

DELETE WHICHEVER IS NOT APPLICABLE	
IN THE HIGH COURT OF SOUTH AFRICA	
(1) REPORTABLE: YES/NO.	YES
(2) OF INTEREST TO OTHER JUDGES (SALES DIVISION, PRETORIA)	YES
(3) REVISED.	
2/2/2017	<i>J. L. Kg.</i>
DATE	SIGNATURE

2/2/2017
CASE NUMBER: 87740/16

In the matter between:

ERG MANAGEMENT (SOUTH AFRICA) PTY LTD
(previously registered as ENRC MANAGEMENT
(SOUTH AFRICA) (PTY) LTD)

FIRST APPLICANT

DR SEBASTIAN FRANZ BUCHTE

SECOND APPLICANT

and

MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

DIRECTOR GENERAL: HOME AFFAIRS

SECOND RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] The first applicant, Eurasian Resources Management Group (South Africa) (Pty) Ltd previously registered as ENRC Management (South Africa) (Pty) Ltd is a wholly owned

subsidiary of ERG, based in Luxembourg. The second applicant ("Dr Buchte") is the Chief Executive Officer of the African Division known as ERG Africa, which has its offices situated in Kempton Park, Republic of South Africa ("the Republic"). He is also a director of the first applicant which 'renders administrative and logistical support' to all the subsidiary companies based in Africa. Such services 'include everything from budget management and financial planning to the purchasing and supplying of all the logistical requirements of the ERG Africa group. Furthermore, the first applicant conducts mining projects in several African countries, the Republic of South Africa being one of them and also has an aviation company based in Johannesburg. The first applicant has an annual turnover in Africa of about R10,5 billion with between R1 – 1,5 billion thereof being spent in South Africa.

[2] The applicants are challenging and seek to review the decisions of the respondents which placed the Dr Buchte on a V-List as an illegal foreigner which has the effect of preventing him from entering the Republic for life, thereby impacting upon his ability to perform his functions and responsibilities within the first applicant and also impacting on the rights and interests of the parent company ERG and these are set out in the affidavit. The interim relief is sought to avoid the irreparable harm that the applicants will suffer occasioned by, the inability of Dr Buchte to conduct his responsibilities which require his presence in the Republic; the inability to achieve the corporate objectives within ERG, ERG Africa; and the inability of Dr Buchte in his position as CEO for ERG Africa to engage on a personal level and within the Republic with staff and with business partners on strategic matters affecting the first applicant. Presently Dr Buchte as the expert on mining affairs in the company intends attending the annual Mining indaba in Cape Town between 6 – 9 February 2017, which is the 'primary market event', to represent and participate in presentations on behalf of ERG and its subsidiaries in Africa. This application concerns in particular his V-Listing of 21 September 2016.

[3] Therefore the applicants approached the court on urgency for the following orders:

- “ 2. Pending the outcome of Part B of the Notice of Motion, the First Respondent (“the Minister”) and the Second Respondent (“the Director General”) are directed to take all steps necessary or reasonably required to:
- 2.1 suspend the purported decision to declare the Second Applicant as a person prohibited from entering and working or qualifying for a visa for such purpose in the Republic of South Africa, and to include his name on the Department of Home Affairs’V-List;
- 2.2 grant the Second Applicant a visa in terms of section 11(2) and/or section 19 of the Immigration Act, to travel to, enter, remain in and work in the Republic of South Africa, for such period as specified in the visa, and subject to his compliance with the prescribed requirements for such visa;
- 2.3 extend and/or renew such visa in favour of the Second Applicant as necessary from time to time, subject to his compliance with the prescribed requirements for such visa;
- 2.4 allow the Second Applicant to travel to the Republic of South Africa for purpose permitted in terms of such visa(s);
- 2.5 ensure that the Second Applicant is not unlawfully impeded in physically travelling to, entering, working and residing in, and exiting from, the Republic pursuant to such visa(s);
3. Directing that costs in respect of Part A of the Notice of Motion shall be costs in the cause of Part B, alternatively shall be reserved for determination when Part B

is decided. “

[4] Part B is about the review and setting aside of:

- (a) decisions of the first respondent whereby Dr Buchte was declared a prohibited person;
- (b) the decisions taken for refusing to consider or decide favourably his application for a visa to allow him to travel and to work in the Republic which application was rejected at the South African Consulate in Munich on 30 September 2016;
- (c) the refusal to decide on the appeal lodged on 3 October 2016.

[5] The application is opposed on grounds that it was not urgent and should be struck from the roll and, on grounds that it was not competent for this court to grant interim relief when considering the application on the doctrine of separation of powers. Furthermore, that as against other foreign nationals Dr Buchte would be placed in a more favourable position by the open ended permission to enter the country.

BACKGROUND

2007 – 8 August

[6] Prior to Dr Buchte taking up employment with the first applicant he was a consultant for Boston Consulting Group (Dusseldorf) ('BCG'). He was based in South Africa on an Intra Company Transfer visa ('ICTV'). He settled in Johannesburg and purchased a home where he settled with his family, with his children attending the local German School. During April 2014 he joined the first Applicant "ERG" not "ENRC" and since he was based in Luxembourg he cancelled his ICTV for BCG. His family joined him in Germany in July 2014.

[7] After cancellation of his ICTV he had to obtain a section 11(2) visa which would have enabled him to travel to South Africa to fulfil his employment and business responsibilities with the first applicant and during that time he would be based at the offices of ENRC in Johannesburg. He was advised by one of his attorneys, Mr Wieselhalter, in April 2014 that the section 11(2) visa could be obtained only through the first respondent's head office in Pretoria, and later he was informed that the second respondent had moved the function to various Embassies. When the first applicant in Luxembourg wished to send one of its Danish employees to the Republic, the South African Embassies in Luxembourg and Denmark informed them that a section 11(2) visa was not necessary on a business visit to the Republic.

[8] 'SFB15' was annexed to the papers which referred to a request on 4 October 2014 by Dr Buchte to Mr Hansen to forward communication Mr Hansen had with the South African Consulate in Copenhagen. Mr Hansen had previously made enquiry to the Consulate to establish and to confirm that it was not necessary to have a visa for up to 90 days for business purposes because it was not clear what the distinction was between 'business visit and working'. There was further enquiry whether it would be necessary to change his status to a work permit in that he performed certain activities in the Republic, "provides advice and work alongside the South African Organisation, but I may also take on more specific 'hands on' responsibilities, e.g managing people and projects". Mr Fomsgaard from the Consulate responded on dated 19 August 2014 and stated the following::

"You are not required to hold a Visa if you as a Danish citizen are going to South Africa for business meeting and/or supervising.

Make sure you have an invitation letter from the company you are visiting, stating just that. Never mention the word work, as it is a totally different matter and a long process."

[9] On 3 August 2014 he returned to South Africa on vacation and he was accompanied

by his family. They occupied their home in Johannesburg. It was brought to his attention during this time that the ENRC's computer system had been hacked and on 8 August 2014 he was visited by officials of the respondent while he was at the ENRC offices to investigate the problem and he stated that only the ENRC staff knew of his presence. The hacking had grave consequences and security risks for ERG, ERG Africa and ENRC. It occurred at a time during negotiations regarding staff rationalization requirements with ERG.

[10] While at these offices he was informed that there were people who had come in to see him and he declined to see them and left. He later got a call from a Mr Adams who introduced himself as an official of the first respondent. Mr Adams enquired about his residence status and, at about the same time his wife called to inform him that their home had been searched without a search warrant and, that her German passport had been seized and that she was given a receipt therefore.

[11] He was summoned back to the offices of ENRC by Mr Gilbert, the Human Resources director where a meeting took place with Mr Adams from the respondents offices and other officials and Mr Behrens, ENRC's attorney. He was questioned on his employment with ENRC and he confirmed that he was employed by the parent company ERG in Luxembourg. He was not given prior notice of his constitutional rights nor was there an attempt by Mr Adams to comply with the 'basic requirements for procedurally and fair administrative action in terms of section 3 of the Promotion of Administrative Justice Act , since a decision had already been taken to deport him.

[12] Mr Adams was in possession of a document with an ENRC letterhead. He was not informed of the contents thereof and he was denied a copy. Despite denying that he had broken the law and reiterating that that he was employed by ERG, Luxembourg and not ENRC South Africa, Mr Adams advised that he had instructions to arrest and detain him at the deportation facility known as Lindela in Krugersdorp. He aware of media reports on the

alleged atrocities at such facility and he averred that this filled with him with 'absolute terror'.; He informed Mr Adams that he was visiting with his family; that despite the first respondent's system not reflecting that his ICTV with BCG had been cancelled, he retrieved another passport from his residence which reflected the cancellation.

[13] Dr Buchte averred that the passport he was carrying showed that he had entered the country on 3 August 2014 on a visitor's visa and it bore the entry stamp. It is not clear where this visitor's visa was issued. On being questioned on why he had two passports he explained to Mr Adams that he was in possession of three passports issued by the German Authorities, that he needed the passports because of his frequent travels mainly in Africa. It was legal in Germany to carry more than one passport. They asked why he had been travelling in and out of the Republic since the beginning of April 2014 and he explained that on his regular visits for the parent company ERG to the mines in the DRC, Zambia, Mozambique he was allowed to transit South Africa and to enter South Africa for business visits;

[14] Instead of being detained and deported he was given the choice to leave the country if he could secure a plane ticket to Germany that evening and he chose to leave voluntarily. At about 16h30 Mr Adams together with other employees of the first respondent drove him to OR Tambo airport. He was given a notice of deportation document to sign. The said document described him as an 'illegal foreigner' which meant that he was in principle in detention. This was done despite him indicating and scribbling in his own handwriting that he was voluntarily leaving the country. Mr Adams failed to explain his right to challenge such determination and legal consequences that would follow, despite knowledge that he was protesting the unlawfulness of the detention. He was further misled into believing that there was an ongoing investigation regarding his presence in South Africa and whether or not he should be allowed to return to the country.

[15] It was contended by the respondents that in terms of section 43 of the Act Dr Buchte had breached the terms of his work permit given when he was in the employ of BCG. Upon termination of employment with them on 31 March 2014 he failed to apply for a change of status. Furthermore, that he had left South Africa on 21 April 2014 and re-entering on 3 August 2014 under the pretext of being on vacation when he was in fact employed in South African by the first applicant. It was averred that Dr Buchte fled from his office on 8 August 2014, he was arrested, detained and thereafter deported.

8 August 2014 – February 2016

[16] An application for information in terms of the Promotion of Access to Information Act 2 of 2000 ("PAIA") was launched on 14 August 2014 and a copy of the DHA1689 notice (Notification of Deportation of an Illegal Foreigner) was availed. The decision to deport was appealed against by the lodgement to the second respondent on 25 August 2014 by notice in terms of section 8(4) of the Act. The appeal consisted of 30 pages together with annexures. On 2 October 2014 Dr Buchte was advised that since he had not exercised such right to appeal his deportation when afforded an opportunity to do so, that he could pursue the matter in terms of section 29(2) of the Act. According to the respondents this required an application for rehabilitation in the prescribed manner to be filed with the Director General.

[17] A 55 page joint appeal in terms of section 8(6) (appeal) and section 29(2) (prohibition upliftment representations) was lodged with the first Respondent on 22 October 2014. On 21 February 2015 the first respondent advised that he considered the section 29(2) representations and upheld the decisions of the Director General contemplated in terms of section 29(1). Dr Buchte averred that this was done without considering his appeal. Between 25 August and 4 September 2015 letters were written to the first and second respondents in order to secure extension of time to lodge a review application. There was no response. The respondents averred that they had no obligation to respond because the said

appeal and representations were irregular in that they were not procedures prescribed in the Act.

[18] According to Dr Buchte he was advised to rather attempt to settle the matter with the respondents and this was followed by a request from the first respondent for representations to be made in the form of a memorandum and an inspection ERG Africa, ENRC South Africa by the Department of Trade and Industry ('DTI'), which investigation was conducted. The DTI reported on 1 February 2016 that the businesses of ERG Africa were legitimate and a report was given based on the important role played by Dr Buchte within the business followed by a recommendation that he be allowed to return to South Africa.

[19] In a letter dated 8 February 2016 by Mr Matthews from the respondents' Inspectorate Inspectorate Directorate receipt of Mr Watters letter of 28 January 2016 was acknowledged. Dr Buchte was informed that he had exhausted all avenues within the Department, that the matter relating to his prohibition could not be dealt with any further. This decision did not seem to take into consideration the report by the by the DTI. An appeal in terms of section 8(4) of the Act was lodged with the Director General on 23 February 2016. The respondents contended that this appeal was made in futility because Mr Matthews' letter did not constitute administrative action. Mr Watters on behalf of Dr Buchte contended that Mr Matthews decision of 8 February 2016 was taken in terms of the Immigration Act where the Department had not considered evidence requested by the Minister as stated in the report from the DTI.

March 2016 onwards

[20] As a result of settlement negotiations engaged with the officials of the first respondent Ms Moyo and counsel for the second applicant Mr Sethene, Mr Watters was informed on 2 March 2016 by his counsel that the second applicant's V-Listing had been

lifted and that he could proceed to apply for a section 11(2) visa at the South African Consulate in Munich. It was suggested that communication from the respondents confirming such upliftment may have gone astray and it contended that Mr Sethene was precluded from filing an affidavit.

The respondents denied this version and contend that it was only the Chief Director, inspectorate who was authorised to uplift the status of a prohibited person. Furthermore there was no proof that the prohibition had been uplifted in terms of section 29(2) of the Act.

[21] Consequent upon the alleged settlement, applications for visas were lodged on 15 March and 13 June 2016 respectively and section 11(2) visas valid for 90 days were issued. The visa application forms are annexed to the papers and in both Dr Buchte had disclosed that he had been V-listed on 8 August 2014 and furthermore, that the V-listing had been lifted. The first visa that was issued by the Consulate in Munich expired on 5 June 2016 and it had a 'permission to work' endorsement. Thereafter Mr Watters addressed letters to the respondents on 18 March 2016, 29 March 2016 and 10 April 2016. The first letter was a notice of intended litigation. Mr Watters sought clarity on Dr Buchte's status and was seeking assurance that the visa would be honoured and he further gave reasons why it was necessary for him to visit the Republic.

[22] The letter of 10 April 2016 was directed to the second respondent because there was no response to the two previous ones despite proper delivery. The other concerns raised therein were that there had been no response to the fresh notice of appeal in terms of section 8(4) submitted to the second respondent on 23 February 2016 and which had cited additional/new grounds of appeal. When no reply to the letters came Dr Buchte undertook a trip to the Republic on 22 April 2016 and subsequently five others followed. The second visa expired on 9 September 2016 and in that regard he travelled to the Republic on seven occasions.

[23] On 20 September 2016 Dr Buchte travelled to Ndola, Zambia and he transited at OR International Airport. On his return on 22 September 2016 he was prevented from travelling via South Africa on grounds that he was on the V List. He had to make alternative arrangements to travel back to Zurich. He was telephonically advised on 26 September 2016 that he had been placed on the V List and no reasons were given. On 30 September 2016 he lodged another section 11(2) visa application at the South African Consulate in Munich and he was told that the application would only be received on proof that the V-Listing had been uplifted.

[24] A request for reasons for the listing together with an appeal in terms of section 8(1) of the Act followed. The second respondent was requested to adjudicate over the appeal not later than 7 October 2016. In a letter of 10 October 2016 the first respondent referred Dr Buchte to the decisions of 2 October 2014 and 21 February 2015 and confirmed the prohibition in terms of section 29(2) of the Act. It was alleged by the first respondent that Dr Buchte while knowing that he was a prohibited person had misrepresented himself at the South African High Commission in Munich in order to obtain visas which he used to travel in and out of the Republic. Furthermore, he was advised that his matter cannot be attended as he had had 'exhausted all avenues within the department of Home Affairs'.

[25] However on 19 October 2016 Mr Nkhoma of the Immigration Management Services at OR Tambo wrote to Mr Watters and posed certain questions relating to a special plea to the first respondent to reconsider Dr Buchte's status. The information was given on 20 October 2016, however, Mr Nkhoma's attention was drawn to the first respondent's decision of 10 October 2016 and it was enquired from him whether the special plea was still under consideration. There was no further communication with Mr Nkhoma after this date.

URGENCY

[26] The grounds of urgency are articulated in paragraphs 186 -218 of the founding affidavit and are summarised herein. According to Dr Buchte the businesses of ERG, ERG Africa and the first applicant are being adversely affected by his continued absence from the Republic despite him having followed all the procedures in section 8(4) and 29(2) of the Act to appeal his prohibition. ERG Africa's Head Office is in Johannesburg where its finance, procurement, IT, and other project teams are located and where the CFO and Technical Director's, who report directly to him, have their offices. It was also not an alternative to relocate himself and his management team to Lubumbashi or elsewhere in the DRC where they had been warned of possible political instability

[27] It was therefore part of the business model of the company that he be based in Johannesburg for practical, administrative and financial reasons' and in order for him to drive the present and future objectives of the company and its subsidiaries. Johannesburg was the business hub in Southern Africa where all the relevant engineering service providers were situated. Furthermore there was need for him to have personal interaction with their BEE partners. Questions had now been raised regarding his continued absence which were bound to affect his reputation and had potential of allowing competitors to have advantage over them . He had planned on behalf of ERG Africa and the first applicant to play a significant role at the mining Indaba which will be running in Cape Town from 6 – 9 February 2017 and he needed to be in the Republic to work with staff on their presentations. Lastly he had personal reasons why he was planning to return to the Republic.

[28] The urgency was opposed on grounds that there were no justifiable reasons why interim relief on an urgent basis ought to be granted. It was contended that there were no reason why the business activities of the first applicant had to be affected due to Dr Buchte's physical absence from the Republic. He had failed to cite examples how the first applicant was prejudiced during his absence from August 2014 to March 2016. In deciding that the matter was urgent I took into account the fact that Dr Buchte alleged that he had complied with the all the procedures of appeal and of requesting an upliftment of the prohibition and further that he had advance reasons as to why his presence in the Republic was required.

THE LAW

[29] Before determining whether the requirements for an interim interdict have been established and, in considering the doctrine of *separation of powers* whether the court is competent in the circumstances to grant the relief sought, I need to examine the facts and the applicability of the relevant provisions of the Act. I was informed by Mr Bofilatos that he was the third senior counsel instructed in the matter, the answering affidavit which was delivered a day before the hearing makes no attempt to deal with the allegations against the respondents and its officials especially in giving answers to the allegations that the several appeals were not properly adjudicated upon. It was lacking in details as to how the respondents dealt with Dr Buchte . The respondents were given at least three weeks to answer and in my view failure to properly deal with the allegation in the founding paper could be interpreted as a reluctance on their part to be of assistance to the court. Nevertheless I am of the view that the matter can be dealt with.

[30] It is common cause that a foreigner is not a citizen of the Republic and that an illegal foreigner would be a person who has transgressed the provisions of the Act. Dr Buchte's deportation on 8 August 2014 resulted in him being placed on the V-List as a prohibited person. Dr Buchte was not declared to be an undesirable person therefore the provisions of

section 30 of the Act are not applicable to him. The Act defines a Prohibited Person in section 29 and Dr Buchte is affected by section 29(1)(c) which defines such person as 'anyone previously deported and not rehabilitated by the Director General in the prescribed form'.

[31] Another category of an illegal foreigner is any person refused entry into the Republic by an immigration official. The refusal could be on any grounds and it is my view that it does not exclude persons defined in section 29 of the Act. The distinction relates only to the fact that such determination at a port of entry is reviewable direct to the Minister as provided in section 8(1) and 8(2) of the Act. This category is not applicable to Dr Buchte because the refusal on 22 September 2016 to allow him to travel from Ndola, Zambia via the Republic presumably occurred at the airport in Ndola and it could not have been by an immigration official in that country in the employ of the first respondent. The refusal could have been triggered by information placed on the immigration system at the airport giving details of individuals who were on a V-List who were not allowed to travel to the Republic, hence the demand at that point for Dr Buchte to furnish proof of the upliftment before being allowed to travel to the Republic from Ndola. I therefore do not share Mr Kennedy's view that Dr Buchte was place of the V List for the second time. This shall be dealt with below when examining whether Dr Buchte was ever removed from the V List of 8 August 2014.

[32] It is common cause that Dr Buchte was detained on 8 August 2014 without a warrant. Section 34(1) of the Act provides that an immigration officer may without warrant cause to be arrested or arrest an illegal foreigner and irrespective of whether an arrest has occurred either deport or cause such person to be deported, and that pending such deportation, may cause such person to be detained at a facility designated by the Director General. Section 34(1) is subject to section 34 (1)(a) to (e). The immigration officer who has arrested the affected person without a warrant and who seeks to deport such person must issue a notification in writing which complies with, section 34(1)(a), by notifying the person of his/her

right to appeal in terms of the Act; and with section 34(1)(b), by informing the person of his/her right to request that the detention be confirmed by a warrant of Court and, if such warrant is not issued within 48 hours of such arrest the illegal foreigner shall be entitled to release.

[33] Section 8 of the Act provides for the review and appeal procedure to be engaged by aggrieved persons. Section 8(1) has been dealt with above. The following sections are applicable:

- (a) section 8(3), any decision in terms of the Act that 'materially and adversely' affects the rights of any person shall be communicated in the prescribed manner and shall be accompanied by reasons for that decision'.
- (b) the aggrieved person may in terms of section 8(4) within 10 days of the notification apply in the prescribed manner to the Director General for the review or appeal of the decision;
- (c) the Director General shall consider the section 8(4) application and may in terms of section 8(5) confirm, reverse or modify the decision;
- (d) any person aggrieved by the decision in section 8(5) may in terms of section 8(6) apply to the Minister in the 'prescribed manner for the review or appeal within 10 days of such decision;
- (e) in terms of section 8(7) the Minister shall consider the section 8(6) appeal or review and either confirm, reverse or modify.

[34] On 3 August 2014 Dr Buchte and his family arrived in the Republic on vacation. As a German citizen he was in possession of a visa exempt passport which meant that as a visitor he was exempt from applying for a visa to enter the country. He qualified and was allowed to enter the Republic by means of a visitor's visa as contemplated in section 11 of

the Act, and which visa is normally issued upon arrival at the port of entry. However it seems that this visa was issued by the Consulate in Munich confirming Dr Buchte's version that the function had been moved to the Embassies. A visitor's visa is defined as one contemplated in terms of section 11(1) which may be issued for any purpose other than those provided for in sections 13 to 24 and subsection 11(2). Section 11 (2) provides that 'the holder of a visitor's visa may not conduct work: Provided that the holder ...may be authorised by the Director General in the prescribed manner and subject to the prescribed requirements and conditions to conduct work'.

Work in the Act is defined as including (a) 'conducting any activity normally associated with the running of a specific business; or (b) being employed or conducting activities consistent with being employed or consistent with the profession of the person, with or without remuneration or reward, within the Republic'

[35] On the morning of 8 August 2014 while on vacation in the Republic, Dr Buchte went to the offices of ERNC to investigate an incident of hacking which had grave consequences for ERG Africa and the first applicant. He was not employed by ERNC but by ERG Luxembourg and was CEO for ERG Africa. The interrogation by officials of the respondent at the offices of the first applicant occurred in the presence of the Human resources director, Mr Gilbert, Mr Behrens attorneys for ERNC. It seems to me that as the events unfolded Mr Adams and officials of the respondent had taken decision to arrest and to detain Dr Buchte because he was eventually arrested without a warrant as allowed by section 34(1). He alleged that no copies of the documents he signed at OR were given to him as well as a copy of a letter on the first applicant's letter head in possession of Mr Adams. Dr Buchte has not explained whether he subsequently enquired from the first applicant whether there had been prior communication with the respondent on his status and who the author might have been. The fact that Mr Adams was in possession of the letter on his visit could only mean that there was a possibility that the respondents had communicated with the first applicant

prior to his detention.

[36] It is evident from page 157 of the papers that Dr Buchte confirmed by appending his signature to the receipt of notification of deportation, that he was in detention; that he was served with a Notification of Deportation; that his rights in terms of sections 34(1)(a) and (b) were explained to him and that he could appeal to the Director in terms of section 8(4) within 10 days of receipt of the notice. He elected not to exercise such rights but to await his deportation at the first reasonable opportunity, which occurred on the same day after he had secured a plane ticket and was escorted and handed over to the immigration officials for deportation at OR Tambo. The notification of deportation does inform Dr Buchte that he shall not be allowed to return to the Republic unless he has obtained the necessary lawful authority and in my view this could be interpreted to mean authority as provided for in section 29(2). It is my view that as soon as Mr Watters obtained these forms as a result of the PAIA request he should have realized that the only course to follow was the section 29(2) application dealt with below.

[37] The requirement to provide reasons as contemplated in section 8(3) of the Act is peremptory. The regulations provide for such reasons in accordance with Form 2 of 'DHA-1714A'. It is evident from the conduct of Mr Adams that the interrogation of Dr Buchte must have been preceded by some investigation which was considered when the decision to arrest and deport was taken. Mr Adams failed to comply with section 8(3) in that Dr Buchte was not given any written reasons for such decision to arrest and deport him. This is confirmed in the respondents letter of 16 May 2015 in response to Mr Watters PAIA request.

[38] It was denied in such letter that Dr Buchte was ever arrested or that documents were ever seized from his workplace or his home. The denial is contradicted by the notification of deportation duly signed by Mr Adams and his supervisor Mr Gwala on 8 August 2014 and; proof of receipt by Mr Adams of documents seized from Dr Buchte's wife.

[39] Everyone, citizen of the Republic or foreigner has a right to procedurally fair and just administrative action as provided for in section 33 of our Constitution and from section 3 of the Promotion of Administrative Justice Act 3 Of 2000 ("PAJA"). It is therefore no excuse and not acceptable that such reasons were not made available due to the fact that Dr Buchte elected to leave the Republic voluntarily. The election to leave was preceded by an investigation and the decision to arrest and deport. In my view the absence of reasons, had the potential to adversely affect the prosecution by Dr Buchte of any envisaged appeal or review or representations to be made to the respondents in terms of the Act.

[40] On 2 October 2014 the Director General who considered Dr Buchte's appeal in terms of section 8(4) advised him to pursue his matter in terms of section 29(2) of the Act. The acknowledgement of receipt of the deportation notification is self explanatory. It is recorded that Dr Buchte elected not to exercise his rights on deportation and that he was leaving voluntarily. The other documents reveal that he was finger printed and handed over to the immigration officials at OR Tambo as a detained person. This in my view would accord with his explanation that he did not wish to be detained at Lindela.

[41] On 3 October 2014 an appeal in terms of section 8(4) and 30(2) which is attached to the papers was lodged with the respondents. It seems that on 22 October 2014 another appeal in terms of sections 8(6) and representations in terms of section 29(2) were made after Mr Matthews letter of 8 February 2016 which advised that Dr Buchte had exhausted all avenues within the Department therefore his matter could not be attended was followed by another appeal in terms of section 8(4). It is my view that the appeals in terms of section 8(4) to 8(6) were not appropriate in the circumstance because the prohibition occasioned by the deportation on 8 August 2014 had not been lifted.

[42] A section 29(2) is not a review or appeal as contemplated section 8 of the Act but a

procedure where Dr Buchte had to show good cause why a declaration should be made by the Director General to remove the prohibited person status and there had to be compliance with the procedure in the regulations. It is unfortunate in my view that anyone of the officials of the respondents would suggest that Dr Buchte had exhausted all avenues within the Department and this goes to a similar letter allegedly sent on 10 October 2016. While the Director General advised that he apply in terms of section 29(2) there is no indication that Dr Buchte complied or that the Director General considered any application in that regard and as prescribed by law or that he had communicated his reasons for declining the application in writing to Dr Buchte.

[43] In order for a prohibition to be uplifted in terms of section 29(2) a prohibited person contemplated in 29(1)(c) has to be rehabilitated and has in terms of this regulation to:

26(4)

- (a) depose to an affidavit to the satisfaction of the Director General that he shall
comply with the provisions of the Act,
- (b) has been absent from the Republic for a minimum of 4 years
- (c) has provided a police clearance.

26 (5)

a rehabilitated person shall not be exempt from the visa requirements at a port of entry.

26(6)

The Director General shall consider the following:

- (a) reasons for prohibition;
- (b) the seriousness of the offence committed;
- (c) representations made by the prohibited person, which should include a police
clearance certificate;

26 (7)

the Director General shall provide written reasons for his decision as contemplated in section 29(2)

[44] In a letter of 21 February 2015 the first respondent refers to the section 29(2) representation made to the Director General. The first respondent also upheld Dr Buchte's prohibition in terms of section 29(1). This letter without detailed particularity mentioned an investigation that had been engaged and gave reasons for deportation, ' Mr Buchte had contravened the terms and conditions of his visitor's visa, namely that he was prohibited from conducting any work whilst visiting the Republic of South Africa'. As already indicated what is lacking are the written reasons by the Director General as prescribed by regulation 26(7). In my view Dr Buchte has not shown that his section 29(2) appeal representations complied with the provisions of regulation 26 (1) to (7) copies of the 55 page appeal / representations were not annexed to the founding affidavit.

[45] The settlement negotiations that were allegedly engaged from December 2015 between Dr Buchte's legal team represented by Mr Sethene and with special adviser to the Minister, Ms Moyo are not supported by confirmation in writing as to what the terms of such settlement were and definitely did not follow the procedures prescribed in the Act and regulations. Dr Buchte applied for a visitor's visa on 29 February 2016 and one was issued on 16 March 2016 and endorsed with permission to perform his work. It is doubtful to me that any settlement or upliftment was reached. Firstly, the Act requires that reasons of an upliftment or not to be in writing. Secondly uncertainty as to Dr Buchte's status remained as expressed by Mr Watters in the letters to the Minister and Director General dated 18 March 2016, 29 March 2016 and 10 April 2016 where he was still pursuing the appeals on behalf of Dr Buchte and before he embarked on his first visit to the Republic in 2016 after being absent from the country since 8 August 2014. I must mention that these letters dispel any suggestion as argued by Mr Bofilatos for the respondents, that the visas were obtained by

giving incorrect details. Except for the fact that different passports were used Dr Buchte has not misspelt his surname in the application forms. Any misspelling of his surname in the visa can be attributed to the person issuing such visa. There was a further responsibility placed on the official at the Consulate who granted the visa to have investigated and confirm that the prohibition had been removed. The issue of the visa does not in my view mean that the prohibition had been removed as indicated it has to be done in writing by giving reasons and this is evidenced by the content of the letter discussed below..

[46] In the letter of 18 March 2016 to the Minister, Mr Watters confirms that a section 11(2) visa to travel has been issued and states while his client was still intent on challenging the prohibition *"our client is mindful of the fact that he was previously declared a prohibited person and there may still be a risk, despite the visa, that he may face detention, deportation or prosecution"...*our client does not wish to take the risk of violating South African Law' and the following assurances were sought *"to allow Dr Buchter to enter SA and to attend work described below without interference.....and while in SA neither DHA nor anyone on its behalf, will arrest, detain and or seek to remove Dr Buchter from the RSA for any reason relating to or emanating from his removal from SA on 8 August 2014"*.

REQUIREMENTS FOR INTERIM RELIEF

[47] It is trite that the requirements for an interim interdict are (a) *prima facie* right to the relief sought even if such relief is open to doubt; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted (c) the balance of convenience must favour the grant of the interdict, and (d) the absence of a satisfactory remedy to the applicant. The court must ensure that when applying these principles in deciding whether or not to grant interim relief it must do so in a way that promotes the objects, spirit and purport of the Constitution; **National Treasury v Opposition to Urban Tolling Alliance** 2012 (6) SA 223

(CC), ("Outa").

[48] Mr Bofilatos argued that the grant of the interim relief would interfere with the function of government which vests with the statutory duty to deal with Dr Buchte's application for a visa. In *Outa supra Moseneke* DCJ stated at paragraph 47:

"The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after careful consideration of separation of powers"

While the Court did not deem it necessary to define 'clearest of case' I would venture to suggest that it could include in exceptional circumstances. The difficulty however would be that an applicant for a visa would still be required to comply with the prescribed requirements for a visa.

[49] Mr Kennedy argued that in dealing with the balance of convenience Dr Buchte would suffer irreparable harm if the interim order is not granted. He argued that the decision in **South African Informal Traders Forum and Others v City Council of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg** 2014(4) SA 371(CC) was applicable where Moseneke DCJ stated at paragraph [22]

"The order sought by the applicants before this Court would not anticipate any part of the main proceedings to be determined before the High Court

in Part B. Nor would it prejudice such proceedings. On the contrary, without an order from this Court, the damage in the interim would be so severe that the applicants ability to obtained relief from the High Court in Part B would substantially be rendered nugatory. The order sought now is this no more that a “status quo order” granted in the interests of justice to prevent what might otherwise be substantial prejudice”.

In my view the matters are distinguishable in many respects. Most of the applicants in this matter did not transgress any law. Most of the traders were lawfully engaged in legitimate trading approved by the City Council. The respondents had indiscriminately evicted the traders without first distinguishing between those who were legally trading from those who were not. Furthermore, the scheme to relocate the traders to another place had been found to be unlawful and the traders had not been consulted before the evictions were effected.

PRIMA FACIE RIGHT

[50] Mr Kennedy submitted that the failure by the respondents to properly consider the various appeals lodged on behalf of Dr Buchte and dismissing them without reasons amounted to permanently excluding him from the country. The right to procedurally fair administrative action extends to everyone including a foreigner who wishes to gain entry into the country. In this instance fair administrative action commenced with the right to be heard and to be given written reasons for the deportation even if the election to voluntarily leave the country was seemingly influenced by a fear to be locked up in a facility which has the bad reputation such as that of the designated facility at Lindela. This right extends to giving reasons why the application to uplift the prohibition was refused. Communication that he had exhausted all avenues in the Act incorrectly interpreted the processes envisaged in the Act and, could be interpreted that he is permanently excluded from being admitted to the

Republic. In my view this does demonstrate the existence a prima facie right.

IRREPARABLE HARM AND BALANCE OF CONVENIENCE

[51] On his version Dr Buchte admitted to have been in contravention of his visitor's visa. He has not disclosed as to how many days during his vacation he had been at the offices of the first applicant to resolve the hacking problem. On his version alone I find it to be improbable that he could have been at the offices of the first applicant for the morning of the 8 August 2014 and officials would arrive there in order to effect a deportation. His visitor's visa unlike the one issued in March 2016 was not endorsed for work.

[52] The first relief that is sought is for the Director General to suspend the decision to declare Dr Buchte a prohibited person, to suspend placing his name on the V List, allowing him to work or qualifying him for a visa in the Republic, subject to his compliance with the prescribed requirements of the visa'. In this regard the Court should be placed in the same position which the Director General should have been placed in order to evaluate and consider the upliftment. Having regard to the requirements in regulations 26(6), this court is not in a position to direct an interim upliftment.

[53] The second, third, fourth and fifth reliefs sought are for the Court to direct the grant of a section 11(2) visitor's and/ or a section 19 work visa; extending and or renewing such visa from time to time; allowing him to travel to the Republic for purposes as permitted in the visa; that the Director General ensure that he is not unlawfully impeded in physically travelling, entering, working residing and exiting from the Republic. This too the Court cannot do. As correctly stated in the orders that are sought this must be subject to Dr Buchte's compliance with the prescribed visa requirements. If one looks at the reasons for urgency there is a plethora of reasons why Dr Buchte requires to be in the Republic. In terms of the Act all these reasons and purposes to be allowed entry into the Republic require

scrutiny by the respondents.

[54] What would the purpose be of granting interim relief if at every turn he still has to comply with visa requirements and a decision has to be made. What happens if the order is granted and he is found not to be in compliance, would this not amount to order granted in futility. In as far as the relief in section 2.2 is concerned my understanding of the provisions of the Act is that it is not possible to grant an individual a visitors and work visa at the same time. In my view this stems from Dr Buchte's view of what he thinks is the anomaly pertaining to the application of the authorisation pertaining to 'business and/or work visits.

[55] A section 11(2) visa must be endorsed by the Director General for the nature of work to be conducted during such visit and this would have been required also for the purpose of his visit to attend the mining Indaba. What is given in this application are general reasons, there is no invite, there is no indication as to the role he will play and regarding his expertise, the subject of his contribution and presentation at such Indaba.

[56] How does the Court evaluate that in this special instance that a Visa is required. The question is, has the Court been placed in the position the Director General would have been in order to consider the application. I come to the conclusion that applicant has failed to show that irreparable harm would be suffered if the interim relief is not granted and the balance of convenience does not favour the grant of an open ended relief if there is still an obligation upon him nevertheless to comply with the provisions of the Act and the possibility that his application might be declined.

ABSENCE OF A SATISFACORY REMEDY

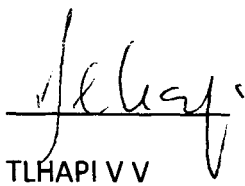
[57] In view of what has been said above it seems to me that this requirement too has not been satisfied.

ORDER

[58] In the result the following order is given:

1. The application in Part A is dismissed.

2. Costs are costs in the cause of Part B.



TLHAPI V V

(JUDGE OF THE HIGH COURT)

COUNSEL FOR THE APPLICANT : ADVOCATE P KENNEDY SC
ADVOCATE A.M VAN DEN HEEVER

ATTORNEYS FOR THE APPLICANT : CHRIS WATTERS ATTORNEYS

COUNSEL FOR THE RESPONDENTS : ADVOCATE BOFILATOS SC

ATTORNEYS FOR THE RESPONDENTS : STATE ATTORNEYS

JUDGMENT RESERVED 30 NOVEMBER 2016

For the Respondent: