

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 7155/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
Date: 26 August 2025

In the matter between:

KHUMBULANI NDEBELE

First Applicant

NOKUKHANYA FUNDILE KHUMALO

Second Applicant

and

DIRECTOR GENERAL: HOME AFFAIRS

First Respondent

MINISTER OF HOME AFFAIRS

Second Respondent

Coram: M Van Nieuwenhuizen, AJ

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

INTRODUCTION

[1] This is an application in terms of which the applicants seek an order to review, set aside and substitute the decision taken by the first respondent on the 28th of July 2017 and the 8th of November 2019 not to lift the applicants' prohibition person status in terms of section 29(1)(f) of the Immigration Act,¹ (hereinafter referred to as "*the Immigration Act*"), alternatively the applicants request that the decision be remitted to the first respondent for reconsideration.

[2] The respondents oppose the application. The respondents contend that the first applicant obtained a South African identity document ("*ID*") through fraudulent means. Additionally, the respondents maintain that subsequent to his deportation, the first applicant unlawfully re-entered the country. The first applicant denies having fraudulently obtained an ID.

CONDONATION

[3] The applicants seek condonation for the delay in instituting the application in terms of the timelines contained in section 7 of the Promotion of Administrative Justice Act, 3 of 2000 (as amended) (hereinafter referred to as "*PAJA*").

[4] During the hearing, counsel representing the respondents abandoned their opposition to the condonation sought by the first applicant for the extension of the time periods provided in terms of section 7(1) of PAJA for the institution of the review application.

[5] The decision by the Director General was received by the first applicant on the 8th of November 2019 and the application for review was instituted on 16 February 2021. It is common cause that the application was instituted outside the 180 days prescribed by section 7(1) of PAJA.

[6] Under section 7 of PAJA, it follows that the Court is only empowered to entertain the review application if the interests of justice dictates an extension in

¹ Immigration Act 13 of 2002 (as amended)

terms of section 9 of PAJA.

[7] Factors to be considered was set out in ***City of Cape Town v Aurecon SA***² as being an enquiry into the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised and the prospects of success. The applicants brought the application approximately 186 days after the expiry of the 180 day period provided for in section 7 of PAJA.

[8] The main reason alleged by the applicants for the delay was due to financial constraints, which prevented the applicants from securing legal representation to pursue the application for review before the Court.

[9] The applicants furthermore allege that they have good prospects of succeeding in the application.

[10] It is in the interests of justice for this Court to grant the application in terms of section 7(1) of PAJA and accordingly condonation for the late institution of the application is condoned.

PRELIMINARY POINT - FAILURE TO EXHAUST INTERNAL REMEDIES

[11] The respondents took a point *in limine* that the applicants have failed to exhaust the internal remedies as contemplated in section 7(2)(a) of PAJA and as such prior to the judicial review the applicants ought to have appealed or reviewed the decision by the first respondent in terms of section 8(6) of the Immigration Act.

[12] The respondents argue that in *casu*, the first applicant was advised to appeal the decision of the Director General to the Minister upon receipt of the outcome from the Director General.

² 2017 (4) SA 223 (CC) at para 46

[13] In the circumstances, the respondents argue that the first applicant was pertinently presented with the opportunity to challenge the decision of the Director General, however decided not to do so, but to directly approach this Court, without exhausting the internal remedies provided for in law. The applicants were obliged in law to comply with section 7(2) of PAJA and there are no exceptional circumstances warranting such failure.³

[14] This Court was referred to the Western Cape matter of **Arthur v Director General, Home Affairs**⁴ by the applicants' counsel.

[15] The importance of this judgment is that it addresses the question whether an internal review or appeal lies against a negative decision of the Director General under section 29(2) of the Immigration Act and secondly, what the appropriate test is that should be applied by the Director General under section 29(2) of the Immigration Act.

[16] The Western Cape High Court in the **Arthur** matter stated that there is some uncertainty that emerges from the High Court cases as to the proper interpretation of section 29(1) of the Immigration Act and its effect in law. The result of this uncertainty has been that the parties, in matters such as **Gbedemah**⁵ and **Najjemba**⁶, have adopted the approach that a negative decision from the Director General under sections 29(2) of the Immigration Act is capable of appeal or review to the Minister under section 8(6) of the Immigration Act.⁷ The Court in the **Arthur** matter stated that a different approach was taken in that matter. The applicant

³ **Abid Ali v Minister of Home Affairs** (TPD Case No. F36405/2006)

⁴ (17549/2022) [2023] ZAWCHC 198 (10 August 2023)

⁵ **Gbedemah and Another v Director General: Department of Home Affairs and Others** (Case No. 2011/17479)

⁶ **Najjemba v Minister of Home Affairs and Another** 2022 JDR 3050 (WCC). The Court also referred to the matter of **AK and Others v Minister of Home Affairs and Another** 2023 (3) SA 538 (WCC)

⁷ **Arthur** matter, *Ibid*, para 23

framed his review on the basis that the Director General's decision under section 29(2) is a decision of first instance, and not a review or appeal of a prior decision under section 29(1).⁸ (Own emphasis)

[17] In regards to the question of whether an internal appeal lies against a decision of the Director General, the Court in the **Arthur** matter⁹ referred to the case of **Director General, Department of Home Affairs and Others v Link and Others**¹⁰ where the Full Bench held that where the Director General takes a decision at first instance, no appeal lies to the Minister against that decision under section 8(6) of the Immigration Act.¹¹ Although **Link** dealt with the Director General's decision in an application for permanent residence, and not with section 29(2) of the Immigration Act, the principle remains the same. (Own emphasis)

[18] An appeal to the Minister under section 8(6) of the Immigration Act is an appeal against a decision of the Director General that has been taken in a review or appeal to the Director General against another official's decision.¹² In other words, the appeal to the Minister under section 8(6) of the Act lies against decisions of the Director General *when he is, himself, deciding a review or appeal*. The appeal under section 8(6) of the Immigration Act does not lie against decisions of the Director General when he takes the decision at first instance (Own emphasis).¹³

[19] Section 29(1) of the Immigration Act is a section that deems certain people to be prohibited persons by operation of law. It does not require a separate decision to be made by any official before the person concerned is prohibited. Their prohibition status arises by operation of law when they fall into one of the categories of persons listed as prohibited under the section.¹⁴

⁸ **Arthur** matter, Ibid, para 24

⁹ At paras 25 and 26 of the Judgment

¹⁰ 2020 (2) SA 192 (WCC), paras 49 and 50

¹¹ **Arthur**, para 25

¹² **AK**, para 31

¹³ **Arthur**, para 26

¹⁴ **Arthur**, para 27

[20] This means three things:

[20.1] First, where a person is notified that they are a prohibited person under section 29(1) of the Immigration Act, their remedy is to apply to the Director General to declare that they are not prohibited under section 29(2);

[20.2] Second, because the section 29(2) decision by the Director General is a decision of first instance, it is not appealable under section 8(6) of the Immigration Act to the Minister;

[20.3] Third, the remedy for a person aggrieved by the Director General's refusal to declare him/her not prohibited under section 29(2) is to bring a review application in the High Court.¹⁵

[21] Accordingly, when a person is notified that they are a prohibited person under section 29(1) of the Immigration Act, their remedy is to apply to the Director General to declare that they are not prohibited under section 29(2). Because section 29(2) is a decision of first instance by the Director General, it is not appealable under section 8(6) of the Immigration Act to the Minister. A person's remedy aggrieved by the decision of the Director General in refusing to declare them not prohibited, is a review to the High Court.

[22] In *casu* it was submitted by counsel for the applicants that the decision by the Director General at first instance is not appealable in terms of section 8(6) of the Immigration Act and accordingly the point *in limine* of the respondents should fail.

[23] The following chronology and documents are relevant:

[23.1] On 28 July 2017 a decision was made by the Director General confirming that the first applicant's application for the upliftment of the prohibition in terms of section 29(2) has been unsuccessful.¹⁶ The rejection letter was signed by an official on behalf of the Director General.

¹⁵ **Arthur**, para 28

¹⁶ Founding Affidavit, Annexure "**KN13**", CaseLines 001-37

[23.2] On the 13th of September 2017 the first applicant lodged a section 8(6) review application to the Minister.¹⁷

[23.3] On the 8th of November 2019, the Director General submitted a second decision that the first applicant's prohibition shall not be uplifted. This rejection letter was signed by the Acting Director General. The Director General's decision was communicated as an outcome in terms of a section 8(4) appeal, which was argued by the applicants was not the case and such an appeal was not lodged under section 8(4).¹⁸

[24] Clearly the decision taken on the 8th of November 2019 (Annexure “**KN15**”) is taken by the first respondent at first instance and does not constitute the outcome of an appeal against the decision of the first respondent on the 28th of July 2017. This would constitute an irregularity. Hence the decision of the 8th of November 2019¹⁹ basically constitutes a re-affirmation of the decision taken on the 28th of July 2017²⁰ by the first respondent. It is apparent that the first applicant intended to review the decision of the first respondent dated the 28th of July 2017 on the 13th of September 2017.²¹ However that application found its way back to the first respondent, hence the decision of the 8th of November 2019.²² In Court counsel for the respondents argued that the internal review to the second respondent was premature as it was prior to the decision taken on the 8th of November 2019. Clearly the internal review application to the second respondent was brought as a result of the decision taken on the 28th of July 2017.

[25] Section 3(2) of the Immigration Act expressly stipulates that the Director General may, subject to terms and conditions that he or she may deem necessary, delegate any power conferred on him or her by this Act, to an officer or category of officers or an employee or category of employees or a person or category of persons

¹⁷ Founding Affidavit, Annexure “**KN14**”, CaseLines 001-38 to 001-43

¹⁸ Founding Affidavit, Annexure “**KN15**”, CaseLines 001-44 to 001-45

¹⁹ Annexure “**KN15**”, CaseLines 001-44

²⁰ Annexure “**KN13**”, CaseLines 001-37

²¹ Annexure “**KN14**”, CaseLines 001-38 to 001-43

²² Annexure “**KN15**”, CaseLines 001-44

in the public service, but shall not be divested of any power so delegated.

[26] Accordingly, it is clear that the Director General may delegate his powers however he remains responsible for any action arising from that delegation of power. I therefore agree with the applicants' submission that as such the applicant could not submit an appeal to the same office that made the decision as that would have been irregular.

[27] As such the decision by the first respondent on the 8th of November 2019 constitutes a decision by the first respondent at first instance and as a consequence having regard to the principles as set out in the **Arthur** matter – because section 29(2) is a decision of first instance by the Director General (the first respondent) it is not appealable under section 8(6) of the Immigration Act to the Minister. A person's remedy aggrieved by the decision of the Director General in refusing to declare him not prohibited, is a review to the High Court.

[28] Accordingly, the respondents' point *in limine* is dismissed.

THE TEST UNDER SECTION 29(2) OF THE IMMIGRATION ACT

[29] In the **Gbedemah** matter²³ this division of the High Court held that it is for an applicant under section 29(2) to “*satisfy*” the Director General that he was entirely ignorant of the unlawfulness that resulted in his prohibition person status under section 29(1) of the Act. The Court set the test under section 29(2) as being whether the Director General “*is satisfied that the applicant in question was truly innocent*”.²⁴

[30] On this articulation of the test, a burden is placed on a person, who has been prohibited under section 29(1)(f) of the Immigration Act, to provide an explanation of why he is innocent of the circumstances that resulted in his prohibition

²³ **Gbedemah and Another v Director General: Department of Home Affairs and Others** (Case No. 2011/07479); **Arthur** judgment, para 34

²⁴ **Gbedemah and Another v Director General: Department of Home Affairs and Others** *supra* at para 33

under section 29(1). In exercising his power under section 29(2) the Director General will assess the adequacy of that explanation.²⁵

[31] There will be a range of factual circumstances in which an applicant's explanation will be given and what amounts to good cause will differ, depending on the facts of each case. At a minimum, however, the explanation would likely have to include the circumstances in which the fraud arose, the level of involvement of the applicant in the events that resulted in the fraud, and where possible, support for these assertions with any documents that demonstrate the applicant's innocence. Merely asserting that the applicant was innocent of the fraud, without doing more, is unlikely to meet the burden that showing cause places on an applicant under section 29(2).²⁶

[32] In **Najjemba**²⁷ the Western Cape High Court held that section 29(2) requires an applicant to "*put forward any reasons that might constitute good cause as to why he or she should not be a prohibited person*".²⁸ The Court further held that the Director General must take into account factors "*other than those that resulted in the prohibition under section 29(1), in order to determine whether there exists good cause to declare an otherwise prohibited person not to be prohibited*".²⁹

[33] In **Najjemba**, the Court set aside a decision to refuse to lift the applicant's prohibition status because it found that the applicant had provided all the evidence at her disposal including various payments to the immigration agency she had utilised, and her communications with the agency.³⁰ In the light of this evidence, which appeared not to have been properly considered, the Court held that the Minister (on appeal) had not answered the right question. The Minister had focused on the fact that the applicant was prohibited under section 29(1)(f) of the Act and did not

²⁵ **Arthur** Judgment, para 35

²⁶ **Najjemba v Minister of Home Affairs and Another** *supra*; **Arthur** Judgment, para 36

²⁷ **Najjemba** *supra* at para 25; **Arthur** judgment *supra* at para 38

²⁸ **Najjemba** *supra* at para 34

²⁹ **Najjemba** *supra* at para 34; **Arthur** judgment para 38

³⁰ **Najjemba** *supra* at para 39; **Arthur** Judgment, para 39

consider her explanation, together with all its supporting documents, for why despite the fact that she had been in possession of a fraudulent work visa, there was good cause to declare her not to be prohibited.³¹

[34] In **AK**,³² the Western Cape High Court reviewed and set aside the Director General's decision under section 29(2) of the Act because the applicant had provided "*all the evidence at her disposal*" and it was difficult to ascertain what more she could or should have done to show good cause for her prohibited status to be lifted.³³ Key to the Court's discretion was also the fact that the Director General had failed to take into account the impact that the refusal to lift the applicant's prohibited status would have on her minor children. As a result, the Court reviewed, set aside and substituted the Director General's decision.

THE DIRECTOR GENERAL'S REASONS

[35] The two decisions to reject the first applicant's application for upliftment of the prohibition provides the following reasons for the decision:

[35.1] The decision by the Director General of 28 July 2017 provides the following reason:

"1. *You failed to furnish the Department with a detailed representation indicting how you fraudulently obtained (sic) South African identity document as well a passport.*

2. *A copy of your old Zimbabwean passport was not presented to the Department when lodging (sic) prohibition appeal."*

[35.2] The decision by the Director General of 8 November 2019 provides the following reasons:

"1. *You remained in the country with (sic) fraudulently obtained South African identity document regardless of the amnesty call from the Minister of Home Affairs during the Zimbabwean dispensation period.*

³¹ **Najjemba** *supra* at paras 40 and 43; **Arthur** Judgment, para 39

³² **AK and Others v Minister of Home Affairs and Another** *supra*

³³ **AK** *supra* at para 32

2. *As you were found residing illegal in the country, you were arrested and deported from South Africa on 25 July 2012, following your deportation on 15 October 2012 you violated the Immigration Act by entering the country illegally and again arrested and deported back to your country of origin on 19 October 2012.*

3. *Your unlawful acts proved to the Department that you are not a person with a good character.”*

THE FIRST RESPONDENT’S FAILURE TO PROVIDE EVIDENCE UNDER OATH

[36] The first applicant’s counsel argued that the Director General did not provide any evidence under oath to the Court to set out what considerations were taken into account and what the basis was upon which the Director General decided that the first applicant’s explanation of his innocence was not sufficient.

[37] In the **Arthur** judgment the Court confirmed the test under section 29(2) of the Immigration Act as being “*The ultimate question that needs to be answered under section 29(2) is whether the applicant has provided sufficient reason for the Director General to conclude that there is good cause to lift the applicant’s prohibition person status*”.³⁴

[38] The first applicant’s counsel argued that the Director General is accordingly required to evaluate the efficiency of the applicant’s explanation of his innocence.

[39] The first applicant’s counsel furthermore argued that the Director General did not provide any evidence under oath to the Court to set out what considerations were taken into account and what the basis was upon which the Director General decided that the first applicant’s explanation of his innocence was not sufficient.

[40] With reference to the matter of **ZH and Others v Minister of Home**

³⁴ **Arthur** Judgment, *supra*, para 56

Affairs and Another³⁵ the first applicant's counsel argued that that even though the Director General is responsible for the making of the alleged impugned decision, the answering affidavit is deposed to by an official within the Department. The first applicant submits that the deponent to the answering affidavit cannot provide evidence on behalf of the Director General in respect of the material and considerations which the Director General took into account at the time when he made his decisions.

[41] The first applicant's counsel argued that the Court can therefore only take into account those portions of the answering affidavit in which the deponent referred to matters within her knowledge, as insofar as it imputes any intention to the Director General or the Minister, it is hearsay and inadmissible. This was confirmed in the matter of **Z.H. and Others v Minister of Home Affairs and Another**.³⁶

[42] With reference to **Helen Suzman Foundation and Another v Minister of Home Affairs and Others**³⁷ the applicant's counsel argued that the Court on appeal confirmed³⁸ that there is no basis to relax the rule against hearsay in terms of section 3 of the Law of Evidence Amendment Act³⁹ in the absence of any suggestion that the Minister himself was unable to give evidence under oath. In the **Helen Suzman** foundation matter it was *inter alia* held that:

“[93] Furthermore, that no person can give evidence on behalf of another as in the present instance and in the absence of any suggestion that the Minister himself was unable to do so, no basis exists to relax the rule against hearsay in terms of section 3 of the Law of Evidence Amendment Act 45 of 1998. Support for this submission is found in the decision of Gerhardts v State President 1989 (2) SA 499 (T) at 504G to the effect that it is not permissible for one State official to make an affidavit for another State official.

³⁵ (15279/2021) [2022 ZAWCHC 150; [2022] 4 All SA 129 (WCC) (20 July 2022) at paras 6-9 of the Judgment

³⁶ **Z.H.** Judgment *supra* at paras 6-9

³⁷ 2023 ZAGPPHC 490; 32323/2022 (28 June 2023)

³⁸ **Helen Suzman Foundation** Judgment at para 93

³⁹ Act No. 45 of 1998

As Goldstone J (as he then was) put it:

"Clearly one person cannot make an affidavit on behalf of another and Mr. Hattingh, who appears on behalf of the three respondents, concedes correctly that I can only take into account those portions of the second respondent's affidavit in which he refers to matters within his own knowledge. Insofar as he imputes intentions or anything else to the State President, it is clearly hearsay and inadmissible."

[43] Counsel for the applicant argued that this omission by the Director General is significant.

THE FIRST APPLICANT'S CASE

[44] The first applicant's contention is that the first applicant sought his citizenship on the basis that his father is a South African citizen and accordingly based on section 3 of the Citizenship Act No. 88 of 1995. He argues furthermore that his father's sister, Ntombikazi Ndebele was interviewed by the Home Affairs, and she allegedly clarified the aforesaid and his application submitted to the Director General included an affidavit by his aunt in support thereof.

[45] The first applicant alleges that his biological father is a South African citizen and his application for citizenship was based thereon. In support of the aforementioned allegation, the first applicant alleges that his birth certificate confirms that his father is Temba Ndebele who is South African and his mother is Yardly Ticha who is Zimbabwean. The birth entry number of the first applicant is S[...] and his birth was registered on the 14th of December 1977. He alleges his date of birth is 6 April 1965.⁴⁰

[46] The first applicant alleges in his founding affidavit that his erstwhile business partners, Martin and Ruth Dzviti, attempted to invalidate their partnership agreement by claiming that he is an illegal foreigner and they submitted a false

⁴⁰ Annexure "KN4", CaseLines page 001-24; FA, para 9 and 10, CaseLines 001-7 to 001-8

Zimbabwean birth certificate, which indicated that the first applicant's father is George Ndebele and the birth entry number is H[...].⁴¹

[47] The first applicant alleges that he approached the Harare Registrar of Births and Deaths to enquire on the authenticity of the birth certificate HMS-590-80 and it was allegedly confirmed on the 19th of November 2012 that the birth entry number belonged to Dickson Motsi.⁴² These documents also appear under the records of the respondents.

[48] In his representations to the Minister of Home Affairs dated 13 September 2017⁴³ the respondent in paragraphs 8 and 9 states the following:

"8. It is worth nothing that our client has previously made submissions to the Department regarding this matter and that the Director General ought to have taken these submissions into consideration. A copy of these submissions are attached hereto as Annexure "D". Annexure "D" is not attached to the aforesaid letter in these proceedings.

9. We would hasten to point out that our client maintains that he never had fraudulent documents. Our client was deported as a result of falsified documentation purported to be issued by the Zimbabwean authorities. Despite evidence from the same authorities supporting our client's claims he was still deported. The aspect is ventilated in paragraph 5 of Annexure "D" above. What can be concluded for these submissions is that our client is a victim of the deliberate ploy to have him deported without just cause. As a matter of fact the Department carried out a deportation of a legitimate South African citizen and did not conduct a proper investigation before imposing such an unfair punishment."

[49] Because Annexure "D" is not attached to Annexure "KN14" it is not clear when the submissions under Annexure "D" were made or the precise extent of

⁴¹ Annexure "KN8", CaseLines 001-29

⁴² Annexure "KN9", CaseLines 001-30 and Respondents' Records, CaseLines 011-59

⁴³ Annexure "KN14", CaseLines 001-38 to 001-43

those submissions. The applicants' counsel argued that the respondents' records uploaded to CaseLines also confirm that the birth certificate HMS-590-80 is not authentic and it was confirmed by the Registrar of Births and Deaths of Zimbabwe that the birth certificate submitted by the first applicant with birth registry number S[...] is authentic and that the first applicant's biological father is Temba Ndebele who is South African.⁴⁴

[50] Counsel for the first applicant argued that despite the above confirmation being provided to the respondents, the deponent to the answering affidavit denies that the first applicant is the child of Temba Ndebele and states that "*Our investigations have disclosed that the applicant was the child of George Ndebele, a Zimbabwean citizen*".⁴⁵

[51] The first applicant's counsel furthermore argued that the deponent to the answering affidavit furthermore states that the first applicant fraudulently obtained a South African identity document by misleading the Department of Home Affairs as to the "*details of his parents*".⁴⁶ Furthermore that it was "*later confirmed*" that the South African identity document was fraudulently obtained.⁴⁷ The first applicant's counsel argued that it is clear that the Director General relied on fraudulent documents and irrelevant information to make a decision that the first applicant is a prohibited person. The first applicant's counsel furthermore argued that the effect of the Director General's alleged error with reference to the **Arthur** matter⁴⁸ and the **Westinghouse Electrical Belgium SA v Eskom Holdings (SOC) Ltd and Another**⁴⁹ is that his decision was not rational or reasonable - as a bad reason plays a material role in the decision under attack, it is not possible to conclude that there is a rational connection between the decision and its reasons. In the **Westinghouse**

⁴⁴ See respondents' records, CaseLines 011-57 to 011-62 specifically 011-61 to 011-62 confirming that Temba Ndebele is South African and the first applicant's biological father

⁴⁵ AA, para 48, CaseLines 008-15 and para 71, 008-23

⁴⁶ AA, para 52, CaseLines 008-16

⁴⁷ AA, para 55, CaseLines 008-17

⁴⁸ **Arthur**, *supra*

⁴⁹ 2016 (3) SA 1 (SCA)

Electrical Belgium SA matter⁵⁰ it was held that:

“[44] It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.”

[52] The applicant’s counsel therefore submits that the Director General refused the first applicant’s application in terms of section 29(2) in part because the first applicant allegedly obtained his South African identity document fraudulently and the Director General relies on the fraudulent birth certificate submitted by the erstwhile business partners of the applicant.

[53] In the premises it is argued that the decision of the Director General should be reviewed and set aside.

[54] In argument it was submitted by the first applicant’s counsel that the only effective remedy would be that the decision is set aside and substituted as the decision is a foregone conclusion and the Court is in as good position as the functionary to make the decision. The first applicant’s counsel places reliance on the matter of **Trencon Construction v Industrial Development Corporation of South Africa and Another**⁵¹ for her contentions in this regard.

THE FIRST RESPONDENT’S CASE

[55] If one has regard to the record, it reveals a different version upon which it was allegedly established that the first applicant had obtained a fraudulent identity document.

[56] Counsel for the respondents argued that with reference to the answering affidavit and the records that this matter is distinguishable from the **Najjemba** matter

⁵⁰ Ibid at para 44

⁵¹ **Trencon Construction v Industrial Development Corporation of South Africa and Another** 2015 (5) SA 245 (CC) at para 47

and the ***AK and Others v Minister of Home Affairs*** matter because it is alleged that the first applicant in this particular case acted positively and there is empirical evidence to the effect that the first applicant was the one who acted in filling in the form and personally claimed to have been born in South Africa at the Baragwanath Hospital which assertions were later discovered to be false. The first applicant furthermore provided false information when he provided his aunt's details (who is a South African national) in the form to obtain an identity document when the form requested his mother's details (who is not a South African national but is a Zimbabwean national). It is common cause that the first applicant's mother is a Zimbabwean.

[57] The deponent to the answering affidavit *inter alia* states:

"23. The investigations of the Department of Home Affairs into the applicant's fraudulently obtained South African ID revealed that the applicant in his application for an identity document misled the Department of Home Affairs when he claimed:

23.1 to be the son of Ntombikazi Ndebele;

23.2 he was born in 1965 at the Baragwanath Hospital;

23.3 he attended school at Ningizimu Primary School in KwaZulu-Natal.

24. Upon investigation conducted by Mr James Macebelele statements were obtained from the both the Department of Health, Gauteng and from the Principal of Ningizimu Primary School in KwaZulu-Natal which statements actually disproved the applicant's allegations. I annex hereto as Annexure "NQ5" "NQ6" the statements.

25. It became patently clear that the applicant was directly involved in the fraudulent obtaining of South African ID as he is the person who filled the departmental forms and collected information from various people with a view to substantiating the fact that he was born at the Baragwanath Hospital in 1995 (sic) and attended school in Ningizimu Primary School in KwaZulu-Natal which were in fact not true. The applicant to date has not placed the respondents into (sic) confidence about the above fraudulent conduct.

...

28. *From the foregoing, it is apparent that the Republic of South Africa has incurred costs in investigating the applicant and determining the true circumstances upon which the applicant was in the Republic with no co-operation from the applicant until the end, as the applicant still denies the apparent fraudulent conduct on his part and/or has failed to disclose the identities of the people who assisted him in application for (sic) South African ID.*⁵²

[58] The Department of Health *inter alia* in December 2010 stated the following in correspondence:

"We are unable to trace the records of Ntombikazi Ndebele who claims that she gave birth at Chris Hani Baragwanath Hospital and the clinic cards she introduced is for recent babies.

The hospital number that appears in the clinic card is also for recent babies, not for 1965 ..."

[59] Another letter dated the 22nd of December 2010 from Zola Clinic states the following:

"Zola C was opened in 1984 and no services were rendered prior that years.

*There was never a clinic named Zola Clinic before 1984 when this was opened in 1984.*⁵³

[60] The first applicant alleges himself in paragraph 10 of his founding affidavit⁵⁴ that at the time of applying for the identity document he did not possess a copy of his father's birth certificate nor identity document. In paragraph 13 he states:⁵⁵

"I completed the requisite form unassisted and submitted everything to the Department of Home Affairs. In completing the form, I erroneously filled out, under familial relations, Ntombikazi as being my mother instead of my aunt.

⁵² Annexure "NQ6", CaseLines 008-67

⁵³ Annexure "NQ6", CaseLines 008-68

⁵⁴ CaseLines 001-8

⁵⁵ CaseLines 001-8

This was an error made in good faith as I simply assumed, I was required to list my South African relatives to establish my citizenship.”

[61] The deponent to the answering affidavit states in response:

“... The applicant decided to claim that Ntombikazi Ndebele was his mother and not his aunt when he applied for a South African ID. He claimed that he was born at Baragwanath Hospital which was not true. I specifically deny that the applicant made a mistake when he decided to place the name of Ntombikazi Ndebele as his mother as the applicant is a well educated man holding a Masters degree.”

[62] In paragraph 52 the deponent to the respondents’ affidavit states the following:

“I confirm that the applicant had fraudulently obtained a South African identity document as he has misled the Department of Home Affairs as to his nationality including the details of his parents and where he was born. At all material times, he claimed to have been born in South Africa when in truth he knows he was not.”

[63] The respondents’ counsel persisted in his argument that the impugned identity document was not obtained through falsified documents that someone else had provided (the first applicant’s business partners) but on information he (the first applicant himself) provided in a plight for an identity document.

[64] The respondents’ counsel argued that the authenticity of the birth certificate is yet to be investigated but that that is a matter to be investigated when the first applicant applies for citizenship, which application is *“not alive”*. The first applicant stated in his papers that he intends pursuing that application.

[65] The respondents’ counsel argued that if the first applicant truly believed that he was the descendent of a South African father why did the first applicant deem it necessary to supply false information in the form that he completed to obtain an identity document, wherein he claimed to be the descendent of his aunt who he

claimed to be his mom. The respondents' counsel argued that there are different considerations applicable in an application to lift a prohibition in terms of section 29 of the Immigration Act as opposed to applying for citizenship in terms of the Citizenship Act.⁵⁶ It was argued by the respondents' counsel that it weighed heavily with the first respondent in making his decision that the first applicant did not come clean and admit to his fraudulent actions and because of that it was argued that the first applicant would not show respect to the laws of this country.

INSUFFICIENCY OF THE FIRST RESPONDENT'S REASONS

[66] The main difficulty in this matter is that the first respondent has not provided adequate reasons for his refusal to lift the prohibition person status of the first applicant. It cannot be established from any one of the two rejection letters what the factors and considerations were that the first respondent considered when he rejected the first applicant's application. So for example, it does not appear whether he considered the correspondence received by the Consulate of the Republic of Zimbabwe dated the 19th of November 2012 and the attached birth certificate of the first applicant indicating the identity of a South African father with birth entry number S[...]. Furthermore, the reasons provided constitute conclusions and does not provide a basis for these conclusions. It is furthermore evident that the first respondent has restated the reasons that resulted in the prohibition order under section 29(1). In ***Najjemba*** it was held that the Director General must take into account factors *"other than those that resulted in the prohibition under section 29(1), in order to determine whether there exists good cause to declare an otherwise prohibited person not to be prohibited"*.

[67] It also cannot be argued as the first applicant did that the Director General relied on fraudulent documents supplied by other persons (the first applicant's erstwhile business partners) and irrelevant information when he made his decision

⁵⁶ Act 88 of 1995 (as amended). There have also been amendments to this Act such as the South African Citizenship Amendment Act 69 of 1997 and the South African Citizenship Amendment Act 17 of 2010

that the first applicant is a prohibited person, as it is not clear from the first respondent's reasons on what factors and considerations the first respondent relied and what the basis was for his conclusions.

[68] Likewise, it cannot be argued as the first respondent did with reference to the ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others***⁵⁷ that the decision of the first respondent was reasonable. In the aforementioned Constitutional Court matter O'Regan J held:

“[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.” (Own emphasis)

[69] As a result of the fact that the first respondent has not given adequate reasons for his decision this Court is not in a position to establish whether the first respondent's decision is reasonable and rational.⁵⁸

[70] The insufficient reasons render the decision opaque and difficult to assess. Inadequate reasons also lead to a lack of transparency making it difficult for the first applicant to understand the basis for the decision. The ***Minister of Home***

⁵⁷ (CCT27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004)

⁵⁸ ***Pharmaceutical Manufacturers Association of South Africa and Another: In Re Ex Parte President of the Republic of South Africa and Others*** (CCT31/99) [2000] ZACC (1); 2002 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)

Affairs v Helen Suzman Foundation⁵⁹ judgment highlights the importance of administrative fairness and the role of PAJA in ensuring that Government actions are justifiable. The first applicant's counsel argued that his children is permanently based in the country and that his current wife is a South African.⁶⁰

[71] Administrators must act reasonably, base decisions on relevant evidence and provide clear reasons. A rational connection is required between the power being exercised and the decision.

[72] It is important to note that there is a presumption, in review proceedings that the administrative action was taken without good reason should the administrator fail to give adequate reasons.⁶¹

[73] In **Modisenyane v Health Professions Council of South Africa and Others**⁶² Tolmay J *inter alia* held:

*"[25] The furnishing of adequate reasons for a decision forms the cornerstone of a person's constitutional right to fair administrative justice. The principles are not novel and were articulated in the matter of **Minister of Environmental Affairs & Tourism v Phambill Fisheries**⁶³ where it was held as follows:*

*"What constitutes adequate reasons has been aptly described by Woodward J, sitting in the Federal Court of Australia, in the case of **Ansett Transport Industries (Operations) (Pty) Ltd & Others v Wrath & Others** (1983) 48 LAD 500 at 517 (lines 23-41) as follows:*

*'The passages from judgments which are conveniently brought together in **Re Palmer & Minister of the Capital Territories** 1978 23 ALR 196 at 206-7:1 ALD 183 at 193-4, serves to confirm my view that section 13(1) of the Judicial Review Act requires a decision maker to explain his decision in a way which*

⁵⁹ Ibid

⁶⁰ As contained in his supplementary affidavit dated the 8th of September 2021

⁶¹ Section 5(3) of PAJA

⁶² (97000/2016) [2019] ZAGPPHC 561 (18 October 2019)

⁶³ 2003 (6) SA 407 (SCA), para 40

enables the person aggrieved to say, in effect:

'even though I might not agree with it, I now understand why the decision went against me. I am now in a position to decide whether the decision has involved an unwarranted finding of facts, or an error of law, which is worth challenging'.

This requires the decision makers to set out his understanding of the relevant law, any findings of facts on which his conclusion depends (especially of those facts having been in dispute): and the reasoning process which led him to those conclusions. He should do so in a clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.

[26] *To the same effect, it was stated in Hoexter⁶⁴ that:*

"It is apparent that reasons are not reasons unless they are properly formulated. It must explain why action was taken or not taken: otherwise they are better described as findings or other information.

[27] *As such a decision of a Tribunal which fails to take into consideration the relevant information pending before it by an Applicant, failed to utilize its powers properly and failed to provide adequate reasons may be reviewed and set aside.*

[28] *In **Pepcor Retirement Fund and Others v Financial Services Board**,⁶⁵ the Supreme Court of Appeal held that an administrative decision has to be taken on an accurate factual basis as a result a material mistake of facts could render an administrative decision subject to review.*

[29] *If an error in law occurs a Court is obligated to interpret legislation granting powers to administrators as requiring the power to be exercised in a*

⁶⁴ Hoexter, The New Constitutional Administrative Law, Vol 11, page 288; Also see **Monjane v HPCSA** 7 3 others case number 54184/2016 par 13

⁶⁵ 2003 (6) SA 38 SCA, p 58 par 47; Also see **Government Employees Pension Fund v Buitendag** 2007(4) SA 2 (SCA) par 17

reasonable way.⁶⁶ A decision must be supported by the evidence and information, as well as the reasons given for it.⁶⁷”

REMEDY

[74] Section 8 of PAJA gives the Court a wide discretion to make any just and equitable order to remedy the violation of the right to just administrative action:⁶⁸

8(1) Remedies in proceedings for judicial review

The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

- (a) directing the administrator –*
 - (i) to give reasons; or*
 - (ii) to act in the manner the court or tribunal requires;*
- (b) prohibiting the administrator from acting in a particular manner;*
- (c) setting aside the administrative action and –*
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or*
 - (ii) in exceptional cases –*
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;*
- (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;*
- (e) granting a temporary interdict or other temporary relief; or*
- (f) as to costs.*

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders –

⁶⁶ **Zondi v MEC of Traditional and Local Government Affairs** 2005 (3) SA 59 (CC) at par 36B- I and section 33 of the Constitution

⁶⁷ Hoexter Administrative Law in South Africa, 1st ed, p 307

⁶⁸ Section 8 of PAJA

- (a) *directing the taking of the decision;*
- (b) *declaring the rights of the parties in relation to the taking of the decision;*
- (c) *directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or*
- (d) *as to costs.*⁶⁹

[75] This includes, in exceptional circumstances, the Court substituting or varying the administrative action with a decision in terms of the Court's order.⁷⁰ Substitution, however, is an extraordinary remedy⁷¹

[76] It is a well-established principle of our common law that the Courts will be reluctant to substitute their decision for that of the original decision-maker. This reluctance to intervene and substitute flows directly from the well-known principle of the separation of powers, which requires Courts to recognise their limitations and respect the competence of administrative bodies specifically designed to fulfil a particular purpose.⁷²

[77] The Constitutional Court in ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another***⁷³ clarified the test for exceptional circumstances where a substitution order is sought. It suffices to state that remittal is almost always the prudent and proper course. Appropriate deference ought to be afforded to the administrator. Whether a Court was in as good a position

⁶⁹ Sections 8(1) and (2) of PAJA

⁷⁰ Section 8(1)(c)(ii)(aa)

⁷¹ ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*** *supra* at para 42

⁷² This is fuelled by the thought that the Court typically has none of the industry specific advantages of a specified body and is required to recognise its limitations, unless "*exceptional circumstances*" are present, in which case a Court can legitimately assume an administrative decision-making function; See ***Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and Another*** [2007] ZAECHC 149; 2007 (6) SA 442 (Ck), [2008] 1 All SA 142 (Ck) at para 43

⁷³ [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC), para 32

as the administrator to make the decision and whether the decision was a foregone conclusion are two factors that had to be considered cumulatively. Other relevant factors include delay, bias or incompetence on the part of the administrator.⁷⁴

[78] The ultimate question that needs to be answered under section 29(2) is whether the applicant has provided sufficient reasons for the Director General to conclude that there is good cause to lift the second applicant's prohibition person status. This Court is not in as good a position as the Director General would be. It is also evident, from the issues I have raised above, that the outcome of the application is not a foregone conclusion. For these two reasons alone substitution would not be an appropriate remedy.

COSTS

[79] The applicants have been substantially successful in their application. It is appropriate that the applicants be awarded the costs of the application. There are no compelling reasons to depart from the usual Rule that costs follow the event.

ORDER

[80] I therefore make the following order:

[80.1] The decisions taken by the Director General on 28 July 2017 and 8th of November 2019 to refuse the first applicant's application under section 29(2) of the Immigration Act 13 of 2002 (as amended) are reviewed and set aside;

[80.2] The decision of the Director General is remitted back to the Director General for reconsideration.

[80.3] The Director General is directed to furnish adequate and sufficient reasons for the decision to refuse / grant the first applicant's

⁷⁴ Ibid paras 43-54, *The Municipal Manager: The City of Johannesburg Metropolitan Municipality and Others v San Ridge Heights Rental Property (Pty) Ltd* (517/2022) [2023] ZASCA 109 (11 July 2023) at para 18

application for the upliftment of the prohibited persons status in terms of section 29(2) of the Immigration Act.

[80.4] The Director General shall reconsider the application and provide a new decision, with proper reasons, within 30 (days) of service of this order.

[80.5] The respondents are directed to pay the costs of the application jointly and severally the one paying the other to be absolved.

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 26 August 2025.

M VAN NIEUWENHUIZEN
ACTING JUDGE OF THE HIGH COURT,
JOHANNESBURG, GAUTENG

HEARD ON: 13 May 2025

DATE OF JUDGMENT: 26 August 2025

FOR APPLICANTS: Adv S Kroep

INSTRUCTED BY: Burgers Attorneys

FOR RESPONDENTS: Adv L Kalashe

INSTRUCTED BY: Offices of the State Attorney
Mr J Van Schalkwyk