outcome of Section 31(2)(b) permanent residence exemption application was refused on the 31st of March 2022.
- [5] The applicant has now instituted the current review application as of 12 May 2022, despite proper service of the respondents, the matter is before the court on an unopposed basis as the respondents failed to oppose the relief sought in the notice of motion. The application was served by the sheriff on the first respondent on the 26th day of July 2022, the second respondent was served on the 25th day of July 2022 and the third respondent was served on the 26th day of July 2022.

[6] On 31/03/2022 the respondents refused the applicant's permanent residence application in terms of Section 31(2)(b) of the Immigration Act, Act 13 of 2002 on the following grounds:

“In terms of section 31(2)(b) of the Immigration Act, 2002¹, the Minister may grant a foreigner the rights of permanent residence if special circumstances exist to justify such a decision. Having carefully considered all the information at my disposal, I wish to inform you that I could not find special circumstances which would justify the granting of permanent residence status to you. You have approached me to consider granting you permanent residence status through exemption because of the period of time you have resided in South Africa, the fact that you were married to a South African citizen since 2009, the inheritance you may have received, and that the delay in finalising your permanent residence permit application resulted in the outcome only being available after your husband has passed away. Unfortunately, this does not constitute special circumstances why I should grant you permanent residence through exemption. What I expect to see in an application for permanent residence status, through exemption, is how South Africa and its people will benefit from your continued residence in the country. What would also be of assistance in compelling reasons why you cannot return to your country of origin, given that no child was born from your marriage to Mr Smith, and you have no other family residing in South Africa. Although the delay in finalising your permanent

¹ (Act no 13 of 2002)

residence permit application is regretted, you did not meet the requirements of being legally resident in the country at the time of application on 24 June 2015 and you maintained such illegal status for more than two years until your husband's passing in November 2017. In the absence of proof that special circumstances exist to grant you a permanent residence status through exemption, I can unfortunately not assist you with your request."

[7] Counsel for the applicant submits that the main reasons for the refusal are:

1. The Applicant's failure to show how South Africa and its people will benefit from her continued residence in the country;
2. The Applicant's failure to show compelling reasons why she cannot return to her country of origin given that no child was born from her marriage to Mr Smith, and that she has no other family residing in South Africa;
3. The applicant's failure to meet the requirements of being legally resident in the country at the time of application on 24 June 2015 and you maintained such illegal status for more than two years until your husband's passing in November 2017.

4. He further submits that a proper case is made out in the founding papers for the Honourable Court to set aside the decision of the respondents dated 31/03/2022 in terms of the provisions of Promotion of Administrative Justice Act, Act 3 of 2000 (hereafter: PAJA”).

LEGAL MATRIX

[8] *‘Subject to section 25 and any prescribed requirements, the Director-General may issue a permanent residence permit to a foreigner who*

(b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permanent residence permit shall lapse if at any time within two years from the issuing of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death.’

Section 25(3) provides that *‘a permanent residence permit shall be issued on terms and conditions that the holder is not a prohibited or an undesirable person, and subject to section 28’*. Section 25(4) stipulates that *‘for good cause, as prescribed, the Director-General may attach reasonable individual terms and conditions to a permanent residence permit’*.

‘Section 27(f) of the Act provides:

‘The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who –

(f) has proven to the satisfaction of the Director-General that he or she has a prescribed minimum net worth and has paid a prescribed amount to the Director-General;

[9] However, the section that deals with exemptions stipulates as follows:-

“31 Exemptions (2) Upon application, the Minister may under terms and conditions determined by him or her- (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may:

- (i) exclude one or more identified foreigners from such categories; and
- (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;”

[10] In *Airports Company South Africa v Tswelokgotso Trading Enterprises CC*² the court summarised the current state of the law as follows:

² 2019 (1) SA 204 (GJ) at para [12].

'In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error...'

[11] In *Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*^[13] it was held that:

'Section 33(2) of the Constitution provides a right to written reasons to those whose rights have been adversely affected by administrative action. Indeed PAJA, which was enacted to give effect to this and other administrative justice rights, states in its preamble that part of the purpose of giving effect to these rights is to -

“create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function...” (It is imperative to note that the Minister has forwarded reasons in writing despite that procedure was not adhered to in terms of protocol)

- [12] The Constitution stipulates that:
- (1) Everyone³ has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”⁴
- [13] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd & Ano*⁵ the Constitutional Court held that before a Court can make an order in substitution of the decision there should only be one proper and inevitable outcome and it would be a waste of time to order the administrator to reconsider the matter.
- [14] In considering whether to make such an order the Court must also have regard for other relevant factors such as the level of incompetence of the administrator or any bias on its part, as well as the effects of any delay which has already occurred, and which is still to occur, in the event that the matter was to be remitted.
- [15] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*⁶ at para 45 O'Regan J put it aptly when she remarked that:

³ *Director-General, Department of Home Affairs and Others v Link and Others* (A324/18) [2019] ZAWCHC 138; [2019] 4 All SA 720 (WCC); 2020 (2) SA 192 (WCC) (17 October 2019) it was held:

“The Constitutional Court has held that where the Constitution provides that a constitutional right is available to ‘everyone’ the right extends to all persons, not only citizens but also foreigners, including those who may be in the country but have not yet been granted formal permission to remain.

⁴ In terms of PAJA section 5(2) reasons supplied must be ‘adequate’ and failing which it will be presumed that the administrative action in question was taken ‘without good reason.

⁵ 2015 (5) SA 245 (CC)

⁶ (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

“Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decisionmaker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

APPLICANT’S SUBMISSION

[16] The Applicant mainly relies on the following grounds for the relief sought in the notice of motion:

1. that the decision of 31/3/2022 was unreasonable;
2. that “the decision of 31/3/2022 was taken because irrelevant considerations were taken into account or relevant considerations were not considered; the decision of 31/3/2022 was not rationally connected the reasons given for it by the administrator.
3. the Applicant has been residing in South Africa for the last 13 years, and she intended to reside in the county on permanent basis hence the initial application for permanent residence in

terms of Section 26(b) having been submitted while her husband was still alive. In addition, it is reasonable to accept that the Applicant has formed and established a social network with friends and her immediate community.

4. had the respondents adhered to their own timeframes under which an application for permanent residence must be finalised, the applicant would have received the outcome of her initial application for permanent residence in terms of Section 26(b) before her husband passed away. The applicant would most likely have been issued with the requested permanent residence permit as the only reason provided for rejecting such was that the applicant's spouse has passed away while the respondents were still adjudicating the application.

5. The respondent regrets ("regretted") their delay of 3 years and 1 month for the Section 26(b) application, and clearly fails to appreciate the unreasonableness and substantial implication of their delay on the Applicant's constitutional rights and the impact of the decision on the applicant's life and has been deprived inter alia from permanent residence and exclusion from the labour market.

6. The applicant devoted her all her time and energy to assist

her ill husband from May 2017 to his death on 13 November 2017, which included her appointment as interim administrator in terms of Section 60(4)(a) of Mental Health Care Act 2002. The applicant's determination, love, and care during this ordeal of a time testify of her character and benefit to South Africa and its people.

7. The applicant has been appointed as the executrix to the late estate of the husband and a letter of appointment was issued by the Master of the High Court on 15/06/2018. Currently, the applicant N.O. is involved in active litigation pending in court and the deceased estate of her late husband is yet to be finalized.

8. The respondents contention that the applicant failed to meet the requirements of being legally resident in the country at the time of Section 26(b) permanent residence application on 24 June 2015 and her continued illegal status for more than two years until your husband's passing in November 2017 should be rejected by the Honourable court as the applicant's acted bona fide on the advice and directions provided to her by the respondents' agents at VFS who informed her that she can remain in South Africa until the PR application had been finalized.

9. The applicant intends to open her own business, should she be successful in this application and permanent residence be granted to her, which could create employment opportunities for

South African citizens and accordingly benefit the people of South Africa.

10. The respondents' contention that compelling reasons why the applicant cannot return to her country of origin given that no child was born in her marriage with her late husband is unreasonable and irrational and should be rejected. The applicant's social network build over 13 years in South Africa, irrespective of children or family in the country is a relevant consideration not considered alternatively, arbitrary disregarded by the respondents.

11. The respondents' failed to consider the fact that the applicant's country of origin – Russian Federation, is at War with its neighbour Ukraine as a compelling reason why the applicant cannot return to her country of origin, despite its constitutional responsibility towards all persons within the Republic of South Africa. It is submitted that the above Honourable court grant relief in terms of Section 8(1)(c)(ii)(aa) of PAJA by substituting or varying the administrative action of founding affidavit at correcting a defect resulting from the administrative action due to all the relevant facts placed before the court and the fact that it will be waste of time to order the respondents to reconsider the matter.

[17] Counsel for the applicant submits that the respondent in past demonstrated their inability to timeously deal with applications in

terms of Immigration Act, the previous refusal was issued by the Minister / 2nd respondent (highest authority) and any further.

- [18] Counsel opines that the applicant has a right to fair administrative actions, and there is a reasonable apprehension of irreparable harm should the permanent residence permit exemption certificate not be granted.

APPLICATION OF THE LAW TO THE FACTS

- [19] The decision of the Minister ought to be taken in terms of the Act. It is imperative to note that the Minister did not allow the levels as alluded to in terms of administrative processes. The Minister was the final arbiter in the administration process but he failed to observe the authority of those beneath him.

- [20] The decision by the Minister alludes to reasoning that has no merit particularly when one looks at the Immigration Act. It is evident that the applicant intended to reside in the county on a permanent basis thus her initial application for permanent residence in terms of Section 26(b) having been submitted while her husband was still alive. The respondent delayed in attending the application which is indicative of unreasonableness on the part of the respondent. The respondent says the applicant

became illegal in the country however fails to indicate that same was a result of failure to attend to her application timeously.

[21] There is no indication that the respondent is incompetent to deal with this matter. It is further not evident that this court can take the decision on behalf of the respondent as it is one proper and inevitable outcome and it would be a waste of time to order the administrator to reconsider the matter.

[22] The personal circumstances of the applicant cannot be overemphasized that she has created ties in the country and since the passing of her husband, she has been appointed the executrix of the estate.

[23] Upon perusal of the Immigration Act, I could not find the application of the reasoning that the applicant does not have children in the Act. The intention of the legislature in considering the application for permanent residence has been stated and it is imperative that the respondents upon considering the application apply the Act accordingly.

Conclusion

[24] The respondent has failed to apply the law to the facts of this matter as envisaged by the legislature, therefore it will be prudent that the matter is remitted back to the respondents in order to

properly consider the application on the basis of what the law stipulates. I have considered the two draft orders submitted by counsel. I have amended same in relation to the costs order as it is trite that the attorney and own client scale is no more,

In resultant, I am prepared to consider the second draft order which I have marked X and I make an order of the court.



ENB KHWINANA
ACTING JUDGE OF NORTH GAUTENG
HIGH COURT, PRETORIA

DATE OF HEARING: 19th AUGUST 2022

DATE OF JUDGMENT: 09TH OCTOBER 2022

COUNSEL FOR APPLICANT: ADV A P J BOUWER

GROENKLOOF CHAMBERS PRETORIA

bouwerlaw@gmail.com

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NR: 25993/2022

On 09th October 2022 before the Honourable Justice Khwinana AJ



In Court 4D Unopposed motion nr 29

In the case between:

YAROSLAVA ROMASHKO

Applicant

and

THE DIRECTOR-GENERAL OF THE DEPARTMENT

First Respondent

OF HOME AFFAIRS



THE MINISTER OF THE DEPARTMENT OF

Second Respondent

HOME AFFAIRS

YOGIE TRAVERN DIRECTOR

Third Respondent

This Order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. This Order is further uploaded to the electronic file of this matter on Case Lines by the Judge or his/her Secretary. The date of this Order is deemed to be 09 October 2022.

~~DRAFT~~ ORDER_

AFTER HAVING read the papers filed on record, after having heard counsel for the applicant and/ or having read the written submissions provided by counsel for the applicant, and after having considered the application an order is granted in the following terms:

1. That the decision of the Respondents dated 31 March 2022, in terms of which they refused the Applicant's application for a permanent residence permit exemption certificate in terms of Section 31(2)(b) of the Immigration Act 13 of 2002 as amended under reference number PRE2556732 be set aside.

2. That the Respondents are ordered to review their decision not to issue the Applicant with a permanent residence permit exemption certificate in terms of Section 31(2)(b) of the Immigration Act 13 of 2002 as amended submitted under reference PRE2556732 and to notify the Applicant of its reviewed decision within 10 (ten) days of the date of service of this order.

3. Pending the review of the Applicant's application for a permanent residence permit exemption certificate as well as any further internal and/or legal processes in terms of the Immigration Act, 13 of 2002, as amended and/or legal processes with regard to the status of the Applicant and/or the Applicant's subsequent application for status, the Respondents

3.1. Are ordered to allow the Applicant to reside in the Republic of South Africa.

3.2. The Respondents are interdicted from taking any steps which may result in the Applicant being arrested and/or detained and/or deported.

3 3. That the Respondents are ordered to pay the costs of this application, on an attorney and client scale.

BY ORDER OF COURT: REGISTRAR

Counsel for the applicant: Adv. A. P. J Boucher

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