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

Case Number: 14733/2023

In the matter between:

Paul David Harding

Applicant

And

The Minister of Home Affairs

First Respondent

The Director-General of Home Affairs

Second Respondent

**The Minister of International Relations
and Co-operation**

Third Respondent

**JUDGMENT ELECTRONICALLY DELIVERED
30 OCTOBER 2023**

Baartman, J

[1] The applicant seeks the review and setting aside¹ of the second respondent's decision rejecting his permanent residence application in terms of section 27(e) of the Immigration Act, 13 of 2002 (**the Act**). The applicant further

¹ Sections 5(3) and 6 of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**).

seeks a substitution order, which I deal with below. The first and second respondents oppose only the latter relief and agree that the decision be reviewed and set aside but request that the matter be referred to the decision-maker for reconsideration.

[2] On 1 December 2006, the applicant purchased a property, 1[...] St James Road, St James in the Western Cape, for R3.5 million without the assistance of a bond (**the St James property**). He spent a further R1 million on renovating the property. A copy of the deed of transfer is annexed to this application.

[3] In November 2015, the applicant and his wife applied for permanent residence in South Africa to the South African High Commission in London. In September 2019, the applicant and his wife divorced and only he now pursues that application. In 2015, the applicant declared that he owned 4 properties in the United Kingdom (**the UK**) from which he earned the following monthly rental income:

- (a) £625 25 which is equivalent to R12 665.34 per month in respect of the property situated at [...] S[...] Court, Padbury, Buckingham, Bucks;
- (b) £602 per month, which is equivalent to R12 205.79 per month in respect of the property situated at 5[...] A[...] Road, Winslow, Bucks;
- (c) £575 per month, which is equivalent to R11 652.38 per month in respect of the property situated at 1[...] L[...] Walk, Winslow, Bucks;
- (d) £575 per month, which is equivalent to R11 652.38 per month in respect of the property situated at 2[...] L[...] Walk, Winslow, Bucks.

[4] He alleged the following in the application:

'(v) It is clear from the table hereinabove that our client has the right to a combination of assets giving him no less than R37 000.00 per month, which he will continue to receive indefinitely.

(vi) In light hereof, our client complies with the prescribed requirements stipulated by section 27(e) (ii) of the Act, ...'

[5] In addition to the above, the applicant also submitted, among others, a 3-month bank statement confirming that he had sufficient financial means to sustain him and his wife. Annexed to the application were also police clearance, medical certificates, proof of ownership of the properties and the lease agreements in respect of each property. In correspondence dated 24 November 2015, the secretary to the South African High Commission in London informed the applicant as follows:

'...your applications for immigration permits were referred to the Department of Home affairs in Pretoria.... It is possible that in the course of such processing, additional documents may be required...'

[6] In correspondence dated 29 November 2021, the Immigration Services sought the following:

'Kindly assist in urgently completing & signing the attached form for the Department to verify your funds/assets in respect of your application.... Should no response be received within 5 working days, this matter will be considered as finalised...'

[7] The request from the department came 6 years after the applicant had

made his initial application. His circumstances had changed considerably by then, most importantly he was now a pensioner and had disposed of 3 of the UK properties. On 1 December 2021, the applicant complied and annexed the St James property's deed of transfer and a copy of his pension statement from which it was apparent that he was in receipt of a pension from the Connells Group Pension Scheme administered by Mecer in the United Kingdom. It was apparent from the pension documents that the applicant had received a lump sum of £194 769.69 (R4.42 million) on 20 September 2021 and that from 25 September 2021, he would receive, indefinitely, an annual pension of £29 215.56 (R662 824.51) in monthly instalments of R55 235.00 per month gross. The consent form that he signed reads as follows:

'I [applicant and passport number] applied for permanent residence in terms of Section 27(e) of the Immigration Act, which requires me to prove that I have a right to a pension or an irrevocable annuity or retirement account as a prescribed minimum payment for the rest of my life.

I hereby grant approval to the Department to verify the documents which I have submitted as proof of my financial status from abroad including:

South African bank statements - attached

Deed submitted in respect of property obtained in the Republic of South Africa - attached

Investments with any South African Institution

(handwritten to the official form were: UK Bank Statement and Copy of pension).'

[8] On 25 August 2022, the department informed the applicant that 'up to date no response have (sic) been received pertaining to verification of your assets as listed on your consent form'. In correspondence dated 9 January

2023, the department rejected the applicant's application as follows:

'...2. During the processing of your application, the Department was unable to verify the documents pertaining to your pensions submitted in support of your application for permanent residence. Given the fact that the Department could not verify the documents with the relevant institution, you therefore do not qualify for permanent residence in terms of section 27(e) of the Immigration Act... Director-General (Acting) 14/10/2022'

[9] On 17 January 2023 and on 18 April 2023, the applicant requested 'adequate reasons for...rejection of his application'.² The Department did not even acknowledge receipt of the requests.

The Immigration Act and Regulations

[10] Section 27(e) of the Act provides as follows:

'27 Residence on other grounds

The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who-

(e) intends to retire in the Republic, provided that such foreigner proves to the satisfaction of the Director-General that he or she -
has the right to a pension or an irrevocable annuity or retirement account which will give such foreigner a prescribed minimum payment for the rest of his or her life; or
has a minimum prescribed net worth; ...'

² Section 5 of PAJA.

[11] Immigration Regulation **(IR)** 24(11) of the Immigration Regulations published on 22 May 2014 (GN No. R413, GG No. 37679) and as amended on 29 November 2018 by GN No. R1328 in GG No. 42071 **(Regulations)** provides as follows:

'24(11) The payment contemplated in section 27(e)(i) of the Act shall be, per month, the amount determined from time to time by the Minister by notice in the Gazette and the net worth contemplated in section 27(e)(ii) of the Act shall be a combination of assets realising, per month, the amount determined by the Minister by notice in the Gazette.'

[12] The notice published in *Government Gazette* No. 37716 (No. 451) of 3 June 2014 provides as follows:

'Minimum amounts as payments per month from pension of irrecoverable annuity or retirement account in relation to retired person visa or permanent residence permit.'

'I, Mr MKN Gigaba, Minister of Home Affairs, hereby, in terms of sections 20(1)(a) and (b) and 27(e) of the Immigration Act, 2002 (Act No. 13 of 2002) determined the following minimum amounts as payments per month from a pension or irrevocable annuity or retirement account:

Minimum Payment per Month	17. R37 000.00
Minimum Net Worth	19. R37 000.00

Discussion

[13] In 2015, the applicant applied in terms of section 27(e)(ii) of the Act alleging that he had the prescribed net worth. At the time, he owned 4 properties in the UK from which he received rental income. He met the prescribed net worth from the rental income. There is no dispute in this regard. In 2021, when he signed the consent form, he met the requirements of section 27(e)(i) as he was in receipt of an irrevocable pension from which he received monthly pension payments of more than the prescribed minimum payment for the rest of his life.

[14] It is apparent from the wording of the Act and Regulations that section 27(e) requires that an applicant be financially independent to the extent and amount that the Regulations require, which is an income of R37 000 per month. I assume from the reasons given, in the department's favour, that it was at least able to verify that the applicant has an unbonded property, the St James property, bank accounts and alleged balances in South Africa and the UK. The department would then have been able to verify whether the applicant has received any funds from his pension fund.

[15] The department has not indicated why it was unable to verify the information pertaining to the pension fund. Despite resisting substitution, the respondents failed to take the court into their confidence as to what the problem was with verification and how they intend to overcome the problem if given yet another opportunity, 8 years later. The applicant is left to speculate on whether his consent was inadequate or whether he should have approached the pension fund or compelled the pension fund to co-operate. It is unclear what attempts, if any, the department made to verify the pension documents.

[16] This matter and 2 others involving 64 applicants appeared on the unopposed motion court roll of 17 October 2023. Two matters were dealt with in terms of agreements between the parties. I postponed this matter for argument to 25 October 2023 and afforded both parties an opportunity to file heads of

argument. The respondents did not take the opportunity to file an answering affidavit, nor did they explain, in an explanatory affidavit, the process of verification. It follows that there is no indication that referring the matter back to the Department would result in a different outcome.

[17] The Department has had ample opportunity to clarify the verification process so that a court can assess whether it is appropriate to refer the matter back. The Department has been in possession of the application since 2015; that is an extraordinary amount of time to process a retirement resident application where the legislation is uncomplicated and the information supplied apparently readily verifiable. I say this mindful that the Department has in recent years been overwhelmed by the sheer volume of applications. However, the Department has not cited lack of capacity to complete the verification process. If the Department has had trouble with the pension fund or the financial institutions, it preferred not to inform the applicant or the court.

[18] The lack of clarity about the verification process has received judicial attention. In *Maier*³, the court said the following:

'48. In the exchange between the court and counsel for the respondents with regard to the proposed verification process, it was apparent to the court that there appeared to be some uncertainty and confusion as to exactly what such process would entail. Initially counsel for the respondents stated that it was no more than to verify that the applicants had the bank accounts they asserted in their application and founding affidavit. When given an opportunity to consult with his client during an adjournment on exactly what was meant by the verification process, he informed the court that it was a process by which the staff of the respondents would undertake to verify the bank balances of the applicants

³ *Maier and another v Minister of Home Affairs and another* 2023 JDR 0118 (WCC)/ (4145/2022) [2022] ZAWCHC 264.

in their various bank accounts....

50 The exact process of that verification exercise is not even clear to this court. I was more than satisfied that the financial information placed before this court has been adequately verified in order for this court to make a decision, in terms of Section 8(1) (c)(ii) (aa) of the PAJA, on the applicants' application for permanent residence permit in south Africa.

51. What is disconcerting to this court is the respondents' contention, in its proposal referred to above, that the applicants will only be granted permanent residence permits "on condition that they pass the verification process of their local and foreign bank statements and meet the minimum requirements". There is no indication as to what minimum requirements the applicants have not already met in this matter, other than the respondents' contention that they need to verify bank statements.

52. Moreover, it is even more disconcerting that the respondents' counsel stated in the heads of argument that the respondents would have to consider "all relevant factors....and come to a fair just and equitable decision ".These assertions by the respondents clearly indicate the failure to properly understand and appreciate the confines of the statute and regulations which they themselves are bound by.'

[19] It is unfortunate that the Department persists with an obstructive attitude and expects the court to condone the abuse. In this matter, the applicant has put up bank statements from the UK and South African financial institutions from the which the flow of his cash is apparent. He is a man of means and meets the minimum required net value. In addition, the applicant has submitted documentation from his pension fund dated 16 September 2021 from which the following appears:

'... Payment of your lump sum of £194 769.69 will be made into your account on or around 20 September 2021.

Your annual pension of £29 215.56 will be paid to you in monthly instalments. Your first pension payment, including any arrears, will be made on 25 September 2021.

The pension amount above is the gross amount and will be subject to income tax at the appropriate rate....

Your pension will increase each year on 1 April. ...

Your benefit from the Scheme uses up 72.20% of your Lifetime Allowance of £1073100.00...'.

[20] It is apparent from the Lloyds Bank statement, dated 29 November 2021, that the applicant had on 25 November 2021 and on 25 October 2021 received £2 157.43 from the pension fund. The payment reference is same used in the pension fund's 16 September 2021 correspondence referred to above. The applicant's FNB statement had a closing credit balance of R2 807 299.35 in October 2021. In addition, in this application, the applicant annexed his FNB statement for the period 29 April 2023 to 31 May 2023 from which a closing balance of R327 067.67 in credit is apparent.

[21] The applicant further annexed his Lloyds bank statement for the period March 2023 to June 2023 from which his £2 278.95 pension payments on 25 April 2023 and 25 May 2023 are apparent. He further annexed correspondence from the pension fund dated March 2023 from which the following appears:

'...Under the Rules of the Scheme, I am pleased to confirm that following the pension increase of 2023 your pension has increased from £29 929.32 per annum to £31 038.60 per annum. This is the gross amount and will be subject to income tax at the appropriate rate.'

[22] The applicant, in an abundance of caution, annexed two 'Pension Payslip Scheme: Connells Sec 1 Connells' from which it is apparent that after tax, his income is more than the prescribed amount.

Is substitution the appropriate remedy?

[23] In *Trencon*⁴, the Constitutional Court held as follows:

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

[24] The information that was before the Department is before me from which it is apparent that in 2015, the applicant met the requirements for residency in

⁴ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd and another* (2016) JOL 33413 (CC) and *Aquila Steel (South Africa) (Pty) Ltd v Minister of Minerals Resources and Others* 2019 (3) SA 621 (CC).

terms of section 27(e). The information supplied to the Department in 2021 is before me and indicates that the applicant met the requirements in terms of section 27(e)(ii). The applicant's current information confirms that he still meets the requirements. The respondents have conceded that the matter be reviewed and set aside. As indicated above, they resist a substitution order but have failed to file an answering or explanatory affidavit. Even after the matter was postponed for heads of argument, the respondents did not place an explanatory affidavit before court; instead, they have simply instructed their legal representative to request that the matter be remitted to them. That request, 8 years later, without any explanation of what the verification process entails is unreasonable. Until the Department gives an idea of what the verification process entails, the respondents are able hold applications in abeyance indefinitely. That is a position this court cannot condone.

[25] I am persuaded that the bank statements corroborate the applicant's professed income from his pension fund. The fund information and contact details are apparent from the documents annexed. I can only conclude that tardiness on the part the Department's employees is to blame for the inordinate delay. It is of concern that the Department has ignored correspondence seeking clarity about the reasons for rejecting the application. That attitude is unfortunate and further compounded by the course taken in this litigation. The applicant is 65 years old and has fully complied with the legal requirements for the residency permit for which he had applied 8 years ago.

[26] I am mindful of the doctrine of separation of powers and that it is generally undesirable for a court to make a decision that is lawfully the domain of an authorised official. However, in the circumstances of this matter, the administrator's decision is a forgone conclusion as the applicant has complied with the requirements of the Act and regulations and is entitled to just

administrative action.⁵ He has inexplicably been denied just administrative action and this court is in as good a position as the administrator to make the decision.

Conclusion

[27] I, for the reasons stated above, am persuaded that this is an appropriate matter to grant substitution and that remitting back to the Department would cause further unnecessary delay. In the absence of an explanation as to what the mysterious verification process entails and what the problems encountered were, if any, the applicant is left at the mercy of the Department's inexplicable tardiness if the court does not grant him the relief he is entitled to on the papers filed in this application. I therefore make the following substitution order.⁶

(a) The second respondent's decision made on 14 October 2022, rejecting the applicant's permanent residence application in terms of section 27(e) of the Immigration Act, 13 of 2002 (**"PR Application"**), which PR Application was submitted in November 2015 at the South African High Commission in London, United Kingdom, is reviewed and set aside.

(b) The decision described above is substituted, and the second respondent is directed to issue to the applicant a permanent residence permit in terms of section 27(e) of the Act within 10 (ten) days of this Court Order, which permit will be made available at VFS, Cape Town.

(c) The first and second respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

Baartman, J

⁵ Section 33 of the Constitution of the Republic of South Africa, 1996.

⁶ Section 8 of PAJA.