



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

**CASE NO: 3970/2021**

**In the matter between:**

**TAWANDA CRISWELL MTEMACHANI**

**Applicant**

**and**

**DIRECTOR-GENERAL OF HOME AFFAIRS  
MINISTER OF HOME AFFAIRS**

**1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent**

**Heard: 16 November 2023  
Delivered: 29 November 2023 (Electronically)**

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**JUDGMENT**

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**PILLAY, AJ**

**INTRODUCTION**

1. This is an application for the review and setting aside of the first and/or second respondent's decision to uphold the refusal of the applicant's application for a critical skills visa in terms of section 19 (4) of the Immigration Act No 13 of 2002 (**"the Immigration Act"**).

2. The applicant seeks, in the first instance, that the first and/or second respondent's respective decisions be substituted with an Order that the applicant be granted a valid critical skills visa in terms of section 19 (4) of the Immigration Act. In the alternative, an Order is sought that the applicant's appeal in terms of section 8 (6) of the Immigration Act be remitted to the second respondent for reconsideration with such directions as this Court deems appropriate.
3. There are accordingly two issues that present for determination in this matter:
  - 3.1. First, whether the applicant has succeeded in showing that the first and/or second respondents have committed a reviewable irregularity.
  - 3.2. Second, if a reviewable irregularity has been shown, what the appropriate remedy is.

## THE EVIDENCE

4. According to the founding affidavit:
  - 4.1. The applicant is a Zimbabwean national who has been subjected to a debilitating 3 ½ years process with the Department of Home Affairs ("**the Department**").
  - 4.2. The applicant cannot leave South Africa because if he departs without a valid visa, he will be declared undesirable and banned from South Africa for five years. It is common cause that the applicant's visitor's visa expired on 10 June 2017.

- 4.3. Shortly before the expiry of the applicant's visitor's visa, he applied for a critical skills visa.
- 4.4. The applicant is a graduate of the University of Cape Town who holds a Bachelor of Science in Computer Studies. He alleges, that as of 26 May 2014, he would qualify for a critical skills visa.
- 4.5. The applicant is married to a long-term spouse in terms of African Customary Law for the last five years. This, he explains, precipitated the need for a waiver to facilitate his application for a critical skills visa as he did not wish to be separated from his wife.
- 4.6. On 18 December 2016, the applicant applied for a waiver in order to allow him to apply for his critical skills visa while in South Africa. This application was successful.
- 4.7. On 9 June 2017, the applicant submitted his critical skills visa application.
- 4.8. According to the applicant, unless he had a valid pending visa application, he would not be allowed to remain in South Africa without a valid visitor's visa. In addition, the applicant could not extend his visitor's visa and at the same time apply for his critical skills visa, which made the process more cumbersome and difficult to predict.
- 4.9. On 20 June 2017 the Department refused the applicant's application for a critical skills visa. The reasons for the refusal were that the applicant

had failed to submit: (a) a certificate of registration with the recognised professional body, council or board; (b) confirmation of the skills or qualifications of the applicant and appropriate post qualification experience; and (c) a police clearance certificate (“**the missing documents**”).

4.10. On 25 August 2017, the applicant submitted an appeal to the first respondent which contained all of the missing documents from the initial application.

4.11. This notwithstanding, the applicant’s appeal was not determined. This necessitated an application to compel the respondents to adjudicate the applicant’s appeal. On 6 December 2019, a Court Order was granted which directed that the respondents determine the applicant’s appeal within 20 days of the Order. The Order further provided that in the event that the applicant’s application was rejected, written reasons had to be provided to the applicant’s attorney within 20 days of the date of the Order.

4.12. On 10 September 2020 the applicant’s appeal was determined by the Assistant Director: Appeals. The letter advising the applicant of the outcome states as follows:

“Your letter of appeal bears reference.

I wish to inform you that I have decided to uphold the decision to reject your application for a temporary residence visa in terms of section 19 (1) of the Immigration Act, 2002, (Act No 13 of 2002) as amended. You were supposed to have lodged a renewal of your visa application within the stipulated period.

You may within 10 working days from the date of receipt of this notice make written representations for a review or appeal of the decision in terms of section 8 (6) of the Immigration Act, 2002 (Act No 13 of 2000 (as amended)). Should you fail to make representations, the decision set out above shall remain effective.”

- 4.13. The applicant explains that his application for a critical skills visa was not submitted in accordance with section 19 (1) of the Immigration Act, which provision was repealed in 2014, but that it was submitted in terms of section 19 (4) of the Immigration Act. Seemingly for this reason, the applicant argues that the Assistant Director: Appeals suffered from a material misapprehension because his application was for a critical skills visa and not a renewal application and there was no stipulated period within which he ought to have lodged such an application.
- 4.14. On or about 13 October 2020, the applicant’s attorney submitted an appeal to the second respondent. The appeal raised various grounds including, *inter alia* the following:
- 4.14.1. That the applicant had applied in terms of section 19 (4) of the Immigration Act and not section 19(1) thereof.
- 4.14.2. Section 19 (1) of the Immigration Act had been repealed. Any reliance on that provision was therefore erroneous.
- 4.14.3. The first respondent’s decision was underpinned by various mistakes of fact in that: (a) the applicant had not submitted an application for renewal of his critical skills work visa as he did

not hold such a visa; (b) the applicant had a right to apply for a change of status which he duly did.

4.14.4. Neither the Immigration Act nor the Regulations provide for a stipulated period in which the applicant was required to apply for a critical skills work visa.

4.15. On 2 December 2020, the second respondent duly represented by the Assistant Director: Appeals (though a different individual) again refused the appeal in terms of section 8 (6) of the Immigration Act. This letter stated, in relevant part, as follows:

“Your appeal dated 14/10/2020 bears reference.

I wish to inform you that I have decided to uphold the decision to reject your application for a temporary residence visa. My decision is based on the fact that you do not qualify for a temporary residence visa in terms of section 19 (1) of the Immigration Act, 2002 (Act 13 of 2002) as amended, because of the following:

- You failed to address the reasons outlined in your rejection letter.

Comments: take note that the waiver is about the requirements as it is self-explained, and not for late submission as you claim, however letter of good cause was expected from you.”

5. According to the answering affidavit:

5.1. The respondents admit the allegations in the founding affidavit that: (a) unless the applicant had a valid pending visa application, he would not be allowed to remain in South Africa, without a valid visitor’s visa; and

(b) that he could not extend his visitor's visa and at the same time apply for his critical skills visa.

- 5.2. The respondents also admit the allegations in the founding affidavit that there is no provision in the Immigration Act or the Regulations that cater for the period in which the applicant must make an application for a change of status.
- 5.3. The respondents further admit that the waiver permitted the applicant to apply for his critical skills visa which had to be submitted while he was in South Africa and that because he only had a visitor's visa that was for a period of 60 days or less, that he was extremely pressed for time.
- 5.4. Notwithstanding the foregoing admissions, the respondents contend that the applicant should, in light of its visitor's visa expiring, have applied for an extension of his visitor's visa while waiting on the outcome of the waiver application. According to the respondents, there is no reason why the applicant did not apply for an extension of his visitor's visa as there was no law nor any regulation deterring him from doing so this. This, according to the respondents would have prevented him "from a precarious situation of being in the country illegally without a visa and also having his waiver application negatively adjudicated upon."
- 5.5. It is emphasised that the waiver approval, did not exempt the applicant from meeting the requirements as stipulated in section 19(4) of the "Immigration Regulations".

- 5.6. It is asserted that in anticipation of the positive outcome, the applicant should have familiarised himself with the requirements of section 19 of the Regulations. Thus, it is contended that the reason for not submitting all the necessary documents due to insufficient time stands to be dismissed.
- 5.7. It is accepted that there was a mistake on the part of the respondents but, this is attributed “purely on (sic) human error.”
- 5.8. It is alleged that the threshold for a substitution order has not been met.

#### **THE RELEVANT PROVISIONS IN THE IMMIGRATION ACT AND THE REGULATIONS**

6. It is common cause that the application at issue is one for a critical skills visa in terms of section 19(4) of the Immigration Act.
7. Section 19 of the Immigration Act reads as follows (in relevant part):

“19 Work visa

(1) .....

[Sub-s. (1) deleted by s. 12 (a) of Act 13 of 2011 (wef 26 May 2014).]

(2) A general work visa may be issued by the Director-General to a foreigner not falling within a category contemplated in subsection (4) and who complies with the prescribed requirements.

(3) .....

(4) Subject to any prescribed requirements, a critical skills work visa may be issued by the Director-General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the



Gazette and to those members of his or her immediate family determined by the Director-General under the circumstances or as may be prescribed.

[Sub-s. (4) substituted by s. 12 (d) of Act 13 of 2011 (wef 26 May 2014).]

...”

8. Regulation 18(5) of the Immigration Regulations, 2014, GN R413 of 2014 published in GG 37679 of 22 May 2014 (“**the Immigration Regulations**”) reads as follows:

- “(5) An application for a critical skills work visa shall be accompanied by proof that the applicant falls within the critical skills category in the form of-
- (a) a confirmation, in writing, from the professional body, council or board recognised by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act, or any relevant government Department confirming the skills or qualifications of the applicant and appropriate post qualification experience;
  - (b) if required by law, proof of application for a certificate of registration with the professional body, council or board recognised by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act; and
  - (c) proof of evaluation of the foreign qualification by SAQA and translated by a sworn translator into one of the official languages of the Republic.”

## **THE LAW: THE DUTY TO PROVIDE REASONS AND THE GROUNDS OF REVIEW**

### **The duty to provide reasons**

9. A significant feature of this case relates to the adequacy or otherwise of the reasons provided by the respondents. The applicant raises this issue as a self-

standing ground of review and as a factor that is relevant to other grounds of review.

10. The legal principles in respect of the duty to provide adequate reasons are well established, the following aspects of which warrant reference:

10.1. First, as a point of departure, it is well established that the duty to provide reasons in the context of judicial review, occupies a central position in our constitutional landscape:

10.1.1. In **Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others** 1999 (2) SA 599 (T) at 630F – J, Southwood J observed that the importance of reasons cannot be over-emphasised. They show how the administrative body functioned when it took the decision and in particular show whether that body acted reasonably or unreasonably, lawfully or unlawfully and/or rationally or arbitrarily.

10.1.2. In the minority judgment in **Bel Porto SGB v Premier, WC** 2002 (3) SA 265 (CC) (2002 (9) BCLR 891; [2002] ZACC 2), the inherent value of adequate reasons was recognised as follows:

“[159] The duty to give reasons when rights or interests are affected has been stated to constitute an indispensable part of a sound system of judicial review. Unless the person affected can discover the reason behind the decision, he or she may be unable to tell whether it is reviewable or not and so may be deprived of the protection of the law. Yet it goes further than that. The giving of reasons satisfies the individual that his or her matter has

been considered and also promotes good administrative functioning because the decision-makers know that they can be called upon to explain their decisions and thus be forced to evaluate all the relevant considerations correctly and carefully. Moreover, as in the present case, the reasons given can help to crystallise the issues should litigation arise.”

10.1.3. In a concurring judgment **SAPS v Solidarity obo Barnard (Popcru as Amicus Curiae)** 2014 (6) SA 123 (CC) (2014 (10) BCLR 1195; [2014] ZACC 23) at par 105, the following observations were made:

- (a) Our constitutional values of accountability, transparency and openness reinforce the need for decision-makers to give adequate reasons for their decisions.
- (b) To truly qualify as reasons, they should be properly informative.

10.1.4. In **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) ([2003] 2 All SA 616; [2003] ZASCA 46) (Phambili Fisheries) at para 40 the Supreme Court of Appeal held:

“ ...

‘(T)he decision-maker [must] explain his decision in a way which will enable a person aggrieved to say,

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

This requires that the decision-maker should set out his understanding of the relevant law, any findings of fact on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which led him to those conclusions. He should do so in 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."

10.2. Second, as to the sufficiency or adequacy of reasons:

10.2.1. In **Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)** 2010 (4) SA 327 (CC) (2009 (12) BCLR 1192; [2009] ZACC 23) at par 63, the Constitutional Court observed that although the reasons must be sufficient they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. According to the Constitutional Court, what constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.

10.2.2. In **Commissioner, South African Police Service, and Others v Maimela and Another** 2003 (5) SA 480 (T) (also referred to by the Constitutional Court in **Koyabe**), it was held that:

- (a) Reasons “must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified” (at 480).
- (b) Reasons must, from the outset (not with the benefit of hindsight), be intelligible and informative to the reasonable reader thereof who has knowledge of the context of the administrative action. If reasons refer to an extraneous source, that extraneous source must be identifiable to the reasonable reader (at 486F).

10.2.3. In **Director-General, Department of Home Affairs and Others v Link and Others** 2020 (2) SA 192 (WCC) at par 29 and 30 a Full Bench of this Division held:

- (a) Reasons must, at least be 'intelligible and informative'.
- (b) The decision-maker should explain his decision in a way that will enable the person who is the subject thereof to understand why it went against him/her and

allow them to determine whether it was based on an incorrect factual premise or an error of law.

- (c) Merely setting out the decision-maker's conclusions will not suffice.
- (d) The decision-maker should set out his understanding of the relevant law, the findings of fact on which his conclusions are based, and the reasoning process which led to them.
- (e) This should be done in clear and unambiguous language and not in vague generalities or legalese, i.e. in the formal terms of the applicable legislation.
- (f) Ultimately, the reasons provided should be sufficient to allow for a 'meaningful' review or appeal: the applicant should have information sufficient to place him/herself in a position to put up a 'reasonably substantial' case for a review or appeal of the decision.

10.3. Third, specifically in the immigration context, the duty to provide reasons is expressly provided for in section 8(3) of the Immigration Act which provides as follows:

“Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely

affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.”

**Taking account of irrelevant considerations and failing to consider relevant considerations, irrationality, error of law and/or fact**

11. The applicant has placed reliance on several grounds of review in the Promotion of Administrative Justice Act No 3 of 2000 (“**PAJA**”), including the following:

11.1. That a mandatory and material procedure or condition (i.e. that of furnishing adequate reasons) was not complied with.

11.2. That the failure to provide adequate reasons rendered the impugned decision to be procedurally unfair.

11.3. That the impugned decision was taken arbitrarily or capriciously.

11.4. That the impugned decision contravenes a law or is not authorised by an empowering provision.

11.5. That the impugned decision is irrational.

11.6. That the impugned decision is so unreasonable that no reasonable person could have exercised the power or performed the function.

11.7. That the impugned decision is otherwise unconstitutional or unlawful.

12. In what follows, I address the three grounds that I consider to be most relevant.

## Rationality

13. One of the grounds of review under PAJA is that the decision is not rationally connected to the reasons given for it by the administrator (section 6(2)(f)(cc)).
14. It is now trite that for the exercise of public power to be valid, a decision taken must be rationally connected to the purpose for which the power was conferred.<sup>1</sup> This entails determining whether there is a rational link between that decision and the purpose sought to be achieved.<sup>2</sup>
15. In **Democratic Alliance v President of the Republic of South Africa and Others** 2013 (1) SA 248 (CC) (2012 (12) BCLR 1297; [2012] ZACC 24) at par 32 the Constitutional Court held:

“[32] The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred....”

16. In **Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd and Another** 2023 (1) SA 1 (CC) at par 57 the Constitutional Court explained that the rationality standard is not about the cogency of reasons furnished for a particular decision but that “it is all about whether there was a rational connection between

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<sup>1</sup> **Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others** 2000 (2) SA 674 (CC) (2000 (3) BCLR 241; [2000] ZACC 1) at par 85.

<sup>2</sup> **Law Society of South Africa and Others v Minister of Transport and Another** 2011 (1) SA 400 (CC) (2011 (2) BCLR 150; [2010] ZACC 25) para 32.



'the exercise of power in relation to both process and the decision itself and the purpose sought to be achieved through the exercise of that power'."

#### Taking account of irrelevant considerations and failing to consider relevant considerations

17. Given that the application that served before the respondents was one for a critical skills visa, it must follow that its adjudication must occur in terms of section 19(4) of the Immigration Act read with Regulation 18(5). The relevant considerations therefore concern whether the threshold imposed by those provisions has been met by the application or not.

#### Error or law

18. Section 6(2)(d) of the PAJA provides for the review of an administrative action if "the action was materially influenced by an error of law".
19. As recognised by the SCA in **Afriforum NPC v Minister of Tourism and Others, and a Similar Matter** 2022 (1) SA 359 (SCA), this formulation was taken from the common-law ground of review articulated in **Hira and Another v Booyesen and Another** 1992 (4) SA 69 (A) ([1992] ZASCA 112) at 93 H-I where the Court held that an error of law will be material if it distorts the exercise of discretion of the decision-maker; if "the tribunal "asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or failed to apply its mind to the relevant issues in accordance with the behests of the statute".

20. In **Afriforum** the SCA found (at par 54) that the Minister had believed erroneously that she was bound by a particular statutory provision. According to the SCA, the error was material because it distorted her discretion in the sense that it caused her to fail to apply her mind properly to the criteria that should have been used for eligibility.

### **THE RESPONDENTS HAVE COMMITTED A REVIEWABLE IRREGULARITY**

21. I have already quoted from the letters that were addressed to the applicant pursuant to the determinations made under sections 8(4) and 8(6) of the Immigration Act. The following aspects of those letters warrant emphasis:

21.1. First, the letters refer to a decision to reject the applicant's "application for temporary residence visa". It is clear on the evidence that no application for a "temporary residence visa" was made; the application was for a critical skills visa. While it may be that in terms of section 10 of the Immigration Act, a critical skills visa is a form of temporary residence visa, in the present instance, the application was specifically for a critical skills visa, the granting of which is governed by its own specific criteria. The criteria applicable to a critical skills visa is not the same as that for other temporary residence visas. The application accordingly fell to be considered as an application for a critical skills visa. The reference in the letters to the application as a generic temporary residence visa is accordingly erroneous.

21.2. Second, the letters refer to an application in terms of section 19(1) of the Immigration Act. It is common cause that section 19(1) of the

Immigration Act has been deleted by section 12 (a) of Act 13 of 2011 (wef 26 May 2014). This aspect of the letters is accordingly erroneous.

21.3. Third, the letters advise that the applicant was “supposed to have lodged renewal of your visa application within the stipulated period”. This aspect of the letters is vague, incoherent and erroneous in that: (a) the visa application that was before the Department was for a critical skills visa; (b) there was no prior critical skills visa and therefore the question of a renewal of that application did not arise; (c) there is no “stipulated period” for applying for a critical skills visa.

21.4. Fourth, the letters did not refer to non-compliance with any of the peremptory requirements for a critical skills visa.

22. In my view, the above difficulties with the letters arise from an objective reading of them. On the evidence, it is also clear that the applicant was confused by the letter written in respect to the application under section 8(4). In his appeal, he therefore clarified that:

22.1. He had applied in terms of section 19(4) and that section 19(1) (which the first respondent had relied on) found no application.

22.2. He had made no application for a renewal of a critical skills visa.

22.3. The legislative and regulatory framework made no reference to a “stipulated period”.

23. Notwithstanding the submissions made by the applicant in his appeal, the determination pursuant to section 8(6) of the Immigration Act does not engage with any of those issues. Instead, it states:

"I wish to inform you that I have decided to uphold the decision to reject your application for a temporary residence visa. My decision is based on the fact that you do not qualify for a temporary residence visa in terms of section 19 (1) of the Immigration Act, 2002 (Act 13 of 2002) as amended, because of the following:

You failed to address the reasons outlined in your rejection letter."

24. It is notable that in the answering affidavit, no clarity is shed on this issue. Instead, it is alleged that: (a) the reasons for refusal to grant the critical skills visa were furnished and conveyed to the applicant; (b) the applicant is not exempted from meeting the requirements of section 19(4) of the Immigration Regulations (it being common cause that there is no Regulation 19(4) and that Regulation 19 relates to retired persons visas); (c) the mistakes in the letters are attributable to "human error".

25. For all of these reasons, I am of the view that respondents have committed a reviewable irregularity in that: (a) they have taken irrelevant considerations into account and failed to consider relevant considerations; (b) the impugned decision was not rationally connected to the reasons given for it; (c) they committed an error of law and/or fact.

26. In the course of oral argument, a novel argument was presented. It went along these lines: the applicant was not eligible for a critical skills visa because by the time that that application was determined on appeal (under section 8(4) and

section 8(6)), the applicant's visitor's visa had expired. In support of this argument, the following submissions were made:

26.1. Section 10(8) of the Immigration Act provides: "An application for a change in status does not provide a status and does not entitle the applicant to any benefit under the Act, except for those explicitly set out in the Act, or to sojourn in the Republic pending the decision in respect of that application." It was argued that notwithstanding the application for a critical skills visa, the applicant was not lawfully in the country at the time of determination of that application in terms of sections 8(4) and 8(6).

26.2. Section 32 of the Immigration Act regulates the position in respect of illegal immigrants (defined as a foreigner who is in the Republic in contravention of the Immigration Act), as follows:

"32 Illegal foreigners

(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.

(2) Any illegal foreigner shall be deported."

26.3. Absent an extension of the visitor's visa (which the applicant had not applied for), the applicant was not lawfully in the country and therefore was not eligible for and could not have been granted, a critical skills visa.

27. I am of the view that the respondents' arguments on this score cannot succeed for the following reasons:

- 27.1. First, on the evidence, the respondents admit the allegations in the founding affidavit that unless the applicant had a valid pending visa application, he would not be allowed to remain in South Africa, without a valid visitor's visa and that he could not extend his visitor's visa and at the same time apply for his critical skills visa. Significantly, the respondents do not allege that the applicant's application for a critical skills visa did not constitute a valid pending application.
- 27.2. Second, the letters containing the respondents' reasons are replete with material errors and are vague and confusing. These errors have been identified in paragraph 21 above. The letters do not, in my view, satisfy the threshold of adequate reasons.
- 27.3. Third, the respondents have put up no reason in the affidavits that have been filed (or in the letters that were sent to the applicant) as to exactly which requirements for a critical skills visa were not satisfied.
- 27.4. Fourth, the new argument that was raised in oral argument does not appear from the evidence in this matter. In order to sustain the argument, I would have to embark on an unacceptably strained reading of the letters.
- 27.5. Fifth, in light of the new argument the Court invited the parties to file supplementary notes in respect thereof. It is clear from those notes that the new argument is founded evidence that does not form part of the record.

28. A further ground of challenge was raised, viz, that the impugned decisions fall to be reviewed and set aside because the functions of both the first respondent and the second respondent had been designated to the Assistant Director: Appeals. According to the applicants, by having the Assistant Director: Appeals adjudicate the applicant's second appeal against the dismissal of his first appeal, the second respondent had breached one of the fundamental principles of natural justice namely that it is improper to be a judge in one's own cause.

29. In light of the conclusions that I have reached, I do not believe that it is necessary for me to deal with this as a further ground of review. It is however of some concern that the Immigration Act envisages an appeal process that lies with two distinct functionaries, namely, the Director-General and ultimately, the Minister whereas the delegations that have been adopted provide for a delegation in both instances to the Assistant Director: Appeals. This notwithstanding, I do have reservations as to the merits of the argument in this application for the following reasons:

29.1. First, it is common cause that the functions of both the Director-General and the Minister have been delegated to the Assistant Director: Appeals. There was no challenge to that delegation.

29.2. Second, a determination of the matter on this ground, would have far-reaching consequences in respect of matters that have already been determined in circumstances where this issue has not been properly and fully ventilated on the papers.

29.3. Third, in any event, in the present instance the two separate appeals were determined by two separate individuals, although both occupied the same designation.

29.4. Finally, in light of the conclusions I have reached, I do not consider it necessary to determine this issue.

## REMEDY

30. Having found that there was a reviewable irregularity, it follows that the impugned decisions must be reviewed and set aside.

31. Attendant on that Order, the applicant argued for an Order of substitution.

32. The legal principles in respect of substitution are well established. In terms of section 8(c)(ii)(aa) of PAJA, a court may substitute its own decision for that of an administrator in 'exceptional cases'.

33. In **National Commissioner of Correctional Services and Another v Democratic Alliance and Others** 2023 (2) SA 530 (SCA), the SCA recently confirmed that the lodestar in the enquiry whether there are exceptional circumstances remains **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another** 2015 (5) SA 245 (CC) (2015 (10) BCLR 1199; [2015] ZACC 22) at par 47 where the Constitutional Court identified the following factors:

"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.”

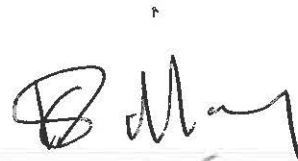
34. I am mindful of: (a) the long history of this matter; (b) the impact of the delays on the life of the applicant; (c) the inadequacy of the reasons given by the respondents; and (d) that the respondents have not raised non compliance with any of the criteria for a critical skills visa. Notwithstanding all of these factors, I am of the view that it would not be appropriate for me to grant an order of substitution. In my view, although there were grave deficiencies in the way in which the matter was handled by the respondents: (a) they are now aware of the irregularities that have been committed to date; (b) they have given this Court an assurance that if the matter is remitted to the Second Respondent for reconsideration it will be dealt with promptly (between 30 and 45 Court days) and in accordance with the timeframes provided for in the Order I make; and (c) I have made provision in my Order as to what is to happen if the Second Respondents does not comply with the remittal Order.

35. In the circumstances, I am of the view that the threshold of exceptional circumstances has not been met and that it would be just and equitable for the matter to be remitted to the Second Respondent for reconsideration.

## **ORDER**

36. In the circumstances, I make the following Order:

- 36.1. The decision of the second respondent to dismiss the applicant's appeal in terms of section 8 (6) of the Immigration Act No 13 of 2002 ("**the Immigration Act**"), against the refusal of his application for a critical skills visa is reviewed and set aside.
- 36.2. The decision of the first respondent to dismiss the applicant's appeal in terms of section 8 (4) of the Immigration Act, against the refusal of the application for a critical skills visa is reviewed and set aside.
- 36.3. The applicant's appeal in terms of section 8 (6) of the Immigration Act is referred back to the second respondent for reconsideration and determination by no later than 26 January 2024.
- 36.4. The respondents shall pay the costs of this application.



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**K Pillay**

**Acting Judge of the High Court**

Appearances :

For the Applicant:

Attorney CS Smith

Instructed by:

Craig Smith Attorneys  
(ref: Mr C Smith)

For the 1<sup>st</sup> & 2<sup>nd</sup> Respondents:

Advocate T Msuseni

Instructed by:

The State Attorney  
(ref: Ms S-L Sampson)