



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

**Case No: 6928/2022**

In the matter between:

**YEW TECK LING**

First Applicant

**SEE HIE CHUA**

Second Applicant

and

**THE DIRECTOR-GENERAL OF THE  
DEPARTMENT OF HOME AFFAIRS**

First Respondent

**THE MINISTER OF HOME AFFAIRS**

Second Respondent

**Coram:** Justice J Cloete

**Heard:** 8 September 2022

**Delivered electronically:** 9 September 2022

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**JUDGMENT**

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**CLOETE J:****Introduction**

[1] The applicants, a married couple in their early seventies, are Singaporean nationals who applied for permanent residence in South Africa on 24 January 2019 in terms of s 27(f) and s 26(b) of the Immigration Act<sup>1</sup> ("the Act").

[2] Section 27(f) of the Act provides:

*'The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who –*  
 ...  
*(f) has proven to the satisfaction of the Director-General that he or she has a prescribed minimum net worth and has paid a prescribed amount to the Director-General.'*

[3] The 'prescribed minimum net worth' is R12 million, and the 'prescribed amount' is R120 000.<sup>2</sup> It is not in dispute that the first applicant's net wealth exceeds R49 million, or that he will be able to pay the prescribed amount. In turn, s 26(b) of the Act provides:

*'Subject to section 25 and any prescribed requirements, the Director-General may issue a permanent residence permit to a foreigner who –*  
 ...  
*(b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permanent residence permit shall lapse if at any time within two years from the issuing of that permanent residence permit*

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<sup>1</sup> No. 13 of 2002.

<sup>2</sup> "Minimum Net Worth in Respect of Application for Permanent Residence Permit", GN 454 in GG 37716 of 3 June 2014.

*the good faith spousal relationship no longer subsists, save for the case of death.'*

- [4] The applicants were married in Singapore on 31 October 1974. It is common cause that their applications are interlinked, since if the first applicant's is granted, so too will the second applicant's as his spouse. It is also common cause that, although the decision of the Director-General ("DG") which the applicants seek to impugn ("the impugned decision") does not refer specifically to the second applicant, the DG (as well as the second respondent) have dealt with the applicants collectively.
- [5] The DG rejected the first applicant's permanent residence application on 26 August 2021 and it was communicated to the applicants on 14 September 2021, i.e. 2 years and 8 months after the permanent residence applications were submitted. Ultimately, and for the reasons set out below, on 10 March 2022 the applicants launched these proceedings in which they seek to review and set aside the impugned decision. They also seek an order that the respondents issue to them the permanent residence permits within 20 working days, alternatively, that the DG takes a decision on their applications and delivers such decision within 30 working days.<sup>3</sup>
- [6] As will be demonstrated below, the DG's stance (and thus also that of the second respondent) on the rejection of the permanent residence applications

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<sup>3</sup> In the notice of motion relief was also sought, to the extent necessary, to condone their failure to exhaust internal remedies in terms of s 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000, but the parties are also *ad idem* that such relief is not required.

and the current relief has shifted since the impugned decision was made. It is necessary to deal with this in some detail given the substitution order which the applicants seek.

### **Relevant factual matrix**

- [7] The DG's decision and his "reasons" therefor were set out in the refusal letter as follows:

*'During the processing of your application it was discovered that you have submitted a fraudulent bank statement in support of your application. This renders you a person who is not of good and sound character. You therefore do not qualify for permanent residence in terms of section 27(f).*

- [8] A full copy of the first applicant's permanent residence application was annexed to the founding papers. A cursory perusal reflects that he attached 9 bank statements as follows:

- 8.1 DBS Bank Singapore: 3 statements for the period 1 October 2018 to 31 December 2018, with 27 transactions excluding monthly account fees and interest earned;
- 8.2 First National Bank Private Wealth cheque account: 4 statements for the period 4 September 2018 to 4 January 2019, with 186 transactions;
- 8.3 First National Bank savings account: 1 statement for the period 4 October 2018 to 3 November 2018 reflecting an opening balance, interest accrued and a closing balance; and

8.4 UOB Private Bank: 1 statement for the period 1 September 2018 to 29 September 2018 incorporating balances of three separate accounts.

[9] The first applicant did not submit any fraudulent documents (including bank statements) in support of his application. Given the DG's failure to identify the alleged '*fraudulent bank statement*' the first applicant was left in the dark. Accordingly, on 15 September 2021 (i.e. one day after collecting the impugned decision), his attorneys filed a request in terms of PAIA<sup>4</sup> for the records pertaining to the decision against him. It was directed to the Acting Chief Director: Legal Services within the Department, who in turn forwarded it to another two officials, stating only that '*The forwarded request is for your attention*'. One of these officials was Ms Linda Sibeko who on 27 September 2021 advised the applicants' attorney by email that the Department '*will revert to you shortly*'. On 30 September 2021 the applicants' attorneys sent a follow-up email to Ms Sibeko, but there was no reply. At the date of deposing to the founding affidavit, i.e. 9 March 2022, the first applicant stated that the PAIA application '*remains pending to this day*', i.e. almost 6 months after its submission.

[10] On 22 October 2021 the applicants' attorneys wrote directly to the DG seeking reasons for his decision in terms of s 5(1) of PAJA.<sup>5</sup> It was explained that the first applicant was '*uncertain of which statement the impugned decision is making reference to*' and a reply was requested by 5 November 2021. There

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<sup>4</sup> Promotion of Access to Information Act 2 of 2000.

<sup>5</sup> See fn 3 above.

was no reply from the DG or any other person within the Department, despite a follow-up letter from the applicants' attorneys on 15 December 2021, requesting a response by no later than 14 January 2022.

- [11] This disregard for the first applicant's plight by the DG and his Department resulted in the launching of the current proceedings. Although the parties are now *ad idem* that no internal appeal lies against a decision at first instance of the DG,<sup>6</sup> as the first applicant put it:

*'...even if I could have filed an appeal – what would I have said? I do not know why the DG's decision was made. Which statement was supposedly fraudulent? Perhaps I could have provided all new bank statements, but would that have addressed the DG's concern? Perhaps the new statements would suffer from the same problems. Or, perhaps the DG formed the view that the statements themselves were legitimate but the amounts listed therein were somehow problematic. Or perhaps it was the account numbers, or the dates of the statements, which led him to believe fraud had occurred. I simply do not know...'*

- [12] After delivery of the rule 53 record by the respondents, the first applicant deposed to a supplementary affidavit, since it was only upon receipt of that record that he was able to establish what the DG was referring to when he made the impugned decision. The following was revealed.

- [13] On 19 January 2021, Ms Glenda Maila of the Permanent Residence Section of the Department emailed First National Bank to request that it *'please assist us with verification of the attached bank account as well as the transactions*

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<sup>6</sup> *Director-General, Department of Home Affairs and Others v Link and Others* 2020 (2) SA 192 (WCC) at para [49].

*therein*'. On the same day, the Bank Statement Verification unit within First National Bank emailed the Department, stating that *'[w]e have analysed the bank statement [sic] provided and confirm that the statement appears to be fraudulent as the transactions reflected thereon does not correspond with the transactions on the Bank's systems'*.

- [14] As soon as the record came into the applicants' possession they contacted First National Bank and lodged a formal complaint. The Bank thereafter conducted an internal investigation and on 25 April 2022 advised both the first applicant and Ms Maila that:

*'We have looked into the incident and can confirm that the bank statement submitted to FNB, by the DHA, dated 19 January 2021, with reference PRP2674541, are legitimate and in line with our banking records.*

*It is confirmed that the correspondence sent to the DHA, by the Bank, dated 19 January 2021, advising that the statements may have been fraudulent, was an error...'*

- [15] The first applicant accordingly submitted that as this was the only basis on which the permanent residence permits were refused, it followed that the applicants should be issued with the permits for which they applied. He stated further that it was a source of particular frustration and concern to them that the dispute could so easily have been resolved once they understood the reasoning behind the impugned decision. Had the DG given adequate reasons for his adverse decision at the outset – that is, explained which bank statement was deemed fraudulent and why – the First National Bank investigation could and would have occurred prior to the current litigation. As he put it *'[o]ne extra*

*sentence in the... decision could have saved both us and the Respondents a great deal of time and money’.*

[16] On 19 May 2022 the applicants’ attorneys wrote to Ms Sampson of the State Attorney, placing the outcome of the First National Bank investigation on record, and calling upon the respondents to withdraw their opposition to the relief sought. On 7 June 2022 Ms Sampson responded by email,<sup>7</sup> as follows:

- ‘1. ...we do not wish to litigate via correspondence.
2. Save to say the following, the Minister was conceded with documents before him and a decision was taken.
3. Such decision is subject to review and your client has legitimately reviewed same.
4. The authenticity of the bank statement have been corrected after the fact. This regrettably cannot be attributed to Department of Home Affairs.
5. This onus remains with the applicant seeking a permit.
6. Department of Home Affairs is amenable to settling the matter on the following terms: As your client’s current permit has expired, your client apply for form 20 to legalize themselves in South Africa.
7. This way the applicant can apply for a PRP application or/invoked the 8(6) appeal process and seek condonation for lodging late.
8. This will afford your client the opportunity to submit the correct and verified bank statements with proof thereof.
9. We are advised that Department of Home Affairs has to be satisfied about the authenticity and veracity of the documents as submitted and your client will now be able to better satisfy Department of Home Affairs.
10. We note the above is a practical and pragmatic solution going forward.
11. We have not briefed counsel to date and are hoping reasonableness will prevail...’

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<sup>7</sup> Although this email is marked ‘*without prejudice*’ the respondents clearly waived privilege since it was annexed to the answering affidavit.

[17] I will assume that the reference to '*conceded*' in paragraph 2 of the aforementioned email was intended to be '*concerned*'. However quite what the respondents sought to convey to the applicants' attorney in this email is difficult to discern. First, given the concession that the authenticity of the bank statement had been corrected, there was nothing for the first applicant to submit afresh as '*the correct and verified bank statements with proof thereof*'. Second, also given the aforementioned concession, the question arises how submission of the same (verified) bank statement would assist the first applicant in being '*able to better satisfy*' the Department.

[18] Third, the respondents should have known that the invocation of any appeal process does not apply to a decision at first instance by the DG. Fourth, despite all of this, it seemed to be suggested by the respondents that the applicants must start the entire process again, 3½ years later, as a '*practical and pragmatic solution*'. (The first applicant did not have the opportunity to deal with the aforementioned email in his supplementary affidavit since it was deposed to on 25 May 2022 – however it is fair to say that if this court cannot make head or tail of what the respondents were trying to convey, it is unlikely that the first applicant could have done so).

[19] The answering affidavit was deposed to by the DG himself. He set out the respondents' grounds of opposition as follows. The permanent residence application was processed in accordance with an established and strict standard operating procedure, which entails five stages (or levels) before a decision is made. There cannot be a deviation from this procedure '*under any*

*circumstances*'. Should an application fail to meet quality assurance requirements at any one of these five stages, it will not proceed to the next stage and will be refused (i.e. at the stage in question).

[20] When First National Bank advised the Department that *'the bank statement'* appeared to be fraudulent, a decision was made that the applicants did not qualify for permanent residence. This, according to the DG, was a *'correct, lawful and reasonable decision'*. Moreover the reason provided to the applicants was a clear and adequate one. According to the DG, the first applicant had submitted a total of 4 bank statements (which is incorrect) and it was unnecessary for him to specify which of these were fraudulent since the reason for his decision *'cannot be clearer'*.

[21] Contrary to what was contained in Ms Sampson's letter of 7 June 2022, namely that the applicants had *'legitimately reviewed'* the impugned decision, the DG took the position that it was not susceptible to review, since the erroneous information provided by First National Bank did not render his decision wrong, unlawful or unreasonable.

[22] The DG went on to say that he is unable to reconsider the impugned decision since this would undermine the established Departmental processes, and the only remedy available to the applicants is to submit an entirely new application:

*'The application in this matter has been finalised. The file has been closed and it cannot be re-opened to accept the new information from FNB and then approve the application without it going through the necessary stages as explained above.'*

- [23] The DG added that, although the respondents do not dispute that his decision to reject the applications for permanent residence was based on a factual mistake, if he were to deal with the matter in any other manner it would be irregular and result in negative audit findings being made against the Department.
- [24] The only reasonable inference to be drawn from this is that the DG considers the discretion which is statutorily conferred upon him in terms of s 27 of the Act is fettered by the Department's internal processes, which on his version cannot be deviated from under any circumstances for fear of a negative audit finding; and that his understanding of '*subject to any prescribed requirements*' in the opening paragraph of s 27 includes those internal processes, whatever they might be, since they were not properly explained in the answering affidavit.
- [25] In his replying affidavit the first applicant fairly questioned how, even if he and his wife were to submit fresh applications, they would ever have a prospect of being granted permanent residence, given that, on the DG's own version, the internal records of the Department contain a decision that they have committed fraud. This essentially places himself and his wife in a catch-22 situation.
- [26] The DG also alleged that, in any event, the applications had not been fully verified, apparently because they did not proceed through the further stages of '*quality assurance*'. The first applicant correctly submitted that, at most, the DG's stance is that there might be some other issue with their applications, but

he does not know what it is, cannot say that such issue exists, and has not sought to establish what it might be.

- [27] In later heads of argument filed on the respondents' behalf, and persisted with at the hearing, the respondents' position changed yet again. They stated that they are not opposing the review relief sought, but only that a substitution order should not be granted, given the policy-laden nature of immigration decisions as well as the doctrine of separation of powers. It was submitted that, in these circumstances, the just and equitable remedy would be to remit the matter for reconsideration by the DG, and for each party to pay their own costs.

### **Discussion**

- [28] The concession finally made by the respondents that the impugned decision is susceptible to judicial review is well made. In *Pepcor Retirement Fund and Another v Financial Services Board and Another*<sup>8</sup> it was held that:

*'[47] In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable... The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power*

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<sup>8</sup> 2003 (6) SA 38 (SCA).

*conferred on a functionary to make decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts...*

*[49] Whether a review should succeed in a matter... will depend on a consideration of the public interest in having the decision corrected and other factors, and in particular, the interests of the person in whose favour a decision has been made. Ultimately, a value judgment, balancing all the relevant factors, will be required...<sup>9</sup>*

[29] *Pepcor* has since been followed in a number of cases, including many where the decision-maker was not at fault for the decision.<sup>10</sup> In *Airports Company South Africa v Tswelokgotso Trading Enterprises CC*<sup>11</sup> the court summarised the current state of the law as follows:

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

[30] The respondents now also agree that the impugned decision is susceptible to judicial review in terms of s 6 of PAJA. Accordingly it follows that it must be set aside. As was held in *Allpay Consolidated Investment Holdings (Pty) Ltd and*

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<sup>9</sup> Para [10] referred to in the passage is not relevant for present purposes.

<sup>10</sup> See for example *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA); *Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd and Others* 2012 (2) SA 16 (SCA); *Dumani v Nair and Another* 2013 (2) SA 274 (SCA); *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) and further *Bullock NO and Others v Provincial Government, North West Province and Another* 2004 (5) SA 262 (SCA); *Government Employees Pension Fund and Another v Buitendag and Others* 2007 (4) SA 2 (SCA); and *Chairpersons Association v Minister of Arts and Culture and Others* 2007 (5) SA 236 (SCA).

<sup>11</sup> 2019 (1) SA 204 (GJ) at para [12].

*Others v Chief Executive Officer, South African Social Security Agency and Others*<sup>12</sup>:

*‘Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b). Section 8 of PAJA gives detailed legislative content to the Constitution’s “just and equitable” remedy.’*

[31] Turning now to what would be a just and equitable remedy. While I fully acknowledge the polycentric nature of decisions made by the DG in terms of the Act, as well as the importance of the doctrine of separation of powers, as I see it the respondents face two serious obstacles in seeking a reconsideration order instead of a substitution order. The first is that, on the DG’s own version, there is nothing before him to reconsider. The second is what the DG himself considers to constitute adequate reasons for any decision.

[32] In *Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*<sup>13</sup> it was held that:

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

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<sup>12</sup> 2014 (1) SA 604 (CC) at para [25]. See also *Westinghouse Electrical Belgium SA v Eskom Holdings (Soc) Ltd and Another* 2016 (3) SA 1 (SCA) at paras [44] to [47].

<sup>13</sup> 2010 (4) SA 327 (CC).

*“create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function...”*

*In keeping with this important goal, s 5 of PAJA must be viewed as giving effect to s 33(2) of the Constitution. These two provisions read together entitle the applicants to reasons...*

*[61] The declaration that a person is an illegal foreigner under s 8(1) impacts adversely on him or her. In addition to having to leave the country, it stigmatises the person and may become a basis for denial of entry into other foreign countries. As a consequence, a person will be anxious to know the basis for the declaration, particularly in circumstances where it might be based on a misunderstanding or incorrect information. In that regard, the person may want to appeal or have the decision reviewed and set aside by a higher authority. Reasons for the finding... are therefore important in seeking a meaningful review...*

*[62] Further, in our constitutional democracy, officials are enjoined to ensure that the public administration is governed by the values enshrined in our Constitution. Providing people whose rights have been adversely affected by administrative decisions with reasons, will often be important in providing fairness, accountability and transparency. In the context of a contemporary democratic public service like ours, where the principles of batho pele, coupled with the values of ubuntu, enjoin the public service to treat people with respect and dignity and avoid undue confrontation the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners...*

*[63] Although the reasons must be sufficient, they need not be specified in minute detail; nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.*

(my emphasis)

[33] In this regard, I can do no better than refer to the first applicant's explanation set out above as to why he considered the "reason" provided by the DG to be wholly inadequate. He is quite right. There is also the additional factor of the inherent fallacy in that "reason". There were not, as the DG maintains, a total of 4 bank statements. What was submitted by the first applicant were 9 such statements from 3 different banks containing no less than 213 transactions and spanning the period September 2018 to January 2019. The DG's somewhat dismissive stance that his "reason" could not have been clearer, simply cannot be accepted. In these circumstances, there is every likelihood that, even if it were somehow permissible for this court to refer the matter back to the DG for reconsideration, the applicants will face the same hurdle should the DG, for one or other reason, decide that they have not met the requirements for the issue of permanent residence permits.

[34] Section 8(1) of PAJA, which deals with just and equitable remedies, provides in relevant part that:

*'The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –*

*...*

*(c) Setting aside the administrative action and –*

*...*

*(ii) in exceptional cases –*

*(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action...'*

[35] The test for applicability of substitution orders was set out in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa and Another*.<sup>14</sup>

*[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. 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. 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 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 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 in 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. Generally, a court ought to evaluate the stage at which the administrator's process was situated when the impugned administrative action was taken. For example, the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision. In other instances some matters may concern decisions that are judicial in nature. In those instances – if the court has all the relevant information before it – it may very well be in as good a position as the administrator to make the decision.*

*[49] Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and "it would merely be a waste of time to order the [administrator] to reconsider*

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<sup>14</sup> 2015 (5) SA 245 (CC).

*the matter". Indubitably, where the administrator has not adequately applied its unique expertise and experience to the matter, it may be difficult for a court to find that an administrator would have reached a particular decision and that the decision is a foregone conclusion. However, in instances where the decision of an administrator is not polycentric and is guided by particular rules or by legislation, it may still be possible for a court to conclude that a decision is a foregone conclusion.'*

- [36] Regrettably, in this matter the DG has been singularly vague and unhelpful in detailing and explaining the internal process(es) to be followed. All that this court knows is that there are five stages at which '*quality assurance*' procedures are implemented, and that the first applicant's application was '*at a stage where verification of the supplied bank statements was done*'. Given that First National Bank provided the DG with incorrect information, the process – at whatever stage it was – summarily terminated. The DG has not disclosed what that stage in the process was, nor has he disclosed what other stages, if any, still have to be completed. Moreover, one could reasonably have expected him to take the court into his confidence about which, if any, of the other documents submitted by the applicants could have raised a red flag. Balanced against this is the patent, ongoing, severe prejudice to the applicants who have now had to wait 3½ years for their permanent residence applications to be finalised, with no foreseeable end in sight. The DG does not even suggest a time limit to be imposed by this court for any "reconsideration" and the court is thus left in the dark as to what the DG considers to be a reasonable time.
- [37] Put differently, the DG only has himself to blame for failing to place facts before this court which could persuade it that it is not in as good a position as the DG

to make a decision. It also seems that, given the DG's explanation of an internal process(es) which may not be deviated from '*under any circumstances*', taken together with the inference that he considers his own discretion to be fettered by those (undisclosed) internal processes, any question of expertise recedes into the background. Indeed, the DG himself has not suggested that such expertise would be required were a reconsideration order to be granted. His stance is different, namely that there is nothing before him to reconsider.

- [38] The DG has known since the current proceedings were instituted that the applicants sought a substitution order as part of the relief. As was held in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board*:<sup>15</sup>

*'The respondents have had more than sufficient time and opportunity to put all the relevant facts before this Court. If the respondents at any relevant time had at their disposal additional information impacting negatively upon the applicant's compliance with the "scarcity of occupational skills requirement", or any of the other criteria governing the issue of an immigration permit, such information could, and should, have been put forward. The fact that no additional information of this kind was forthcoming justifies this Court in concluding that no such information exists and that all the relevant facts are before this Court. This Court is therefore certainly in as good a position as the Regional Committee to make a decision regarding the applicant's application for an immigration permit in terms of section 25 of the Act.'*

- [39] Taking all of the above into account it is my view that this is the type of situation which falls into the category of "exceptional circumstances" envisaged in

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<sup>15</sup> 2001 (2) BCLR 1239 (C) at 1261F-G. See also *ZH and Others v The Minister of Home Affairs and Another* 15279/2021 [2022] ZAWCHC 150 (20 July 2022) at paras [48.6] to [48.7].

s 8(1)(c)(ii)(aa) of PAJA. Accordingly, and subject to payment of the prescribed amount, the provisions of s 25(3) and (4) as well as s 28 of the Act, the substitution order sought by the applicants is the appropriate one to make.<sup>16</sup> Finally, given the manner in which the respondents have dealt with this matter, it would be wholly inappropriate to make an order that each party pay their own costs as the respondents suggest. It would make a mockery of their duty to be accountable.

[40] In this regard, the preamble to the Act states in terms that its aim is to set in place a new system of immigration control which ensures that:

- '(a) *visas and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, and without consuming excessive administrative capacity; ...*
- (d) *economic growth is promoted through the employment of needed foreign labour foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated and tourism is promoted;...*
- (h) *the South African economy may have access at all times to the full measure of needed contributions by foreigners...*

(my emphasis)

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<sup>16</sup> Section 25(3) provides that 'a permanent residence permit shall be issued on terms and conditions that the holder is not a prohibited or an undesirable person, and subject to section 28'. Section 25(4) stipulates that 'for good cause, as prescribed, the Director-General may attach reasonable individual terms and conditions to a permanent residence permit'. Section 28 deals with the withdrawal of a permanent residence permit.

[41] The following order is made:

1. The first respondent's decision dated 26 August 2021 to reject the first applicant's application for permanent residence in terms of section 27(f) of the Immigration Act 13 of 2002 ("the Act"), and consequently that of the second applicant's in terms of section 26(b) thereof, is reviewed and set aside;
2. The respondents shall issue to the applicants the permanent residence permits for which they applied on 24 January 2019 within 20 (twenty) working days from date of this order, subject to payment by the applicants of the prescribed amount as set out in Government Notice 454 (Government Gazette 37716) dated 3 June 2014, as well as section 25(3), section 25(4) and section 28 of the Act; and
3. The costs of this application shall be paid by the respondents in their official capacities on the scale as between party and party, jointly and severally, the one paying the other to be absolved, and including any reserved costs orders.

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J I CLOETE

For applicants: Adv David **Simonsz**,

Instructed by: Le Roux Attorneys Inc, Megan Lee,;

For respondents: Adv Ntokozo **Mjiyako**,;

Instructed by: State Attorney, Sachin-Lee Sampson,