REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: **097109/2023**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[redacted] 22.07.2025

In the matter between:

SITRUSRAND BOERDERY (PTY) LTD Applicant

and

MINISTER OF EMPLOYMENT AND LABOUR First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF EMPLOYMENT AND LABOUR Second Respondent

MINISTER OF HOME AFFAIRS Third Respondent

DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS Fourth Respondent

The matter was heard in open court and the judgment was prepared and authored by the judge whose name is reflected herein and was handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date of handing-down is deemed to be 22nd July 2025.

JUDGMENT

KEKANA AJ

INTRODUCTION

[1] The applicant seeks to review and set aside a decision that was taken by the Department of Employment and Labour ("the Department") refusing/rejecting the applicant's application for a letter of recommendation required in terms of section 21 of the Immigration Act, 13 of 2002 read with regulation 20(1)(b) of the Immigration Regulations ("the decision"). The decision involved the refusal to issue a letter of recommendation (Working Condition and Salary Benchmarking Certificate) required by the Department of Home Affairs ("Home Affairs") to obtain a Corporate Visa.

[2] The decision was taken by the Department's Adjudication Committee on the 24th March 2023 and communicated to the applicant on 12 April 2023.

[3] Section 21(1) of the Immigration Act reads: "Subject to subsection (1A), a corporate visa may be issued by the Director-General to a corporate applicant, to employ foreigners who may conduct work for such corporate applicant in the Republic."

[4] Regulation 20(1)(b) of the Immigration Regulations provides that when applying for a corporate visa, the applicant must submit a completed Form 13 and provide: (a) Proof that there is a need to employ the number of foreign nationals requested; and (b) A letter from the Department of Labour confirming that: (i) A diligent search was conducted but no suitable South African

citizens or permanent residents were found for the positions; (ii) Job descriptions and proposed remuneration for each foreign employee are provided; and (iii) The salaries and benefits offered to foreign workers are not less than those offered to local employees in similar roles.

BACKGROUND

[5] The applicant, a farming company specialising in citrus produce, grows, packs and exports South African citrus. It required 762 workers for various positions in anticipation of the March to October 2023 harvest season. The positions are as follows: 696 General farm workers; 52 Packers and Auto packers; 1 Grader/sorter; 10 Carton Makers; 2 Auto Packer Operators and 1 Handyman/maintenance worker.

[6] The Applicant advertised 762 vacancies in the local newspaper in English. The recruitment drive yielded only 15 applications. None of the applicants were found suitable for the positions. On 10 February 2023, the applicant applied to the Department for a letter of recommendation as required in terms of section 21 of the Immigration Act, read with regulation 20(1)(b) of the Immigration Regulations, alleging that it could not find suitable locals to fill the positions.

[7] The applicant sent a letter contemplated in Regulation 20(1)(b) of the Immigration Regulations for purposes of obtaining a corporate visa to employ foreign workers to fill the 762 posts. In response the Department referred a list of 1244 potential candidates via email to the applicant on several dates as follows:

7.1 On 24 February 2023, a list of 594 potential candidates was sent to the applicant;

7.2 On 26 February 2023, an additional list of 246 potential candidates was sent to the applicant;

7.3 On 1 March 2023, a list containing 122 more potential candidates was sent to the applicant;

7.4 Finally, on 22 March 2023, a further list containing 249 potential candidates was sent to the applicant.

[8] On 24 March 2023, the Department's International/Cross-Border Labour Migration Management Adjudication Committee ("the Adjudication Committee") convened a meeting to adjudicate the applicant's application.

[9] On 11 April 2023, the applicant offered written feedback to the Department on the recruitment drive it had conducted following interviews with those who had responded to advertisements that had been placed in various community halls within Sunday's River Valley and surrounding areas, and those who had been referred to the applicant by the Department ("the feedback").

[10] In the feedback, the applicant indicated to the Department that 1 759 candidates applied for the posts, but only 58 candidates were successful. On the 12th April 2023, the Department transmitted an email to the applicant communicating the decision. The decision is contained in the Department's letter dated 11 April 2023, in which the Department communicated that the application for a letter of recommendation is refused/rejected. The letter reads as follows:

"This letter serves to inform you that after careful consideration of your application for a Working Conditions and Salary Benchmarking Certificate in respect of your Corporate Visa (DHA-1743) application, the Department of Employment and Labour made a negative recommendation thereon based on the following factor: The skill is available in the country."

[11] It is the above decision that is the subject matter of this review application.

GROUNDS OF REVIEW

[12] The applicant's grounds of review are as follows: (a) the department failed to consider relevant considerations, (b) the decision is irrational; (c) the decision is procedurally unfair

APPLICANT'S SUBMISSIONS

[13] The applicant submitted that the Department did not take cognizance of the reality that there were only 3 candidates with the required skills, while it was looking to place 672 candidates. In this regard, the applicant contends that the department failed to consider relevant factors. Further, the decision is procedurally unfair because the applicant was not provided with an opportunity to make representations before the decision.

[14] The Applicant further contends that the decision-maker failed to consider the feedback provided on the list of potential candidates that were sent to the applicant. The basis for this contention is that this feedback was provided after the meeting of the Adjudication Committee and that because the decision is dated 11 April 2023, the same day the feedback was communicated to the Department, the decision maker could not have considered it.

[15] A further submission by the applicant is that the deponent of the respondents' affidavit lacks personal knowledge of the contents of the affidavit and the authority to make the affidavit. In the absence of a confirmatory affidavit from one of the members of the Adjudication Committee, due to her absence at the adjudication meeting, her statements are hearsay. Because the deponent did not attend the meeting and sign the letter (decision), she was not involved in making the impugned decision.

RESPONDENTS' SUBMISSIONS

[16] The respondents submitted that the applicant failed to demonstrate that it conducted a diligent search, resulting in an inadequate outcome. Further, had the Applicant conducted a diligent search and conducted interviews in good faith, it would have been able to find suitable candidates, as the required positions are for general workers whose skills are generally available in the country.

[17] Initially, the applicant advertised only in a local newspaper in English, despite some or the majority of potential candidates being unable to read English. This, the respondents submit, is a lack of intention to find suitable candidates.

[18] Following the Department's assistance in recruiting potential candidates and reviewing the applicant's reasons for not finding suitable candidates, the Department was not satisfied that the feedback was satisfactory because it maintains the skill is available in the country. The respondent submitted that the reasons that were provided by the applicant were considered and found wanting, and these include:

18.1Non-compliance with the application procedure;

18.2Insufficient experience in roles such as packers, sorters;

18.3Submission of duplicate applications;

18.4Absence of experience with citrus farming;

18.5Lack of familiarity with packhouse operations;

18.6Insufficient understanding and poor eyesight;

18.7Inability to perform basic counting tasks;

18.8Limited proficiency in English; and

18.9Failure to attend scheduled appointments/no-show.

[19] Finally, the respondents contend that, considering that the applicant submitted all pertinent information through Form 13 and provided additional details through subsequent engagement, the procedure was fair as the applicant had been given many opportunities to present its case.

DEPONENT OF THE ANSWERING AFFIDAVIT INCOMPETENT

[20] The applicant contends that the deponent to the answering affidavit is not competent to depose to the affidavit because the deponent did not form part of the committee that took the decision on the 24th March 2025.

[21] The respondent contends that the deponent occupies the position of chief director of Employee Services, a unit responsible for overseeing the issue of the certificates in question. Further that the deponent indicated that she considered the records and the documents in making the decision.

[22] The deponent is an official in the department and her knowledge is based on documents which have been identified and form part of the record herein. In the answering affidavit, the deponent places no reliance on consultation with another person to gain knowledge and therefore the allegations contained in the answering cannot be held to be hearsay.

APPLICABLE LEGAL PRINCIPLES: JUDICIAL REVIEW

[23] It is trite that all exercises of public power must comply with the principles of lawfulness, reasonableness, and procedural fairness, as guaranteed by section 33 of the Constitution and codified in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Judicial review under

PAJA is concerned with how the decision was taken, not the merits thereof (See Trencon Construction v IDC 2015 (5) SA 245 (CC).

[24] In terms of section 6 of PAJA, administrative action is reviewable on, inter alia, the following grounds: (a) The action was unauthorised or the administrator acted beyond their powers; (b) The action was taken without considering relevant factors or based on irrelevant considerations; (c) The action was not rationally connected to the purpose, the information before the administrator, or the reasons given; (d) The procedure followed was procedurally unfair; (e) The decision-maker was biased or acted for an ulterior purpose or in bad faith.

[25] Even where a ground of review is established, the court has a discretionary remedial power under section 8 of PAJA, which includes setting aside the decision, remitting it, or substituting it where appropriate.

ANALYSIS

FAILURE TO CONSIDER RELEVANT CONSIDERATIONS

[26] The applicant submitted that when the Adjudication Committee considered the applicant's application on 24 March 2023, the feedback regarding the 1,759 potential candidates had not yet been received, as it was only provided to the Department on 11 April 2023. It was further submitted that the record contains no indication that, after the feedback was received on 11 April 2023, the Adjudication Committee reconvened to consider it prior to the decision being communicated to the applicant the following day, on 12 April 2023. Further that there is similarly nothing in the Rule 53 record to suggest that the written feedback was considered at any stage of the decision-making process. On this basis, the applicant contends that the Department failed to take relevant considerations into account in making its decision.

[27] The respondent submitted that the applicant failed to demonstrate that it had conducted a diligent search. It was further submitted that, had the applicant conducted interviews in good faith, it would have identified suitable candidates. The respondents maintained that the positions for which the applicant sought foreign workers were for general labour, and that such skills are commonly available within the country.

[28] On 10 February 2023, the Director-General of the Department of Employment and Labour (DoL) acknowledged receipt of the applicant's work visa request. The letter stated:

> "As part of our thorough process, the provincial office of the Department will advertise the job opportunity on the Employment Services of South Africa (ESSA) system, consult with private recruitment agencies, and review national jobseeker databases to determine if the required skills are available.
>
> The final decision on your application will be communicated in writing by the Chairperson of the Adjudication Committee within 30 working days."

[29] Importantly, before the Department made its decision, it attempted to verify whether the necessary skills were indeed unavailable locally. It is undisputed that a recruitment campaign was conducted by the Labour Centre in the Sunday River Valley and Motherwell regions following the applicant's application. This drive attracted 1,410 job seekers, and approximately 1,006 were verified and referred to the applicant.

[30] On 24 March 2023, the Adjudication Committee met to review the applicant's request. According to the minutes of that meeting of the adjudication committee, the job was listed on the ESSA system, and 5,995 job seekers were matched to the opportunity. In addition, 1,410 people responded through the Labour Centre's recruitment, with 1,006 verified and referred to the applicant. After reviewing all of this, the committee recommended against the application, stating that the required skills are available in the country.

[31] Section 21(2)(d) of the Immigration Act requires the Department to consider, among other things, any representations made by the applicant regarding the need to employ foreign nationals. In its application, the applicant indicated that its own recruitment efforts—specifically, an advertisement placed in a local newspaper—had not yielded suitable candidates. The committee's adverse recommendation took into account not only this attempt by the applicant but also the parallel recruitment efforts undertaken by the Labour Centre, including the verification of job seekers.

[32] The applicant's contention that the respondents failed to consider the feedback that was sent to the department on the 11th April 2023, which was relevant to the decision, was not considered. The respondents contend that the deponent considered the feedback before the decision was made. Considering the number of potential candidates on the ESSA system, the respondent's assertion that the feedback was considered cannot be denied. The deponent indicated that she considered the feedback and was unconvinced that the applicant could not find the skill it required locally. The applicant did not prove otherwise.

[33] In my view, the Department duly considered the applicant's representations and also took into account the broader context. This included the general availability of the skill set in question, the thousands of potential matches identified on the ESSA database, and more than 1,000 verified job seekers who were referred to the applicant for employment.

[34] Accordingly, I am of the view that the Department considered all relevant facts in concluding that the skill is readily available in the country. The applicant's failure to successfully place candidates does not negate the existence of over 5,000 potential job seekers on the ESSA system. [35]In these circumstances, the Department cannot be faulted.

RATIONALITY

[36] The applicant contends that the decision by the Adjudication Committee is reviewable and ought to be set aside on the basis of irrationality as contemplated in section 6(2)(f)(ii)(cc) of PAJA

[37] The applicant argued that the adjudication committee was presented with information indicating that only 3 job seekers were placed, whereas the applicant was seeking 762 workers. Accordingly, the decision is not justified by or rationally connected to and supported by the information before the Adjudication Committee. The applicant contends that given the foregoing, the decision is liable to be reviewed and set aside for want of rationality.

[38] The respondent argued that the department considered the information before it and concluded that the skill that the applicant sought to fill was available in the country. The respondent contends that the decision aligns with the Department's mandate to ensure that the skill in question is genuinely unavailable in the country before the foreign nationals are allowed to occupy the

positions in question. The respondent submitted that the purpose for which the power was granted was to address the socio-economic and employment challenges that South Africa faces.

[39] It is well established that a decision is reviewable under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") if it is not rationally connected to the information before the administrator or to the reasons provided by the administrator. The inquiry under this ground is whether the decision is rationally justified and supported by the information that was before the decision-maker at the time, as well as the reasons given for the decision.

[40] Where a decision is not rationally connected to the information before the administrator or the reasons provided, it is reviewable for irrationality. (See Pharmaceutical Manufacturers Association of SA: In re President of the RSA 2000 (2) SA 674 (CC)).

[41] In the present matter, the Adjudication Committee had before it the following information:
(a) The applicant sought to employ 696 general farm workers, 52 packers and auto-packers, 1 grader/sorter, 10 carton makers and auto-packer operators, and 1 handyman/maintenance worker;

(b) Despite placing an advertisement in the local newspaper, the applicant was only able to place 3 workers;

(c) The Department conducted a recruitment drive which resulted in a substantial number of jobseekers expressing interest in the advertised opportunities and being referred to the applicant;

(d) A total of 1 244 verified potential candidates were sent to the applicant for consideration. Based on this information, the Department concluded that the skills required were available within the Republic and, accordingly, refused the application.

[42] In terms of section 21 of the Act, the Department is required to be satisfied that, following a diligent search, the applicant was unable to find suitable local candidates. The statutory power to approve the employment of foreign nationals is triggered only once it is established that the required skills are not reasonably available within the local labour market. This power is intended to ensure that job opportunities are, in the first instance, made available to South African citizens

and permanent residents. Having found that there were thousands of potential candidates on the ESSA system, the committee could rightfully not accede to the applicant's application.

[43] In the circumstances, and given the information before the Adjudication Committee, the decision to refuse the application is rational and cannot be faulted.

PROCEDURALLY UNFAIR

[44] The applicant submitted that the Department failed to afford it an opportunity to make representations prior to taking the impugned decision. Consequently, the provisions of section 3(1), read with section 3(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), were not complied with, rendering the decision procedurally unfair and susceptible to review.

[45] The respondent, on the other hand, contended that the Department followed the procedure prescribed by the applicable regulations. It argued that, in terms of the regulatory framework, once an application is submitted, the Department is required to take a decision based on the information provided. Accordingly, the respondent submitted that the applicant's version was placed before the decision-maker through the application itself, and no further procedural step was envisaged.

[46] In support of this contention, the respondent relied on the decision in Jaihai v Financial Services Tribunal and Another (3416/2022) [2023] ZAGPPHC 697; [2023] 4 All SA 404 (GP) at para 42, where Sardiwalla J reaffirmed the principle that while procedural fairness is a fundamental requirement under PAJA, it should not be interpreted in a manner that imposes rigid or expansive obligations that unduly inhibit the state's ability to function effectively.

[47] It is trite that procedurally unfair administrative action is reviewable under PAJA. In the present matter, the applicant set out the considerations prescribed in Regulation 21 in its application, including its assertion that, despite a diligent search, it was unable to locate suitable candidates domestically. The Department, however, rejected the application on the basis of the results of its own recruitment efforts, which indicated that a significant number of suitable local candidates were available.

[48] In my view, no further representation was required in the circumstances. The procedure inherently assumes that if the Department is satisfied that the skill in question is not available in the country, it will approve the application. Conversely, if the Department concludes that the skill is available, it will reject the application. The recruitment data placed before the adjudication committee confirmed the availability of the skill in South Africa. Importantly, the decision of 12 April 2023 reflected the same rationale considered by the committee and was not based on any new material or undisclosed considerations. The basis for the refusal – namely, the availability of the skill locally – was known from the outset.

[49] Requiring the adjudication committee to invite further representations in such circumstances would, in my view, amount to an unwarranted procedural burden inconsistent with the objectives of efficient administration. In Moseme Road Construction CC and others v King Civil Engineering CC and another 2010 (4) SA 359 (SCA) the refused to impose a relief against Moseme Road Construction CC despite finding that the process followed to award the tender to Moseme Road Construction was flawed. Essentially finding that not every error will lead to a decision in favour of the applicant in review applications.

CONCLUSION

[50] Having considered the grounds upon which this review is based, the court finds that the applicant has failed to demonstrate that the respondent's decision is reviewable or liable to be set aside. In the court's view, the Department duly considered all relevant factors placed before the committee. Furthermore, the decision was rational and the procedure followed cannot be faulted.

I therefore make the following order:

1. The application for review is dismissed with costs.

[redacted]

KEKANA PD
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 19th February 2025

DATE OF JUDGMENT: 22nd July 2025

APPEARANCES

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