

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case Number: 22071/2011

In the matter between:

Prince Mangosuthu Gatsha Buthelezi, MP First Applicant

Mosiuo Lekota, MP Second Applicant

and

Minister of Home Affairs First Respondent

**Director-General of the Department
of Home Affairs Second Respondent**

**Minister of International Relations
and Cooperation Third Respondent**

**Director-General of the Department of
International Relations and Cooperation Fourth Respondent**

JUDGMENT DELIVERED ON FRIDAY 3 FEBRUARY 2012

Baartman, J

- [1] The Dalai Lama, who resides in Dharamsala, India, intended to visit South Africa from 5–15 October 2011. His first engagement was scheduled for 7 October 2011, the 80th birthday party of Archbishop Emeritus Desmond Tutu. The Dalai Lama applied to the relevant South African authority for visas for himself and 6 of the persons who were due to accompany him; I deal with the specifics of his application below. However, by 4 October 2011, a decision in respect of his application remained outstanding. He withdrew his application because he was of the view that at that stage, he had insufficient time to travel to South Africa to meet his 7 October 2011 engagement, since his residence was a day's travel from the nearest airport.
- [2] The applicants, Prince Mangosuthu Gatsha Buthelezi, MP, and, Mosiuoa Lekota, MP, have alleged that the failure to have timeously taken a decision in respect of the application has rendered the relevant government departments' (**the respondents**) conduct reviewable. They therefore sought to review and set aside the "*refusal decision*", in terms of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) together with certain ancillary relief. Initially, the respondents took issue with the applicants' *locus standi*. They did not pursue that attack; I, for purposes of this judgment, accept that the applicants have *locus standi*.
- [3] I deal below in more detail with the largely common cause facts on which the applicants relied for the relief claimed, the point *in limine* (*that the matter is moot*) and to the extent necessary, the applications by People Against Suffering and Poverty, Peace Action, Chamtrul Rinpoche's Buddhist Group and Karen Vos to be allowed to part take in the proceedings as *amici curiae* (**the amici curiae**).

BACKGROUND

- [4] In addition to the 7 October engagement, the Dalai Lama also intended to deliver a speech entitled 'Peace and Compassion as a Catalyst for Change' and to attend events at the University of Stellenbosch, the Mahatma Gandhi Institute, and MaAfrica Tikkun.

The visa application

- [5] On 20 June 2011, Mr Tsering (**Tsering**), a representative of the Dalai Lama, met Mrs Balatseng (**Balatseng**), an official at the offices of the South African High Commission in New Delhi. The applicants alleged that at the meeting, Tsering had attempted to submit the Dalai Lama's visa application but that Balatseng had refused to accept it and had instead advised that a visa once issued would only be valid for 3 months.
- [6] It follows that, according to this advice, if the visa had been issued at that time, it would have expired prior to the Dalai Lama's intended travel. It is now common cause that that was not the legal position; instead, the period for which a visa is valid only starts running once the holder thereof has successfully presented it at a South African port of entry. (See, in particular, Regulation 9(6) of the Immigration Regulations: Government Gazette Volume 475:31 January 2005, which makes it clear that the 3-month period commences upon entry.)
- [7] On 4 August 2011, Tsering attempted to re-submit the visa application, this time directly to the High Commissioner, who indicated that he was unable to accept the application because he was awaiting clearance from the South African government.
- [8] On 29 August 2011, Tsering was able to file the Dalai Lama's application. However, 3 days later, an official of the South African High Commission returned the application to Tsering and informed

him that the application had to be submitted to VFS, the Global Visa Processing Company that handles the administration of most routine visa applications in India. Tsering was of the view that that was not the appropriate route for a high profile person such as the Dalai Lama where after further discussions followed.

- [9] By 7 September 2011, the application had still not been processed. In an attempt to finalise the application, advocate Dumisa Ntsebeza, the chairperson for the Desmond Tutu Peace Centre (**the Centre**), approached Mr Ebrahim, the Deputy Minister of International Relations and Cooperation. This intervention also proved fruitless.
- [10] On 8 September 2011, following further discussion with the High Commissioner and other officials, Tsering re-submitted the application. The Dalai Lama's original passport was not included in the documents submitted on 8 September, because, at the time, he was on an extended visit to Canada, Brazil and Argentina.
- [11] However, on 20 September 2011, Tsering delivered the original passport to the office of the South African High Commissioner following the Dalai Lama's return to India. On the same day, Tsering also paid the required visa fee.
- [12] On 26 September 2011, in response to the unfortunate sequence of events described above, the Centre unsuccessfully attempted to file a visa application on behalf of the Dalai Lama in Cape Town. Officials in Cape Town cited the Dalai Lama's apparent failure to have made application in New Delhi for the refusal.
- [13] It is so that the Dalai Lama required 1 day to travel from his residence to the nearest airport. Therefore, between 20 September 2011 and 4 October 2011, representatives of the Centre, the Human Rights Watch and the Dalai Lama had regularly enquired into the progress in processing the Dalai Lama's application.

[14] Eventually, on 4 October 2011, the Dalai Lama, in considering the time required to travel to the airport, formed the view that time had effectively run out and withdrew his application.

THE RELIEF SOUGHT

[15] It is against that background that the applicants contend that there was a constructive refusal to grant the application. They seek the following relief:

"1. Reviewing and setting aside the failure of the Respondents, and/or of officials employed by the Respondents, to properly and lawfully process, consider and make a decision on the application for an appropriate visa as contemplated by the Immigration Act 13 of 2002 ("the Act") ...;

2. Declaring that the conduct of the Respondents, and/or of officials employed by the Respondents, in failing to properly and lawfully process and make a decision on the application for an appropriate visa as contemplated by the Act by the Dalai Lama ("the refusal decision"), was inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution") and invalid, to the extent that:

2.1 The refusal decision was unreasonably and unlawfully delayed in the circumstances;

2.2 The refusal decision was ultra vires the Act;

2.3 The First Respondent acted unreasonably and unconstitutionally under direction of the Third Respondent;

2.4 The First Respondent took the refusal decision with an ulterior purpose and bias;

2.5 The refusal decision failed to take into account relevant considerations and/or took into account irrelevant considerations;

- 2.6 *The refusal decision was vitiated by a material mistake of law;*
- 2.7 *The refusal decision unjustifiably violated constitutional rights;*
- 2.8 *The refusal decision was inconsistent with the values of openness and transparency and the Constitution; and*
- 2.9 *The refusal decision was inconsistent with South Africa's international law obligations.*
- 3. *Ordering the Respondents, jointly and severally the one paying the other to be absolved, to pay:*
 - 3.1 *The First Applicant's costs, including the costs incurred by the employment of two counsel;*
 - 3.2 *The Second Applicant's costs, including the costs incurred by the employment of two counsel."*

[16] The granting or refusal of an application for a temporary visa constitutes administrative action. Thus, this court may review and set aside such action and grant an order that is just and equitable and may, in exceptional circumstances substitute, vary or correct a defect resulting from administrative action or direct the administrator to perform in terms of section 8(2) of PAJA.

[17] The section provides as follows:

"Section 8 (2)

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders –

- (a) directing the taking of the decision;*
- (b) declaring the rights of the parties in relation to the taking of the decision;*
- (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of*

which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs.”

[18] In granting such an order, the court will give effect to the rights entrenched in section 33 of the Constitution, Act 108 of 1996.

“33. (1) Everyone 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.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration.”

[19] I accept that a delay in taking a decision could, in appropriate circumstances, amount to a refusal to take the decision. The remedy in such a case would be to approach the court for an order directing the relevant authority to make the decision or such other relief as may be appropriate in the circumstances. However, in the light of the approach which I have adopted in the present dispute, it is unnecessary to determine this question.

NO LIVE CONTROVERSY – MOOTNESS

[20] On 4 October 2011, the Dalai Lama withdrew his application and the events that he intended to attend have long passed. The applicants have indicated that they have invited him to attend events in South Africa in March 2012 but there is no evidence that the Dalai Lama has accepted or even intends to accept their invitation.

[21] It follows that there is no longer an “*existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.*” (See **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others** 2000 (2) SA 1 (CC) at paragraph [21] footnote 18)

[22] Notwithstanding this factual situation, a court has discretion to hear an application despite it being moot. (See Currie and De Waal: The Bill of Rights Handbook (5th Edition) at 95).

[23] In **Independent Electoral Commission v Langeberg Municipality** 2001(3) SA 925 (CC) at paragraph [9] the Court held:

“In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others Ackermann J said:

‘A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.’

Even though a matter may be moot as between the parties in the sense defined by Ackermann J that does not necessarily constitute an absolute bar to its justiciability. This Court has a discretion whether or not to consider it. Langa DP, in President, Ordinary Court Martial, and Others v Freedom of Expression Institute and Others, throws some light on how such discretion ought to be exercised. The conclusion in that judgment is that s 172(2) of the Constitution does not oblige this Court to hear proceedings concerning confirmation of

orders of unconstitutionality of legislative measures which have since been repealed but has a discretion to do so and 'should consider whether any order it may make will have any practical effect either on the parties or on others'. The reasoning is equally applicable to this appeal."

- [24] At paragraph [11], the Court then described the exercise of its discretion as follows:

"...That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced. ..."

- [25] Applying these considerations to the present matter, it is apparent that the withdrawal of the visa application, the absence of the Dalai Lama as an applicant in this matter, the fact that the events he intended to attend have taken place and the absence of his response to the new invitation are material factors that must influence the decision whether to consider the application, despite the matter being moot.

- [26] Mr Katz SC, who appeared with Mr Simonsz for the first applicant, relied on the decision in **MEC for Education, KwaZulu-Natal, and Others v Pillay** 2008 (1) SA 474 (CC) as authority for the proposition that we should exercise our discretion in favour of the applicants and entertain the merits of the matter, despite its mootness. I accept that Pillay is authority for the proposition but I am of the view that it is distinguishable from the current matter.

[27] The applicant in Pillay unsuccessfully sought permission to have Ms Pillay wear a nose-stud to school in contravention of the school's code of conduct. The applicant alleged that the nose-stud was worn in observance of a religious practice. The applicant unsuccessfully sought relief on the basis of unfair discrimination in the Equality Court. The applicant successfully appealed the Equality Court's finding. The High Court, seized with the appeal, found that there was indeed unfair discrimination. Pursuant to the appeal, the school applied for leave to appeal directly to the Constitutional Court.

[28] That application was resisted on the basis that the matter had become moot because Ms Pillay had by then left school and the National Department of Education had introduced new guidelines for school uniforms. Therefore, so the argument went, any decision which that Court would take would have no relevance to the then applicable regime.

[29] The Court found that the matter was moot because Ms Pillay had left school but exercised its discretion to consider the matter. It advanced the following reasons for its decision at paragraph [35].

“As already noted this matter raises vital questions about the extent of protection afforded to cultural and religious rights in the school setting and possibly beyond. The issues are both important and complex, as is evidenced by the varying approaches of the courts below as well as courts in foreign jurisdictions. Extensive argument has been presented, not only from the parties but [also] from three amici curiae. There is accordingly no doubt that the order, if the matter is heard, will have a significant practical effect on the school and all other schools in the country, although it will have no direct impact on Sunali. It is therefore in the interests of justice to grant leave to appeal.”

[30] In the current matter, there are no conflicting court orders as faced the court in the Pillay matter. Similarly, we do not have cultural or religious issues that could surface in similar applications. Mr Du Plessis, counsel for the second applicant, described the visa application and, in his view the refusal that forms the subject of this matter as “the most important this year.” The delay was occasioned by the South African government’s concern for the possible negative implication the granting of the application might have for the trade relations between it and the People’s Republic of China. However, it is arguable that the profile of the Dalai Lama makes it unlikely that similar controversy will arise in other visa applications. In any event, every visa application, including any future visa application by the Dalai Lama, must be considered in accordance with the law; hence the importance of a decision that is no longer live cannot, without more, be converted into one that necessitates court intervention.

[31] The applicants further relied on the matter of **Mohamed and Another v President of the RSA and Others** 2001(3) SA 893 (CC) for its submission that the matter was not moot and/or that we should exercise our discretion in their favour and consider the matter despite it being moot.

[32] In Mohamed, the South African government had unlawfully handed over Mr Mohamed to the United States (US) authorities for prosecution on capital charges in connection with the bombing of the US embassy in Dar es Salaam, Tanzania, in August 1998. Mr Mohamed, if convicted, would have faced the death penalty. The appellants, who included Mohamed, sought a declaratory order expressing disapproval of the arrest, detention, interrogation and transfer of Mr Mohamed to the FBI agents, and further sought an order requiring the South African Government to intercede with the US authorities regarding the wrong done to Mr Mohamed.

[33] The Mohamed matter is distinguishable from the current dispute. Mr Mohamed faced the death penalty in the US and appropriate relief could have affected his fate. In contrast, the Dalai Lama withdrew his application. As noted already, there is no indication that he intends to accept the new invitation extended to him. The State acted unlawfully in the Mohamed matter and, on that basis alone, it would have been in the interests of justice to consider the matter. In any event, the matter had to be considered because it was not moot, as is made clear in paragraph 70 of the judgment where the Court said:

"We disagree. It would not necessarily be futile for this Court to pronounce on the illegality of the governmental conduct in issue in this case. In the first instance, quite apart from the particular interest of the applicants in this case, there are important issues of legality and policy involved and it is necessary that we say plainly what our conclusions as to those issues are. And as far as the particular interests of Mohamed are concerned, we are satisfied that it is desirable that our views be appropriately conveyed to the trial Court. Not only is the learned Judge presiding aware of these proceedings, but the very reason why they were instituted by the applicants was said to be that our findings may have a bearing on the case over which he is presiding.

On the papers there is a conflict of opinion between one of the defence lawyers on the one hand and a member of the prosecution team on the other, both of whom have filed affidavits expressing their respective views as to the admissibility and/or cogency in the criminal proceedings of any finding we might make. It is for the presiding Judge to determine such issues.

For that purpose he may or may not wish to have regard to disputed material such as our findings. It is therefore incumbent on this Court to ensure as best it can that the trial Judge is enabled to exercise his

judicial power in relation to the proceedings in this Court; and an appropriate order to that end will be made.”

- [34] Allegations of disregard for human dignity and the rights entrenched in the Constitution have been levelled against the respondents in various matters before the courts. However, the courts have been unanimous in condemning such behaviour where the circumstances have justified it. But this case turns on its own peculiar facts. Furthermore, there is therefore no reason to fear that our courts would not in future, in appropriate circumstances, come to the Dalai Lama's or any other aggrieved visa applicant's aid, should he or she approach the court. However, given the nature of this case, the relief sought would have no practical effect.
- [35] It follows that the interests of justice do not permit the exercise of this court's discretion in favour of the applicants to consider the matter despite its mootness. As indicated in the preceding paragraph, any order that this court may make would have no practical effect on the Dalai Lama or any current or prospective applicant because of the peculiar facts of this matter. The importance of the issue is affected by the withdrawal of the application and the passage of time; the events the Dalai Lama intended to attend took place a long while ago. The criteria for granting visa applications are well-known and do not involve any complex legal issues. Although the parties have addressed this court fully on mootness and the merits, it does not justify this court giving advisory opinions on abstract propositions of law.

THE AMICI CURIAE

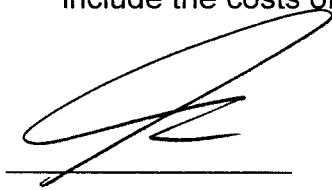
- [36] The *amici curiae* made submission in respect of the merits; for the reasons stated above, it is not necessary to deal with the merits. I am

of the view that no order as to costs should be made in respect of the *amici curiae*.

CONCLUSION

[37] For the reasons stated above, the application stands to be dismissed with costs, such costs to include the costs occasioned by the employment of 2 counsel. Therefore, I make the following order:

- (a) The application is dismissed.
- (b) The applicants are ordered to pay the respondents' costs jointly and severally the one paying the other absolved, such costs to include the costs of 2 counsel.



Baartman, J

I concur.

Davis, J

DAVIS J:

[1] I have had the pleasure of reading the judgment of my sister Baartman J. I agree with the order she proposes and her justification therefore. However, I consider it appropriate, in the light of the very helpful arguments presented by counsel and the issues raised to explain my own reasoning for so concurring.

[2] The decision that the application in this case is moot and that, further, this court should not exercise a discretion to entertain the application, is not one of which I arrive lightly. Applicants contend correctly that there are a number of disturbing features which emerge from the papers. As noted by Baartman J, the Dalai Lama's representative was given incorrect advice as to the period from which a valid visa begins to run. Instead of being informed that the period, for which the visa is valid, commences upon it being presented at a South African port of entry, it appears that the South Africa High Commission in India informed the Dalai Lama's representatives that, once issued, the visa would only be valid for a three months period; hence the advice given to the Dalai Lama to apply much later than was his initial intention. That advice is contrary to the legal position. See, in particular, Regulation 9 (6) of the Immigrations Regulations: Government Gazette Volume 475: 31 January 2005 which makes it clear that the three month period commences upon first entry.

[3] A further concern turned on a significant difference between the version proffered by the second respondent and the first respondent as to the cause of the delay in making a decision about the application. Both respondents emphasised that a visit from the Dalai Lama held potential economic implications for South Africa. In particular, both respondents contended that a visit from the Dalai Lama could impair South Africa's important trade relations with China. Thus, second respondent impressed upon the court the importance of the relationship between South Africa and China:

"The Peoples' Republic of China offers vast export opportunities and the potential to absorb a high proposition of value added exports from South Africa. In the light of the mutual benefit that emerged from comparable levels of industrial development, the People's Republic of China also offers unique opportunities in terms of investment, joint ventures, and technology transfer for South Africa. The People's Republic of China therefore remains a strategic partner for South Africa in the Asia region."

For these reasons, both respondents informed the court that the first respondent was required to consult with her cabinet colleagues before deciding upon the application for a visa by the Dalai Lama. Second respondent said of this process:

"The Minister sought the views of her cabinet colleagues to ensure that her efforts would not have unintended impact on their functions. Those views were advanced. She accepted them and went about the business of applying her mind to the applications lodged. The notice of withdrawal was communicated to her during this process of consideration."

By contrast, first respondent avers:

"I was awaiting the views that I have requested from official and the department of state that if a direct and substantial interest in the visit of the Dalai Lama to our country, particularly DIRCO (Department of International Relations Cooperation's). When I was advised that he and the members of his entourage had withdrawn their applications for visas."

[4] These are mutually contradictory versions, yet both were placed, without any explanation, by the respondents before the court pursuant to this application.

[5] In dealing with the legal basis by which economic relations with China could constitute a reason for a refusal of a visa, Mr Moerane who appeared together with Mr Sibeko and Ms Gcabashe on behalf of the respondents, relied on section 85 (2) (a), (b) and (c) of the Republic of South Africa Constitution Act 108 of 1996, to locate this power. Both Mr Katz and Mr Du Plessis contended that first and second respondents had no power outside of the provisions of the Immigration Act to allow or refuse entry into a country. Thus, all decisions regarding the entry or refusal of an applicant for a visa must find its source and scope in the Immigration Act. In this connection, they referred to the decision of Mohammed at para 32:

"Accordingly, the state's power to report relevant to the present case can be derived only from the provisions of the Act."

[6] The crisp point was that decisions of this nature must be grounded in law and that the applicable law provides no basis for the only reasons offered by respondent

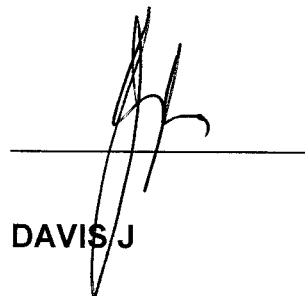
for possibly not granting a visa. In this connection a failure to make a decision expressly falls within the definition of decision under the Promotion of Administrative Justice Act 3 of 2000.

[7] Applicants examined the balance of the Act in order to show the limitations of respondents' power. Section 10 A (3) of the Immigration Act 13 of 2002 ('the Act'), which provides first respondent with a discretion to grant a visa, must be read in terms of the Act as a whole. Section 29 of the Act, sets out a category of foreign persons who are prohibited and therefore do not qualify for a visa. A decision in terms of section 29 will generally be made as a result of information which an applicant for a visa is required to provide as requested in completing form 11 to the Immigration Regulations. Section 30 of the Act states that certain foreigners may be declared undesirable by the second respondent and thereafter would fail to qualify for a visa.

[8] A reading of sections 29 and 30 of the Act, in the view of applicants, makes it clear that the Act contains no provision by which first respondent is entitled to consider additional factors in refusing a visa and, in particular, questions of trade relations. On the basis of this argument, if respondents consider that such a factor should be taken into account, the Act will require an amendment.

[9] These are powerful and persuasive arguments which, in the ordinary course, would require a decision from this court. However, notwithstanding the attempts of

the applicants and the *amici* to extend the range of this dispute and therefore argue that the application holds more general implications than that of this single application for a visa, albeit by a Nobel Prize laureate, the factual matrix of the application is predicated exclusively upon the particular facts of the Dalai Lama. As matters stand, he is no longer an applicant for a visa and, notwithstanding suggestions about a further invitation, he has not indicated that he will be an applicant in the near future. To decide this case on the basis of these facts would be to generate an invitation for applicants to procure legal advice from the courts, and would extend the exercise of the discretion to entertain a moot application way beyond the existing case law, meticulously analysed by Baartman J.



DAVIS J