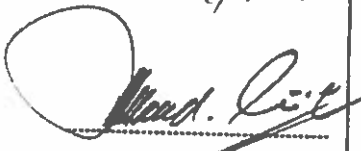




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA DIVISION.)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <u>YES</u> / NO.	
(2) OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO.	
(3) REVISED.	
21/5/2019	
DATE	SIGNATURE

CASE NO: 13760 / 2017

In the matter between:

RDM ROAD SOLUTIONS (PTY) LTD

Applicant

and

MINISTER OF HOME AFFAIRS

Respondent

JUDGMENT

HOLLAND-MÜTER A/J:

[1] This matter has a very long and unfortunate history between the parties

dating back as far as 31 March 2011 when the first legal salvo was fired between the parties.

- [2] The applicant is a company specializing in general road haulage of freight of goods between the Republic of South Africa and countries such as Zimbabwe, Zambia, the DRC and Mozambique. The applicant has various contracts with SAB Millar, Tongaat Hulett, Omnia Fertilizers, Boxmore Plastics, Irvines Africa and Trade King to transport goods and products to and from the various foreign countries by road.
- [3] The applicant has a fleet of thirty-two trucks, all permitted in terms of prevailing legislation to undertake services to the foreign countries. At the end of 2015 the applicant employed five (5) South African employees on a permanent basis and thirty-eight (38) foreign employees.
- [4] On 31 March 2011 Goodey A/J, in case number 59612/2010 (not 2014 as indicated in the papers all along), made an order in which he directed that foreign truck drivers employed by applicants (the current applicant was the eleventh applicant in that application), may enter the Republic of South Africa validly and legally with a visitors permit as contemplated in section 11(2) of the Immigration Act, and that the Minister, insofar as he

has not done so, authorize foreign truck drivers to conduct work in the Republic in terms of section 11(2). This was a settlement between the parties in that matter. See a copy of the judgment on page 45-47 in the application.

- [5] The visitor's visa issued under section 11(2) permits the holder to perform work to a maximum period of three (3) months in the Republic and has an added disadvantage that the holder of such visa may not open a bank account in the Republic. The huge disadvantage is that these employees has to be paid in cash, creating a risk for employer and employee.
- [6] A corporate visa on the other hand provides the mechanism to be employed for a period (usually three years) and the employee is entitled to open a bank account in the Republic.
- [7] The applicant had until 18 October 2013 relied upon a corporate visa as contemplated in section 21 of the Immigrations Act, 13 of 2002 (hereafter referred to as the "Act"), to validate the employment of its foreign employees.
- [8] The applicant's employees were often in the past harassed by immigration authorities at the border posts when entering and leaving the Republic be-

cause many of these officials for unknown reasons (incorrectly) did not accept the validity of the endorsement on foreign drivers' visas as contemplated by the judgment of Goody A/J above.

- [9] The applicant regularly advertises positions for inter alia cross border drivers and other related positions such as mechanics and administrative personnel to be filled by South Africans. It has been found regularly that there are seldom suitable local applicants for the cross border driver positions for various reasons such as:
- (i) Many qualified local drivers prefer not to drive post border but to drive in South Africa;
 - (ii) Some local drivers' reasons for the unwillingness to drive cross border are fear for illness (malaria), language barriers in foreign countries, extended periods of traveling abroad over long periods, adverse against the extended periods at particularly the Beit Bridge border post (up to 32 hours) to make border crossing and a shortage of experienced drivers in South Africa.
- [10] The applicant applied for a corporate visa for the foreign employees on 23 September 2015, (VFS Reference Number TRA 1733878). The applicant

had no reason to believe or to expect that the application would be rejected when applying, because it had been motivated on similar grounds as previously during 2010 when it made successful application for a corporate visa.

[11] This application was refused and an internal appeal was lodged on 27 October 2015, the appeal directed to the Director General, Home Affairs. This appeal is as contemplated in section 8(4) of the Act.

[12] The section 8(4) appeal was eventually rejected by the Director General of Home Affairs during May 2016 after a long delay and after the applicant obtained a mandatory interdict against the Director General of Home Affairs during April 2016 under case number 25021/2016. The court order directed the Department of Home Affairs to provide its findings on appeal and to supply reasons for such findings. This was done during May 2016.

[13] The Director General of Home Affairs' rejection was on the basis that:
“The reasons are that, foreign language as a requirement unfairly discriminates against the locals and ..”.

[14] The applicant then appealed to the respondent in terms of section 8(6) of

the Act. This appeal was lodged on 19 May 2016. The respondent rejected the appeal and served a letter of rejection on the applicant on 1 November 2016. The reason for the rejection was once again the foreign language issue. See par 45-46 on p 22 of the founding affidavit.

[15] This rejection was the basis for the first review application brought by the applicant before this court. This review served before Raulinga J on 5 February 2018. Raulinga J, when reviewing and rescinding the order subject to the appeal, directed that the initial application by the applicant be remitted for reconsideration. The order provided for the applicant to supplement its original application as appropriate within 60 days and that the respondent reconsider the internal appeal thereafter. This application before Raulinga J was brought under the auspices of the Promotion of Administrative Justice Act, No 3 of 2000,

[16] The applicant remitted the appeal in terms of section 8(6) of the Act to the respondent on 4 July 2018 for reconsideration as directed by the court order above. See annexure "FA6". All necessary documentation were annexed to the letter for reconsideration.

[17] The response from the respondent was most likely the letter dated 20

August 2018 (annexure "FA2"). In this letter the Assistant-Director Appeals notified the applicant, with reference to the applicant's letter dated 8 December 2014, that applicant's *review or appeal in terms of section 8(4)* is rejected. The reason advanced is once again the foreign language issue being discriminating against locals and that the curriculum vitae of preferred candidates were not annexed. See discussion below.

[18] It is important to note that these reasons are similar to those advanced earlier when rejecting the original application and raises the question whether the official task to reconsider indeed applied his/her mind to the reconsideration of the application. In view of no opposing papers or opposition, the likelihood thereof becomes more and more relevant.

[19] This result induced the applicant to lodge this application.

[20] It is also necessary to note that, although requested on more than one occasion, the respondent never made any recommendation, positive or negative, available to the applicant. The importance thereof is that, although the Department of Labour (DOL) may make recommendations, the decision is to be taken by Home Affairs. If there were negative recommendations made by DOL, the applicant must be informed thereof to re-

spond thereto. This did not happen at any stage since the initial application was lodged with Home Affairs.

Does the Respondent's decision dated 31 July 2018 constitute an administrative action and/or whether such decision resorts under the exclusions of PAJA?

[21] In my view it is not necessary to dwell on this issue. The previous order granted by Raulinga J on 5 February 2018 has answered this question. Suffice to state that I am satisfied that the decision taken to reject the initial application and the subsequent remitting thereof for reconsideration is warranted. The decision taken constitutes an administrative act for the following:

- * there was a decision taken by an organ of state (the Department);
- * the decision was taken by performing a public function;
- * the decision was taken in terms of legislation;
- * the decision adversely affect rights of a party; and
- * the decision has a direct, external legal effect and it does not fall under any of the listed exclusions.

See Hoexter, Administrative Law in South Africa, 2nd ed at 197.

Also see **JD de Ville, Judicial Review of Administrative Action in South Africa**, Lexis-Nexis Chapter 2 at 35 and on.

[22] The decision taken does not fall under any of the listed exclusions (such as the exercise of executive power, legislative or judicial functions and other decisions expressly excluded by the Constitution) and otherwise satisfy all the above elements.

See **De Ville supra** T 59-62 and **Hoexter supra** at 234-245.

Also see the listed exclusions in section 1 of PAJA.

[23] In terms of PAJA a court has the power to review the decision if, in the context of this application, the decision was materially influenced by an error of law (section 6(2)(d)), was taken for as reason not authorized by the empowering provision (section 6(2)(e)(i)), was taken because of irrelevant considerations were taken into account or considerations were not considered (section 6(2)(c)(iii)) or the decision was taken arbitrarily (section 6(2)(e)(iv)).

THE REVIEW OF THE RE-SUBMITTED APPLICATION:

[24] The applicant re-submitted it's application to Home Affairs on 4 July 2018 as per annexure "FA6". The letter when resubmitting the applica-

tion as per the Court order clearly indicates that it is done in terms of section 8(6) of the Act. The only response thereafter from Home Affairs is dated 20 August 2018 (annexure "FA2").

[25] The court is satisfied that when the impugned decision was taken by the respondent in *reconsidering* the application, the respondent failed to apply its mind for the following reasons:

- * the application was submitted on 4 July 2018 (annexure "FA6") and not on 8 December 2014 as indicated in the letter dated 31 July 2018 (annexure "FA2");
- * the contents of annexure "FA2" lists the same grounds for rejection as was the case when the application was first considered during 2016. No other ground or reason for rejection but for the *foreign language* issue and the failure to annex the curriculum vitae of preferred candidates were listed by the respondent;
- * a negative recommendation was received from DOL, but despite requested to forward any DOL recommendations to the applicants as requested, it was not done. The applicant was not given the opportunity

to respond to any negative DOL recommendation;

- * the response of the respondent in the replying letter (informing the applicant of the *outcome* of the application to review the appeal in terms of section 8(4) of the Immigration Act), warrants the inference that the respondent did not apply it's mind in this instance at all. This was not an appeal in terms of section 8(4) of the Act but to re-consideration the decision after being referred back to the respondent by Raulinga J. When reviewing and setting aside the decision taken by the respondent, the order further provided that the applicant may approach the court should the respondent fail to reconsider the reviewed decision. The respondent did not indicate whether it followed section 8(6) in the reconsidering of the reviewed decision.

[26] I am satisfied that the impugned decision falls within the parameters of the Administrative Law and is subject to judicial review. Sections 6 & 8 of PAJA finds application when reviewing such decisions.

[27] Section 6(1) regulate the institution of proceedings for judicial review and section 8 determines the proceedings for judicial review.

Section 8 of PAJA determines as follows:

“Remedies in proceedings for judicial review:

(1) 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-

(a) directing the administrator-

(i) ...

(ii) ...

(b) ...

(c) setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases-

(aa) substitute or varying the administrative action or

correcting a defect resulting from the administrative

action, or... (my emphasis)

[28] It was submitted on behalf of the applicant that the present application before the court amounted to be an exceptional case authorizing the court to substitute the decision as sought in the Notice of Motion. The court requested counsel on behalf of the applicant for written heads of argument

and to address the specific issue whether by substituting the existing decision the court was not intruding onto the executive usurping executive powers.

[29] The courts are normally reluctant to substitute its decision for that of the administrative authority, such reluctance of the courts' acceptance and understanding of the principle of separation of powers and the distinction between appeals and reviews. See **De Ville** *supra* p 335-338.

[30] **De Ville** opines that the question as to whether a court will depart will be answered with reference to the entire context of the case and will include the following considerations:

- * whether the administrator in question is left with any discretion in the matter or whether the end result is a foregone conclusion;
- * the importance of time considerations in the present case;
- * the willingness of the administrator to re-apply its mind to the issue;
- * indications of bias or incompetence on the side of the administrator;
- * the circumstances as it exists now as opposed to when the matter was decided by the administrator; and
- * the competence of the court *vis-a-vis* that of the administrator in deciding the issue.

These are not exhaustive and the primary consideration is fairness to all concerned.

See *De Ville* supra p 336-337; and footnote 348.

[31] **Holmes AJA** echoed that a court has a discretion to be exercised judicially upon consideration of all the facts of a case ... and that it is in essence a question of fairness to both parties. See **Livestock and Meat Industries Control Board v Garda 1961 (1) SA 342 A at 349G.**

[32] Turning to the application before court, the following aspects need to be considered:

[33] When considering the case in particular, the following observations are made:

- * It is not clear whether the decision dated 20 August 2018 is a response to the application being remitted subsequent the court order. If it is then it demonstrates the ineptitude of the administrative organ. No reasons for arriving at the decision other than the earlier reasons, were given.
- * If the decision taken was indeed taken on 31 July 2018 (annexure "FA2"), it is clear that the respondent has rejected the applicant's application on at least four different occasions for the same arbitrary rea-

sons. It then amounts to irrational decision making. There is no indication that the guidelines in the court order by Raulinga J was considered. There is nothing suggesting that the recommendations by DOL was given to the applicant although requested and in my view an aspect to consider after the remitting of the reviewed application. This amounts to the ignoring of the basic principle of *audi alteram partem rule* in that the applicant is not given an opportunity to respond to negative considerations.

- * The prejudice towards the applicant in that it cannot freely appoint permanent drivers on a three year contract, that these foreign drivers at present cannot open a bank account in South Africa leaving them exposed and vulnerable being remunerated in cash.
- * Local drivers more than often opt not to drive cross-border, resulting in the applicant's business being jeopardized. The applicant cannot appoint drivers on a more permanent scale.
- * The issue of foreign drivers being more suited to drive abroad and to communicate in the foreign languages in neighboring countries, in particular at border control posts.

- * When appointing drivers in terms of section 11(2) permits which is severely ineffective. The endorsements on these permits are often not accepted at border control causing undue long delays and constant harassment of these drivers by border control officials.

[34] If the above is taken into account and considered, I am of the view that this case qualifies to be an exceptional case warranting the relief in section 8(1)(c)(ii)(aa) of PAJA.

[35] **De Ville supra p 338** concludes that even in the event that the court substitutes its decision for that of the administrative authority, the matter is referred back to the authority to take the decision as required. The decision thus remains that of the authority and not of the court. This ensures that the court would not risk intervening with the powers of the executive.

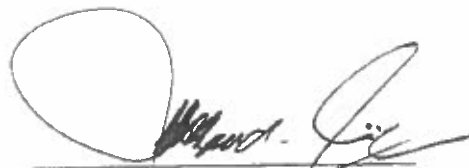
Conclusion:

[36] I am of the view that this case qualifies to be an exceptional case in terms of section 8(1)(c)(ii)(aa) of PAJA and that it would be justified to follow that process. The conduct of the respondent in my view warrants the appropriate cost order sought.

[37] I would also take the opportunity to thank Advocate Pretorius for the helpful heads of argument. It was of great assistance to finalize the judgment.

ORDER:

1. The decision taken by the respondent dated 31 July 2018 and delivered to the applicant on 20 August 2018 in which the respondent upheld the rejection of an application for a Section 21 Corporate Visa, in terms of the Immigration Act, 13 of 2002, is hereby reviewed and set aside;
2. The Respondent is directed to issue the Applicant with a Corporate Visa as applied for on 23 September 2015, under VFSReference Number TRA1733878 (alternatively TRA2536694) provided that such corporate visa shall be valid for a period of three (3) years from date of issue;
3. The respondent is to pay the costs of the application on an attorney and client scale.



J HOLLAND-MÜTER A/J
ACTING JUDGE OF THE GAUTENG DIVISION (PRETORIA)
OF THE HIGH COURT

BY ORDER OF COURT

TO: MCMENAMIN VAN HUYSSSTEEN & BOTES
ATTORNEYS FOR APPLICANT
REF: J HARMSE/IM1118
TEL: 012-344 0525

ADV K PRETORIUS
083 736 1167

FOR THE RESPONDENT: NO APPEARANCE