



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

23/03/2017

CASE NO: 9745/2017

In the application between:

ADRIANUS CORNELIUS MARIAN HUIJSKENS

1st Applicant

MARTINA JACQUELINE WINTER

2nd Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED*

23/3/2017
DATE

SIGNATURE

THE MINISTER OF HOME AFFAIRS

Respondent

JUDGMENT

DAVIS, AJ:

- [1] The First Applicant is a citizen of the Netherlands. He is married to the Second Applicant, a German citizen. They, together with their 14 and 7 year old children are currently legally in the Republic of South Africa in terms of an intra-company transfer work permit. The intra-company transfer work permit expires on 31 March 2017.

[2] On 9 February 2017 the Applicants launched their present urgent application in terms of which they *inter alia* claim an order that the Respondent be ordered to nominate an agent or official to receive the Applicants' application for permanent residency "*on other grounds*" as contemplated in Section 27(c) of the Immigration Act, 13 of 2002, and that they be entitled to remain in South Africa pending "... *the final determination of the application in terms of Section 27(c) and/or other further steps taken in terms of the Act and/or a judicial review or any other legal action brought by the Applicants pertaining to the application for permanent residence and/or the grant of a general work permit to the First Applicant*". They also claim the issue of a "*permit or a letter*" permitting them to travel abroad and to return to South Africa once the intra-company transfer work permit has lapsed.

[3] **FACTUAL BACKGROUND:**

The Applicants allege that the factual background pertaining to their current situation is the following:

- 3.1 The First Applicant is a shareholder of RCR Industrial Flooring S.a.r.l. Luxembourg ("*RCR Luxembourg*") who is in turn the holding company of PC Floors SA (Pty) Ltd ("*PC Floors*").
- 3.2 The First Applicant is a senior executive of RCR Luxembourg and is currently the managing director of PC Floors.

- 3.3 During 2013 PC Floors and its South African sister company, RCR Industrial Flooring and T Africa (Pty) Ltd ("*RCR Africa*"), also a subsidiary of RCR Luxembourg, were running at a deficit of some R6 million.
- 3.4 Since the First Applicant's involvement in the South African companies, RCR Luxembourg has invested some R31 million in PC Floors SA and some R3 million in RCR Africa. The South African companies have been turned around and currently have a turnover of some R200 million and a profit of some R20 million.
- 3.5 PC Floors employs some 45 permanent employees and some 75 sub-contractors on a semi-permanent basis. Its BEE level has also increased to BEE Level 3 by the end of 2016 and to all intents and purposes the company is doing financially well.
- 3.6 For purposes of the above, the First Applicant has also extended the footprint of the South African companies or that of its holding company into sub-Saharan Africa and regularly travels to Africa. He makes the following statement in paragraph 4.13 of his affidavit:

"In taking the business of PC Floors forward we are in the final stages of negotiating business contracts in sub-Saharan Africa. I intend to extend these even more. The possibilities and opportunities are endless. My future strategy for RCR Africa and PC Floors aims to increase the profits to R200 million by 2021."

- 3.7 As will be more fully set out hereunder, an intra-company transfer work permit is generally a short-term affair. The Respondents' Acting Chief Director: Permits sets out the position as follows:

"Occasionally, multinational companies may decide to transfer an existing employee in a key position from a foreign branch to a branch, subsidiary or an affiliate of that company in South Africa.

These employees must apply for intra-company transfer work permits. In such cases no proof of steps taken to obtain the services of a South African citizen or permanent residents will be required. However, it is required that the Applicant must have been employed in the company abroad for at least 6 months prior to his or her transfer to the South African operations and the South African branch, subsidiary or affiliate company must provide a skills transfer plan as proof that the transfer of skills to a South African citizen or permanent residence will take place.

Section 19(1) of the Immigration Act provides that intra-company transfer work visas are issued for a maximum period of 4 years and are not renewable or extendable. Should the continued services of the Applicant for some or other reason be required by the South African operations at the end of the 4 year term an application for a new intra-company transfer work visa must be applied for from the Applicant's country of origin or of permanent residence."

(The 4 year period referred to is in fact not set out in the section but in Regulation 18(10) of the Immigration Regulations dated 22 May 2014.)

3.8 In respect of the issue of skills transfer, the First Applicant states:

“Being involved in the process of restructuring and re-establishing the company over the past 4 years had not allowed for an opportunity to identify and train a second in command who can attend to the company’s business in the event of my prolonged absence. We obviously have not contemplated the possibility of the current predicament.”

[4] The Applicants’ reasons for the present urgent application against the abovementioned factual backdrop, are the following:

4.1 The Applicants entered the country during January 2013. No detail is provided of this entry but it appears that this had been in terms of a first intra-company transfer work permit.

4.2 The current intra-company transfer work permit annexed to the founding papers, was issued on 5 February 2015 and expires on 31 March 2017. The condition thereto was that the First Applicant continues employment with PC Floors SA as a managing director.

4.3 On 9 May 2016, i.e. during the currency of the present intra-company transfer work permit, the First Applicant applied for a general working

permit as envisaged in Section 19(2) of the Immigration Act, No. 13 of 2002 (*“the Immigration Act”*).

- 4.4 In order for the First Applicant to obtain such a work permit he had to comply with the requisites of Regulation 18(3) of the Immigration Regulations in terms of which he was required to submit a certificate from the Department of Labour confirming that despite a diligent search his employer was unable to find a suitable South African citizen or permanent resident with the required qualifications or skills and experience equivalent to those of the First Applicant to take up his position.
- 4.5 The First Applicant applied to be exempted from this lastmentioned requirement in terms of Section 31(2)(c) of the Immigration Act.
- 4.6 On 17 August 2016 the application for the aforesaid exemption was refused as no “*good cause*” as required in terms of Section 31(2)(c) of the Immigration Act could be found. The First Applicant (through his employer) was advised as follows by the deponent for the Respondent, being the aforementioned Acting Chief Director: Permits:

“The holder of an intra-company transfer work visa contemplated in Section 19(5) of the Immigration Act 9 issued prior to 26 May 2014 for a period of 2 years who wish to continue with an international assignment for the remainder of the 4 year period may submit an application for a new intra-

company transfer work visa contemplated in Section 19(5) of the Immigration Act ...

Section 19(2) of the Immigration as amended inter alia aims to promote economic growth through employment of needed foreign labour which does not adversely impact on existing labour standards and rights and expectations of South African workers. Holders of the international employment contracts do not infringe on the rights and expectations of South African workers since they are not employed in a position on the establishment of the local branch, subsidiary or affiliate and their salaries and benefits are structured differently from that of South African workers.

In view of the aforementioned and based on the fact that Mr Huijskens requires a work visa to continue with his international assignment in South Africa until 31 March 2017 he is advised to apply for a new intra-company transfer visa to be issued for the remainder of this international assignment through the South African Mission in his country of origin or of permanent residence."

- 4.7 The Applicants decided not to follow the advice. Instead they appealed the refusal of their exemption application and they are awaiting the outcome of this appeal.
- 4.8 Subsequently also, the Applicants have formed the intention of remaining permanently in South Africa and, according to them or as they were advised, they intended to apply for permanent residence in terms of Section 27(c) of the Immigration Act.

4.9 They however had difficulty in making an appointment with the Respondent's agent, VFS Visa Processing SA (Pty) Ltd and upon attending such appointment, the agent refused to accept the application. This was on 12 January 2017.

4.10 A month later the Applicants launched their urgent application, initially enrolled for 7 March 2017 (being yet a further month later) when it was removed from the roll due to the fact that the application was not yet ripe for hearing. Consequently the matter came before me on Wednesday 15 March 2017 at which date it was, unsurprisingly, argued by the Respondent that any urgency in the matter was self-created.

[5] **LEGISLATIVE FRAMEWORK:**

The relevant statutory enactments are the following:

5.1 In terms of Section 10 of the Immigration Act, a foreigner who is not a holder of a permanent residence permit may enter and sojourn in the Republic of South Africa only if in possession of a visa issued by the Director-General of the Department of Home Affairs for a prescribed period. Subject to the provisions of the Act, upon application in person and in the prescribed manner, a foreigner may be issued with a visa for the purposes of transit through the Republic (as contemplated in Section 10B), visiting the Republic (as contemplated in Section 11), study (as contemplated in Section 13), conducting

activities in the Republic in terms of an international agreement to which the Republic is a party (as contemplated in Section 14), establishing or investing in a business (as contemplated in Section 15), working as a crew member of a conveyance in the Republic (as contemplated in Section 16), obtaining medical treatment (as contemplated in Section 17), staying with a relative (as contemplated in Section 18), working (as contemplated in Section 19 or 21), retirement (as contemplated in Section 20), being part of an exchange program (as contemplated in Section 22) or applying for asylum (as contemplated in Section 23).

- 5.2 The Applicants' current sojourn in the Republic is in terms of Sections 19(5) and (6) which provide as follows:

“(19) (5) An intra-company transfer work permit may be issued by the Director-General to a foreigner who complies with the prescribed requirements.

(6) The holder of an intra-company transfer work visa may conduct work only for the employer referred to in subsection (5) and in accordance with the requirements set out in his or her visa.”

- 5.3 Regulation 18(9) of the Immigration Regulations provides as follows in this regard:

“(9) In terms of Section 19(5) of the Act, the relevant employer shall ensure that –

(a) a foreigner is only employed in a specific position for which the visa has been issued;

(b) the foreign employee will at all times comply with the provisions the Act and conditions of his or her visa and undertakes to immediately notify the Director-General if the employee refuses to comply with the provisions of the Act or conditions of the visa; and

(c) a plan is developed for the transfer of skills to a South African citizen or permanent resident.

(10) An intra-company transfer work visa shall be issued for a period not exceeding 4 years and is not renewable."

5.4 A general work visa, being the one applied for by the First Applicant and in respect of which an appeal is still pending was one provided for in Section 19(2) which is a general work visa to be issued to a foreigner not falling within a category of critical skills or qualifications. The requirement in respect of which the First Applicant seeks a exemption is the following:

"Regulation 18(3):

An application for a general work visa shall be accompanied by –

(a) a certificate from the Department of Labour confirming that:

(i) despite a diligent search, the respective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant;

- (ii) *the applicant has qualifications or proven skills and experience in line with the job offer;*
- (iii) *the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic; and*
- (iv) *the contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labour standards in the Republic and is made conditional upon the general work visa being approved."*

5.5 The basis upon which the Applicants intend applying for permanent residency is the following:

"27 Residence on other grounds.

The Director General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who –

(c) intends to establish or has established a business in the Republic as contemplated in Section 15 and investing in it or in an established business as contemplated in Section 15 the prescribed financial contribution to be part of the intended book value and to the members of such foreigner's immediate family provided that:

(i) the Director-General may waive or adduce such financial or capital contribution for businesses prescribed to be in the national

interest or when so requested by the Department of Trade and Industry; and

(ii) the permanent residence permit shall lapse if the holder fails to prove within 2 years of the issuance of the permanent residence permit and 3 years thereafter to the satisfaction of the Director-General that the prescribed financial contribution to be part of the intended book value is still invested as contemplated in this paragraph."

5.6 Section 15 of the Immigration Act deals with business visas and provides that:

"(1) ... A business visa may be issued by the Director-General to a foreigner intending to establish or invest in or has established or invested in a business in the Republic in which he or she may be employed and an appropriate visa for the duration of the business visa to the members of the foreigner's immediate family ..."

5.7 In addition to the aforesaid the First Applicant relies on Regulations 24(5), 24(7) and 24(9). They provide as follows:

"24(5) An application for a permanent residence permit contemplated in Section 27(c) of the Act shall be accompanied by a certificate issued by a chartered accountant registered with the South African Institute of Chartered Accountants or a professional accountant registered with the South African Institute of Professional Accountants to the effect that –

- (a) *at least an amount in cash as determined from time to time by the Minister after consultation with the Minister of Trade and Industry by notice in the Gazette is available; or*
 - (b) *at least an amount in cash and capital contribution as determined by the Minister after consultation with the Minister of Trade and Industry by notice in the Gazette is available ...*
- (7) *An application for a permanent residence permit contemplated in Section 27(c) of the Act by an applicant who has established a business in the Republic shall, in addition to the requirements of sub-Regulation (4) be accompanied by –*
 - (a) *proof that at least 60% citizens or permanent residents are permanently employed in various positions directly in the operations of the business;*
 - (b) *proof of registration with the South African Revenue Service; and*
 - (c) *proof of registration with the relevant professional body, council or board recognised by SAQA in terms of Section 13(1)(i) of the National Qualifications Framework Act where applicable...*
- (9) *A foreigner who invests or has invested in an existing business shall, subject to this regulation, submit certified proof of investment in the business in respect of the preceding financial year..."*

- [6] The First Applicant referred to the investments made by the Luxembourg holding company into its South African subsidiary. No individual investment or cash or capital contribution was mentioned nor contemplated by him and no new business was to be established. It appears from the affidavit that the First Applicant merely seeks to intend running the subsidiary of the foreign company, ostensibly for an indefinite period of time. Whether this in itself qualifies for residence in terms of Section 27(c) or not is not now for me to decide. Further, the First Applicant has also not indicated what possible measure of success or prospective success there might be in his appeal against the refusal of the exemption of the Regulation 18(3) requirements of his previous application for a general work permit. He is also scant on information regarding the compliance with Regulation 18(9)(c) by his own employer of which he is the Managing Director. Be all that as it may, the issue is now whether the Applicants should be granted the indulgence of remaining in the Republic beyond the term of validity of the current intra-company transfer work permit and to do so whilst applying for permanent residence from within the Republic. On behalf of the Respondent it was strenuously argued that there is no reason to deviate from the express provisions of the Act and to create exceptions or precedents. As matters currently stand, there is no right in law for the Applicants to remain in the country once their current permit expires and there has been no formal application to the Director-General in terms of Section 31(2)(c) to waive the prescribed requirements or forms by way of

which the Applicants intended to submit their application for permanent residency.

[7] Upon a proper reading and consideration of the affidavits filed of record, it appears that the Applicants are the authors of their own dilemma:

7.1 They have not made any timeous application for a new intra-company transfer work permit, despite having been advised to do so as long ago as 17 August 2016.

7.2 They have unilaterally decided to pin their hopes on their general work visa application and on the appeal against the refusal of the exemption of the Regulation 18(3) requirements.

7.3 They had not in the fashion mentioned above complied with the transfer of skills or planning of a successor in the First Applicant's position.

7.4 They furnished no cogent reasons why having waited only until the 12th of January to attempt to apply for permanent residency.

7.5 They furnished absolutely no reasons why they have not, with the use of their multiple entry existing intra-company transfer work permit (with which the First Applicant had already previously left South Africa for other countries in Africa and returned) left South Africa to submit their applications (whatever they may be) in terms of the regulations at the applicable foreign missions.

[8] On the other hand, there is also no explanation by the Department why the appeal process in respect of the First Applicant's work visa application had not yet been finalised. At least the Applicants, whilst legally in the country, are entitled to rely on this outstanding pending procedure. Had the appeal been timeously completed prior to the termination or impending termination of the First Applicant's intra-company transfer work permit, he would have been able to properly arrange for the continuation of the foreign company's subsidiary's business so as to not prejudice the South African citizens employed thereat. I have also considered the personal circumstances of the Applicant and his family. Taking into account all these considerations the court is amenable to allow the Applicant and his family to remain in South until the Department has finalised its own internal processes.

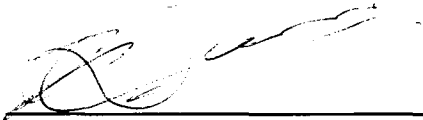
[9] **ORDER:**

In the premises I grant an order in the following terms:

1. Pending the finalisation of the appeal against the refusal of the waiver or exemption of the requirements of Regulation 18(3)(a) in respect of the First Applicant's general work visa as contemplated in Section 19(2) of the Immigration Act, No. 13 of 2002, the Respondent is interdicted from declaring the Applicants and their minor children, Zina Marie Winter and Stella Fien Winter to be undesirable persons in terms of Section 30 of the Immigration Act and/or to prosecute and/or to deport and/or to take any further steps against the

Applicants and the minor children premised on the fact that the First Applicant's intra-company transfer work permit has lapsed or will lapse on 31 March 2017;

2. Each party is to pay his or her own costs.



N DAVIS
ACTING JUDGE OF THE HIGH COURT

Date of hearing:
Judgment delivered:
Counsel for Applicants:
Attorneys for Applicants:
Counsel for Respondent:
Attorneys for Respondent: