REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 1479/16

In the matter between:

WANDY ALNOD SWELEYI Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL OF HOME AFFAIRS Second Respondent

THE CHIEF DIRECTOR: PERMITS Third Respondent

Delivered: 30 November 2016

JUDGMENT

BOQWANA, J

Introduction

[1] The applicant is a Malawian citizen who came to South Africa on an asylum seeker permit. This permit was endorsed to allow him to take up employment. During the period of 2003/2004 he started working for Advocate John Dickerson SC's household as a gardener where he met and established a bond with Adv. Dickerson's son, Alistair, who was born with cerebral palsy on 28

November 1993. Alistair was nine years old when he met the applicant. Shortly thereafter, he was employed by Adv. Dickerson as Alistair's full time care-giver. The applicant applied for a general work permit which was granted on 22 February 2011. This permit enabled him to continue taking care of Alistair and contribute to his educational, social and emotional well-being. He also assisted Alistair's father, as his employer. This permit was valid for a period of five years and was due to expire on 18 February 2016. The applicant's passport got stolen in 2014 and the Department of Home Affairs ('the Department') issued him with a new general work visa on 1 December 2014 on the same conditions and expiry period as the one issued in February 2011.

[2] In support of his first application for a general work permit which was evidently successful, the applicant placed before the second respondent reports prepared by Dr Harold Weber, Alistair's family doctor and Mr Larry Loebenstein, his psychologist. The applicant contends that his application was successful based on the strength of these reports. It is appropriate to quote some key passages from these reports as they are directly relevant to the application that followed prior to 18 February 2016, to which I shall return. In his report, prepared when Alistair had just turned 17 years old, Dr Weber recorded, *inter alia*, the following:

> '… He [Alistair] is unable to walk unaided and only for a short distance of a few meters with crutches, is unable to receive formal schooling and receives rudimentary training in a special needs unit attached to St Josephs School.
>
> As a result of these deficits, Alistair is unable to care for himself, and due to his size, no female caregiver will be able to cope.
>
> Mr. Sweleyi attends to his daily needs, cooks for him, and assists with ablutions and his clothing.
>
> These functions require considerable knowledge and experience of the needs of the person, and required extensive training. It would be extremely disruptive if Mr. Sweleyi was replaced or prevented from continuing in his present role, as a bond have been forged between caregiver and child.

It is therefore in Alistair's interest (both physical and psychological) that Mr. Sweleyi be allowed to continue in his present role, and the present support and care system would be severely disrupted by the process of engaging a replacement and training them to deal with Alistair's particular physical and psychological needs.

Mr Sweleyi has shown that he is an empathetic, knowledgeable and very dedicated caregiver that has bonded well with Alistair, and replacing him would not be in Alistair's best interest.'

[3] Mr Loebenstein supported Dr Weber's report. He further stated that:

' … Alistair does not describe Wandi Sweleyi as being a caregiver, but as his best friend. He explains this by stating that they have a rapport, an understanding of each other and that Wandi Sweleyi is intuitive to his needs. Wandi Sweleyi is of assistance with tasks that Alistair finds difficult to do independently, but he is (sic) also encourages him to accomplish tasks of his own volition.

Of specific concern is Alistair's appreciation about falling due to his grossly impaired gait and he knows that Wandi Sweleyi is always in close attendance when he attempts to mobilise himself independently. His praise for Wandi Sweleyi extends to a sentiment that no caretaker replacement could ever be his best friend and he wishes that Wandi Sweleyi could be domiciled in his home on a continuous basis.

The consultation with Mr Wandi Sweleyi confirmed that he assists Alistair in many ways. He is particularly attentive to Alistair's attempts at independent mobility as it is impossible for Alistair to stand up without assistance due to his inordinately compromised motor functioning. He thus anticipates Alistair's needs and ensures that all his routines are adhered to.

Having a secure, predictable and comforting home environment with the assistance of a person with Wandi Sweleyi's attitude and capabilities has allowed Alistair to advance his academic and social skills at school.

It is my firm opinion that should this particular relationship be broken that this would impact adversely on Alistair's recent academic, social and emotional wellbeing.'

[4] It is alleged that prior to the applicant's employment, Alistair had been cared for by a number of care-givers, none of whom were suitable or remained for a significant duration in their employment. This was allegedly disruptive for both Alistair and Adv. Dickerson, who is responsible for his care.

[5] The applicant alleges that, Alistair who is now 22 years old has made progress in terms of his personal functioning beyond the expectations of his family. Alistair allegedly attributes his present increased independence to on-going commitment, intervention, as well as the applicant's support and anticipation of his needs. Although Alistair is now an adult, he continues to require assistance. Both Alistair and Adv. Dickerson require the applicant to continue with their employment relationship for as long as Alistair requires it. He would be severely affected if the applicant was forced to leave his employment. The applicant alleges that it is on the basis of his skills and experience that Adv. Dickerson wishes to continue employing him.

[6] During May 2014, new Immigration Regulations ('the Regulations') in terms of s 7 of the Immigration Act, 13 of 2002 ('the Act') were introduced. The relevant Regulation for the purposes of this case is Regulation 18 (3) (a) ('the Regulation'), which provides as follows:

> **' Work Visa**
>
> 18 …
>
> (3) An application for a general work visa shall be accompanied by –
>
> (a) a certificate from the Department of Labour confirming that –
>
> (i) despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;
>
> (ii) the applicant has qualifications or proven skills and experience in line with the job offer;

(iii) the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic; and

(iv) the contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labour standards in the Republic and is made conditional upon the general work visa being approved;

(b) proof of qualifications evaluated by SAQA and translated by sworn translator into one of the official languages of the Republic;

(c) full particulars of the employer, including, where applicable, proof of registration of the business with the Commission on Intellectual Property and Companies (CIPC);

(d) an undertaking by the employer to inform the Director-General should the applicant not comply with the provisions of the Act or conditions of the visa; and

(e) an undertaking by the employer to inform the Director-General upon the employee no longer being in the employ of such employer or when he or she is employed in a different capacity or role.'

[7] On 17 August 2015 and prior to the expiry of his general work visa (which was to be on 18 January 2016), the applicant brought an application to the first respondent, through his attorneys, for an exemption from the Regulation in terms of s 31 (2) (c) of the Act. Section 31 (2) (c) states that:

'**31 Exemptions**

(2) Upon application, the Minister may under terms and conditions determined by him or her –

(c) for good cause, waive any prescribed requirement or form'

[8] The basis of the application was that the applicant had been employed by Adv. Dickerson for 8 years and obtained a general work permit for the first time in February 2011. Adv. Dickerson wished to continue employing him in the

position of a caregiver based on his skills and experience. In order to continue doing so, he required a renewal of the general work visa in terms of s 19 (2) of the Act for a period of five calendar years. The applicant submitted that Adv. Dickerson was not a prospective employer but his current employer and therefore, the Regulation should not be applicable to him on this basis alone. Secondly, Adv. Dickerson could not afford to be without the applicant's skills and specific knowledge for a period of 4 to 7 months whilst a decision was still being made by the Department of Labour as to whether a certificate should be issued. According to the applicant, that is how much time it took to process these applications). Thirdly, Alistair who had significant impairment of his physical and mental abilities resulting from the cerebral palsy required care on a daily basis due to his disability and physical needs, which required considerable knowledge and experience. It would be extremely disruptive if the applicant needed to be replaced. Fourthly, there was no labour market for the applicant as the emotional bond between him and Alistair was considerably strong and impossible to replicate. It was therefore, in Alistair's best interest that the applicant remained his caregiver. Fifthly, the fact that Alistair's progress in life and well-being depends on the care he receives from the applicant is sufficient to constitute good cause (in terms of s 31 (2)) and for the reasons outlined above, the Regulation ought to be waived. The applicant attached his curriculum vitae, the 2010 reports from Dr Weber and Mr Loebenstein (which I have referred to above), as well as a letter from Adv. Dickerson and a contract of employment in support of his application to the first respondent.

[9] The Acting Chief Director (Permits), addressed a letter dated 18 January 2016 to the applicant's attorneys in response to his application. The letter detailed the decision of the 'first respondent', *inter alia*, as follows:

> ' Having carefully considered the information you provided in your representation, I regret to inform you that I could not find any good cause why a waiver of the requirements as prescribed in Regulation 18 (3) (a) of the Immigration Regulations should be granted.

> Section 19 (2) of the Immigration Act, inter alia, aims to promote economic growth through the employment of needed foreign labour which does not adversely impact on existing labour standards and rights and expectations of South African workers.
>
> When applying for general work visa, the employer is obliged to satisfy the Director-General that the employment of a foreigner would promote economic growth and would not disadvantage a South African citizen or permanent resident. Documentary proof, in the form of a certification by the Department of Labour, as prescribed in Regulation 18 (3) (a) of the Immigration Regulations, must be submitted as proof that a diligent search was done and that employer was unable to employ a citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant. The certification by the Department of Labour is consistent with the provisions of the Employment Services Act which, inter alia, aims to regulate the employment of foreigners on local employment contracts. It is thus an important tool to identify positions being offered to foreign nationals in the private and public sector, to benchmark the duties that they are required to perform, as well the skills and qualification needed to perform these duties, against the curricula vitae of unemployed South African citizens and permanent residents in the same occupational category.
>
> Should Adv. Dickerson wish to continue employing Mr Swaleyi (sic), he will have to obtain the certification from the Department of Labour which is necessary to process Mr Swaleyi's (sic) general work visa application.' (Underlined for emphasis)

[10] The applicant's attorney received this letter on 25 January 2016 and launched an urgent application to review and set aside the decision refusing the applicant's application on 10 February 2016. The applicant further sought the court to substitute the decision with its own, alternatively, remit the matter back to the first respondent for reconsideration. He further sought the court to direct the second respondent to issue a Form 20 document authorising him to remain in South Africa pending his application for the general work visa by close of business 18 February 2016. The matter was postponed to 4 May 2016, for the

filing of the answering affidavit, replying affidavit and heads of argument. On 4 May 2016 the matter was again postponed to 31 May 2016, setting out a timetable for the filing of further papers. On 31 May 2016 parties once again postponed the matter by agreement between themselves to 7 September 2016 with the respondents consenting to prayer 2 read with prayer 4, (i.e. to the review and setting aside of the decision of the respondents and the remittal of the matter to the respondents for reconsideration). The parties further agreed that the second respondent be directed to issue a Form 20 document by close of business 14 June 2016. This in order to authorise the applicant to remain in South Africa as contemplated in s 32 (1) of the Act pending the finalisation of the application for review. A further timetable for filing of further documents was agreed to.

[11] The applicant persisted with the substitution relief and did not take up the offer of the reconsideration of the matter made by the respondents. The respondents filed their answering affidavit, *inter alia*, restating the provisions of the Regulation. It is important to quote some of the passages of the answering affidavit as they are directly relevant to the determination of the issues before me. The deponent to the answering affidavit, Mr Ronney Marhule (Acting Chief Director: Permitting (sic), states, *inter alia*, the following in the answering affidavit:

> ‘ 8. Regulation 18 (3) is couched in peremptory language. There may be qualified South African citizens (a permanent resident with qualifications or skills and experience equivalent to those of the applicant) that offer caring services and it will never be known whether there are such persons that may be suitable to offer this particular service, unless a ‘diligent search’ is done, as is required by Regulation 18 (3).
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> 9. It is the position of the Department that unless a ‘diligent search’ is made, then there are not enough facts before it to make a favourable decision for the Applicant in terms of Section 31(2)(c) of the Act. Although, the Applicant has taken a contrary position, the decision that has been made, is a reasonable one, namely, that in the absence of gainsaying evidence that there are no South

African persons (or a permanent resident) with qualifications or skills and experience equivalent to those of the applicant, then the Applicant is not the only person that can offer the service and therefore it follows, that the Applicant is not entitled, as of right, to the work visa that he desires. The position would be completely different had the Applicant first complied with Regulation 18 (3).

10. In light of the above, the correct process to be followed would be for the Applicant to comply with Regulation 18 (3) and thereafter, the matter should be referred back to (sic) for reconsideration, as per Prayer 4 of the Notice of Motion.

11. Pursuant to the position adopted herein above, the Respondents believe that this matter is not one in which a substitution order is warranted.' (Underlined for emphasis)

[12] According to the applicant, the stance adopted by the respondents in the answering affidavit confirms his contention that the decision is reviewable and not only that but also that substitution is the only just and equitable relief in the circumstances. The applicant submits that the decision is reviewable on various grounds. Firstly, as is evident from the letter articulating the decision, the first respondent failed to take relevant consideration into account as he is required to do by s 6 (2) (e) (iii) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Secondly, other than the bald statement that the decision-maker had '*carefully considered the information you provided in your representation*', there is no indication at all that the applicant's representations were in fact considered. Thirdly, it would appear that the letter containing the decision is a standard rejection letter. It does not provide reasons why the first respondent found that the applicant failed to show 'good cause' for the waiver of the requirements of Regulation 18 (3) (a). It merely re-states the purpose of the Regulation and makes no reference to the contention that Regulation 18 (3) (a) (i) only applies to new applications. Fourthly, the decision appears to rely on the provisions of the Employment Services Act, which, while it came into effect in August 2015, the

Regulations to the Act have yet to be promulgated. The applicant submits that the first respondent relied on irrelevant or less relevant information in coming to his decision, contrary to the requirement for the administrative action set out in s 6 (2) (e) (iii) of PAJA. Fifthly, the first respondent's decision was materially influenced by an error of law in that he failed to appreciate the extent of the discretion afforded him under s 31 (2) (c) of the Act. It was submitted on behalf of the applicant by Ms de la Hunt that the document containing the decision illustrates that the discretion was narrowly construed to limit its application to economic interests. Sixthly, the decision was not only materially influenced by an error of law but it was not rationally connected to the purpose of the important provisions, the information before the first respondent and the reasons given by the third respondent on his behalf. Finally, the decision is so unreasonable, that no reasonable decision-maker would have come to the conclusion that good cause did not exist for granting the waiver on the grounds set out in the applicant's application.

[13] As to substitution, the applicant submits that the attitude of the respondents shows that they have expressed a categoric opinion and it would be futile to send the matter back for reconsideration. It is a foregone conclusion that the application should be granted.

[14] I first deal with the reviewability of the decision. In the decision of *Littlewood & Others v Minister of Home Affairs & Another* 2006 (3) SA 474 (SCA) where the first appellant and his wife discovered that their permanent residence permits endorsed in their passports were not authentic, having lived in South Africa for more than two years and having severed ties with their country of origin, the Minister refused an application for an exemption in terms of s 28 (2) of the Aliens Control Act 96 of 1991. Without valid permits the appellants' presence was prohibited in South Africa. Section 28 (2) of that Act authorised the Minister to exempt any person from the provisions of s 23…if the Minister was satisfied that there were 'special circumstances' which justified his or her

decision. In a letter detailing the Minister's decision, drafted by the Department's officials, it was merely pointed out, *inter alia*, that possession of a fraudulent permit was a serious offence and that it was a responsibility of every visitor in the country to adhere to the law. The first appellant was then told that he and his family must make arrangements to leave South Africa and lodge a prescribed work permit application with the South African High Commission in London. The Appeal Court stated as follows at paragraphs 16 and 17:

> '[16] …The application was turned down for no reason but that the Department of Home Affairs saw the possession of a fraudulent permit as a serious offence that had caused a predicament for which it was not responsible. But that begs the question whether the circumstances that had arisen – albeit that it was not attributable to fault on the part of the department – constituted 'special circumstances' justifying the granting of an exemption. It is apparent from the reasons advanced in the letter that the Minister – on the advice of his officials – failed to apply his mind to that question at all. (The departmental memorandum that accompanied the recommendation to the Minister, and the affidavits that have been filed in these proceedings, take the matter no further.)
>
> [17] The Minister was not called upon to decide whether his department was at fault but rather whether 'special considerations' existed justifying an exemption. The effect of his failure to apply his mind to that question was that he failed altogether to exercise the discretion conferred upon him by the Act and his decision must be set aside.' (Underlined for emphasis)

[15] Although the facts in the *Littlewood* case are different from those in the present matter, the findings of the court there are apposite to the question of whether the first respondent in this case applied his mind to the key question of whether good cause existed justifying an exemption from the Regulation.

[16] Although the letter to the applicant's attorneys records that no good cause was shown after careful consideration of the application, the latter part of the letter clearly indicates that what occupied the mind of the decision maker was that the applicant ought to have complied with the Regulation. The answering

affidavit takes the point further by suggesting that absent compliance with the Regulation and more specifically the certificate by the Department of Labour, there can be no consideration of the application for exemption. That, in my view, is indicative of the fact that the decision maker did not apply his mind to the question and the facts before him so as to ascertain whether any good cause was shown. In my view, the decision maker missed the point altogether. The application before him was not whether to grant the general work permit but whether to grant the applicant a waiver from a prescribed requirement when submitting an application for a general work permit. It is so, that when a general work permit is considered, it must be accompanied by a certificate but the application brought by the applicant was for him to be exempted from the prescribed requirement of furnishing a certificate from the Department of Labour together with his application for the general work visa. In that regard, he would have had to show good cause as to why the prescribed requirement should not apply to him, or why he cannot comply with it.

[17] The application was not rejected because the circumstances provided as reasons for the request for a waiver did not show good cause, it was rejected because the decision maker clearly saw himself bound by the Regulation, and was not prepared to consider any information presented to him outside of the certificate by the Department of Labour. This approach does indeed negate the very reason for the existence of discretionary powers that the first respondent has in terms of s 31 (2) of the Act. The rigid approach demonstrates that the first respondent did not apply his mind at all to the relevant question at hand and hence the relevant considerations. That consequently fettered his discretion.

[18] In *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) the Court observed at para 1:

> 'A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by

> implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercise a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all.'

[19] The court went on to find at para 10 that: 'He was entitled to evaluate the application in the light of the directorate's existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think that it can be said that he failed to exercise his discretion.'

[20] Mr Nacerodien who appeared for the respondents accepted that s 31 (2) (c) provides the first respondent with wide discretionary powers. He however submitted that such discretionary powers are constrained. In his view, such powers must be exercised in the context of a particular scenario. The scenario in this case, being the purpose of the Regulation which is to protect the South African labour. He argued that the Department of Labour is best suited to provide that evidence, such being shown by means of a certificate. In his view, evidence was required to gainsay the applicant's say-so; his version could not simply be accepted. According to him, it would never be known if there are any South Africans who could provide the same caregiving service provided by the applicant as no evidence of a diligent search was provided.

[21] Mr Nacerodien further referred to a passage in Hoexter's *Administrative Law in South Africa*, Second Edition at pages 46 to 47 to support a proposition that the decision maker cannot have a completely free hand in applying his discretion. His decision must be accompanied by implied duties to act according to minimum standards of legality and good administration. I agree with that. But that does not mean that discretion should be so guarded such that it can never be exercised. That would imply fettering by rigidity. I do accept that there may be cases where the discretion is narrowly confined leaving the decision maker with

very little room to move, due to statutory or policy constraints. The respondents have not shown the current situation to be that kind of a case. They have instead proposed contradictory positions. On the one hand, they accept that s 31 (2) (c) gives the first respondent a wide discretion whilst on the other they suggest that his discretion is constrained due to the use of the word 'shall' in the Regulation.

[22] I venture to say that by its nature a 'prescribed requirement', as the word suggests, is peremptory. Notwithstanding that, the legislature in s 31 (2) (c) saw fit to provide that 'any prescribed requirement or form' can be waived on good cause shown. The prescriptive requirement in the Regulation is directed at a person applying for a permit to comply with it and not at the decision-maker's discretionary powers. Furthermore, and most importantly, almost all the requirements prescribed in the Regulations are mandatory. Therefore, if the language used in those provisions is such that it confines the discretion of the first respondent and if the interpretation proposed by the respondents is correct, that would mean that the first respondent has no discretion whatsoever or has very limited discretion to waive any requirement or form prescribed in the Regulations. The existence of s 31 (2) (c) would be rendered superfluous. The Regulations, however, reveal a contrary position. They specifically place recognition to the provisions of s 31 (2) (c) of the Act and the first respondent's discretion to waive the prescribed requirements on good cause shown.

[23] Regulation 29 of the Regulations provides as follows:

> ' **Waiver of prescribed requirements**
>
> **29.** An application contemplated in section 31 (2) (c) of the Act shall be made to the Minister on Form 48 illustrated in Annexure A, supported by reasons for the application.'

[24] Notably Form 48 contains, *inter alia*, the following information:

> ' …
>
> **PLEASE READ THE FOLLOWING**

In providing for the regulation of admission of foreigners to and their residence in the Republic, the Immigration Act, 2002 (Act No 13 of 2002), inter alia, aims to promote economic growth through the employment of needed foreign labour which does not adversely impact on existing labour standards and rights and expectations of South African workers.

Temporary residence permits

In order to satisfy the Director-General that the issuing of a work permit to a foreigner would promote economic growth and would not be to the disadvantage of South African citizens or permanent residents, documentary proof must be submitted that a diligent search had been done and that the employer had been unable to employ a local candidate with qualifications or skills and experience equivalent to those of the applicant. This requirement is satisfied by means of an advertisement in the national printed media, which would afford South African citizens and permanent residents the opportunity to compete for the position.

In terms of section 31(2)(c) of the Act, the Minister may, for good cause, waive any prescribed requirement or form. **Should a foreigner thus not be able to comply with the above requirements, he/she or the employer may request the Minister to exempt the applicant from submitting the relevant document(s)**. The following documents have to accompany this application:

(a) A letter signed by the employer, citing the requirements to be waived and a comprehensive motivation for each requirement.

(b) A copy of the applicant's curriculum vitae.

(c) A copy of the applicant's passport and all temporary residence permits affixed therein.

(d) A copy of the employment contract signed by both the employer and the employee.

(e) Background on the company/institution for record purposes.

Should the request be considered favourably, a letter will be forwarded to the applicant or his/her employer, which has to be submitted with the application and remaining requirements at the nearest Regional Office of the Department or South African foreign office if the applicant is still abroad.

Permanent residence permits

In terms of section 31(2)(c) read with section 27 of the Immigration Act, 2002 (Act No 13 of 2002), and the permanent residence application form BI-947, the Minister may, for good cause, waive any prescribed requirement or form. Should a foreigner thus not be able to comply with any of the requirements, he/she may request the Minister to exempt the applicant from submitting the relevant document(s). The following documents have to accompany this application:

(a) A letter signed by the applicant, citing the requirements to be waived and a comprehensive motivation for each requirement.

(b) A copy of the applicant's curriculum vitae.

(c) A copy of the applicant's passport and all temporary residence permits affixed therein.

(d) A copy of the employment contract signed by both the employer and the employee. if applicable.

(e) Background on the company/institution for record purposes.

(f) Business Plan, Bank or financial statements, if applicable

(g) Recommendation from the Department of Trade and Industry, if the application is made in respect of a business being conducted in the Republic.' (Underlined and highlighted for emphasis)

[25] A general work permit is a type of a temporary residence permit as contemplated in s 1 read with ss 10 and 19 of the Act. It is quite plain from the reading of the information contained in Form 48 that the first respondent can waive the requirements contemplated by the prescribed Regulation on good cause shown by a foreigner and/or employer who is unable to comply with the prescribed requirements.

[26] There are no guidelines as to what would be considered as constituting good cause. As things stand, it would appear that matters would be treated on a case by case basis as situations of applicants may be unique. Mr Nacerodien is

correct, though, that exercise of discretion must be within the object and purport of the Act. This is to avoid condoning non-compliance with prescribed requirements unrestrictedly. Furthermore, this is especially so in the era of modern constitutionalism as observed by Hoexter at page 46, which requires some constraints on broad discretionary powers in order to, *inter alia*, minimise the danger of infringement of rights of individuals or class of people. That, however, should not mean that the element of flexibility should be lost. As was stated by O 'Regan J in *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at para 53 'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner.'

[27] I am alive to the fact that the issue of permits is in general open to abuse. Abuse has, however, not been alleged in this particular case. It cannot be assumed that all applicants who apply for waiver do so in order to abuse the system. Each case must be dealt with on its own merits. For all these reasons the decision of the first respondent ought to be reviewed and set aside.

[28] Turning to examine the issue of substitution. Once a decision is reviewed in terms of s 6 of PAJA, s 8 (1) provides the court with a fairly wide discretion to grant any order that it deems to be just and equitable. A substitution order is granted in exceptional circumstances. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC), Khampepe J restated some of the principles and clarified the test for exceptional circumstances. Broadly, she held the following:

> '[46] A case implicating an order of substitution accordingly requires courts to be mindful of the need for judicial deference and the obligations under the Constitution
>
> ….
>
> [47] To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. <u>The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion.</u>

> These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'
>
> [48] A court will not be as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. This would depend on the facts of each case…' (Underlined for emphasis)

[29] I agree with Mr Nacerodien that the decision of the administrator is not a foregone conclusion. Similarly, it cannot be said with utmost certainty that the court is in as good a position as the administrator to make a decision in place of the administrator in this case for various reasons. In the first instance, the administrator made his decision moving from an incorrect legal premise that the requirements of the Regulation had to be complied with before the application for a waiver could be entertained. When he makes the decision this time around he will have to consider the reasons presented by the applicant for the waiver which include the physical and mental condition of a young man with cerebral palsy; the uniqueness of the 'caregiving' relationship and the bond between the applicant and Alistair, which has developed since 2003/2004, and which has reportedly contributed to his development and well-being which may informingly be affected negatively if the applicant's service is discontinued. Whether those factors taken together with others constitute good cause is a decision to be made by the first respondent.

[30] The court is not in as good a position because the reports done by the experts regarding Alistair's livelihood, physical, emotional and psychological capabilities have not all been updated. The applicant attached 2010 reports to his application to the administrator which contained assessments that were done

when Alistair was a minor. Alistair is now a 22-year-old young man. A new report dated 1 February 2016 by Mr Loebenstein was placed before the court. This report indicates Alistair's progress in terms of his personal functioning. Such improvement is attributed to the applicant's presence in his life.

[31] The administrator would be better placed to make the necessary assessment and call for any further information necessary to consider the exemption application. He may also call for whatever other evidence as may be necessary in considering the application, such as, more information on steps taken to search for a suitable South African caregiver before finding the applicant. These examples are not meant to be prescriptive but they are given merely to illustrate the inappropriateness of the substitution relief.

[32] Mr Nacerodien suggested that if remittal is ordered, it must be accompanied by directions as the outcome of the application could still be the same as before. My view is that, from the reading of this judgment, the respondents would grasp the reason why the first respondent's decision was reviewed and remitted. The court order remitting the matter does not need to be accompanied by further directions. Equally so, the applicant would note the shortcomings of his application from the judgment and forward whatever additional information relevant to the administrator for the reconsideration of the application. These would include fresh reports regarding the physical development of Alistair and other evidence regarding skills and experience of the applicant, the uniqueness of the case as well as evidence to support the assertion that Adv. Dickerson has previously searched for suitable South Africans and that none were suitable for Alistair.

[33] As regards costs, the applicant is entitled to payment of the costs, even though he did not take up the offer made by the respondents to reconsider the application. It is clear that the issue of compliance with the Regulation *vis a vis* the first respondent's discretion needed to be determined by this court, taking into account the averments made by the respondents in their answering affidavit.

[34] In view of the fact that the applicant's application for a waiver is to be remitted for reconsideration and the applicant had been issued with a Form 20 pending the review application, it makes sense that he be re-issued with a Form 20 document pending the outcome of his application for a status.

[35] In the result, I make the following order:

1. The first respondent's decision dated on 18 January 2016 rejecting the applicant's application for a waiver in terms of section 31 (2) (c) of the Immigration Act 13 of 2002 of the requirements as prescribed by Regulation 18 (3) (a) of the 2014 Immigration Regulations is hereby reviewed and set aside;
2. The applicant's application for a waiver in terms of s 31 (2) (c) of the Immigration Act 13 of 2002 of the requirements as prescribed by Regulation 18 (3) (a) of the 2014 Immigration Regulations, supplemented by such additional information as may be furnished by the applicant within 20 days of this order or such extended period as parties may agree and such other information as may be required for proper consideration of the application, is remitted to the first respondent for re-consideration.
3. The applicant is to be re-issued with a Form 20 document authorising the applicant to remain in the Republic of South Africa pending the application for a status, (if not already done as contemplated in section 32 (1) of the Immigration Act 13 of 2002), by Thursday, 8 December 2016 subject to the applicant presenting himself at the Department of Home Affairs at Barracks Street, Cape Town on that day.
4. The costs of this application are to be paid by the respondents.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Applicant : Adv. A de la Hunt

Instructed by : G Eisenberg, Cape Town

For the Respondents : Adv. A Nacerodien

Instructed by : State Attorney, Cape Town