

**In the High Court of South Africa
(Western Cape Division, Cape Town)**

**Case No: 2694/22
[REPORTABLE]**

IN THE MATTER BETWEEN:

PROSPER SIMBARASHE MUSHORE

Applicant

AND

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL

Second Respondent

JUDGMENT DATED 02 NOVEMBER 2022

RALARALA, AJ

INTRODUCTION

1. The matter comes before this court by way of review. The applicant approached this court, seeking an order to review and set aside the decision taken by the Assistant Director Appeal on behalf of the first respondent on 15 February 2021 in terms of section 8(6) of the Immigration Act 13 of 2002 (“the Immigration Act”). The impugned decision upheld the second respondent’s rejection of the applicant’s critical skills visa application. The decision was made on 15 February 2021. Furthermore, the applicant seeks an order that this court substitute the impugned decision with an order directing the second respondent to issue him with a critical skills visa in terms of section 19(4) of the Immigration Act. If this court is not inclined to substitute the impugned decision with its decision, then in the alternative, the applicant requests that the impugned decision be remitted to the Minister for reconsideration. The respondents opposed the applicant’s application.

2. The applicant is Mr. Prosper Simbarashe Mushore, a Zimbabwean national who has lived in South Africa since 2009.

3. The first respondent is the Minister of Home Affairs.

4. The Director General of Home Affairs is the second respondent.

5. The application is brought in terms of section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The application is opposed by the respondents.

6. This matter was brought on an urgent basis. For the sake of completeness, the applicant sought the following orders in his notice of motion:

1." Dispensing with the forms and service provided for in the uniform Rules of Court and directing that the application be heard on urgent basis in terms of rule 6(12) (a).

2. Reviewing and setting aside the First Respondent's decision of 15 February 2021, taken in terms of section 8(6) of the Immigration Act no 13 of 2002 ("the Immigration Act") upholding the rejection of the applicant's application for a critical skills visa in terms of section 19(4) of the Immigration Act.

3. Directing the second respondent to issue to the applicant a visa in terms of section 19(4) of the Immigration Act, within 15 days of the order of this court.

4. In the alternative to prayer 2, remitting the decision to reject the applicant's application in terms of section 19(4) of the Immigration Act to the first respondent for reconsideration.

5. Further and or alternative relief.

6. Costs. "

PRELIMINARY ISSUES

7. There are two preliminary issues that this court must consider. *First*, the court is enjoined to consider whether a proper case has been made for condonation for the late filing of the respondent's answering affidavit. *Secondly*, whether the applicant satisfied the requirements of urgency set out in rule 6(12) (a) and(b) of the Uniform rules of court. For the sake of brevity, I will deal with these issues sequentially.

CONDONATION

8. The respondents were out of time in filing their answering affidavit. As a result, they filed an application for condonation for the late filing of their answering affidavit. In support of their application, the respondents averred that due to the application being brought on an urgent basis, they operated on truncated periods in obtaining the services of Counsel to consult and draft the respondent's answering affidavit after the requisite tender processes were complied with. The deponent was only available on 25 May 2022. Consequently, the filing of the answering affidavit was three days out of time. The Applicants did not oppose the application for condonation. To my mind, the delay is not unreasonable. The explanation proffered by the applicant is plausible. Furthermore, condonation of the late filing of the answering affidavit will not result in any prejudice to the Applicant. In my view, the application for condonation must succeed. This leads me to the second preliminary point.

URGENCY

9. The applicant brought this application on an urgent basis. The respondent raised a preliminary point on urgency. As explained above, this court is called upon to determine whether a case of urgency has been made out by the applicant, allowing the court to condone noncompliance with the rules regarding forms and service in terms of Rule 6(12) of the Uniform Rules of Court. Rule 6(12) provides that a court may dispose of urgent applications at such time and place and in such manner and according to such procedure as the particular circumstances enjoin. The applicant is required to explicitly set forth in its affidavit the factors relied upon as rendering the matter urgent, and reasons for claiming that proper redress could not be afforded at a hearing in due course. In *Luna Meubel Vervaardigers(Edms)Bpk v*

Makin and Another (t/a Makin's Furniture Manufactures 1977 (4) SA (W) at p137 F
the court stated:

" Mere lip service to the requirements of Rule 6(12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

10. In *casu*, the applicant launched this application on an urgent basis for hearing on 10 August 2022. The applicant's affidavit sets out urgency basing it on the fact that the applicant is facing deportation as his status in the country is that of an illegal foreigner. As such, his ability to work and earn an income is negatively impacted. Ms Williams who appeared for the applicant argued that the applicant has waited for almost eight years for the critical skills work visa application to be finalized by the respondents, which is unreasonable and contributes to the urgency of the application. The applicant further asserts that the fact that the respondents agreed to a date on the semi urgent roll constitutes a recognition of the urgency of the matter. Meanwhile, the respondents contend that the urgency is self-created, alleging that the applicant appealed the decision of 28 October 2014 in January 2021 almost six years later. Mr. Ngombane who appeared for the respondent, argued that this constitutes an abuse of the court process and circumvents the Uniform Court Rules, and agreeing to a date on the semi urgent roll does not constitute a concession that the matter is urgent. I am of the view that the circumstances set forth by the applicant above render the matter urgent, and there is therefore no factual basis for the argument that this application is an abuse of the court process or the rules of court. To my mind the reasons advanced by the respondent satisfies the requirements of urgency specified in rule 6(12) of the Uniform Rules.

FACTUAL BACKGROUND

11. In February 2009, the applicant applied for a quota work permit (as visas were then called) in terms of section 19(1) of the Act (prior to the current Act coming into operation). The quota work permit was granted on 21 January 2010. The applicant avers that he is a qualified chemical Scientist. Applicant's work permit expired on 18 September 2014 however six days prior, on 12 September 2014, Applicant

submitted a critical skills visa application at the Visa Facilitation Services in Cape Town. On 28 October 2014, the application was rejected. Within ten working days of the rejection decision, the Applicant filed an appeal in terms of section 8(4) of the Act. The appeal was dismissed on 1 October 2020 and the applicant only became aware thereof on 11 January 2021. No reasons were provided for the delay of the outcome of the Appeal.

12. On 25 January 2021, the Applicant launched an appeal in terms of section 8(6) of the Immigration Act for consideration by the Minister of Home Affairs. On 15 February 2021, the Assistant Director: Appeals rejected the appeal due to the applicant's failure to submit a letter of good cause for failing to submit the application within 60 days. The decision came to the Applicant's attention on 3 January 2022. It is this latter decision that is the subject of this review. The nub of this application, as it will appear fully in the course of this judgment, is whether that decision should be reviewed and set aside.

GROUND OF REVIEW

13. The applicant's grounds for review can be summarized as follows:

[13.1] That the Assistant Director at Department of Home Affairs: Appeals who made this decision on 15 February 2021 had no authority to do so in terms of section 6(2)(a)(i) of PAJA.

[13.2] That a mandatory and material procedure or condition prescribed by an empowering provision was not complied with in that section 19(4) of the Act, was not complied with. Applicant claims that the visa application is substantively compliant.

[13.3] That it was procedurally unfair to accept the application and place it before the decision maker without informing applicant that the application was alleged to be late. It was further unfair to apply Regulation 9(5)(a) retrospectively and Directive 26 ex post facto. The unreasonable delay of six years in processing the application was unfair.

[13.4]. That the decision of the respondent was materially influenced by errors of law in that sections 19(2) and section 32(1): Regulations 30(1) and 9(5) (a) Directive 26 were erroneously applied to the applicant's application in terms of section 19(4); Regulation 18(5); Directive 22 and the Critical Skills List published in the Government Gazette No: 3776 on 3 June 2014, were ignored alternatively, not properly applied.

[13.5]. The decision was taken for a reason not authorized by the empowering provision and the failure to submit a letter of good cause being the only remaining reason for refusing the appeal.

[13.6]. The decision was taken because irrelevant considerations were taken into account and relevant considerations were not considered in that the 60-day period was erroneously applied, a letter of motivation was incorrectly required and applicant's compliance with substantive requirements of section 19(4) was not properly considered.

[13.7] Last, the decision was taken arbitrarily and capriciously. It is not rationally connected to the purpose of section 19(4), the empowering provision for the reasons set out above.

14. Consequently, applicant contends that the decision is not rationally connected to the information before the administrator, or the reasons given for it by the administrator.

RELEVANT LEGAL PRINCIPLES AND ANALYSIS

15. For the sake of completeness, I will consider the reasons for the rejection of the initial application and thereafter I will address the applicant's application in relation to the impugned decision. The following reasons were given for the rejection of the initial application:

[15 .1] Failure on the part of the applicant to submit proof that he possessed skills that fell within the critical skills category.

[15.2] The documents he submitted in support of the application did not satisfy the Department of Home Affairs that his occupation was listed as a critical skill.

[15.3] Failure to submit a Police clearance certificate in terms of regulation 18(1)(b) of the Immigration Regulations.

[15.4] Failure to submit a written confirmation from a professional body, council or board recognized by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act.

[15.5] Failure to submit in terms of Regulation 18(5)(b), proof of application for a certificate of registration with the professional body, council or board recognized by SAQA.

[15.6] Failure to submit the application no less than 60 days prior to expiry date of his visa.

16. The initial rejection of the applicant's application was taken on 28 October 2014. The second rejection was on 11 January 2021 subsequent to the written representation submitted to the Director General to review the decision taken on 28 October 2014. I must highlight that this decision was made six years and two months after the submission of the representations. I must point out that there was an unreasonably lengthy delay by the Director General to consider the representation. In my view, this decision was not made within reasonable time frame. Section 33 of the Constitution guarantees the right to just administrative action, which includes the right to administrative action that is lawful, reasonable, and procedurally fair. *In Kruger v President of the Republic of South Africa and Others* 2009 (1) SA 417 (CC) para 25, the court remarked as follows:

"The purpose of PAJA is to ensure that just and fair administrative action occurs. A failure to give a decision over an unduly prolonged period of time constitutes unfair administrative action. It is in the interests of justice that respondents be put to terms to take their decisions within a reasonable period of time"

17. In a letter addressed to the applicant dated 15 February 2021, it encapsulated the following reasons for the rejection of the applicant's application by the Director General:

[17.1] That the applicant does not qualify in terms of section 19(4) of the Immigration Act due to failure to submit the application within 60 days.

[17.2] Absence of confirmation from South African Qualifications Authority (SAQA).

[17.3] The Applicant's skills do not fall within the critical skills.

[17.4] Lastly, the employer did not make efforts to employ South African citizens or permanent residence holders.

18. Section 19 (4) of the Immigration Act provides as follows:

" Subject to any prescribed requirements, a critical skills work visa may be issued by the Director General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the Government Gazette and to those members of his or her immediate family determined by the Director under the circumstances or as it may be prescribed."

19. Essentially, Section 19(4) of the Immigration Act deals with critical skills work visa, it empowers the Director General of the Department of Home Affairs to issue a critical skills work visa to individuals who have met all the prescribed requirements. Section 19 (4) must be read with Regulation 18 Regulation to the Immigration Act, which lays out the requirements to be fulfilled in order to obtain a critical skills work visa.

20. Regulation 18 governs work visa applications in general and it provides as follows:

" (1) An applicant for a general work visa, critical skills work visa or intra –company visa shall submit –

(a) A written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his or her dependent family members, should it become necessary: and

(b) A police clearance certificate.

(2) ...

(3) ...

(4) ...

(5) An application for critical skills work visa shall be accompanied by proof that the applicant falls within the critical skills category in the form of-

(a) a confirmation in writing from a professional body, council or board recognized by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act, or any relevant government Department confirming the skills or qualifications of the applicant and appropriate post qualification experience;

(c) if required by law, proof of application for a certificate of registration with the professional body, council or board recognized by SAQA in terms of section 13(1)(i) of the National Framework Act; and

(d) Proof of evaluation of the foreign qualification by SAQA and translated by a sworn translator into one of the official languages of the Republic.”

21. The provisions are peremptory and, in my view, demand a strict compliance with the requirements. The reasons provided for the decision of the Director General in terms of section 8(4) fall outside the ambit of section 19(4) and Regulation 18(5). I am of the view that these considerations had no relevance to the application.

22. The Applicant in his papers contends that it was not necessary for the submission of a confirmation from SAQA in view of the fact that on 24 October 2014,

the Deputy Director: Immigration Services Mr J McKay issued Immigration Directive No 22 of 2014, in relation to compliance with Regulation 18(5). The directive deemed it unnecessary to submit confirmation from a professional body where proof of application for a certificate of registration with the professional body, council or board recognized by SAQA is available. Regulation 9(5)(a) deals with the amendment of existing visas and provides as follows:

” A foreigner who is in the Republic and applies for a change of status or terms and conditions relating to his or her visa shall-submit his or her application, on Form 9 illustrated in Annexure, no less than 60 days prior to the expiry date of his or her visa ”

23. The respondents in the answering affidavit concede that the applicant’s appeal was refused based on irrelevant provisions of the Act and Regulations. I am of the view that Regulation 9(5) finds no application in consideration of an application for a critical skills work visa as contemplated in section 19 (4) of the Immigration Act read with Regulation 18(1) and 18(5) to the Immigration Act.

24. The Applicant avers that it is erroneous for the Assistant Director to state that the Applicant’s skills do not fall within the critical skills, as a chemical scientist is included in the critical skills list, published in Government Gazette no: 3776 on 3 June 2014. The skills list sets out clearly chemical scientist skillset as a critical skill. This evidence by the applicant remains uncontroverted. In my view, the decision by the Assistant director has no basis and it was irrational and was not supported by the relevant information that was placed before him.

25. This decision was a subject of an appeal in terms of section 8(6) of the Act for reconsideration by the Minister of Home Affairs. The decision was made on 15 February 2021 and the Applicant was only informed on 03 January 2022. The Assistant Director: Appeals acting on behalf of the first respondent decided to uphold the previous decision of the Assistant Director Appeals, based on the applicant not qualifying for a temporary residence visa in terms of section 19(4) of the Immigration Act, due to failure to submit a letter of good cause for failing to submit the application within 60 days. As already demonstrated in the preceding paragraphs, section 19(4) and Regulation 18 as far as they apply to critical skills work visa, do not require

submission of a letter of good cause for failure to submit the application within 60 days. I'm in agreement with the applicant's counsel that the 60-day time frame was erroneously applied and section 19(4) and Regulation 18 (1) and (5) contain no provision empowering the functionary to demand a letter of good cause. In my view, irrelevant considerations were taken into account in consideration of the appeal as envisaged in section 6(2)(e)(iii) of PAJA.

26. Importantly, the Act confers powers on the Minister of Home Affairs to delegate certain powers through Section 3(1) which provides as follows:

" The Minister may, subject to the terms and conditions that he or she deems necessary, delegate any power conferred on him or her by this Act, excluding a power referred to in sections 3,4,5 and 7, to an office or category of officers or an employee or categories of employees or a person or category of persons in the Public Service, but shall not be divested of any power so delegated."

27. While the Minister is authorized to delegate certain powers in terms of section 3 (1) of the Immigration Act, the Delegations list in terms of the Immigration Act signed by the Minister of Home Affairs on 28 October 2019 clearly illustrates that the Assistant Director had no authority to consider the review application, as the Minister did not delegate such powers to him. In my view, the decision is invalid and thus needs to be reversed or corrected, which is an approach that is in harmony with the principle of legality. *In Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others (CCT7/98) [1998] ZACC 17,1999 (1) SA 374; 1998 (12) BCLR 1458 (14 October 1998) the court stated:" [58] It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim constitution."*

28. Moreover, the Respondents in their answering affidavit do not dispute that the decisions were based on irrelevant provisions. Consequent thereto, respondents request that the matter be remitted to the correct and designated functionary. The

evidence illustrates that the impugned decision was in contravention with the law. This conduct by the respondent is unacceptable and should be discouraged. In *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6, Jafta J, expressed as follows:

“[40] Since the Supreme Court of Appeal have found that the approval was invalid as it was unlawfully made, that court ought to have declared it invalid

[41] What happened in this case is unacceptable and disgraceful. The MEC who was in office at the relevant time bullied the Acting Superintendent – General to take a decision contrary an earlier properly considered decision of the Superintendent General

[43] The MEC’s conduct illustrates a complete disregard for the relevant legal prescripts.... The conduct is incompatible with the principles and values enshrined in the Constitution. Furthermore, the Constitution imposes an obligation on officials to act reasonably and lawfully when exercising public power.”

29. I am taking the view that the decision in terms of section 8(6) of the Act taken on behalf of the Minister, must be reviewed, and set aside as it was unauthorized as contemplated in section 6(2)(a) (i) and (ii) of PAJA.

30. Mr. Ngombane, argued that in the circumstance that the court is agreeable to the applicant’s argument, the matter should be remitted to the Minister of Home Affairs for reconsideration. In opposition Ms. Williams argued that under the present circumstances, it would be appropriate to substitute the impugned decision and direct the second respondent to issue a critical skills work visa.

31. Section 8(1) of PAJA confers the power to grant any order that the court deems just and equitable in judicial review proceedings in terms of section 6(1). In terms of section 8(1)(c)(ii) (aa) of PAJA the court may after setting aside an administrative action, remit it for reconsideration by the administrator or in exceptional circumstances substitute the administrative action. In *Trencon*

Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another 2015 (5) SA 245(CC) at para 47 the Constitutional Court stated:

“To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. 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 the administrator is a forgone conclusion. These two must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasize 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.”

32. The court was appraised of the relevant particulars of this matter and had accordingly examined all relevant factors presented, from the initial application on 12 September 2014 to the appeal submitted on 25 January 2021. I have also taken into account the considerable delays occasioned in the consideration of the matter particularly the appeals in terms of section 8 (4) and (6) of the Act respectively. However, the court was not provided with the copies of the initial application and that of the appeal filed on 10 November 2014 with supporting documentation. See *Trencon (supra)*, at para 48. Of particular concern which in my view would require the administrator to take heed of, are the dates of issue of the letter from the South African Chemical Institute and Directive 22 of 2014, vis-à-vis the date of the initial application and compliance with the peremptory requirements in Regulations 18(5) and 18(1). In the circumstance, I am of the view that this court is not in as good a position as the first respondent to substitute the decision.

ORDER

33. In the result, having read all the documents filed and having heard arguments from both parties, the following order is granted:

[33.1] The decision of the 25 January 2021 is hereby reviewed and set aside.

[33.2] The decision to reject the applicant's application in terms of section 19(4) of the Immigration Act is remitted to the first respondent for reconsideration within 30 days of the date of this order.

[33.3] The respondents are directed to pay the applicant's costs jointly and severally.

RALARALA, AJ
ACTING JUDGE OF THE HIGH COURT

Counsel for Applicant: Advocate Jennifer Williams
Instructed by: Gary Eisenberg of Eisenberg /ASSOC

Counsel for Respondent: Advocate Ngobane
Instructed by: State Attorney