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Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20136/2022

C[...] **E[...]**

First Applicant

In her personal and representative capacities

P[...] **M[...]** **E[...]**

Second Applicant

S[...] **M[...]** **J[...]** **E[...]**

Third Applicant

and

MINISTER OF HOME AFFAIRS

Respondent

Date of hearing: 14 March 2024

Date of Judgment electronically handed down: 7 October 2024

JUDGMENT

BAWA AJ:

A. Introduction

[1] The applicants sought a special exemption for permanent residence under section 31(2)(b) of the Immigration Act 13 of 2002 (“the Immigration Act”). The first applicant (“Ms E[...]”) is the mother of (“S[...]”), a minor child who has severe dystonic spastic cerebral palsy, is developmentally delayed and non-verbal, and suffers from a form of quadriplegia. He is unable to move independently and is classified on a Level IV on the Gross Motor Function Classification Scale. The second applicant (“P[...]”) is S[...]’s minor sister. The grounds on which the exemptions are sought are S[...]’s disabilities coupled with the care and support which S[...] receives at a charitable centre in Cape Town, the Friends Day Centre (“the Friends Centre”) and medical care from Red Cross Children’s Hospital (“Red Cross”). The applicants allege that S[...] would not receive this care in Angola and this was not placed in dispute. It is clear that the family, and to a greater extent S[...] is a recipient of largesse from charities and medical organisations, including Red Cross.

[2] The respondent (“the Minister”) informed the applicants that having carefully considered all the information at his disposal he could not find special circumstances which would justify the granting of permanent residence to them pursuant to section 31(2)(b) of the Immigration Act. This refusal is the subject matter of this review application.

B. Background

[3] S[...] was born on 20 May 2007 in Luanda, Angola and is approximately 17 years of age. As a result of his severe permanent disabilities, he is unable to walk, cannot talk and cannot take care of himself. He suffers from chronic pain arising from his body’s rigidity and immobility and will require highly specialised medical treatment and care for the rest of his life.

[4] Ms E[...] was in a long-term relationship with S[...]’s father, S[...] M[...]. The family came to South Africa in November 2013. They entered the country using

visitors' visas which expired on 10 January 2014. The reason they came to South Africa was to seek the medical care that S[...] required. Shortly after they arrived in South Africa, Mr M[...] returned to Angola. Mr M[...] subsequently stopped sending money and cut ties with his wife and children, leaving Ms E[...] as an impoverished single parent.

[5] In February 2014 Ms E[...] approached the Department of Home Affairs to apply for a medical treatment visa for S[...] in order to stay in South Africa, but was informed that the applicants would have to do so from Angola. For various reasons, including both S[...]’s health and the expense, they did not do so. For all intents and purposes, the applicants have remained in South Africa unlawfully since the expiration of their visitors’ visas. There is no indication that prior to the exemption application to the Minister, any other attempts were made to legalise their stay in South Africa. As an illegal foreigner in South Africa, Ms E[...] is not eligible for employment. She is a layperson who, beyond working on an informal basis to provide for her family’s basic needs, has not secured permanent gainful employment in South Africa.

[6] S[...] was accepted at the Friends Centre. As confirmed in an affidavit deposed to by Heather Yelland, a senior physiotherapist practising at the Friends Centre, it is a special care centre that provides care, activity and therapy for children and adults with severe to profound physical disabilities. It caters for persons with special needs in Cape Town. The Friends Centre has capacity to cater for 120 learners. In 2023 it only had 83 fully enrolled learners with severe to profound disabilities, thus it not operating at full capacity.

[7] The Friends Centre operates on dedicated donor funding including funding received from the South African Departments of Health and Social Development.

[8] S[...]’s condition is incurable and he will require lifelong care and assistance, including ongoing therapy to prevent complications and maximize his mobility and function. At no cost to Ms E[...], S[...] receives speech therapy, language stimulation, aqua and other forms of therapy of the standard required for his condition at the Friends Centre. The Friends Centre has provided S[...] with an electronic wheelchair

and a tablet to enable him to move himself and communicate with others. There is no mention of S[...]’s life expectancy. There is also no mention of the exact cost implications to the South African state of his medical care, though the evidence provided is that S[...] needs multilevel surgeries which can be provided at Red Cross, as this is not included in what is provided by the Friends Centre. It is anticipated that these surgeries are required to alleviate his chronic pain and to enable him to transfer from a wheelchair to a bed, without being lifted when his mother and sister are no longer able to physically lift him.

C. The exemption application

[9] The application was made in terms of section 31(2)(b) of the Immigration Act, which states:

“(2) Upon application, the Minister may under terms and conditions determined by him or her-

(a)

(b) grant a foreigner or a category of foreigners the rights of permanent residence **for a specified or unspecified period when special circumstances exist which would justify such a decision:**

Provided that the Minister may-

(i) exclude one or more identified foreigners from such categories; and

(ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;

(c) for good cause, waive any prescribed requirement or form; and

(d) for good cause, withdraw an exemption granted by him or her in terms of this section.”

[10] In effect what must be shown is that there are special circumstances that warrant the Minister granting a foreigner, or a category of foreigners, rights of permanent residence. It is common cause that Form 47 of the Regulations provides that when the Minister takes into account “special circumstances”, the Minister must be satisfied that the issuance of an exemption to a foreigner would promote economic growth and would not be to the disadvantage of South African citizens or permanent residents. In the exemption application the applicants submitted that these considerations are inapposite to this matter as the purpose behind the application is not, at its core, to grant Ms E[...] the right to work but to provide S[...] with care and the medical treatment he requires.

[11] Given that S[...] is reliant on the care from Ms E[...] and P [...], and given the family unit, permanent residence is sought by the E[...] family as a unit, and receipt thereof would enable Ms E[...] to find employment and regularise her informal work to support her family.

[12] Though the Minister exercises a broad discretionary power, he must do so within the confines of legality and the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

[13] The special circumstances relied upon by the applicants in the application were:

“9.1 S[...]’s medical condition and the need for long-term medical assistance require his continued residency in South Africa for the foreseeable future;

9.2 S[...] has benefitted from vital medical assistance and an exceptional support system in South Africa, which he would lose and be unable to replace if required to return to Angola, to his lifelong prejudice;

9.3 There are no other adequate alternative visa or immigration options available to E[...] family;

9.4 The E[...] family have built a connection to South African society, in which they have resided and integrated over the past six or so years; and

9.5 The fact that any ministerial exemption would not undermine the South African economy.”

[14] In addition, the applicants requested that the Minister to consider the application through the prism of the Constitution and the Children’s Act 38 of 2005 (“the Children’s Act”) giving primary consideration to the best interests of the minor child, specifically disabled children and to apply section 31(2)(b) of the Immigration Act with a humanitarian dimension.

[15] The primary exceptional circumstance relied on to obtain a ministerial exemption stems from S[...]’s condition and his need to receive specialised treatment in South Africa. It was stated in the application that S[...]’s condition would severely deteriorate were he no longer to have access to treatment at the Friends Centre and Red Cross. The application to the Minister also makes it clear that the applicants (not only S[...]) are dependent on scholarships and charities which, though generous “are not certain to continue into the future”.

D. The impugned decision

[16] The Minister is empowered to grant a permanent residence exemption when special circumstances exist that justify such decision.

[17] The Minister’s decision dated 12 June 2022 is as follows:

“Having carefully considered all the information at my disposal, I wish to inform you that I could not find special circumstances which would justify the granting of permanent residence status to your client and her children.

You have approached me to consider granting Ms C[...] E[...] and her children, P[...] and S[...], rights of permanent residence status through exemption, *inter alia*, because of the fact that S[...] M[...] J[...] E[...] was born with Cerebral

Palsy, a serious impairment. Whilst it is understandable that S[...] receives medical treatment and therapy in South Africa relating to his medical condition, the Act does make provision for foreigners to obtain visas for the purposes of medical treatment. The notion that your client is impoverished and without funds cannot be the reason for why they are unable to obtain the relevant legalising documents. The fact that you have made it clear that they live off the funding from charity organisations which is not guaranteed to last indefinitely, makes your client highly likely of becoming a public charge.

You are undoubtedly aware of the economic situation South Africa is facing and the high rate of unemployment amongst our citizens and permanent residents. It should be known that the responsibility towards your client lies with her country of origin, Angola. For these reasons alone, I am not prepared to favourably consider your application on behalf of Ms E[...] and her children.” (Underlining added)

[18] The applicants seek to have the impugned decision reviewed and set aside in terms of the PAJA and pray that the Court direct that the applicants be issued with the exemptions sought, alternatively that the matter be remitted for a fresh decision within three months. In the founding papers the applicants rely on sections 6(2)(f)(ii), 6(2)(h), 6(2)(i) and 6(2)(e)(iii) of PAJA.¹

E. Grounds of review

¹ “6 Judicial review of administrative action

(2) A court or tribunal has the power to judicially review an administrative action if-

(e) the action was taken-

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(f) the action itself-

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.”

[19] The applicants raised four grounds of review which they contend vitiated the Minister's decision.

[20] First, that the Minister erred in finding that the applicants could obtain medical treatment visas in terms of a medical visa issued under section 17 of the Immigration Act,² when as a matter of fact and law they cannot.

[21] The applicants submitted that it was irrelevant whether medical treatment visas were generally available to other persons who may meet the criteria. What is relevant is that all three applicants could not obtain medical treatment visas. Even if S[...] could obtain such visa, such visas are not available to S[...]’s family on whom he still depends, both as a child and as a person with special needs. This was not a solution because S[...] would be separated from his family. But even if they could, Ms E[...] and P[...] would not be allowed to work or study s relative with a medical visa. As there are no alternative visas or permits which Ms E[...] and P[...] would qualify for, were S[...] to follow the medical visa route, he would be separated from his family, who are his primary caregivers. In support of their contentions, the applicants referred to the Minister’s answering affidavit in which the Minister acknowledged that medical visas are not a substitute for permanent residence.

[22] Second, medical treatment visas are limited to a maximum of six months in terms of regulation 16(2). S[...]’s condition is permanent and only an exemption will provide him with permanent residence. He cannot reasonably be expected to reapply every six months. In his answering affidavit, the Minister also admitted that

² “17 Medical treatment visa

(1) A medical treatment visa may be issued to a foreigner intending to receive medical treatment in the Republic for longer than three months by-

- (a) the Director-General, as prescribed; or
- (b) the Director-General through the registrar's office or a designated official of an institution where the foreigner intends to receive treatment, provided that such institution-
 - (i) has been approved by and is in good standing with the Director-General;
 - (ii) certifies that it has received guarantees to its satisfaction that such foreigner's treatment costs will be paid;
 - (iii) in the case of a minor, provides the name of a person present in South Africa who is, or has accepted to act, as such minor's guardian while in the Republic or certifies that such minor will be accompanied by a parent or guardian to the Republic;
 - (iv) undertakes to provide a prescribed periodic certification that such foreigner is under treatment; and
 - (v) undertakes to notify the Director-General when such foreigner has completed his or her treatment.”

medical visas are not appropriate where there is a need for medical care in South Africa on an ongoing basis because of permanent incapacity. Consequently, the Minister had misdirected himself in his reliance on the availability of medical treatment visas.

[23] Third, that the Minister was wrong to find that the applicants were highly likely to become public charges because they live off funding from charitable organisations, which is not guaranteed indefinitely. The Friends Centre have undertaken to support S[...] on a permanent basis.

[24] In respect of the third ground of review, it was submitted that on the evidence before the Court, the concern that the funding for S[...] would run out, making him a burden on the State's purse, is unwarranted. The applicants, in the founding and supplementary founding affidavits, set out that the Friends Centre has an established and continuous track record of 64 years. It is alleged that once admitted, the students receive care for their entire lives. The Friends Centre has made provision for S[...]’s lifelong stay for free, including advance planning and engagement with their donors. The applicants argue that the Minister has offered no evidence for the claim that S[...] is likely to end up a burden to the State and has failed to explain what facts this conclusion is based on.

[25] In the applicants’ heads of argument, the emphasis had shifted to the fact that the Friends Centre had resources and was prepared for S[...]’s long-term enrolment and that the alleged error made by the Minister was in respect of his view of the alleged unreliability of the care and support provided by the Friends Centre. This, it was contended, was of limited relevance.

[26] Finally, the applicants state that the decision fails, both implicitly and explicitly, to take into account the best interests of the child as required by section 28(2) of the Constitution. The Minister’s decision condemns S[...] to a life of suffering in Angola, even though charities in South Africa are willing and able to assist him. The Minister’s decision is thus contrary to the best interests of the child which are paramount.

[27] In this regard the applicants submit that the Minister failed to treat the best interests of the child as of paramount importance when refusing the exemptions. In addition to section 28 of the Constitution, section 6(2)(f) of the Children's Act provides that "[a]ll proceedings, actions or decisions in a matter concerning a child must ... recognise a child's disability and create an enabling environment to respond to the special needs that the child has".

[28] In terms of section 11 of the Children's Act, in matters concerning disabled children, due consideration must be given to the following: (a) providing the child with conditions that ensure dignity, promote self-reliance and facilitate active participation in the community and (b) providing the child and the child's caregiver with the necessary support services. In matters concerning children with chronic illness, due consideration must be given to providing the child with the necessary support services.

[29] Mr Simonsz, with Ms Labuschagne, for the applicants submitted that the paramount consideration for the Minister ought to have been whether his decision would be in S[...]s best interests. Applying the principles set out in *S v M*,³ which dealt with the sentencing of a primary caregiver of children, it was argued that the Minister ought to have considered whether his decision would promote a life of dignity, nurture a life free from avoidable trauma, and provide both the child and the child's caregiver with the necessary support services. Instead, it was submitted, the decision exposes S[...] to a life of unending misery.

[30] Further, that it was not constitutionally permissible for the Minister to take the approach that he had, namely that Angola bore the responsibility for S[...] and that it was neither appropriate nor justifiable to grant permanent residence on the basis that S[...] would receive better medical treatment in South Africa. The Minister was exercising a public power concerning a disabled child in South Africa and as such he was required to treat S[...]s best interests as of paramount importance.

³ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 CC at paras [19] – [20].

[31] It was further submitted that the consequences for S[...] if he returned to Angola were so harsh, and the burden on South Africa, if he remained, were so negligible that the decision could not be found to be reasonable, rational or constitutional.

F. Minister's submissions

[32] Mr Rosenberg, who appeared for the Minister, correctly submitted that the Minister is vested with a broad discretion in terms of section 31(2)(b) of the Immigration Act and provided that the discretion was properly exercised (which it was submitted was the case), his decision was valid and should not be set aside on the basis that a court, or another decision-maker, would have reached a different conclusion, or on the basis that the plight of the applicants were exceptional and deserving of sympathetic treatment.

[33] He submitted that the Minister had appreciated the nature and extent of S[...]’s disability, however, S[...]’s needs, deserving as they were, did not, without more, trump all other considerations.

[34] The Minister, also a qualified medical doctor, averred that he was under no misapprehension as to the nature of S[...]’s condition and his needs and the short-term character of medical treatment visas.

[35] It was submitted that the Minister was obliged to take a range of factors into account, which factors had been listed in the reasons for his decision. The Minister had considered the medical reports supporting the application for exemption which made it clear that S[...]’s condition required long-term treatment and support and that his family played an important role as caregivers. The Minister also took into account the fact that South Africa had provided S[...] with medical services since 2014 and that the support available in South Africa would probably significantly exceed that which he would receive in Angola. Further, the Minister fully appreciated the challenges which S[...] might face on return to Angola in the short, medium and long term. I pause to note that in the answering affidavit, the Minister stated that the application lacked detailed and satisfactory evidence of the lack of appropriate

medical treatment and care in Angola. This, the applicants submit, was an impermissible supplementation of the reasons for his decision. Be that as it may, the application was argued on the basis that South Africa offered health care to S[...] that was not available to him in Angola.

[36] The Minister took the view that severe disability and the relative lack of capacity in an applicant's country to deal satisfactorily with such disability is not sufficient, without more, to justify an exemption and the grant of permanent residency. Similarly, the fact that the applicant would be better off under South African healthcare was also not in and of itself a justifiable basis for granting permanent residence.

[37] Further, the Minister was of the opinion that there was an insufficient basis to conclude that the charitable treatment being received would continue indefinitely and it was likely that such generosity would not be maintained in the long term. In light of the high demands on South Africa's medical, social, and economic resources as a result of high unemployment, the primary responsibility for the applicants lay with Angola rather than South Africa.

[38] The Minister submitted that in weighing all the factors in favour of, and those operating against, the granting of the application, he decided not to exercise his discretion to grant permanent residence. Reliance was placed on *MEC for Environmental Affairs and Development Planning v Clairisons* wherein it was stated:⁴

"The law remains, as we see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere".

[39] The Minister characterised the applicants' challenge, based on the aforementioned four grounds on the part of the Minister, as material mistakes of fact.

⁴ 2013 (6) SA 235 (SCA) at para [22].

However, because none of the mistakes of fact were uncontentious and objectively verifiable, it was submitted, relying on *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another*,⁵ that contesting the assessment and weighing of the facts by the decision-maker does not amount to a recognisable ground of review.

G. Evaluation of review grounds

(i) Relevant law

[40] The Minister is bound by the reasons given for refusing the exemption applications and cannot raise or rely on further reasons in an answering affidavit to justify the decision taken. Indeed, the Minister confirmed that the factors he took into account were listed in the reasons for his decision, yet apparent from the answering papers, the Minister sought to supplement those reasons.

[41] The Supreme Court of Appeal (“the SCA”) in *National Lotteries Board v South African Education and Environment Project*⁶ stated that:

41.1. the duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly;

41.2. the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable;

41.3. such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified because in truth the later reasons are not the true reasons for the decision, but rather an *ex post facto* rationalisation of a bad decision.

⁵ 2020 (4) SA 453 (SCA) at para [23].

⁶ *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para [27].

[42] Although the above pronouncement was *obiter dictum* in *National Lotteries Board*, the principle that a decision maker is bound by the reasons given has consistently been followed and applied.⁷ The Constitutional Court in *National Energy Regulator of South Africa and Others v PG Group and Others*,⁸ affirmed the SCA's decision in *National Lotteries Board* to the effect that reasons formulated after a decision has been made cannot be relied upon to render the administrative decision rational, reasonable and lawful.

[43] As far as review based on mistakes of fact is concerned, in *Airports Company South Africa v Tswelokgotso Trading Enterprises CC*⁹ the Court summarised the current state of the law as follows:

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

(ii) Grounds of review

[44] At the outset I point out that the applicants' contentions that S[...] would not be provided with adequate care by the medical care system in Angola were not placed in dispute, although no substantive evidence to that effect was contained in the exemption application before the Minister concerning the quality of care in Angola. The Minister took it no further than saying that “the medical care provided to S[...] in South Africa would probably significantly exceed that available in Angola”.

⁷ See also *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) footnote 85; *Umgeni Water v Sembcorp Siza Water (Pty) Ltd and Others*; *Minister of Water & Sanitation v Sembcorp Siza Water (Pty) Ltd and Others* 2020 (2) SA 450 (SCA) at para [52]; *Becker v Minister of Mineral Resources and Energy and Others* [2023] 2 All SA 73 (WCC) at para [85].

⁸ 2020 (1) SA 450 (CC). See also *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* 2023 (2) SA 305 [SCA] at para [19].

⁹ 2019 (1) SA 204 (GJ) at para [12].

[45] In relation to the first ground of review, much reliance is placed on the phraseology in the decision that “the Act does make provision for foreigners to obtain visas for the purposes of medical treatment.”

[46] The Minister’s position was that he had appreciated medical visas did not provide a basis for medical treatment in South Africa on a long term and permanent basis. The Minister had stated that he was aware of the limitations attaching to the grant of medical visas.

[47] At no stage does the Minister state he is refusing the exemption application on the basis that the applicants should be applying for a medical visa. In this regard the first ground is premised on a misconstruction of what is stated in the reasons. On my reading of the Minister’s reasons - when read in their entirety - it cannot be said that he laboured under any illusion that the medical visa was akin to that of permanent residence, nor does he suggest that Ms E[...] and P[...] would be entitled to apply for such. There is no suggestion that S[...] should be seeking a short-term visa twice a year as suggested by the applicants. The Minister perceives the second ground of review as simply a reformulation of the first ground.

[48] It was also not the Minister’s position that Ms E[...] and her daughter could apply for medical visas. The entire gist of the exemption applications was that of S[...] requiring medical care and treatment and his dependence on his mother and sister for care. Ms E[...] and P[...] have not shown any special circumstances independent of S[...]’s care that would warrant them being granted permanent residence. Quite correctly, given this interdependence of the applicants, their applications were reliant on whether or not S[...]’s medical and care needs are sufficient to constitute special circumstances which qualify them (as his caregivers) to obtain permanent residency. The Minister indicated in his answering papers that his reference to medical visas was not a factual error. Rather that he sought to make the point that medical visas are available in appropriate circumstances for medical treatment and that in principle, permanent disability with the accompanying ongoing need for medical care and treatment in South Africa is not in and of itself a basis for obtaining permanent residence rights in South Africa. When an applicant applies for a medical visa to enter South Africa, consideration is given as to whether

or not to grant a foreigner a visa to enter South Africa for medical treatment. If such is refused, then such person cannot enter and *vice versa*. In the instant case no such permission was sought.

[49] I do not read the Minister's reference to medical visas in his reasons as a conclusion that the applicants could have obtained medical treatment visas in terms of section 17 of the Immigration Act, nor was he saying that they should rather have applied for such visa. The Minister in his reasons points out that the Immigration Act makes "provision for foreigners to obtain visas for the purposes of medical treatment."

[50] In other words, as the Immigration Act makes specific provision for visas to be obtained for medical treatment, and if an applicant seeks to have medical care in South Africa, that is the provision under which applications should be made, so that proper consideration is given as to whether an applicant should be granted a visa to enter South Africa for the purposes of getting medical care.

[51] By implication, as such medical visas are not available to S[...]’s family on whom he still depends, both as a child and as a person with special needs, they are not a solution because S[...] would be separated from his family.

[52] The Minister did not in his reasons indicate that a medical visa was an alternative. It follows that the Minister would have been aware that medical visas could only be issued for a maximum period of six months at a time.¹⁰ Indeed the Minister confirms in his answering affidavit that medical visas are not a means to obtain indefinite medical care in South Africa in circumstances where there is a permanent incapacity. This was also not the basis on which the applicants lawfully sought entry to South Africa. One could understand why caution would be exercised in relation to the need for permanent care and medical treatment being a basis on which to obtain permanent residence in South Africa.

¹⁰ Regulation 16(2).

[53] In relation to the third ground, the Minister argued that the third review ground had been refashioned in the applicants' head of argument. The applicants had accepted in their founding papers that they were dependent on the charity of others and that there could be no certainty that these charities would support them indefinitely. It is indeed so that all the applicants are supported by charity. S[...] is only at the Friends Centre for four hours of the day. As far the Friends Centre is concerned, the extensive evidence before the Court about the sustainability of free care being provided for S[...] by the Friends Centre was not before the Minister when he made his decision.

[54] With reference to Ms E[...] and P[...], all that the exemption application discloses is that the former does informal "work" and the latter is still a minor. To draw the conclusion that the applicants are dependent on charity is not a factual error based on what was put before the Minister. Even with regard to the Friends Centre and its operations, its funding comes from donors and governmental departments. Given that the essential medical care is provided by Red Cross, as much of an assurance as the Friends Centre seek to provide to the Court, there is an element of uncertainty in relation to the costs of S[...]’s medical care and how Ms E[...] and P[...] would be supported. Given the level of unemployment in South Africa and high percentage of unemployment in the unskilled labour market, which Ms E[...] finds herself in, the exemption application does not provide clarity as to how this family will not be a burden to the State. The Friends Centre does not provide meals, or other necessities nor is it a residential facility shelter to S[...] and/or his family. It operates from 08h15 to 14h00 Mondays to Friday during the school term, which coincides with that of the Western Province school system and so S[...] is not cared for at the Friends Centre after school hours, on weekends and during school holidays. It is thus up to Ms E[...] and P[...] to care for S[...] during those times.

[55] There is no mistake of fact on the part of the Minister in relation hereto. Ms E[...] and her children have been dependent on charitable support. This is also so stated in the founding affidavit. In the Minister’s view it was unlikely that this charity would endure indefinitely and it was probable that at some point the applicants would require State assistance and as such become a "public charge".

[56] The fourth ground relates to S[...] and P[...]’s rights as minor children. There is no indication from the reasons furnished that their rights as children were taken into account. The Minister accepted he was required to give due and full consideration to the nature and importance of S[...]’s condition and what would be in his best interests – he indicated to the court that he had done so and in coming to his decision, he indicated that he recognised the quality of care which S[...] was receiving in South Africa and what challenges he would face by forfeiting those benefits. Though he indicated that he was aware of the rights in the Constitution and the Children’s Act and took them into account, there is no indication from the reasons furnished that the Minister did indeed apply his mind to the fact that two of the applicants were minor children who has already spent several years in South Africa. It appears from the reasons that the Minister did not have regard to the exemption application through the prism of section 28 of the Constitution read with the Children’s Act. This is the primary reason why this decision is being set aside.

[57] The Minister submitted that the paramountcy of the best interests of the child does not operate as a trump to all other rights and considerations. Indeed, this is correct but it does require a balancing of rights to be undertaken and there is no indication that such balancing occurred.

[58] On the totality of the evidence presented before this Court, the inescapable conclusion is that the Minister failed to consider the impact of his decision on S[...] and P[...] with reference to their rights encapsulated under section 28 of the Constitution read with section 36 of the Constitution and the relevant provisions of the Children’s Act.

[59] Consequently, the Minister's decision must be reviewed and set aside on the grounds that he failed to consider relevant information under section 6(2)(e)(iii) of PAJA.

[60] The Minister set out a number of further factors he took into account which, in brief, included:

60.1. S[...]’s severe disability and Angola’s inability to deal with it did not justify an entitlement to permanent residence;

60.2. Evidence as to the availability in Angola in relation to appropriate medical treatment was brief, undetailed, and unsatisfactory;

60.3. Medical visas are available for particular medical needs and emergencies;

60.4. Better medical facilities in South Africa were not an appropriate and justifiable reason for granting permanent residence;

60.5. Insufficient bases to conclude that the charitable support to the applicants would continue indefinitely and would probably taper off in the longer term; and

60.6. High demands on South African medical services, economic and social resources and unemployment rate.

[61] Though all these reasons are relevant, they were not all contained in the reasons provided to the applicants in response to their exemption application. To the extent that some of these reasons are not included in the reasons furnished to the applicant by the Minister, there is no indication that such were considered at the time the decision was taken nor the extent of the weight given thereto. The furnishing of full and complete reasons is important so that the basis on which decision-makers take decisions that affect the rights of those affected is clear and not open to doubt or speculation regarding what the decision-maker intended or meant. In my view the explanation from the Minister falls foul of the principle articulated in the *National Lotteries Board* and other cases referred to above.

[62] Had the reasons as set out in the answering affidavits been the reasons articulated in response to the exemption application, there would have been greater clarity provided to the applicants as to the reasons for the Minister’s decision.

[63] In reaching this conclusion I make no findings that the position of the E[...] family constitutes special circumstances. Given the conclusions reached above, this is for the respondent to decide as I am not in a position to do so for reasons set out below.

H. Substitution

[64] The applicants argued that this was a case in which the Court should substitute the Minister's decision in terms of section 8(1)(c)(ii)(aa) of PAJA with an order issuing the permanent residence exemptions.

[65] The test for when it is appropriate for a court to substitute is set out in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*:¹¹

“To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.”

[66] The applicants submit that all of the relevant information, facts, and medical history is before the Court. They say that their core claims are undisputed, namely that S[...] receives exceptional, free and lifelong care in South Africa and that there are no alternative mechanisms by which the applicants can stay in South Africa.

¹¹ 2015 (5) SA 245 (CC) at para [47].

They argue that the issue of whether the Friends Centre will, at some future stage, no longer be able to support S[...] should be decided in their favour.

[67] In light of the aforementioned and the constitutional statutory duties resting on public decision-makers when making decisions in respect of children, the applicants submit that it is a foregone conclusion that S[...] and his family are deserving of permanent residence exemptions. Any other outcome would be so detrimental to S[...] that it should not be permitted.

[68] The Minister submitted that the applicants' argument which relied on the assumption that the Friends Centre would take care of all of S[...]’s needs and that S[...]’s interests are dispositive of the application was incorrect.

[69] The Minister further submitted that were the Court to set aside the Minister’s decision on the ground that one or more of the grounds relied upon by the applicants, the Court could not conclude, when regard is had to S[...]’s best interests, that the result is a foregone conclusion. It would be an unwarranted infraction of the separation of powers for the Court to embark on the required weighing up process and to exercise a discretion which has been conferred on the Minister.

[70] I am inclined to agree with the Minister. Were the Court to be careless in assuming powers bestowed on the Minister, especially in the context of S[...]’s medical condition, it may well create a ground for permanent residence carved as an exemption that was not contemplated by the Legislature. S[...] is most fortunate. I cannot but be mindful of the number of children born in the Western Cape, and for that matter in South Africa, with special needs like S[...], and as reflected in a number of judgments, albeit in the context of medical negligence cases, who are not provided with “world-class therapy” by way of charitable assistance or receive access to electric wheelchairs and electronic equipment which has been afforded to S[...]. These judgments reflect that the cost of the care and medical treatment

required by children, with the same or very similar conditions, as S[...] are calculated to run into millions of rands.¹²

[71] Apart from the charitable assistance, the evidence is that S[...] requires extensive medical care. Whilst this can be provided by Red Cross the applicants' application is silent on how the costs of such medical care would be borne. There is nothing to indicate that this will not be borne by the State.

[72] It is thus understandable that caution needs to be exercised in relation to the need for permanent care and medical treatment being a basis on which to obtain permanent residence status in South Africa. The reality is that indeed the South African government is likely to bear the costs of S[...]’s medical care – it does so already directly in relation to the “free” medical treatment provided to him at Red Cross and even contributes indirectly to his care as the Departments of Health and Social Services respectively provide subsidies and/or assistance to the Friends Centre. It is also so that S[...] is only at the Friends Centre a few hours each day. Currently, he is being cared for the remainder of the time by Ms E[...] and P [...], but if that is no longer possible for whatsoever reason, then in all likelihood it will have to be the State that steps in to care for him in a special facility. The implications thereof require careful consideration, more so, because it may set some sort of precedent. I am certainly not equipped to give proper consideration to what ultimately is a policy-laden decision to make.

[73] In light thereof, and given the broad discretion of the Minister, I take the view that the decision should be set aside and be remitted for reconsideration. Albeit that this matter comes before this Court by way of a review of an exemption, I cannot exclude the possibility that it potentially has significant cost implications for the public purse or may result in an unintended precedent being set with far wider impact than only the applicants in this matter.

¹² See generally a reflection of the costs in *MEC for Finance, Eastern Cape and Others v Legal Practice Council and Others* 2023 (2) SA 266 (ECMk); *TN obo BN v MEC for Health, Eastern Cape* 2023 (3) SA 270 (ECB); *MSM obo KBM v MEC for Health, Gauteng* 2020 (2) SA 567 (GJ) ([2020] 2 All SA 177; [2019] ZAGPJHC 504)

[74] While the applicants sought that in the event the matter is remitted, the Minister should be given three months to redetermine the matter, I am mindful that there is a new incumbent Minister who would have to consider the application afresh and may require a longer period of time or more information.

I. Conclusion

[75] The applicants are not lawfully in South Africa and have remained in South Africa undocumented for approximately ten years. They entered under the guise of a visitor's visa "for holiday purposes" when their purpose was to come to South Africa specifically to obtain medical care for S[...]. This, without applying for a medical visa, thereby not giving the South African authorities an opportunity to grant or refuse a medical visa and/or to grant or refuse entry based on the facts. It is only now that an application for permanent residence is sought for the first time.

[76] The applicants have been assisted on a *pro bono* basis. Although the application has succeeded and the decision is remitted back to the Minister for fresh reconsideration, however, in the circumstances I make no order as to costs.

[77] The following order is made:

1. The respondent's decision in terms of which the applicants' application for exemption in terms of section 31(2)(b) of the Immigration Act 13 of 2002 is reviewed and set aside;
2. The matter is remitted to the Minister for reconsideration in the light of this judgment and to do so within a period of six months;
3. There is no order as to costs.

N Bawa
Acting Judge of the High Court

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to SAFLii. The date of the judgment is deemed to be 07 October 2024.

Appearances:

Counsel for the applicant: Adv D Simonsz, with Adv Labuschagne instructed by Cliffe Dekker Hofmeyr Inc

Counsel for the respondent: Adv S Rosenberg SC instructed by State Attorney, Cape Town

Date of hearing: 14 March 2024

Date of Judgment electronically handed down: 7 October 2024