Case no: 11034/16

In the matter between:

ALECK TAPIWA KUHUDZAI First Applicant

PAIDAMWOYO MEMORY MAKONI Second Applicant

and

THE MINISTER OF HOME AFFAIRS Respondent

JUDGMENT DELIVERED ON 24 AUGUST 2018

SHER, J:

1. The applicants, who are husband and wife, seek to review and set aside a decision by the Minister of Home Affairs which was taken in August 2016, whereby he refused their application to be granted permanent residence (by way of an exemption from the prescribed requirements) in terms of the provisions of s 31(2)(b) and (c) of the Immigration Act.[1]

2. This was the second such application to the Minister which the first applicant had brought. He first applied unsuccessfully during 2011, and the application which is the subject of the current proceedings was submitted to the Minister in March

[1] No. 13 of 2002.

2015. There were lengthy delays on the part of the Minister in rendering a decision in both of the applications. In regard to the one which is the subject of these proceedings the Minister's decision was only made after first applicant launched an application to compel.

Background

3. The applicants are Zimbabwean nationals. First applicant was the first to arrive in 2004 together with his twin brother, after they were each awarded a 'prestigious' presidential scholarship to study at the University of Fort Hare. First applicant's brother enrolled for a degree in commerce, and first applicant for a degree in law. Both worked hard and were successful in their studies. First applicant's brother was granted a permanent residence permit on 24 July 2015.

4. First applicant was awarded the LLB degree in May 2008. If one has regard for the transcript of his academic record it appears that he was an exceptional student, obtaining some 14 distinctions during the course of his study.

5. After graduating first applicant secured an internship at the South African Human Rights Commission where he was employed until 2009 when he joined PASOP (People Against Suffering Oppression and Poverty) an NGO which deals with the rights of immigrants and refugees, as an advocacy officer. In November 2009 he was employed for a few months by the Zimbabwean consulate in Johannesburg on a 'special dispensation' project for Zimbabwean immigrants, which sought (in conjunction with SA authorities) to regularize the status of Zimbabweans whose entry or residence in SA was not in accordance with legal requirements. He thereafter secured articles with a firm of attorneys in Cape Town, which he completed in 2013. Between 2012 and 2014 he successfully sat for the attorneys' admission examinations, and completed the Practical Legal Training ('PLT') Course. At the time when he lodged the instant application with the Minister he was employed by ARESTA (The Agency for Refugee Education, Skills Training & Advocacy) an NGO similarly engaged in the field of refugee assistance, as a Refugee Rights Education and Advocacy Programme Manager. He said in his affidavit in support of his application that although he had fully complied with the

academic, professional and practical requirements for admission as an attorney, as a matter of law he could only be admitted if he had obtained citizenship or permanent residence.[2]

6. As is evident not only from his employment with entities which deal with asylum-seekers, refugees and migrants but also from the number of papers he has presented to governmental entities including the Department and the Parliamentary Portfolio Committee for Home Affairs, which deal with draft legislation and issues pertaining to such persons, first applicant is clearly passionate about their rights. It is also abundantly clear that he has developed considerable expertise and specialized knowledge in such areas of law. As such, he said in his application to the Minister that upon his admission as an attorney he would like to run a law clinic for refugees and asylum-seekers.

7. Second applicant obtained a BA degree from the University of Zimbabwe in 2005 and is qualified as a linguistics teacher. In 2011 she obtained a Diploma in Humanitarian Aid and Project Management. She married first applicant in Zimbabwe by customary rites on 20 September 2014. She entered the country on a temporary visitor's visa, which she subsequently requested be extended so that she could continue to remain with first applicant, but her application was refused. At the time when she jointly made application for permanent residence with first applicant she was awaiting the outcome of an appeal in respect of the extension she had requested.

The Minister's decision/non-decision

8. The Director-General of the Department acknowledged receipt of the application in respect of both applicants, which was lodged in March 2015, by way of a letter dated 19 May 2015, in which he informed them that it was under consideration. He said that inasmuch as the decision was one which could only be taken by the Minister 'in person' it was a 'lengthy procedure'.

[2] In terms of s 15(1)(a) of the Attorneys' Act 53 of 1979. S 24 of the Legal Practice Act 28 of 2014 similarly provides that a duly qualified person may only practise as a legal practitioner if he/she is a South African citizen or a permanent resident in the Republic.

9. Some 8 months later a decision had not yet been arrived at, and following further enquiry the Director-General informed the applicants in a letter dated 8 January 2016 that the Department was 'still busy to consider' (sic) granting them permanent residence.

10. The Minister's failure to attend to the matter for over a year eventually prompted the applicants to make application to this Court on 23 June 2016 for an Order compelling him to make a decision. The application was enrolled for hearing on 11 August 2016. The day before it was due to be heard the Minister communicated his decision to the applicants' attorney by way of a letter [3] which (with my emphasis in bold where indicated) reads as follows:

> "APPLICATION IN TERMS OF SECTION 31(2)(b) OF THE IMMIGRATION ACT, 2002 (ACT NO 13 OF 2002): REQUEST FOR EXEMPTION: MR ALEX TAPHIWA KUHUDZAI
>
> After having considered all the information at my disposal, I have decided not to grant your client the rights of permanent residence through exemption in terms of section 31(2)(b) of the immigration Act 13 of 2002. Section 31(2)(b) enables the Minister to grant exemption to a foreigner if good cause exists to justify such a decision. After consultations between the Department of Home Affairs, the Department of Justice and Constitutional Development and the Law Society of South Africa, **I already took a decision on 9 September 2014 that exemption will not be granted to any foreigner for the purpose of practising as an attorney or advocate in South Africa,** which is a requirement in the Attorneys Act and Advocates Act, respectively.
>
> The Department of Justice and Constitutional Development made it explicitly clear that it did not intend to amend these 2 pieces of legislation and the Law Society of South Africa maintains that there is an annual oversupply of law graduates without sufficient employment opportunities for them in the labour market.
>
> Section 22 of the Constitution of the Republic of South Africa accords the right to choose a trade, occupation or profession freely (sic), only to a South African citizen. The practice of a trade, occupation or profession may be regulated by law and this is precisely what the Attorneys Act and Advocates Act aim to do. My obligation as the Minister of Home Affairs is first and foremost to consider the right of employment of South African citizens before extending this right to a foreigner. Your client's case is not unique. When I took the policy decision on 9 September 2014, there were 30 cases before me of foreigners who studied law at South African Universities and who requested exemption in order to practice their profession as lawyers. Since then many more came with the same request and, as with Mr Kuhudzai they were informed by the Department of my decision. I do not think it is fair of Mr Kuhudzai to compare his case to that of his brother. Mr Alex Takura Kuhudzai opted to study a BCom degree in Accounting, a field which does have a demand for employees other than South African citizens and permanent residents. After completion of his studies, he

[3] Dated 10 August 2016.

applied for and was granted a general work visa. After 5 years continuous work visa status he formally applied for, complied with all the prescribed requirements, and was issued with a permanent residence permit.

Your client chose his field of study to be law, which is a field that has no demand for employees other than South African citizens and permanent residents. The field of law he chose freely and with no guarantee whatsoever that he would be granted the necessary residential status in South Africa to practice his profession. Having said this, I want to put it on record that Mr Kuhudzai had (sic) not been prejudiced from earning an income to sustain his family. The Department had issued him with a General Work Visa which is valid until 15 July 2019 to work as a Refugee Right Educator with Arista and, provided that his future work visa application complies with all the prescribed requirements, the visa is likely to be renewed when it expires. **Once he has completed 5 years of work visa status in the country he may, just like his brother, formally apply for a permanent residence permit. Once he is a permanent resident of South Africa, he is free to choose any profession he wishes to pursue.**

I trust that the matter had been dealt with satisfactorily and that you and Mr Kuhudzai would now understand the reason why I'm not prepared to favourably consider the request for exemption."

11. The first thing which may be pointed out with reference to this letter is that it clearly dealt only with the application which was made by the first applicant, and did not purport to communicate any decision in respect of second applicant. Notwithstanding this, the applicants brought the instant application on the basis that the Minister's decision was in respect of both of them, and surprisingly, neither the Minister nor his legal representatives picked up on this and did not take issue in respect of the second applicant, and the application was responded to as if it concerned a joint decision in respect of both applicants. The matter was also argued by both counsel for the applicants as well as counsel for the Minister, on this basis. The failure to render a decision in respect of second applicant has obvious implications for the relief which was sought on her behalf. In my view, inasmuch as no decision was made in respect of her she is not entitled to an Order in the terms sought, but given the delay concerned she is entitled to alternative relief in the form of an Order directing the Minister to consider her application and to render a decision in respect thereof within a reasonable period.

12. Secondly, it must be pointed out that the reference by the Minister to first applicant's brother, and his comparison of their circumstances, indicates that the

Minister had regard for extraneous considerations which were not contained in the application which was put before him by the applicants, but which must have been derived from a consideration of the contents of the papers which were filed by first applicant in the application to compel. In the affidavit and supporting documents which first applicant submitted to the Minister the only information he imparted in relation to his brother was that he had also been awarded a 'prestigious' scholarship by the Zimbabwean government to study at the University of Fort Hare.

The grounds of review

13. S 31(2)(b) provides that the Minister may, upon application, grant a foreigner or a category of foreigners the right of permanent residence for a specified or unspecified period, when special circumstances exist justifying such a decision. The Minister may also exclude a foreigner or a group of 'identified' foreigners from such dispensation and may, for good cause, withdraw such right(s) from a foreigner or a category of foreigners. S 31(2)(c) provides that the Minister may for 'good cause' waive any prescribed requirement or form, in respect of any such application by a foreigner for the grant of permanent residence.

14. The applicants sought to review the Minister's decision on a number of grounds. In the first place they contended that the decision had been arrived at because irrelevant considerations were taken into account, or because relevant considerations were not.[4] In addition, they contended that the decision was reviewable on the basis that the Minister had not properly applied his mind to the circumstances outlined in their papers but had simply given effect to a 'blanket' policy which was in force at the time in regard to the consideration of such applications,[5] and by doing so the Minister had failed to exercise the discretion which was given to him in terms of the relevant provision in the Act. Finally, the applicants contended that the Minister's decision was reviewable[6] on the grounds

[4] This would constitute a ground of review in terms of s 6(2)(e) of the Promotion of Justice Act 3 of 2000 ('PAJA').
[5] Paras [15](e) and [27] of the founding affidavit.
[6] In terms of s 6(2)(f) of PAJA.

that it was not rationally connected to the purpose for which it was taken[7] and was not rationally connected to the information which was before him at the time.[8]

15. In response, it was contended that the Minister had arrived at his decision after due and proper consideration of all the facts and circumstances which were before him, and not on the basis of a rigid and blind application of the policy which had been formulated in September 2014 in respect of such applications by foreigners. As such it was rationally connected both in relation to the information which was before the Minister, as well as in relation to the purpose for which the power was exercised. Respondents pointed out that the applicants did not launch a direct, frontal challenge to the lawfulness or constitutionality of the policy itself and submitted that as a result it had to be accepted as being lawful and valid. Whilst it is indeed so that the applicants did not seek an order setting aside the policy or declaring it to be unconstitutional, this does not mean that the application of the policy by the Minister in the circumstances of the matter could not be challenged, both on the grounds that it was applied in such a way as to elevate it to an inflexible rule which did not allow for the Minister to exercise the discretion which was afforded him in terms of the statutory provision concerned, or on the basis that its application led to a decision which was not rationally connected, either to the information which was before the Minister at the time, or to the purpose for which the discretion was to be exercised.

16. Respondent's counsel drew my attention to a number of decisions[9] wherein both the Constitutional Court as well as the Supreme Court of Appeal have held that it is entirely permissible for a public functionary to obtain guidance from the terms of a policy which may have been adopted on an issue which requires a decision,

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[7] S 6(2)(f)(ii)(aa)- see para [15] of the founding affidavit.

[8] This would constitute a ground of review in terms of s 6(2)(f)(ii)(cc) of PAJA. As the applicants put it, the decision was not rational 'when seen within the factual matrix' in which it was made (*vide* para [23] of the founding affidavit).

[9] *MEC for Education in Gauteng Province and Ors v Governing Body of the Rivonia Primary School & Ors* 2013 (6) SA 582 (CC); *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC); *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA); *MEC for Agriculture, Conservation, Environment and Land Affairs, Gauteng v Sasol Oil and Ano* 2006 (5) SA 483 (SCA).

particularly if the decision is a complex one involving the balancing of a range of competing interests or considerations, or which requires specific expertise on the part of the decision-maker.[10] In *Arun Property Development*[11] the Constitutional Court pointed out that the objects of setting a policy are usually to arrive at reasonable and consistent decision-making, and to provide a guideline and a measure of certainty to the public, by avoiding the need for a case-by-case, fresh enquiry into every similar request for the exercise of public power.

17. However, as much as there can be no doubt that the setting of a policy on a complex issue involving difficult and competing interests serves a salutary purpose by providing some certainty and a kind of presumptive default position in regard to how a future decision which needs to be taken might be approached, the cases I was referred to make it equally clear that where such decision requires the exercise of a discretion the policy cannot serve to fetter it as if it is a rule to be followed blindly or inflexibly without exception[12] and the decision-maker is still required to conduct a proper and balanced weighing-up of the position adopted by the policy or the answer offered by it to the question before him, in relation to the other relevant factors he may be required to take into account in the context of the circumstances before him, in order to arrive at his decision.

18. Thus, in *Kemp*[13] the Supreme Court of Appeal[14] pointed out that there can generally be no objection to an official exercising a discretion in accordance with an existing policy provided it is apparent that he has satisfied himself 'independently' that it is appropriate to the circumstances of the particular case. In that matter the Court upheld a decision which had been taken by the Director of Animal Health, whereby he had refused, in the exercise of a statutory discretion which he had, to grant a permit for the importation of a consignment of sable antelope from Zimbabwe. In arriving at his decision the Director had relied on an embargo on the importation of cloven-hoofed animals which had been put

[10] *Sasol* n 9 at para [19].
[11] Note 9 at para [47].
[12] *Kemp & Ors v Van Wyk* n 9 at paras [1] and [10]; *Sasol* n 9 at para [19].
[13] *Id.*
[14] Per Nugent JA.

into operation a year earlier by the Directorate after it had been warned by the Zimbabwean authorities of an outbreak of foot-and-mouth disease. On a consideration of the circumstances in terms of which the decision was taken the SCA concluded[15] that although the embargo had been decisive for the Director's determination it could not be said that he considered himself bound to refuse the permit because of it, and his decision had not been made without due and proper regard for the circumstances surrounding the application for the permit.

19. In my view the opposite is true in this matter. It is patently evident from the first paragraph of the Minister's letter that he considered himself bound to the policy position which he arrived at on 9 September 2014 ie that no exemption in terms of s 31(2)(b) and (c) would be granted to any foreigner seeking permanent residence for the purpose of practising as an attorney or advocate in South Africa. That this decision was adopted as an inviolate rule to be followed in all cases where such foreigners made application for permanent residence in terms of s 31(2)(b) is evident from the Minister's statement that first applicant's case was not 'unique' and he had not only refused to grant any exemption to the 30 or so cases which were pending before him at the time when he took the "*policy decision*" but had also refused to do so in respect of all those that came thereafter. As he put it: "*Since then many more came with the same request and as with Mr Kuhudzai they were informed by the Department of my decision*" ie the 2014 policy decision.

20. That the Minister failed to properly and 'independently' consider whether it was appropriate to apply the policy position he had adopted in light of the circumstances set out by first applicant is further evident if one considers the remaining contents of his letter. Although he claimed to have arrived at his decision after considering all the information at his disposal, he went on to set out the specific factors which motivated his decision. Other than referring to first applicant's having chosen law as his 'field of study' and working as a 'Refugee Rights Educator' in terms of a work visa, and seeking to distinguish his

[15] At para [11].

circumstances from those of his brother, the Minister made no reference to any of first applicant's other personal and meritorous circumstances, which were material and relevant to a consideration of his application. In this regard there was, for example, no indication whatsoever that the Minister had any regard for the fact that although first applicant had only held his work visa[16] for about 2 years at that time, he had been residing lawfully in the country since 2004 ie for some 14 years already (on the strength of study and work visas). Ordinarily, foreigners in the country on a work visa are legally entitled[17] to apply for permanent residence after the expiry of a period of 5 years. The only reason why first applicant was apparently unable to do so was because he had not yet resided in the country on a single work visa for a continuous period of 5 years. In the circumstances it is clear from the reasons which the Minister gave for rejecting the application that he failed to apply his mind to the full panoply of facts and circumstances which had been put forward in the application, and thereby failed to consider whether there were special circumstances present which justified the grant of permanent residence rights to the first applicant, and whether in consequence thereof good cause existed to waive the prescribed requirements. By doing so he failed to properly exercise the discretion which was conferred upon him by the Act, and his decision falls to be set aside.[18]

21. Similarly, the Minister made no attempt to deal with the anomaly that notwithstanding that the avowed purpose of his policy position was to protect the employment rights and opportunities of South African citizens who were desirous of working in the legal profession, an area which according to him was overstocked with law graduates, his department had nonetheless seen fit to grant first applicant, upon completion of his studies (a) work visa(s) which allowed him to render legal advice and services to refugees and asylum-seekers, for a number of years. This aspect perhaps is more closely related to the other

[16] Which is valid until 15 July 2019.
[17] In terms of s 26(a) of the Act.
[18] See *Littlewood & Ors v Minister of Home Affairs and Another* [2005] ZASCA 10 (22 March 2005) at paras [16]-[17]; *Tima & Ors v Minister of Home Affairs* [2015] ZAGPPHC 763 (9 July 2015) at paras [20]-[23].

principal ground on which the Minister's decision was challenged viz that it was irrational (in that it was not 'rationally connected' in the respects set out above) and was thus reviewable in terms of s 6 of PAJA.

22. In the penultimate paragraph of his letter the Minister said that once first applicant has completed "*five years of work visa status in the country he may, just like his brother, formally apply for a permanent residence permit"* and once he was a permanent resident he was "*free to choose any profession he wished to pursue*".

23. In the answering affidavit which he filed on behalf of the Minister the Director-General went further and confirmed that based on the facts which were before the Court it was "*likely*"[19] that when first applicant's current work visa expires in July 2019 he will qualify for permanent residence and will then be "*free to exercise his chosen profession*".[20]

24. It is thus abundantly clear from the passages referred to that as far as the Minister is concerned, once first applicant has completed a period of 5 years of continuous temporary residence on a work visa basis in July 2019, he will be eligible to apply for permanent residence, without restriction in regard to his desire to work in the legal profession, and according to the Director-General in all probability it will be granted to him on this basis, at which point he will clearly be eligible to apply to be admitted as an attorney and to practice freely in the area of refugee and immigration law.

25. One would have thought that in order to give effect to his declared intention to protect local members of the legal profession from encroachment on their work opportunities by foreigners who have studied and qualified in this country, the Minister would not only have taken a policy decision that such foreigners would not be able to obtain permanent residence via the 'short route' (ie by obtaining exemption from having to wait for the prescribed period of 5 years 'continuous' temporary (work) visa status to be over before they could be eligible to apply),

[19] Barring any new facts which might emerge.
[20] Paras [41] – [42] of the answering affidavit.

but that in addition there would be a further restriction in place in regard to them being eligible to apply for permanent residence thereafter. The object which the policy seeks to achieve after all, is supposedly to protect the legal profession from competition by foreigners. One can hardly say that one is trying to restrict foreigners from competing with locals in regard to a specific profession or trade if the restriction you impose only pertains to them acquiring permanent residence quicker than would normally be the case, but once they have waited out the prescribed time period they are not restricted and are just as free as any citizen or permanent resident to practice in such profession and to compete with locals. In this sense the decision which was arrived at by the Minister was not rationally connected, both in regard to the purpose for which the discretion which he had in terms of s 31(2)(b) was to be exercised, as well as in regard to the information which was before him in relation to first applicant's circumstances. Put simply, it was irrational to hold that first applicant's application for permanent residence should be refused in order to protect local lawyers from his competing with them, if in a period of a little less than 3 years after the decision was taken he would be perfectly free to do so without restriction. It seems to be little more than an arbitrary decision which unfairly restricts first applicant temporarily from being able to earn a livelihood in a profession which he has been working in for a number of years already, for which he clearly has both the passion and the necessary aptitude.

26. In my view therefore the decision to refuse first applicant's exemption application was not rationally connected to the purpose for which the power was to be exercised and to the information which was before the Minister at the time, and falls to be reviewed and set aside.

The appropriate remedy

27. The applicants submitted that in the event the Court found in their favour it should exercise its discretion[21] to substitute the Minister's decision with one of its own, by granting first applicant permanent residence, by way of exemption, in

[21] In terms of s 8(1)(c)(ii)(aa) of PAJA.

terms of 31(2). They contended that in the event that the matter was to be remitted to the Minister for reconsideration it would effectively be the third time he would be asked to apply his mind to principally the self-same facts, at least insofar as the first applicant was concerned, and this would be unfair and prejudicial to the parties, given the lengthy delay involved in the process which the first applicant has engaged in since the time of his first unsuccessful application in 2011. The applicants submitted that little purpose would be served in remitting the matter to the Minister as his 2014 policy decision was still in place and the outcome of any remittal would therefore be a foregone conclusion.

28. In terms of PAJA[22] the Court has a discretion to substitute a decision only in exceptional cases. In *Gauteng Gambling Board* [23] the Supreme Court of Appeal held that an exceptional case is one where, upon a proper consideration of all the relevant facts a court is persuaded not only that the outcome is a foregone conclusion, but that it is in as good a position as the designated functionary to make the decision and the discretion to exercise the power should not be left to the functionary. The Constitutional Court has subsequently warned that substitution is an 'extraordinary remedy'[24] and remittal is still 'almost always the prudent and proper course'.[25] And where the decision involves the exercise of specialized skills or expertise or involves competing policy choices a court is also required to show judicial deference[26] lest it should make itself guilty of overreach. In addition, although delay is an important factor that must be weighed in the balance, sight must not be lost of the fact that the time spent awaiting adjudication in the litigation process itself may be a large component thereof.[27]

29. In my view given the important policy considerations involved this is not a matter where the court should venture its own decision, and it is not in as good a position as the designated functionary is to consider the merits of the application.

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[22] *Id.*
[23] *Gauteng Gambling Board v Silverstar Development Ltd & Ors* 2005 (4) SA 67 (SCA).
[24] *Trencon Construction v Industrial Development Corporation* 2015 (5) SA 245 (CC) at para [42].
[25] *Id.*
[26] *Id* paras [43]-[46].
[27] *Id* paras [52]-[53].

This is also not a matter where the outcome is necessarily a foregone conclusion, one way or the other. Although the 2014 policy still appears to be extant, it cannot be said that the Minister may not be prepared to reconsider the first applicant's application afresh without being shackled by the policy, given the remarks which the court has made in this judgment, and in light of the facts of this matter. It may well be that on proper reflection the Minister may recognize the anomaly and unfairness in refusing first applicant's exemption application at a time when he will only be a year or so away from being able to obtain permanent residence in any event, in the ordinary course, once his work visa expires. Furthermore, given that the Minister still has to arrive at a decision in respect of the second applicant it is not desirous that the applications should be dealt with separately on a piecemeal basis, by two different entities. In my view the proper course is for the matter to be remitted insofar as the first applicant is concerned, and the Minister should be directed to consider the application by both applicants jointly, and to make his decision known in regard to both of them, at one and the same time.

30. During argument I was informed that as the applicants were impecunious their legal representatives had generously offered to act for them on a *pro bono* basis. This is admirable, and is to be commended at a time when the legal profession is often criticized by members of the public of only having its own interests at heart. It was apparent to the Court that both the applicants' attorneys as well as their counsel, in particular, had put in many hours of work both in regard to the drafting of the papers as well as in regard to the drafting of heads of argument and preparation for the hearing. In my view, given that as a result of such efforts the applicants managed to achieve substantial success in regard to the principal relief which they sought, it would be an injustice not to order that the respondent should be liable for the reasonable costs of such efforts, as taxed or agreed, and by making such an Order the respondent will be no worse off than would have been the situation otherwise. In further submissions which were received from

the applicants' counsel I was referred to a number of matters[28] in which the Courts were prepared to make such an Order. In my view, the effect of such an Order would not be to encourage impecunious persons to litigate recklessly, spuriously or vexatiously.[29] It still remains within the discretion of every Court to decide in each matter whether costs should be awarded, and if so, to whom and in what measure.

31. In the result the application must succeed. For the sake of completeness I point out that the terms of the Order which follows hereunder, in respect of the first applicant, is modelled on that made in *Littlewood*.[30]

32. I make the following Order:

32.1 The decision by the Minister of Home Affairs dated 10 August 2016, refusing the first applicant's application (in terms of s 32(1)(b) and (c) of the Immigration Act 13 of 2002) for the grant of permanent residence by way of an exemption from the prescribed requirements, is set aside and such application, supplemented by such additional or further information as may be required for a proper determination thereof, is remitted to the Minister for reconsideration within a period of 60 (calendar) days from date of this Order.

32.2 The Minister is directed to consider the application by the second applicant for the grant of permanent residence by way of an exemption from the prescribed requirements (in terms of s 32(1)(b) and (c) of the Immigration Act 13 of 2002), supplemented by such additional or further information as may be required for a proper determination thereof, and to render his decision in respect thereof within a period of 60 (calendar) days

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[28] See *inter alia Minister of Justice & Constitutional Development & Ors v Southern African Litigation Centre & Ors* 2016 (3) SA 317 (SCA); *Zeman v Quickelberge & Ano* (2011) 32 ILJ 453 (LC); *Thusi v Min of Home Affairs* 2011 (2) SA 561 (KZP).

[29] As was pointed out in *Zeman* n 28 at para [108], although a *pro bono* litigant may not always be awarded costs in the event of success, he/she will invariably always be potentially at risk of having costs awarded against him/her in the event of failure.

[30] Note 18 at para [17].

from date of this Order, together with his decision in terms of the preceding paragraph.

32.3 The respondent shall be liable for the applicants' costs of suit, as taxed or agreed.

SHER J

Attendances:

Heard: 26 June 2018

Further submissions: 27 July 2018

Appellants' counsel: S Khoza

Appellants' attorneys: DA Barnes & Associates

Respondents' counsel: M Adhikari

Respondents' attorneys: State Attorney (Cape Town)