IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No.: **2025-058782**

In the matter between:

FIDEL ISHEANESU MUGUNZVA Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS Second Respondent

Coram: Montzinger AJ

Heard: 24 February 2026

Delivered: 11 June 2026

Summary: Administrative law — review of declaration of prohibited person in terms of section 29(1)(f) of the Immigration Act 13 of 2002 — Condonation in terms of sections 7(1) and 9 of PAJA — explanation not covering entire period of delay — reasonable prospects of success on the merits not outweighing inordinate delay and the inadequate explanation — condonation refused. Merits considered notwithstanding — contention that section 29(1)(f) follows *ex lege* rejected — absence of *audi alteram partem* in the initial decision — whether section 29(2) and 8(6) operate as a wide appeal to remedy the absence of *audi alteram partem* — decisionmakers failed to engage with question of complicity — substitution inappropriate — application dismissed — each party to bear their own costs.

ORDER

1. The applicant's application for an extension of the 180-day period in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 is refused.

2. The review application is dismissed.

3. Each party shall bear its own costs.

JUDGMENT

Montzinger AJ

Introduction

[1] This is an application for the review and setting aside of three interrelated decisions by the officials of Department of Home Affairs and the second and first respondents, the Director-General ("DG") and Minister respectively (collectively referred to as "Home Affairs"). Those decisions declared the applicant, a Zimbabwean national, a prohibited person in terms of section 29(1)(f)[1] of the Immigration Act[2] and arose in circumstances where he, as a foreigner, was found to be in possession of a fraudulent permanent resident permit ("PRE").

[1] **29. Prohibited persons.**
(1) The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit:
(a) …
(b) …
(c) …
(d) …
(e) …
(f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.

[2] Immigration Act 13 of 2002

[2] According to the applicant, the circumstances leading to the impugned decisions involved an unknown agent named *"Wendy,"* who apparently provided services to the public to help them obtain immigration status documents. The applicant used *Wendy's* services to regularise his status in South Africa and, through *Wendy*, obtained a PRE. That PRE was found years later to be fraudulent, resulting in the applicant being declared as a prohibited person.

[3] The three impugned decisions subject to scrutiny are: first, the decision taken by officials of Home Affairs on or about 13 February 2020 ("the initial decision") to declare the applicant a prohibited person. The second decision was taken by the second respondent, the DG of the Department of Home Affairs ("the DG decision") on 21 September 2021. The third decision was taken by the Minister of Home Affairs ("the Minister") on 11 March 2022 ("the Minister's decision"). The DG refused to uplift the declaration that the applicant is a prohibited person and the Minister in turn dismissed the appeal against the DG's decision. Since 2022 the applicant's status therefore remained that of a prohibited person.

[4] The applicant is seeking to review the decisions in terms of PAJA[3] and set them aside. In addition to setting the decisions aside the applicant also seeks condonation for the late filing of the review application and if successful with the review a declaratory order that he is not a prohibited person. If successful, the applicant also seeks a costs order.

[5] The application is opposed by Home Affairs on various grounds. I start by first providing context to the applicant's challenge.

[3] Promotion of Administrative Justice Act 3 of 2000

The context to the applicant's challenge

[6] The applicant was born in Zimbabwe on 25 March 1986. He first entered South Africa on 11 September 2011 on a visitor's visa that was due to expire on 2 October 2011. He obtained a second visitor's visa entry on 29 October 2011 but departed on 4 November 2011. His last lawful sojourn under his visitor's visa expired on 28 November 2011.

[7] While in South Africa on his visitor's visa during 2011 he sought employment as a business plan writer with Subcotex Consultancy. Ms Mickayla Mentoor, the owner indicated that he could not work for her on a visitor's visa and referred him to an immigration agent known as *Wendy*. He went to see *Wendy* but had no pre-determined objective of acquiring a PRE. His purpose was only to consult on his immigration options.

[8] Despite his intentions to only obtain more information on his immigration options, *Wendy* asked about his family and whether he had siblings or parents who had ever stayed or still lived in South Africa. According to the applicant *Wendy* picked up on these details and instead of him completing an application form, undertook to revert to him in due course. He left *Wendy* without completing any forms.

[9] In early 2012 he had contact with *Wendy* again who this time informed him that his name appeared on a Home Affairs list and suggested that the applicant's mother may have applied for him and his siblings to stay in South Africa under an apparent amnesty program initiated by the South African government soon after 1994[4]. While the

[4] This amnesty program relates to a period after 1994 where the South African government as part of the re-opening of South Africa in its early post-apartheid years offered permanent residence exemptions *en masse* to eligible SADC citizens. According to the amnesty program citizens of the SADC countries would be granted permanent residence if they could prove they had continuously lived in South Africa since at least 1 July 1991,

applicant had some reservations whether the amnesty applied to him considering that his mother had no knowledge of any application or given the obvious delay in the purported process, this did not deter *Wendy* as she gave, according to the applicant, an explanation that made sense.

[10] At the end of May 2012, *Wendy* contacted the applicant and informed him to collect his PRE. He did so during June 2012 and collected two documents. The first document was a sticker stamped 30 May 2012 that went into his passport, the second document was an exemption letter date stamped 15 June 2009 recording that the applicant was the holder of exemption certificate no. 2218/97 RC and has been exempted since 22 February 1997 from being in possession of a permanent residence permit. The applicant paid *Wendy* R12,000.

[11] The PRE permit contained a date discrepancy between the sticker's date of 1997 and the date stamp of 30 May 2012 as well as the 2009 date on the exemption letter. The applicant questioned *Wendy* about these date discrepancies. She explained that the backdating was done to the time when the initial exemption was granted, and that the 30 May 2012 date stamp on the 1997 sticker reflected the date she collected the documents at Home Affairs. The applicant accepted *Wendy's* explanations.

[12] On 12 June 2012, the applicant re-entered South Africa through Oshoek using the PRE. Thereafter he used it without incident for approximately eight years. He apparently travelled, opened bank accounts and even obtained employment at Sanlam. According to the applicant's passport stamps he also departed and re-entered South Africa on multiple occasions. The applicant maintain that he used the PRE extensively and on

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had no criminal record, and were either economically active or married to a South African, or had dependent children who were born or were residing lawfully in South Africa.

each occasion border officials of Home Affairs processed the document without question.

[13] In 2018, the applicant lost his PRE letter and applied at VFS Pretoria for proof of permanent residence using Home Affairs' DHA-Form 46. Home Affairs processed the application and informed the applicant, on 26 February 2020, that it could not find the permit number as it did not exist, and indicated that the permit is fraudulent. The same correspondence also informed the applicant that he was from that day rendered a prohibited person in terms of section 29(1)(f) of the Immigration Act.

[14] The applicant then approached a company named Strategic Migration Services South Africa ("SMSSA") that on 21 July 2020 filed an application in terms of section 29(2) of the Immigration Act on his behalf. Section 29(2) allows an applicant who has been declared a prohibited person to apply to the DG on good cause shown to issue a declaration that the person is not prohibited. In the representations, the applicant acknowledged that his PRE had been obtained through the agent called *Wendy* and requested that his prohibited status be reversed. On 21 September 2021 the DG refused the request. The applicant filed an appeal to the Minister, again with the assistance of SMSSA, on 7 January 2022 in terms of section 8(6) of the Immigration Act. That appeal suffered the same result as on 11 March 2022 the Minister dismiss the appeal and confirmed the prohibition. SMSSA informed the applicant on 23 March 2022 of the outcome and advised that the courts were his only recourse.

[15] The applicant returned to Zimbabwe during August 2022. As he was unemployed, his income was irregular. He operated a small consultancy doing academic research and started a handyman company doing repair and renovation work. He claims to only have received the actual written decision by the Minister on 23 November 2023.

[16] The applicant only managed to procure his current attorneys of record by mid-2024 and launched the present application to review the impugned decisions by December 2024.

The respective positions adopted by the applicant and Home Affairs

[17] On the issue of condonation the applicant's case is primarily premised on the allegation that he was too poor to pursue legal recourse to review the various decisions. In addition the applicant claims that he is the only person that suffered prejudice from the delays and if he could have approach the court earlier, he would have done so.

[18] On the merits the applicant's case is that all the decisions involved are of an administrative nature and susceptible to review in terms of the provisions of PAJA. In that regard the applicant's primary attack is that he never received an opportunity to make representations prior to the initial decision by the official/s of Home Affairs that declared him a prohibited person. In addition he also never received the reasons for the initial decision.

[19] The applicant also criticised Home Affairs for not having recognised the onus that rest on Home Affairs to do an investigation into how the applicant's allegedly-fraudulent PRE was issued and who is at fault. In respect of the grounds for review the applicant contends that the defective initial decision vitiates the subsequent decisions by the DG and the Minister. In respect of the DG's decision the criticism is that the DG failed to apply his mind to the question whether good cause existed justifying uplifting the declaration of the prohibited status. The Minister's decision was criticised for the same shortcomings as the DG's decision.

[20] Home Affairs' opposition initially entailed three *in limine* points challenging firstly this court's lack of jurisdiction; secondly that the applicant has acquiesced and effectively accepted the initial decision and the outcome of the decisions by the DG and the Minister. Thirdly, that the decisions under attack were not administrative decisions. In response to the request for condonation Home Affairs contended that the applicant instituted the review application after an inordinate and unreasonable delay after he gained knowledge of the existence of the DG and Minister's decision and reasons.

[21] At the time oral argument was heard Home Affairs no longer persisted with the lack of jurisdiction and acquiescence points. It was also sensibly accepted by Home Affairs, represented by Mr Titus, given the overwhelming jurisprudence on the same issue, that the decisions under scrutiny constitute administrative decisions. Only, the unreasonably delay point, as a preliminary issue, remained.

[22] On the merits Home Affairs' position in respect of the initial decision is that the decision is not susceptible to review, as a standalone decision, as all the identified irregularities were remedied during the internal review and appeal processes conducted in terms of section 8(4) to (7) of the Immigration Act. In respect of the decisions by the DG and the Minister the proposition was that both decisions were rational and reasonable as the applicant, on his own version, was complicit with *Wendy* in the perpetrated fraud in obtaining the PRE as he misrepresented facts that enabled him to procure a fraudulent permit.

[23] Since most of the preliminary issues have resolved themselves, I turn my focus to the issue of the unreasonable delay and condonation.

Unreasonable delay and Condonation

[24] The applicant launched these review proceedings outside the 180-day period prescribed in section 7(1) of PAJA and accordingly seeks an extension of that period in terms of section 9. Before turning to the facts to evaluate the delay and condonation I set out the relevant legal framework.

The legal principles governing unreasonable delay and condonation in a PAJA review

[25] Section 7(1) of PAJA provides that proceedings for judicial review must be instituted *"without unreasonable delay"* and *"not later than 180 days"* after the date on which any internal remedies have been concluded or, where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and the reasons.

[26] Section 9(1)(b) of PAJA permits the 180-day period to be extended, either by agreement between the parties or, failing such agreement, by a court on application. Section 9(2) provides that a court may grant such an extension *"where the interests of justice so require."* The statutory test for condonation, where the delay is longer than 180 days, in terms of section 9 of PAJA, is therefore the *"interests of justice."*[5]

[27] The approach to a condonation application in terms of section 7 of PAJA has been considered by the Constitutional Court, in *Buffalo City*[6] drawing on the *OUTA*[7] judgment. Although in *Buffalo City* the Court ultimately decided that case in terms of

[5] s 9(2) of PAJA
[6] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (6) BCLR 661 (CC) paras 49–50
[7] *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639 (SCA) (9 October 2013)

the principle of legality, the judgment contains a considered exposition of how a court faced with a section 7 PAJA review brought outside the 180-day period must approach the matter. That approach entails at least the following.

[28] A court faced with a PAJA review must first determine when the 180-day period commenced. If the review was launched within the 180-day period, the question of condonation does not arise. However, the court may still consider the reasonableness of any delay within the 180-day window, but the time bar is not in issue.

[29] If the review was launched outside the 180-day period, the position is as follows as articulated by Brand JA in *OUTA*[8], in a passage endorsed by Theron J in *Buffalo City*:

> *"Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se…"*

[30] The consequence is that, once the 180-day period has been exceeded, the court is not asked to determine afresh whether the delay was reasonable as a matter of fact. That question has been answered by the statute and the issue of whether the period should be extended in terms of section 9 of PAJA regulates the further evaluation of the review application. As foreshadowed, in considering whether to extend the period the threshold in terms of section 9(2) is whether "the interest of justice so requires".

[31] The content of what is meant with the "interest of justice" is, in the words of Bosielo J in *Grootboom*[9] *"so elastic that it is not capable of precise definition."* It is a

[8] para 26; endorsed in *Buffalo City supra* par 49
[9] *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) par 22

constitutional standard that calls for the exercise of a judicial discretion having regard to all relevant factors, the weight to be attached to each depending on the circumstances of each case.

[32] The factors that are typically relevant to the interests of justice enquiry involve a consideration of the length of the delay; the explanation for or cause for the delay; the prospects of success for the party seeking condonation; the importance of the issue(s) that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice[10]. Some of these factors may justifiably be left out of consideration in certain circumstances. However, as a general proposition the various factors are not individually decisive, but should all be considered to arrive at a conclusion as to what is in the interests of justice.[11].

[33] The factors identified in *Grootboom* are not new. They draw substantially upon the long-standing principles articulated by Holmes JA in *Melane*[12] The four Melane factors, *i.e.* degree of lateness, explanation for the delay, prospects of success and importance of the case, together with the consideration of the respondent's interest in finality, are the same factors that the Constitutional Court in *Brummer*, *Van Wyk* and *Grootboom* identified as being relevant to the interests-of-justice enquiry. The Constitutional Court's contribution has been to elevate the analytical standard to the constitutionally grounded "interests of justice"; expand the list to include the effect of the delay on the administration of justice and on other litigants; and emphasise that the inquiry is value-laden and contextual, not mechanical.

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[10] *Brummer v Gorfil Brothers Investments (Pty) Ltd* 2000 (5) BCLR 465 (CC); *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC), *Brümmer v Minister for Social Development* 2009 (6) SA 323 (CC)
[11] *Grootboom* par 51
[12] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C-F

Consideration of the facts

[34] The 180-day period in terms of section 7(1) of PAJA commenced, at the latest, on 23 March 2022 when the applicant was informed of the Minister's decision of 11 March 2022. The review application was issued on 10 December 2024. The total period of the delay from the date of knowledge of the decision to the institution of proceedings is approximately 1005 days. The period beyond the 180-day window is approximately 825 days. On any approach, this is an inordinate delay. By operation of section 7(1) of PAJA, the delay is *per se* unreasonable. The question is whether the applicant has discharged the onus in section 9(2) of persuading the court that the interests of justice require an extension of the 180-day period.

[35] There is no doubt that the extent of the delay, taken at face value, is excessive. But the delay does not begin in March 2022. There is, on the papers, an earlier chapter that the applicant did not disclose in his founding affidavit and that complicates the condonation narrative.

The 2015 citizenship determination

[36] In January 2015, a DHA-529 form for the determination of citizenship status was submitted to Home Affairs in the applicant's name. The form stated, among other things, that the applicant had entered South Africa for permanent residence in 1997 and had resided in the country for 17 years. Attached to the form was the impugned exemption certificate, number 2218/97RC and various other personal documents. Home Affairs introduced the form in the supplementary review record, and its case is that it responded to the applicant on 12 March 2015 informing him that, according to available information, he was not a South African citizen, that his permanent residence

status could not be verified, and that he should contact Home Affairs permanent residence section. From March 2015 to September 2018, on Home Affairs' case, the applicant did nothing, until he approached Home Affairs again with essentially the same documents during 2018.

[37] The applicant did not disclose the existence of the 2015 application in the founding affidavit. His response in the replying affidavit, to the existence of the document being disclosed by Home Affairs, was three-fold. First, he stated that he has no recollection of signing or filing the DHA-529 form, nor of visiting a Home Affairs office to submit it. Second, he stated that it is possible he completed the form in 2012 so that the agent, *Wendy,* could clarify his citizenship status. Third, he stated that he is certain he never received Home Affairs' response of 12 March 2015 and first saw it when it appeared in the supplementary review record.

[38] As to Home Affairs' response of 12 March 2015, the applicant does not suggest it was fabricated or that it was addressed to someone else. He simply says he is *"certain"* he never received an outcome of the application. He points out that there is no proof of service or receipt by him and that the date stamps on the document do not show that he signed receipt of the document. I accept that there is no documentary evidence or any other evidence, outside the allegations in the answering affidavit and his denial thereof, that the applicant in fact received the 2015 response.

[39] However, the issue of whether the applicant lodged the DHA-529 form with Home Affairs is a dispute of fact that must be resolved. I decide to do so on the *Plascon-Evans*[13] approach. Home Affairs' version is supported by the existence of the

[13] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623

contemporaneous DHA-529 form itself, which bears a date stamp and the applicant's personal documents and details. It was not contended by the applicant that the information on the form was incorrect or the supporting documents false. Home Affairs' version is further supported by its March 2015 response, which records the outcome of the application and its transmission to the applicant.

[40] The implications of this issue for the condonation application are significant. The applicant's case rests on the proposition that he had no reason to suspect the legitimacy of his permanent residence exemption until Home Affairs informed him of the initial decision in February 2020, and that thereafter financial hardship was the sole cause of the delay in launching the review application. However, if I find that that the applicant must have submitted the application in 2015 then the episode introduces an earlier chapter that complicates the applicant's narrative in two respects.

[41] First, it shows that the applicant placed the impugned exemption before Home Affairs as early as January 2015. If the applicant completed the form himself, which he concedes is possible, he was actively engaging with Home Affairs on his status five years before the section 29(1)(f) prohibition. If the form was completed in 2012 and filed later by *Wendy*, the agent, the applicant nonetheless participated in a process that sought to clarify his position in South Africa. Either way, the applicant's engagement with questions about his status predates the narrative he presented in the founding affidavit.

[42] Second, and more directly relevant to condonation, Home Affairs' March 2015 response, even if I accept the applicant's denial that he received it, is a document that was generated and existed in Home Affairs' records at the time the applicant prepared his founding affidavit. The applicant could reasonably anticipate that Home Affairs'

records might contain this document and to disclose it proactively rather than leave it to see what is said in the review record and the answering affidavit. A litigant approaching a court for relief assumes a particular responsibility to ensure that the picture presented to the court is complete. It strikes me that the applicant did not mention this document in the hope that Home Affairs would either not have a record of it or would not refer to it.

[43] If, contrary to the applicant's denial, I accept that he did receive Home Affairs' March 2015 response, the consequences for the condonation narrative would be more severe. It would mean that the applicant was aware, from as early as March 2015, that Home Affairs could not verify his permanent residence status. A reasonable person in his position, having been alerted that his permanent residence could not be verified, would be expected to take steps to clarify the matter by contacting the permanent residence section of Home Affairs as advised and to return to the agent who procured the exemption and demanded an explanation, or by seeking independent legal advice. Instead, on Home Affairs version, the applicant did nothing for over three years, from March 2015 to September 2018, before he approached Home Affairs again with more or less the same documentation. It would mean that the applicant sat idle for years without pursuing clarity on his status as a foreigner. That would impact the interest of justice consideration materially.

[44] However, I cannot on the *Plascon-Evans* approach of resolving factual disputes, make a positive finding that the applicant received the March 2015 response from Home Affairs. However, what I can find is the following:

[44.1] a DHA-529 form for the determination of citizenship status was completed by or on behalf of the applicant and submitted with Home Affairs, which the applicant concedes is possible;

[44.2] the applicant did not disclose the possibility of the existence of this document in his founding affidavit, even though his entire case requires the court to understand the history of his dealings with Home Affairs;

[44.3] Home Affairs' response, whether received by the applicant or not, flagged as early as March 2015 that the permanent residence status could not be verified; and

[44.4] no steps were taken by the applicant between 2015 and 2018 to regularise his status in South Africa.

[45] These observations do not require me to reject the applicant's condonation application outright. They do, however, place the condonation explanation in a more complex light than the applicant's founding affidavit presented and also influence the interest of justice analysis I am required to undertake.

The unexplained periods within the internal remedy process

[46] There is a further tail to the delay context. The applicant presents the delay as commencing on 23 March 2022, when he was informed of the Minister's decision. But the saga began earlier. The application for proof of permanent residence was filed in September 2018. He received Home Affairs' response on 26 February 2020 declaring him a prohibited person. From February to July 2020, a further five months elapsed before SMSSA filed the section 29(2) application to uplift the prohibition on his behalf. There is no explanation in the founding papers for that five-month delay.

[47] The DG's decision refusing the section 29(2) application was communicated on 21 September 2021. SMSSA assisted the applicant to file the section 8(6) appeal to the Minister on 7 January 2022. This was approximately three and a half months later. Again, no explanation is offered in the founding affidavit. Both proceedings were themselves materially out of time as sections 8(4) and 8(6) of the Immigration Act require an aggrieved person to make application within 10 working days of receiving notification of the decision sought to be reviewed or appealed. While section 29(2) does not provide for a cut-off time when to launch application in terms of that section, that application and the appeal in terms of section 8(6) were launched after months of delays without an explanation. Therefore, the internal remedy processes were also characterised by significant unexplained delays. Although, the issue of the lateness of those processes were not dealt with by either the DG or the Minister, the court is not barred from considering the applicant's objective conduct in consideration of the interest of justice.

[48] There is also the proposition advanced by Mr Simonsz, on behalf of the applicant, that the Minister's appeal decision is potentially *ultra vires* the Immigration Act. The proposition is made on the findings made by a single judge in *Arthur*[14] who in turn referred to a full bench decision, also of this Division, of *Link*[15]. The decisions of *Arthur* and *Link* held that because the decision of the DG in terms of section 29(2) is a decision of first instance, it is not appealable under section 8(6) of the Immigration Act to the Minister[16]. However, the proposition is also relevant to condonation, and it would mean that the applicant had to approach the court directly to review the DG's

[14] *Arthur v Director-General, Home Affair* [2023] ZAWCHC 198 (10 August 2023)
[15] *Director-General, Department of Home Affairs and Others v Link and Others* (A324/18) [2019] ZAWCHC 138; [2019] 4 All SA 720 (WCC); 2020 (2) SA 192 (WCC) (17 October 2019)
[16] *Arthur supra* para 28

decision of 21 September 2021. On that approach, the period of delay from the date of knowledge of the decision to the institution of proceedings is closer to 1176 days of which 996 days are post the 180-day time bar, and the explanation even more strained.

[49] On any view of the matter, the delay before this court is 825 days exceeding the 180 days contemplated by PAJA. The delay is excessive and there are aspects to the delay that entails a lot more than simply the period from the day the applicant was informed of the Minister's decision.

Explanation for the delay

[50] While I have found that the delay is excessive, I must weigh the extend of the delay against the applicant's explanation for the delay. In my assessment there are four periods that require explanation.

[51] First there is March 2022 to August 2023. A period of seventeen months. The applicant's explanation for this entire period is, in substance: *"I was too poor."* There is little detail. The applicant informs the court that after the New Zealand visa refusal in December 2022 his quest to challenge his prohibition was only reignited after he had discussions with his PhD supervisor in '*late 2023'*. This means almost a year lapsed that is unexplained why he did not challenge the prohibition. In respect of the rest of this period there is no chronological account of what steps were considered or taken by the applicant in each month. There is no detail of how the applicant's circumstances changed or did not change over the period.

[52] The second period is the eight months from August 2023 to 2 April 2024 when he engaged with Home Affairs himself before appointing SMSSA. There is only the reference to one engagement with Home Affairs. The rest of this period is not

explained. The third period is a period of three months from 2 April 2024 to mid-2024 after Home Affairs informed him that the Minister had already made a decision. The applicant does not explain why he did not pursue the review during this time. The fourth period is from mid-2024 to December 2024. Also, approximately five to six months after finding attorneys willing to represent him.

[53] As mentioned, the applicant's explanation is in the main built on a narrative of a lack of resources. The narrative is however problematic. During precisely the period in which he says he was too impoverished to litigate, the applicant had sufficient resources and initiative to leave South Africa; travel to Zimbabwe; pay part of his lobola, renew his Zimbabwean passport; start a company; apply for an international scholarship; prepare and submit a visa application to New Zealand. Each of these actions required effort, organisation, and at least some expenditure. The applicant does not explain why he could pursue an international scholarship application but not make inquiries to a lawyer or legal aid organisation during the same period. The dissonance between what the applicant says he could not afford and what he in fact did is not addressed the affidavits.

[54] There is a further difficulty with the explanation. The allegations that SMSSA did not advise him of the deadline for a PAJA review being 180 days. No confirmatory affidavit was filed even though SMSSA acted for the applicant throughout the section 29(2) and section 8(6) processes and would have been ideally placed to confirm or refute the allegation. The claim of not being advised of the 180-time bar strikes me as untenable. It is simply incomprehensible that an organisation that claims to specialize in immigration related disputes will not advise its clients of the 180-day period in which to launch a review application after the internal remedies have concluded. This

heightens the concern why someone from SMSSA did not depose to a confirmatory affidavit or at least was not requested to depose to one. Maybe they would not have or were not willing to corroborate the applicant's version?

[55] Furthermore, the averment that the applicant could not afford lawyers or was too poor was supported only belatedly by bank statements that he did not originally file and that the DG had to challenge him into producing. However, the bank statements are also not convincing as according to the applicant he requested cash payments for work he has done. However, the affidavits do not set out the extend of these cash payments. It goes further, the applicant's averment that his sisters lent him the money to fund the current litigation is also uncorroborated. There are no affidavits from the sisters and as I point out later is inconsistent with him indicating that he himself needed to save for the legal fees.

[56] The allegations that the applicant approached eight legal firms and clinics for assistance and was rebuffed is also not convincing. The applicant, again, only tendered evidence in reply of his endeavours to procure legal assistance. Those e-mails however reveal a different picture and is not consistent with the '*I was too poor'* narrative:

[56.1] In November 2023 the applicant contacted Malan Attorneys and requested a *'quote'* for legal services to assist him in his case against Home Affairs. No mentioned was made by the applicant regarding pro-bono assistance or for the need for it.

[56.2] Also, during November 2023, the applicant exchanged e-mails with Mr Chris Watters regarding legal assistance. The applicant wrote an e-mail to Mr Watters on 22 November 2023 expressing the following: *"…Thank you for the*

information Chris. I would definitely like option 1. Any idea of all the total costs so that I can plan around my finances and save every cent this festive season (just an estimate-+) and the payment terms its cash upfront." Again, no mention of being so poor that the legal fees cannot be afforded. In fact, it appears as if the applicant was of the view he could afford it but had to save.

[56.3] The applicant also addressed an e-mail to Craig Smith & Associates during November 2023, again requesting a *'quote for legal services'*.

[56.4] The firm MG Attorneys on 20 June 2024 requested a deposit of R995.00 for a consultation and presumably not having heard from the applicant by 19 July 2024 followed up again and expressed an eagerness to assist the applicant. Why the offer from MG Attorneys was not considered or taken up was not explained.

[57] The explanation for the delay, taken as a whole, is patchy, incomplete and unconvincing. It does not cover the entirety of the period of delay and significant periods of the delay are unaccounted for. The portions that are accounted for rest on the applicant's word alone, unsupported by corroboration and is inconsistent and in part untenable. The explanation has the features of an explanation that the court is asked to take on trust where trust is not warranted by all the surrounding facts.

The prospects of success

[58] I turn to consider the prospects of success as the case law is clear that the absence of prospects of success would render condonation pointless; conversely, strong prospects of success may compensate for some weakness in the explanation.

[59] The applicant's review is not without merit. The line of authorities leading from *Koyabe*[17] through *Najjemba*[18], *Bihombel*[19], *Klemenc*[20] and *Lu*[21] establishes that a declaration in terms of section 29(1)(f) of the Immigration Act is administrative action engaging PAJA, and that the section cannot rationally or lawfully be held to apply to persons who are innocent of wrongdoing. There is, on the face of the papers, a reasonable case that the initial decision by Home Affairs officials of 13 February 2020 was procedurally unfair. The applicant was not afforded notice or an opportunity to make representations before the initial decision to declare him a prohibited person. Home Affairs' proposition that section 29(1)(f) applies *ex lege* is unsustainable having regard to the authorities that have opined and rejected that contention.

[60] I also find that Home Affairs is correct that the internal remedies afforded to a person in terms of sections 8(4) to (7) of the Immigration Act could qualify as wide appeals, if administered as such. That being the case the initial non-compliance with not having been provided with an opportunity to make representations and not be given reasons, can be cured by a wide appeal. However, having regard to the facts of this matter the internal remedies were not administered as wide appeals and therefore could not cure the defects in the initial decision. Furthermore, there is also a strong case that neither the DG nor the Minister grappled with the question of complicity that *Najjemba* and *Littlewood*[22]require. That means the decisions have a real difficulty to survive scrutiny.

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[17] *Koyabe and Others v Minister for Home Affairs and Others* 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC)
[18] *Najjemba supra* paras 24, 27-28.
[19] *Bihombel and Another v Minister of Home Affairs and Another* [2024] ZAWCHC 72 par 37; 42 - 45
[20] *Klemenc v Head of Immigration Inspectorate and Others* (18669/2021) [2024] ZAGPPHC 381 (17 April 2024) par 19
[21] *Lu v Minister of Home Affairs and Another* (2023-034681) [2025] ZAGPPHC 181 (26 February 2025) par 14
[22] *Littlewood and Others v Minister of Home Affairs and Another (160/2004) [2005] ZACSA 10 (22 March 2005)* paras 16 - 17

[61] I am therefore satisfied that the applicant has reasonable prospects of success on the merits of the review and is not lightly to be turned away on procedural grounds.

[62] However, while the prospects of success on the merits weigh significantly in the applicant's favour. They are not, however, conclusive on the issue of condonation. The Constitutional Court in *Grootboom*[23] expressly contemplated that condonation may be refused despite the presence of reasonable prospects of success, where the delay is excessive and the explanation is non-existent. That captures the position in which I find myself. The delay here is excessive. The explanation, while not wholly absent, is materially deficient as it does not cover the entirety of the period, is uncorroborated, and it is undermined by the applicant's own conduct.

[63] I deal briefly with the remaining factors in the interests-of-justice enquiry.

[63.1] The importance of the issues. The matter engages the applicant's right of residence, his livelihood, his ability to pursue academic opportunities, and his dignity. These are not trivial interests. They weigh in favour of condonation, as they would in any matter involving the exercise of state power affecting a person's status.

[63.2] Prejudice. The applicant faces real prejudice if condonation is refused, the prohibition will stand, with all its consequences for his life and career. Home Affairs face the prejudice of an extended period of uncertainty regarding the finality of administrative decisions and the operational difficulty of defending decisions taken six years ago by officials whose recollection and records have,

[23] *Grootboom supra* par 51

in the meantime possibly eroded. On balance, the prejudice analysis tips somewhat in the applicant's favour but not decisively so.

[63.3] The effect of the delay on the administration of justice. This factor encompasses the public interest in the finality of administrative decisions and the orderly functioning of the immigration system. The longer the delay, the greater the strain on finality. There is, however, a countervailing public interest in lawfulness. The administration of justice is not served by leaving unlawful prohibitions undisturbed simply because the affected person has been slow. Nor, however, is the administration of justice served by allowing inordinate delays in PAJA proceedings to be condoned without searching scrutiny of the explanation.

[63.4] The conduct of the applicant. The applicant's conduct, on the totality of the papers, is not the conduct of a person who has diligently pursued his rights at every stage. There are unexplained intervals of months. He left the country, built a life in Zimbabwe, applied for international opportunities, and turn to pursue litigation only when his international plans failed. The conduct is, at best, equivocal. It does not weigh in the applicant's favour.

Conclusion on condonation

[64] In the final analysis and weighing the factors holistically I am driven to the conclusion that the applicant has not made out a case for the extension of the 180-day period in terms of section 9(2) of PAJA. The excessive delay and the incoherent or weak explanation for the delay are but some of the factors that diminishes those factors that favour the applicant, like the prospects of success. It is therefore not in the interests of

justice to grant condonation. The application for an extension of the 180-day period under section 9(2) of PAJA must accordingly be refused.

[65] I have not lost sight of the importance of the rights at stake or of the prejudice the applicant will undoubtedly suffer if condonation is refused. Nor have I lost sight of the reasonable prospects of success on the merits. But the interest of justice enquiry is not unilaterally focused on the applicant. It is, in the language of *Melane*, *"a matter of fairness to both sides."* Section 7(1) of PAJA expresses the legislature's determination that delays beyond 180 days are *per se* unreasonable. That determination is not displaced simply because the applicant has prospects of success. To hold otherwise would be to read section 9(2) of PAJA as conferring a near-automatic right of extension on any applicant with arguable merits, regardless of the quality of the explanation or the extent of the delay. That cannot be the position. If it were, the *per se* rule of section 7(1) would be reduced to a formality.

The Merits

[66] Although I have concluded that condonation must be refused and since I have, in my consideration of the prospects of success above, expressed the view that the applicant has reasonable prospects on the merits it is appropriate that I now explain that conclusion.

The failure to administer *audi alteram partem* and to provide reasons during the initial administrative decision-making process

[67] Relying on the Constitutional Court judgment of *Zondi*[24], Mr Simonsz contention on behalf of the applicant is that the failure to administer the fundamental maxim of

[24] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) ("*Zondi*").

natural justice, *audi alteram partem* and not providing the applicant with the opportunity to make representation before the initial decision was made, constitutes a material error that cannot be remedied in subsequent internal processes. In respect of the failure to provide reasons Mr Simonsz argument merely highlights the fact that our law[25] regards the obligation on a decisionmaker to provide reasons as paramount.

[68] Home Affairs' contention on this aspect, advanced by Mr Titus, is that the irregularities in the initial decision were remedied during the internal review and appeal processes conducted by the DG and Minister in terms of section 8(4) to (7) of the Immigration Act, as the internal remedies are appeals in the wide sense as described in *Tikly*[26]. The argument went further to propose that the Constitutional Court in *Koyabe* stresses the importance of utilising internal remedies before approaching a court to review an administrative decision. As it relates to section 8 of the Immigration Act, it was found in *Koyabe* that in general the section provides for a tailored and remedial structure to cure an administrative irregularity[27]. Home Affairs rely on the aforementioned finding to make the argument that irregularities can be fixed in a subsequent internal remedy process.

[69] PAJA itself does not expressly provide an answer to whether irregularities in the initial decision-making process can be cured during the internal remedy process. Sections 3(1), 3(2)(b)(ii) requires a fair administrative process and that the right to make representations is available to an affected person before an adverse decision is made.

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[25] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA*);* and *Director-General, Department of Home Affairs and Others v Link and Others* 2020 (2) SA 192 (WCC)

[26] *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F-591A. An appeal in the wide sense, being a complete rehearing of, and fresh determination on, the merits of the matter with or without additional evidence or information.

[27] *Koyabe supra* paras 54 - 55

In addition, section 3(5) provides that where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of section 3(2), the administrator may act in accordance with that different procedure. Section 5(1) in turn provides that any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for that action may, within 90 days, request that the administrator concerned furnish written reasons. If no reasons are given section 5(3) creates a presumption that failure to furnish reasons within the prescribed period means that the action was taken without good reason, unless the contrary is proved.

[70] If the above-mentioned sections of PAJA are further read with sections 6(2)(c) and 6(2)(f)(ii) of PAJA it is apparent that the absence of a fair procedure and absence of (proper) reasons are treated as independent grounds of review. Although the two irregularities in this case are on a different footing, as it is in fact contemplated by section 5(1) of PAJA that reasons for a decision can be provided after the decision was made. So late reasons do not necessarily invalidate the initial decision.

[71] However, PAJA requires sections 3, 5 and 6 to be read together with section 7(2). In particular section 7(2)(a) of PAJA provides that, subject to paragraph (c), no court or tribunal shall review an administrative action in terms of the act *"unless any internal remedy provided for in any other law has first been exhausted."* Section 7(2)(b) requires a court that is satisfied that any internal remedy has not been exhausted to direct that the affected person first exhaust that remedy. Section 7(2)(c) allows a court to exempt the affected person from exhaustion only *"in exceptional circumstances"* and *"in the interest of justice."* Section 7(2) is thus a threshold issue before a PAJA review can be pursued. It places internal remedies at the centre of the administrative-

justice process. This rationale is supported by similar sentiment expressed by the Constitutional Court in *Koyabe*[28].

[72] That means that PAJA itself plainly contemplates that some procedural irregularities at an initial decision stage will or could be addressed in the subsequent internal-remedy process. Section 7(2) presupposes that internal remedies have practical content, and *Koyabe* confirms that one of their functions is precisely to *"rectify irregularities."*[29] However, if PAJA were to be construed so that every breach of section 3(2)(b)(i) to (v) or section 5(1) at first instance automatically rendered the action liable to be set aside on review, regardless of what happened in the internal remedy process, the role assigned to internal remedies by section 7(2) and endorsed by *Koyabe* would be substantially undermined.

[73] Since PAJA does not, in terms, tell us if, when and how internal remedies cure initial procedural irregularities, the answer must therefore be sought outside the four corners of PAJA. Since the Constitution does not expressly answer the question[30], I consider whether the Common law provides an answer if irregularities in the initial decision-making process can be cured during the internal remedy processes. As I point out hereafter the Common law does assist.

[74] The Appellate Division during 1995 in *Slagment*[31] confirmed that the general rule that: *'a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body*[32]*',* was unjustified. The court in *Slagment* then held, also

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[28] *Koyabe supra* paras 35 -36
[29] *Koyabe supra* para 35
[30] The Constitution, in section 33, only establishes the right to administrative action that is *"lawful, reasonable and procedurally fair."*
[31] *Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union* 1995 (1) SA 742 (A) at 756D-757A; confirmed by *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd* (85/2004) [2005] ZASCA 11; [2005] 2 All SA 239 (SCA); 2005 (6) SA 182 (SCA) (22 March 2005)
[32] That conclusion was developed years earlier in *Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A) at

with reference to English authority[33], that no clear and absolute rule could be laid down as the situations in which the issue arises are too diverse and the rules by which they are governed so various. This means a court must look at the entire process and ask whether fairness has been achieved. There is thus no general rule that a defect at first instance is always or never cured by a fair appeal. The situation will always be fact-specific and dependent on the nature of the envisaged appeal process.

[75] This brings into focus the nature of the internal review and/or appeal and a consideration of the law as established in *Tikly*[34] where Trollip J identified three principal meanings of the word 'appeal' as used in statutes. The first is an appeal in the wide sense, being a complete rehearing of, and fresh determination on, the merits of the matter with or without additional evidence or information. The second is an appeal in the ordinary or narrow sense, being a rehearing on the merits limited to the evidence or information on which the decision under appeal was given. The third is a review, being a limited rehearing directed not at the correctness of the decision but at whether those who made it exercised their powers honestly and properly[35].

[76] The classification of the type of appeal matters because the remedial effect of an internal remedy on a prior breach of natural justice or section 3(2) of PAJA depends largely on the kind of appeal that the internal remedy contemplates. An appeal in the wide sense, which constitutes a full rehearing on the merits with new evidence permitted, has the greatest remedial potential. An ordinary appeal limited to the record

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658A-G where the court accepted as a general rule what was found by Megarry J's dictum in the English judgment of *Leary v National Union of Vehicle Builders* [1971] Ch 34 at 49F ([1970] 2 All ER 713 (Ch) at 720h)

[33] *Calvin v Carr and others* [1980] AC (PC) 574 at 592C ([1979] 2 All ER 440 (PC) at (447*h*)

[34] note 28 *supra*

[35] The Constitutional Court recently reaffirmed the continued vitality of the *Tikly* in the context of a tax matter in *Commissioner for the South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* (CCT 104/23) [2025] ZACC 3; 2025 (6) BCLR 639 (CC); 2025 (5) SA 617 (CC); 88 SATC 162 (31 March 2025)

has limited remedial effect because the record is itself tainted. A review has the least remedial effect because it does not redetermine the merits at all.

[77] I therefore have to consider whether a review or appeal contemplated in section 8(4) to (7) of the Immigration Act is a 'wide appeal' to enable me to consider whether the apparent procedural irregularities in the initial decision was in fact cured by the DG and later the Minister.

[78] This is where the Immigration Act immediately creates another uncertainty. Section sections 8(5), (6) and (7) confer on both the DG and the Minister the same powers to *"confirm, reverse or modify"* the impugned decision. These sections confer those powers without regard to whether the matter comes before the functionary on review or on appeal. Section 8(4) speaks of the affected person's right to apply to the DG *"for the review or appeal"* of a decision while section 8(5) gives the DG the power to *"confirm, reverse or modify"* while section 8(6) confers a right of further appeal to the Minister and section 8(7) again confers on the Minister the power to *"confirm, reverse or modify."* The text of the statute therefore appears, at first reading, to not differentiated between a review or appeal.

[79] However, since the legislature have used two terms with established and distinct legal meanings, the presumption is that those terms have been used with their distinct meanings in mind. Meaning, that a difference between a review and appeal is as expressed in *Tikly*. The two processes are different, even if the decisional powers conferred on the appellate functionary are the same in each case. A construction that

treats a "review" and an "appeal" in section 8(4) and (6) as synonymous does violence to the statute and will render one of the two terms redundant[36].

[80] Once it is accepted that the legislature must be presumed not to have used different words for the same thing, and that the words "review" and "appeal" have well-established and distinct meanings, the conclusion is unavoidable that section 8(4) to (7) contemplates two distinct procedural paths. The applicant has a choice and may invoke the DG's review or appellate jurisdiction. The options are the same at the Minister's level.

[81] What this all means is that a review in terms of section 8(4) to (7) cannot, as a matter of law, cure a prior breach of natural justice or a fair procedure contemplated by section 3(2)(b)(i) to (v) of PAJA in the initial decision. That is because a *Tikly* review is, by its nature, a supervisory enquiry into the propriety of the decision-making process. So, all that remains is to consider whether an appeal in terms of section 8(5) and (7) of the Immigration constitute a wide appeal as described by *Tikly*.

[82] However, it is apparent that sections 8(4) to (7) contemplate an appeal in the wide sense, where the appeal process is embarked on. Section 8(5) empowers the Director-General to *'confirm, reverse or modify'* the original decision while section 8(7) similarly empowers the Minister to *'confirm, reverse or modify'*. The functionaries are not confined to the record that was before the immigration officer. They may receive new representations and new evidence. They stand in the shoes of the original decision-maker and may re-determine the substantive position. In *Koyabe*[37] the

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[36] *Standard Bank Investment Corporation v Competition Commission and Others, Liberty Life Association of Africa Ltd v Competition Commission and Others* (44/2000, 50/2000) [2000] ZASCA 20; 2000 (2) SA 797 (SCA) ; [2000] 2 All SA 245 (A) (31 March 2000) on statutory interpretation and not to do violence to the statute in aim of interpreting it.

[37] *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) par 54.

Constitutional Court endorsed the section 8 internal remedy as a mechanism by which the executive may *'rectify irregularities first'* before resort to litigation. This is consonant with a wide-appeal concept.

[83] I am therefore satisfied that if the processes which the applicant was subjected to was in fact an appeal that initial irregularities could have been cured in both the appeal process before the DG and thereafter the Minister. However, while I have found that an appeal envisaged by section 8(4) to (7) of the Immigration Act is a wide appeal, a court must still determine whether on the facts the appeal was in fact administered as a wide appeal.

Were the appeals administered as wide appeals

[84] In the context of an appeal in terms of section 8(5) and (7) of the Immigration Act there are a few features that must be present to indicate that an appeal was administered as a wide appeal. First, as per *Tikly*, it must be a complete rehearing on the merits with new evidence permitted and the power to substitute the decision. Second, the affected person must have been afforded a meaningful opportunity to make representations, with adequate disclosure of the case to be met and adequate time to respond. The appellate body must not take a deferential approach to the decision on appeal. I now consider whether on the facts the appeals were administered as wide appeals.

[85] I am not persuaded, on the facts of this matter, that the appeals were administered as wide appeals and cured the defect of allowing the applicant to make representations in the initial decision. Neither the DG nor the Minister approached the matter as if for the first time. The DG's reasons treat the fraudulent character of the permit and the

applicant's awareness of it as established starting points and asks whether the applicant has produced anything to displace them.

[86] The Minister's reasons are more pointed still. The first reason recorded is that *'no new facts or evidence had been produced to justify a review of the decision'*. That is the language of review, not of a wide appeal. A wide appeal does not ask whether the appellant has produced something new. It asks whether the underlying decision was right. The Minister's reasoning is internally consistent with a deferential posture towards the DG's decision, which is itself the antithesis of the rehearing *de novo* that a wide appeal requires.

[87] More importantly, neither functionary engaged with the question that *Najjemba*[38] and *Littlewood*[39] require to be addressed. An important question, where a section 29(1)(f) prohibition is challenged, is whether the affected person was complicit in the fraud or whether he was an innocent victim of it. As Tlhotlhalemaje J held in *Najjemba* (and as Mlambo JP confirmed in *Lu*[40], section 29(1)(f) *'cannot rationally or lawfully be held to apply to persons who are innocent of wrongdoing'*. The wide-sense reconsideration that the section 29(2) and section 8(6) processes contemplate therefore required the functionaries to ask, on the totality of the evidence, whether the applicant was complicit.

[88] The DG's reasons do not engage with that question. They proceed on the bare assertion that the applicant *'was aware'* of the fraud, without engaging with the applicant's evidence to the contrary, namely his reliance on the agent *Wendy*, the absence of any practical means by which he could have investigated her, his collection and use of the

[38] *Najjemba* supra paras 40 to 43
[39] *Littlewood and Others v Minister of Home Affairs and Another* 2006 (3) SA 474 (SCA)
[40] *Lu* supra par 35

document openly at banks and at ports of entry over an eight-year period, his use of the permit when applying for a study visa, and his consistent representation of his status during that time. The Minister's reasons engage with the question of complicity hardly at all. The Minister limits himself to the observation that the dates on the document *'should have alerted'* the applicant to its fraudulent character. That is a conclusion, not an engagement with the evidence. The applicant put before both functionaries an explanation of how the date discrepancy was reconciled to him by *Wendy*. Neither functionary engaged with that explanation. Neither said why the explanation was rejected. Neither made a finding that the explanation was untruthful.

[89] On the totality of the aforementioned considerations, the cure on which Home Affairs relies has not been affected. The procedural irregularities that vitiated the initial decision of 13 February 2020 has not been displaced by the subsequent processes.

The decisions of the DG and the Minister

[90] The findings above do substantial work in disposing of the merits. If the initial decision was procedurally unfair, and if the section 29(2) and section 8(6) processes did not cure that defect, the appellate decisions are themselves vulnerable on a derivative basis as they were taken on the foundation of, and in confirmation of, an unlawful declaration. That alone would suffice to set them aside, and it is not strictly necessary to embark on a separate review of the DG's and Minister's decisions on their own terms.

Conclusion on the merits

[91] I conclude, accordingly, that had I granted condonation, I would have granted the substantive relief in respect of the reviewability of the impugned decisions.

Remedy

[92] It remains to consider, for completeness, the remedy that I would have granted had condonation been granted. The applicant seeks not only the setting aside of the impugned decisions but a declaratory order that he is not a prohibited person in terms of section 29(1)(f) of the Immigration Act.

[93] I would not have granted a declaratory order to that effect, even on the assumption that the merits favoured the applicant.

[94] The relief that a court may grant on a successful review under PAJA is governed by section 8 of PAJA, read with section 172(1) of the Constitution. Section 8(1)(c) of PAJA provides that a court may grant any order that is just and equitable, including remitting the matter for reconsideration by the administrator, with or without directions. Section 8(1)(c)(ii)(aa) permits the court to substitute its own decision for that of the administrator only in *'exceptional cases'*. The Constitutional Court has held repeatedly that substitution is a remedy of last resort, available only where the court is in as good a position as the administrator to make the decision and where it is in the interests of justice to do so[41].

[95] A declaratory order that the applicant is not a prohibited person would, in substance, be a substitution. It would not merely set aside the impugned decisions but would put in their place a positive finding on the underlying question. The court would, in effect, be exercising the power that section 29(2) of the Immigration Act confers on the DG.

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[41] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) paras 47-50.

[96] The circumstances of this case do not, in my view, justify substitution. Several considerations militate against it.

[97] First, the question whether the applicant was complicit in the fraud is, on the record, contested. The applicant says he relied on *Wendy*. Home Affairs says his conduct, taken as a whole, is consistent with complicity. The resolution of that contest involves an assessment of credibility, of the surrounding factual circumstances, and of the inferences to be drawn from the applicant's conduct over a long period. That is the kind of assessment that section 29(2) entrusts to the DG. It is not a question on which a court reviewing the administrative process is in as good a position as the administrator.

[98] Second, the record before this court is not complete. There has been no investigation by Home Affairs into the origins of the fraudulent permit. The identity of the official who endorsed it, the circumstances of its issuance, the role of *Wendy*, the records of Home Affairs at the relevant time, and the systemic vulnerabilities that allowed an apparently authentic permit to be issued through unofficial channels. These are all matters that would, in the ordinary course, inform a properly considered decision under section 29(2). A court reviewing the matter on the existing record cannot replicate the investigative function of the executive.

[99] Third, the passage of time may have produced new facts that may bear on the section 29(2) enquiry. Whether those facts and other developments bear on the 'good cause' enquiry under section 29(2) is a question for the DG.

[100] Fourth, although I have found that the applicant has reasonable prospects of success on the merits, I have not made a positive finding that he was an innocent victim of *Wendy*'s conduct. My finding on the merits is essentially negative. The DG and the

Minister did not engage with the question they were required to engage with. I did not and could not make a finding that the applicant is, in fact, not a prohibited person. To issue a positive declaration that the applicant is not a prohibited person would be to assume a role that section 29(2) properly reserves for the DG.

[101] The just and equitable remedy, had condonation been granted, would have been to set aside the impugned decisions and to remit the matter to the DG for fresh consideration in terms of section 29(2), on updated information and after affording the applicant a proper opportunity to make representations.

[102] The directions that I would have given may be expressed as follows. The matter would have been remitted to the Director-General to reconsider the section 29(2) application within 90 days. The applicant would have been afforded a period of 30 days, before the commencement of that 90-day period, to file supplementary representations and supporting material updated to the present date. The DG would have been directed to consider, *de novo*, whether the applicant is a prohibited person in terms of section 29(1)(f) of the Immigration Act, with reference to the question of complicity and to engage with the explanations advanced by the applicant and also to take into account such investigation as Home Affairs is reasonably able to undertake into the origins of the impugned permit and to provide reasons for the decision in compliance with section 5 of PAJA. The DG's decision would then have been subject to the ordinary internal remedies under section 8 of the Immigration Act.

Costs and order

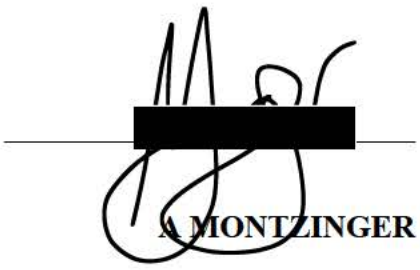
[103] On the question of costs, I am not persuaded that any party should be ordered to pay the costs of the other. In the circumstances, I consider that the appropriate order is that each party should bear its own costs.

[104] In the result, the following order is made:

1. The applicant's application for an extension of the 180-day period under section 9 of the Promotion of Administrative Justice Act 3 of 2000 is refused.

2. The review application is dismissed.

3. Each party shall bear its own costs.



A MONTZINGER

Acting Judge of the High Court

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