

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 034689/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
5/11/24	
DATE	SIGNATURE

In the matter between:

ROBERT KINGSCOTT

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

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

Second Respondent

Summary: Review of the Minister's decision in dismissing the application for a critical skills visa. The applicant alleges that the decision of the Minister is reviewable on the grounds of (a) having been influenced by a material error of law; (b) having taken irrelevant consideration into account; and (c) having been taken in an arbitrary and capricious manner. None of the grounds put forward by the applicant have been shown to exist. The decision of the Minister is not reviewable either on any PAJA or legality review grounds. Held: (1) The

application for review is dismissed. Held: (2) The applicant is to pay the costs of the application taxable at scale B.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application, in terms of which, the applicant, Mr Robert Kingscott seeks to review and set aside the decision taken by the Minister of Home Affairs on 24 October 2022. The applicant contends that the decision of the Minister is to be declared to be constitutionally invalid. Having set aside the decision, this Court must order the Minister to issue the applicant with a Critical Skills Visa (CSV) contemplated in section 19(4) of the Immigration Act¹ read with regulation 18 of the Immigration Regulations². In the alternative, the supplemented application for CSV be remitted back to the Minister for reconsideration. The application is opposed by the Minister and the Director-General of the Department of Home Affairs.

Pertinent background facts to the present application

[2] Given the grounds of review putted for in the present application it is obsolete to punctiliously narrate the entire facts appertaining the application. It suffices to provide salient facts. On 8 December 2020, the applicant applied to the Department of Home Affairs (DHA) to have his General Work Visa (GWV) changed to a CSV. His application was rejected, whereafter, he lodged an appeal with the Director General of Home Affairs (DG). The DG rejected his appeal. The applicant then lodged a further appeal to the Minister. On 24 October 2022, the Minister dismissed his appeal.

[3] For the purposes of this judgment, the letter issued by the Minister, in parts, read as follows: -

“... I have decided to dismiss the said application for the following reasons:

¹ Act 13 of 2000.

² GN R413 in GG 37679 of 22 May 2014, as amended.

(a) In terms of the Critical Skills List published ... dated 03 June 2014, under the category "Engineering", no provision is made for candidate engineer, whereas you have submitted proof of your application for registration with the Engineering Council of South Africa as a candidate engineer;

(b) In terms of section 18(4) of the Engineering Profession Act, 2000 ... "A person who is registered in the category of candidate must perform work in the engineering profession only under the supervision and control of a professional of a category as prescribed", meaning that a candidate engineer works under supervision of a professional engineer. This being the case, a candidate engineer registered as such... will work under supervision of an engineer mentioned under the category "Engineer" in the Critical Skills Lists ... the latter being professional engineer ...

(c) A critical skills work visa contemplated in section 19(4) of the Immigration Act *must be in line with the content of the Critical Skills List mentioned in paragraph 2(a) above, and for the present purposes thus to an applicant who is registered as a professional engineer.*"

[4] Displeased by the decision of the Minister, on or around April 2023, the applicant, launched the present application. The application emerged before this Court as an opposed motion.

Nature of the review and the grounds upon which it is predicated

[5] Involved herein is an exercise of statutory powers, section 6(6) of the Immigration Act, by the Minister. Two judicial pathways are available in an instance where the exercise of statutory power is involved. The applicant hedged his bet on the Promotion of Administrative Justice Act³ (PAJA) as well as the legality review. In the main, the applicant impugned the decision of the Minister on three grounds; namely; (a) material error of law; based on section 6(2)(d) or (i) of the PAJA and irrationality based on legality review; (b) considered irrelevant considerations and ignored relevant ones; based on section 6(2)(e)(iii) of the PAJA and the principle of legality; (c) the decision was arbitrary or capricious; based on section 6(2)(vi) of the PAJA or the principle of legality.

³ Act 3 of 2000.

[6] For reasons that are not altogether clear, the applicant failed to bring to its aid the provisions of rule 53 of the Uniform Rules of the High Court. As such, this Court is not armed with the record of the proceedings sought to be reviewed and set aside.

Analysis

[7] It must be stated upfront that unlike an appeal, a review is not concerned with the correctness of the decision. It is concerned with the process leading to the impugned decision. In motion proceedings, a party is bound to make its case in the founding papers. The applicant chose to confine his review application to three grounds. In any matter, a Court is confined to the four corners of the pleaded case. In this judgment, this Court will look no further than the case as pleaded in the founding affidavit.

Error of law

[8] The applicant contends that the Minister misconstrued and misapplied section 19(4) of the Immigration Act and regulation 18(5) read with the directive. The directive issued by the Deputy Director General in 2014, is not law. Nevertheless, the directive only stated that there is no need to submit or request an additional document from the professional body as confirmation of skills, as that would have been considered by the professional body in the process of registering the applicant. An error of law arises in an instance where there is an error in interpretation and or application of the law. The law in this instance is section 19(4) of the Immigration Act read with regulation 18(5). Section 19(4) provides that subject to the prescribed requirements, an exceptional skills work permit may be issued by the Department to an individual of exceptional skills or qualifications and to close members of his or her immediate family determined by the Department under the circumstances or regulation. It is abundantly clear from the text of the section that exceptional skills or qualifications are contemplated.

[9] A candidate engineer cannot be seen as an individual possessed with exceptional skills or qualifications. The word exceptional, grammatically, it means much greater than usual, especially in skill, intelligence, quality, etc. A candidate engineer, which is what the applicant was registered as, cannot be said to be a greater

than usual engineer. A candidate engineer cannot work alone without supervision. Clearly, a candidate engineer is not a skill contemplated in section 19(4).

[10] Just to digress a bit, counsel for the Minister, invited this Court to in *obiter* deal with what appears to be a growing scourge in the engineering profession where candidate engineers perform the work unsupervised and for a long period of time. In some instances, engineers practice as such without being registered. This Court must mention that in terms of the law, a candidate engineer is not allowed to work unsupervised. Section 18(2) of the Engineering Profession Act⁴ (EPA), specifically provides that a person may not practice as a professional engineer for instance, unless he or she is registered as such. Accordingly, the applicant as a candidate engineer could not practice as a professional engineer, the exceptional skill required in the Republic of South Africa. Given the alleged growing scourge, although not proven before this Court, the relevant professional body, the Engineering Council of South Africa (ECSA) must seriously consider investigating this alleged illegality in the engineering profession. As the saying goes, there is no smoke without fire. Another concerning factor is that in ostensibly abusing the critical skills determination list, it is apparent that unscrupulous applicants, perhaps with the aid of their employers, pick and choose a title listed even though not registered as professional engineers, simply to achieve a favourable consideration for the CSV applications. As an example, the applicant before me chose a title of Manufacturing Manager when in truth he was not employed as such.

[11] In terms of section 14(g) of the EPA it is within the powers of the ECSA to take any steps it considers necessary for the protection of the public in their dealings with registered persons for the maintenance of integrity, and the enhancement of the status of the engineering profession. It may well be that the ECSA must begin to exercise these powers if there is any semblance of truth in the scourge revealed by counsel for the Minister. Counsel for the Minister having invited this Court to restate the law, must request the State Attorney to avail a copy of this judgment to the Secretariat of the ECSA for consideration.

⁴ Act 46 of 2000.

[12] Returning to the issue under discussion, the Minister committed no error of law when he concluded that candidate engineers are not contemplated in section 19(4). Section 6(2)(d) of the PAJA states that a Court or tribunal has the power to judicially review an administrative action if the action was materially influenced by an error of law. The decision of the Minister was not influenced by any error of law, be it materially or otherwise. Regulation 18(5) is more procedural than being substantive. However, what the regulation requires is not only proof of application, as argued by the applicant's counsel, but proof that the applicant falls within the critical skills category in the form of a confirmation, in writing, from the professional body. In other words, the proof must be one that confirms that a particular applicant falls within the critical skills category. A candidate engineer does not fall within the category of critical skills. Aptly put, a candidate engineer is not an engineer. The argument that the regulation does not distinguish between a candidate engineer and an engineer is a lame one. That argument ignores the requirement of the critical skills category.

[13] Again, when the Minister concluded that based on the ECSA registration category, the applicant lacked the necessary critical skills, the Minister was not materially influenced by any error of law. It must then follow that this ground of error of law must fail. Section 6(2)(i) of the PAJA empowers a Court to judicially review if the decision is unconstitutional or unlawful. The decision to dismiss the application for CSV cannot by stretch of any imagination be unlawful nor unconstitutional. The Minister is empowered by the Immigration Act to take the decision. There is no provision in the Constitution that prevents the Minister to take a decision to dismiss a CSV application. This ground of unconstitutionality and unlawfulness must fail. The Minister did not act irrationally since his decision is related to the purpose for which the power exercised was given. The purpose is to ensure that critical skills are retained in the Republic of South Africa. Where a skill is not critical, there is no purpose served to retain such a skill. The means used by the Minister to establish if the applicant was registered as a professional engineer is one that is rationally connected to the purpose of section 19(4) of the Immigration Act. Thus, on a legality review pathway, the decision of the Minister is unassailable.

Consideration of irrelevant and ignoring relevant considerations.

[14] The applicant alleged under oath that he was employed as a Manufacturing Manager. This being an attempt to bring himself within the list of critical skills. However, the contract of employment reveals that the OE Bearings (Pty) Ltd employed him as a Production and Design Engineer and not a Manufacturing Manager. A Manufacturing Manager contemplated in the list must be a professional engineer and not a candidate engineer. The fact that a person is registered as a candidate engineer as opposed to a professional engineer is a relevant consideration when dealing with a section 19(4) of the Immigration Act application. The Minister was required to take that fact into consideration for the purposes of considering a CSV application. Consideration of irrelevant factors and ignoring the relevant ones simply entails the failure to apply mind. Undoubtedly, the Minister had clearly applied his mind. This being motion proceedings, on application of the *Plascon Evans* principle, the version that there was application of mind is not far-fetched when the contents of the letter of the Minister are properly interpreted and considered. The provisions of section 6(2)(e)(iii) of the PAJA does not apply at all.

Arbitrary or capricious decision.

[15] This ground is predicated on an allegation that the Minister based his decision on the categorisation of engineers by the ECSA. Basing a decision on that rendered his decision to be arbitrary or capricious, so it is contended. Thereby, the decision of the Minister was allegedly tainted with irrationality. There is no merit in this ground. As indicated earlier, a candidate engineer lacks critical skills and cannot function alone in terms of the law. There is nothing arbitrary or capricious in wishing to retain skills that are critical as opposed to skills that are less critical. There is nothing exceptional with a candidate engineer. If candidate engineers had a gripe in not been listed, the 2014 regulations ought to have been challenged constitutionally.

[16] During argument, an unpleaded case predicated on the 2023 regulation was punted for under the guise of an interpretation of the word *engineer* as employed in the 2014 regulations. Hence reliance was placed on the judgment of *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources and Others (Aquila)*⁵. The

⁵ 2019 (3) SA 621 (CC) at para 73.

situation contemplated in *Aquila* finds no application in *casu*. Although counsel for the applicant was afforded some leeway to advance this unpleaded case, fact remains that such is not the applicant's pleaded case, and most significantly the 2023 regulations did not influence the 2022 decision. There was no need to interpret the word *engineer* or attempt a light throwing exercise contemplated in *Aquila*. In 2014, all what the Minister did was to determine certain listed skills to be critical skills. To determine means to cause something to occur in a particular way or to have a particular nature. Engineering is the branch of science and technology concerned with design, building, and use of engines, machines, and structures. As a broad branch, the Minister is empowered statutorily to determine that a particular skill in that broad branch constitute a critical skill for the Republic of South Africa. Regard being had to the provisions of section 19(4) of the Immigration Act, it is absurd to accept that the Minister would wish to retain candidate engineers as opposed to professional engineers as critical skills.

[17] Accordingly, this Court takes a view that section 6(2)(vi) of the PAJA finds no application in this regard. The decision to dismiss the CSV application was taken on sound legal basis and it is not arbitrary nor capricious. The decision does not offend the principle of legality since it is lawful and rational.

Order

[18] For all the above reasons, I make the following order:

1. The application for review is dismissed.
2. The applicant is to pay the costs of this application on a party and party scale taxable or to be settled at scale B.



GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 05 November 2024.

APPEARANCES:

For the Applicant:	Mr V Mabuza
Instructed by:	McMenamin Van Huyssteen, Pretoria
For the Respondent:	Mr T Segage
Instructed by:	State Attorney, Pretoria
Date of the hearing:	22 October 2024
Date of judgment:	05 November 2024