IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN] **[REPORTABLE]**

Case no. A324/18

In the matter between:

THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	First Appellant
THE DEPUTY DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Appellant
THE MINISTER OF HOME AFFAIRS	Third Appellant

and

FRANZ-JOSEF LINK	First Respondent
THOMAS LINK	Second Respondent
ERNST ALOYS DORNSEIFER	Third Respondent
MARIA BRIGITTE LEONIE DORNSEIFER	Fourth Respondent

JUDGMENT DELIVERED ON 17 OCTOBER 2019

SHER, J (GOLIATH DJP et GAMBLE J concurring):

1. This is an appeal against a judgment and order of this Court, in terms of which it reviewed and set aside decisions of the Deputy Director-General and the Director-General of the Department of Home Affairs (the appellants) whereby

they refused applications by the respondents for the grant of permanent residence, and the Court ordered them to issue such permits to the respondents.

2. In arriving at its decision the Court a *quo* exempted the respondents from any obligation which they may have had in terms of the Immigration Act[1] (the 'IA') and the Promotion of Administrative Justice Act[2] ('PAJA') to exhaust domestic remedies of appeal or review of the aforesaid decisions, prior to obtaining any relief from the Court.

The factual background

3. The respondents are two German married couples: the Links and the Dornseifers. The Links first came to South Africa in 2001 and have been living in Paarl since 2013. Their stay in SA has occurred in terms of a variety of temporary visas ranging from tourism to business visas.[3] The Dornseifers visited SA on a number of occasions. After a two month visit between April and June 2014 Mr Dornseifer decided to apply for a retired person's visa,[4] which was granted via the SA diplomatic mission in Berlin on 14 October that year. It was valid for a period of 5 years until December 2018.

4. In January 2015 the Dornseifers made application for the grant of permanent residence, and whilst they were awaiting the outcome thereof they moved into a house they had built in Sandbaai and shipped over their household effects from Germany. The Links in turn invested approximately R 9 mil in a property in Paarl and also brought over all their household effects from Germany as well as their domestic animals which included a number of horses, dogs and a cat. Mr F Link, who was previously employed as a tax consultant in Germany, opened a consultancy business in SA in terms of his business visa and he and his partner became involved in a number of community-based social upliftment projects in

[1] Act 13 of 2002.
[2] Act 3 of 2000.
[3] In terms of S 15 of the IA a business visa may be granted to a foreigner who establishes or invest in a business in South Africa by making the requisite financial or capital contributions thereto in the amount prescribed, and employing the required number of local employees.
[4] In terms of s 20 of the IA.

various areas in the Western Cape, including Kayamandi. The Links made application for the grant of permanent residence in June 2015.

5. Neither the Links nor the Dornseifers received any response to their applications. In November 2016, some 2 months short of 2 years after the Dornseifers had lodged their applications their attorneys addressed a letter to the Department of Home Affairs, c/o the Director-General ('DG') in which it was formally requested to consider and make known its decision in respect of their application for permanent residence within 30 days, failing which application would be made to Court for an order compelling it to do so. A month later the same attorneys addressed a similar letter to the Department on behalf of the Links. Neither of these letters were responded to.

6. In the absence of any acknowledgement by the Department that it was attending to the matter, on 21 December 2016 the Dornseifers launched an application to compel it to take the necessary decision, within 30 days. Once again, there was no formal response. Consequently, on 17 January 2017 an order was taken by agreement whereby the DG was directed to consider the Dornseifers' applications for permanent residence within 30 days, and was held liable to pay the costs of the application.

7. Even the Court order did not move the Department into action, and it too was simply ignored. This prompted an application to hold the DG in contempt, which was not opposed. It resulted in an order being taken, by agreement, on 30 March 2017 declaring the DG to be in contempt and directing him to purge it by making a determination in respect of the Dornseifers' applications within 5 days, failing which the matter would be set down for the grant of an appropriate order. In relation to this application too the DG was ordered to pay costs: this time on an attorney-client scale.

8. In the meantime, the Links' efforts to obtain a decision in regard to their applications followed almost an identical path. A letter of demand from their attorneys shortly before Christmas 2016 was similarly ignored and their application to compel also resulted in an order being taken by agreement on 23

February 2017 whereby the DG was directed to make a determination within 30 (calendar) days ie before the end of March 2017.

9. On 3 April 2017 the Deputy Director-General ('DDG') addressed identically worded letters to messrs Dornseifer and Link in which he informed them that their applications (as principal applicants) for the issue of permanent residence permits had been refused. The DDG pointed out that in terms of the relevant statutory provision[5] he was authorised to issue such a permit to a foreigner of good and sound character who intended to retire in the Republic and who proved to his satisfaction that he or she had the right to a pension, irrevocable annuity or retirement account which provided a prescribed minimum income of not less than R 37,000 per month, or alternatively who had a prescribed minimum net worth in the form of assets which would realise at least such a prescribed minimum amount per month.

10. In each of these letters the DDG stated that the applicants had failed to produce 'adequate proof' that they met the prescribed financial requirements and they consequently failed to qualify for permanent residence. No reasons were set out in support of this statement. The applicants were simply informed that they had 10 working days within which they could make representations for a review or appeal, failing which the decision which was communicated to them would remain 'effective'.

11. A week later, on 10 April 2017, the Dornseifers' attorneys responded in a letter to the DDG and the DG in which they pointed out that according to the voluminous documents which had been submitted in support of the Dornseifers' applications Mr Dornseifer was in receipt of a monthly income totalling R 39,342.90 by way of pension and policy pay-outs from German sources, and as such his earnings exceeded the prescribed financial requirements.

12. The Dornseifers' attorneys further pointed out that in terms of the IA, any decision which is taken by an immigration official which materially and adversely affects the rights of any person must be communicated to them together with the reasons for the decision, and inasmuch as the DDG's letter of rejection simply

[5] S 27(e)(i) and (ii) of the IA.

averred that the applications had been refused because the respondents had failed to produce 'adequate proof' and was not accompanied by any supporting facts or reasons, it did not comply with the Act. The respondents accordingly requested that 'adequate and proper' reasons for the DDG's decision be provided, without which they were unable to address the basis for the rejection by way of an appeal or review, and failing which they had instructions to approach the Court for appropriate relief.

13. The following day the appellant's attorney responded that 'the reason' (sic) for the rejection of Mr Dornseifer's application was clearly stated in the rejection letter from the DDG ie that he had failed to produce 'adequate' proof that he met the prescribed financial requirements. This was obviously nothing more than a restatement, word for word, of what was set out in the original letter of rejection. The appellants' attorneys further advised that even if the 'reasons' given for the rejection of the application were 'inadequate, arbitrary or capricious' (sic) in the event Mr Dornseifer was dissatisfied he was nonetheless obliged to exhaust his internal remedies of appeal or review and it would be 'improper' and premature for him to approach the Court for any relief, without doing so.

14. This prompted yet another attempt by the Dornseifers, by way of a letter dated 12 April 2017, to obtain some clarity. After again setting out in some detail why they were of the view that Mr Dornseifer had complied with the prescribed financial requirements they pointed out that the appellants' letter of rejection did not set out any basis for the bald statement that these requirements had not been met. They enquired whether the DDG was disputing the veracity of the supporting documents or the calculation of Mr Dornseifer's monthly retirement income, and again pointed out that without such information he was unable to exercise his rights to just administrative action in respect of the internal remedies available to him.

15. The Dornseifers also reiterated their stance that the DDG's letter of 3 April 2017 did not meet the peremptory statutory requirement in relation to the furnishing of reasons and requested that such reasons be provided within one week ie by 19 April 2017, in order to enable them to prepare a review or appeal, failing which

they gave notice that they intended to approach the Court for an order reviewing and setting aside the rejection and substituting it with an order in their favour. In the penultimate paragraph of their letter the Dornseifers stated that they were of the view that a failure to provide reasons as required would constitute grounds for an exemption from the requirement in terms of PAJA[6] that they exhaust their internal remedies.

16. A similarly worded plea for reasons to be supplied on behalf of the Links was also sent to the appellants on the same date. Predictably, there was no response to this letter either. Instead, by way of a letter dated 21 April 2017 the DG informed Mrs Dornseifer that her application for permanent residence had also been rejected. In her case, reasons were provided. In this regard the DG said that it had been 'discovered' during the processing of her application that she had wrongly applied for permanent residence in terms of s 26(b) of the Act. According to the DG, as a result Mrs Dornseifer had made application in terms of an 'incorrect' category of the IA and her application had been captured and assessed in accordance with the requirements of the aforesaid section and not s 27(e) as 'required' ie as should have been the case, and her application had consequently been rejected as it failed to meet the requirements of the former provision.

17. On 16 May 2017 the respondents launched their application for review. A week later the DG addressed a letter to the remaining respondent, Mr T Link, in which he was similarly informed that his application for a permanent residence permit had been refused. The reason given, in the case of his refusal, was that inasmuch as his spouse was not a citizen or a permanent resident he did not qualify for the issue of a spousal permanent residence permit in terms of s 26(b) of the Act.

18. The appellants never filed any answering affidavits in opposition to the application. In the circumstances they were bound to the facts which were set out in the founding and supplementary founding affidavits, unless these were obviously wrong. The appellants' counsel conceded that there was nothing on

[6] S 7(2)(a).

the record to gainsay the respondent's factual averments, as set out in their affidavits and in the voluminous papers which they filed in support of their applications for permanent residence.

19. On 15 June 2017 the appellants filed a notice in terms of rule 6(5)(d)(ii)[7] in which they indicated that they intended only to raise a question of law in response to the application. In this regard they contended that inasmuch as s 7 of PAJA made it mandatory, unless there were exceptional circumstances present, for an applicant to exhaust all internal remedies prior to proceeding to Court for relief, the application for review was 'premature' as the respondents had failed to exhaust their rights of appeal or review in terms of s 8 of the IA. Consequently, the appellants contended that the application should be dismissed with costs on the attorney-client scale and the respondents should be directed to comply with their obligations in relation to their domestic remedies.

20. The appellants' point of law did not find favour with the Court a *quo,* which was of the view that there were exceptional circumstances present which justified the respondents being granted exemption from having to first exhaust their internal remedies. The Court was further of the view that the review had to succeed and a substitution was merited and it consequently granted an order directing the appellants to issue the relevant permanent residence permits to all the respondents.

The law

(i) <u>The right to just administrative action</u>

21. The Constitutional Court has held[8] that where the Constitution provides that a constitutional right is available to 'everyone' the right extends to all persons, not only citizens but also foreigners, including those who may be in the country but have not yet been granted formal permission to remain. And in a number of decisions the Supreme Court of Appeal[9] and the Constitutional Court[10] as well as

[7] Uniform rules.
[8] In *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).
[9] *Minister of Home Affairs and Ors v Watchenuka and Ano* 2004 (4) SA 326 (SCA).
[10] *Minister of Home Affairs & Ors v Emmanuel Tsebe & Ors; Minister of Justice & Constitutional Development & Ano v Emmanuel Tsebe & Ors* 2012 (5) SA 467 (CC).

this Court[11] have confirmed that foreigners are as entitled as citizens to the protection of fundamental human rights which are entrenched in the Bill of Rights,[12] save where those rights are specifically reserved for citizens only.

22. It is trite that the consideration of the respondents' applications for the issue of permanent residence permits, and the rejection thereof, constituted administrative action. As such, in terms of s 33(1) of the Bill of Rights (which provides that everyone is entitled to just administrative action) even though they are foreigners the respondents had the constitutional right to demand that such action was carried out in a lawful, reasonable and procedurally fair manner. Furthermore, inasmuch as such action, in particular the decision to refuse to grant permanent residence, adversely affected their rights, the respondents also had a constitutional right in terms of s 33(2) to be provided with written reasons for it.

23. These constitutional rights have been mirrored and given effect to as administrative rights in terms of PAJA, as well as the IA. Thus, s 5(1) of PAJA provides that a person whose rights have been materially and adversely affected by administrative action and who has not been given reasons therefor at the time has a right to request them,[13] and in terms of s 5(2) the reasons supplied must be 'adequate'. So important is the furnishing of 'adequate reasons' that, in the absence thereof and any contrary evidence, in any proceedings for judicial review it will be presumed that the administrative action in question was taken 'without good reason'.[14] The IA in turn provides that when any decision which materially and adversely affects a person is communicated to them it *shall* be accompanied by the reasons therefor.

(ii) <u>The importance and purpose of furnishing reasons</u>

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[11] *Kiliko v Minister of Home Affairs and Ors* 2006 (4) SA 114 (C) at paras [27]-[28].

[12] In *Lawyers for Human Rights* n 8 the Court warned that 'the very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of…. foreigners are violated in the process of preserving our national integrity'.

[13] This right must be exercised within 90 days of the date on which the person became aware of the decision.

[14] S 5(3) of PAJA.

24. As to why reasons are necessary, in *Barnard*[15] the Constitutional Court held that our founding constitutional values[16] of accountability, openness and transparency make it a constitutional imperative for officials to provide reasons for their decisions. These values are aimed at holding government responsible for its actions, and as was pointed out in *Goodman Bros*[17] the furnishing of reasons is conducive to fostering public confidence in its administration.

25. Immigration officials have wide powers, the exercise of which have far-ranging consequences and effects on the lives and livelihood of foreigners, be they visitors or aspiring immigrants. As such, just as in the case where they deal with asylum-seekers, it is important that when they deal with immigrants they exercise these powers properly and observe the fundamental principles applicable to administrative action meticulously, because they may often be dealing with persons who lack resources and are thus unable to enforce their legal rights, and who will face major personal upheaval and financial prejudice in the event that their applications are wrongly refused.[18]

26. In addition to the regulatory function which the furnishing of reasons serves, it also is an indispensable part of a sound and healthy system of judicial review.[19] The duty to provide reasons requires that the decision-maker rationalizes his or her decision, thereby helping to 'structure' the exercise of their powers and any discretion which they may have.[20] In this regard, if the decision-maker knows he or she has a duty to explain why a decision was arrived at they will probably address their minds to the 'decisional referents' which must be taken into account in order for them to arrive at their decision.[21] This encourages sound decision-making.

27. As far as the person who is affected by the decision is concerned, without the reasons for it he or she will be unable to determine whether it is wrong or

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[15] *South African Police Services v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at [105].
[16] As per ss 1(d), 41(1)(c) and 195(1)(g) of the Constitution.
[17] *Transnet v Goodman Bros (Pty) Ltd* 2001 (1) SA 853 (SCA) at para [5].
[18] *Vide* the remarks of Maya P in *Refugee Appeal Board of SA & Ors v Mukungubila* 2019 (3) SA 141 (SCA) at para [26].
[19] *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) at para [159].
[20] *Transnet Ltd* n 17.
[21] *Id*.

irregular and thus susceptible to appeal or review, and will accordingly be deprived of their legal and constitutional rights.[22] Even where a decision is not wrong, the furnishing of reasons for it will nonetheless serve an important 'educative' purpose: it will either enable the affected person to correct or remedy any defects in his or her application, thereby ensuring that it succeeds the next time round, or it may allow them to understand that it has no chance of ever succeeding, and should accordingly be desisted from.[23]

(iii) The content and adequacy of reasons

28. What will constitute 'adequate' or 'sufficient' reasons will depend on the circumstances.[24] In each instance it will depend on the factual context, the nature and complexity of the decision and the underlying issues it seeks to deal with and the functionary concerned. Whilst in one matter a more detailed reasoning will be called for, in another merely a brief summation might suffice.[25]

29. But, even though the reasons for a decision need not be specified in minute detail[26] they must at least be 'intelligible and informative'.[27] 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.[28] Merely setting out the decision-maker's conclusions will not suffice.[29] 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.[30]

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[22] *Bel Porto* n 19.
[23] *Transnet Ltd* n 17.
[24] *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) at para [64].
[25] *Commissioner, South African Police Services & Ors v Maimela & Ano* 2003 (5) SA 480 (T); *Koyabe* n 24 at para [64].
[26] *Koyabe* n 24 at para [61].
[27] *Maimela* n 25 at 486B-C.
[28] *Minister of Environmental Affairs & Ors v Phambili Fisheries (Pty) Ltd & Ano* [2003] 2 All SA 616 (SCA) at para [40]; *Barnard* n 15.
[29] *Makungubila* n 18; *Gavric v Refugee Status Determination Officer* 2019 (1) SA 21 (CC) at para [69].
[30] *Id* at paras [68]-[69]; *Phambili Fisheries* n 28; *Barnard* n 15.

30. This should be done in clear and unambiguous language and not in vague generalities or legalese ie in the formal terms of the applicable legislation.[31] Ultimately, the reasons provided should be sufficient to allow for a 'meaningful' review or appeal: the applicant should have information sufficient to place him/her in a position to put up a 'reasonably substantial' case for a review or appeal of the decision.[32]

(iv) The obligation to exhaust internal remedies save in exceptional circumstances

31. In terms of PAJA, save in exceptional circumstances and where it is in the interests of justice to do so, no Court shall review an administrative action unless any internal remedy which is available has first been exhausted.[33] This requirement is compulsory.[34]

32. The rationale behind the compulsion is that it would usually be more cost-effective and expedient for an aggrieved party to make use of an internal remedy of review or appeal which is available immediately, before a specialist functionary, tribunal or appeal body with the necessary expertise and resources for technical or fact-heavy enquiries, instead of having to seek recourse via an over-burdened and expensive judicial system which is usually not possessed of the same resources, expertise and facilities.[35] In addition, it safeguards the judicial system from trespassing onto the terrain of administrative bodies, thereby honouring the separation of powers.[36] This is an important consideration in immigration matters, which are often driven by government policy, which may change from time to time. Courts should be wary that they do not encroach on areas where the executive treads.

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[31] *Phambili Fisheries* n 28; *Barnard* n 15.
[32] *Koyabe* n 24 at paras [63] and [74].
[33] S 7(2)(a) and (c).
[34] *Nichol & Ano v Registrar of Pension Funds & Ors* 2008 (1) SA 383 (SCA) at para [15]; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & Ors* 2014 (5) SA 138 (CC) at para [115].
[35] *Koyabe* n 24 at paras [35] and [37].
[36] *Id* at para [36]; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Ors* 2004 (4) SA 490 (CC) at para [45].

33. That said however, the Constitutional Court has also warned on more than one occasion[37] that the duty to exhaust internal remedies is not absolute and should not be 'rigidly' imposed, without exception, and should not be used to frustrate the efforts of an aggrieved party who made an attempt in good faith to use them, nor should it be raised in order to shield an administrative process from scrutiny.[38]

34. In addition, an aggrieved party should not be compelled to have recourse to a remedy when it would be futile to do so ie when the remedy is ineffective or inadequate, or when it is not readily available, in the sense that it cannot be pursued without obstruction, be it as a result of systemic deficiencies in the process or because of administrative interference.[39]

The law applied

(i) Ad the failure to provide reasons

35. In the light of the principles which are set out in the preceding paragraphs, it can hardly be contended that proper (ie adequate and informative) reasons for the rejection of the principal applications for permanent residence by first and third respondents, were provided. By stating that their applications were refused because they had failed to produce 'adequate proof' that they were in receipt of the prescribed minimum monthly retirement income the DDG was, at best, simply stating a *conclusion* to which he had come, utilizing the formal language in which the prescribed requirement was couched in terms of the applicable statutory provision, and was not providing his *reasons* for it.

36. When they submitted their applications first and third respondents made use of Form 18, the form prescribed[40] for applications for permanent residence in terms of the Act. After setting out in detail therein his personal particulars, as the principal applicant, as well as those of his spouse as co-applicant, first applicant indicated in the form that he was in receipt of a monthly pension in the amount of

[37] *Koyabe* n 24 at para [38]; *Gavric* n 29 at para [56].
[38] *Id*.
[39] *Koyabe* n 24 at paras [44]-[45].
[40] In terms of Regulation 23(1) of the Immigration Regulations.

R 13 193.90 and monthly rental income in the amount of R 62 321.40. Thus, he was in receipt of a combined monthly retirement income of R 75 516.40, well in excess of the then prescribed minimum of R 37 000 per month.[41] Together with the form, first applicant submitted a voluminous pack of documents in support of his application. Included amongst these were not only copies of the documents required in terms of the regulations[42] (such as passports, visas, birth, police clearance, medical and life partnership certificates) but also a range of bank statements, deeds register certificates, letters from his former employers and lease agreements, evidencing that he was in receipt of the monthly pension and the rental income referred to (which was earned in respect of the rental of certain commercial premises in Germany of which he and second respondent were co-owners).

37. In similar vein, when submitting his application third respondent indicated on Form 18 that he was in receipt of monthly pension and retirement income amounting to R 39 342.90 according to the prevailing exchange rate. In addition, his spouse was in receipt of a monthly pension income of R 17 390.86, giving them a combined monthly retirement income of R 56 733.76. He also enclosed a compendium of supporting documents which evidenced his monthly earnings and that of his spouse, including bank statements and letters from a number of German corporate entities in confirmation of their monthly pension and insurance policy pay-outs.

38. In the circumstances, to say that the applications of first and third respondent were rejected because they had failed to produce 'adequate proof' of the prescribed financial requirements was simply not good enough. And then to ignore two subsequent requests for reasons and clarity as to whether or not it was the veracity of the supporting documentation or the calculation of the income which was being earned which was placed in dispute, was, in my view, contemptuous. To thereafter contend that notwithstanding an abject refusal to provide even a perfunctory explanation for such decisions, the respondents

[41] In terms of GN 451 published in GG 37716 on 3 June 2014.
[42] Regulations 19(1) and 23(2)(a)-(g).

should not be allowed to ask the Court to entertain a review thereof and should be sent back to exercise their domestic rights of review or appeal, adds insult to injury. To paraphrase Cameron JA in *Ngxuza*[43] 'all of this speaks of a contempt for people and process that does not befit an organ of government in our constitutional dispensation…when an organ of government invokes legal process to impede the claims' (in this case of aspirant immigrants) 'it not only defies the Constitution, which commands all organs of state to be loyal to the Constitution and requires that public administration be conducted on the basis that people's needs are responded to. It also misuses the mechanisms of the law.'

(ii) Ad the domestic remedies

39. The appellants' case is predicated on the assumption that the respondents had domestic remedies available in terms of the IA to review or appeal the refusal of their application, and the matter was dealt with by the parties before the Court a *quo* on the understanding that this was so, with the only issue being whether or not the respondents had made out a case for being exempted from exhausting such remedies and being allowed to approach the Court without doing so.

40. In terms of s 8(4) of the Act, first and third respondents had the right to make application to the DG for the review or appeal of any decision as 'contemplated in terms of subsection (3)', which was made by a lower level functionary.

41. In interpreting this provision I am required to adopt a contextual and purposive approach[44] viewed through the prism of the Constitution,[45] and I am duty-bound to promote the spirit, purport and objects of the Bill of Rights[46] particularly insofar as the provision may implicate or affect any such constitutional rights,[47] and must endeavour to interpret the provision in a manner which is least restrictive of such rights.[48] In addition, insofar as constitutional rights are implicated I must prefer a

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[43] *Permanent Secretary, Department of Welfare Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) at para [15].
[44] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[45] *Investigating Directorate; Serious Economic Offences and Ors v Hyundai Motor Distributors (Pty) Ltd and Ors In re: Hyundai Motor Distributors (Pty) Ltd and Ors v Smit NO and Ors* 2001 (1) SA 545 (CC) at para [21].
[46] In terms of s 39(2) of the Constitution.
[47] *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) at para [88]; *Fraser v ABSA Bank Ltd* 2007 (3) SA 484 (CC) at para [43].
[48] *SATAWU and Ors v Moloto and Ano NNO* 2012 (6) SA 249 (CC) at para [44].

generous construction over a merely textual or legalistic one, in order to afford those affected the fullest possible protection of their constitutional guarantees.[49] Lastly, I am required to adopt a sensible interpretation which will not result in impractical or oppressive consequences and will not stultify the operation of the legislation concerned.[50]

42. As previously pointed out s 8(3) provides that any decision which is taken in terms of the Act (other than one in terms of s 8(1) whereby an immigration officer refuses entry to any person or finds a person to be an illegal foreigner), which materially and adversely affects the rights of any person, shall be communicated to them[51] and shall be accompanied by the reasons for that decision.

43. In my view, given these prescripts, the reference in s 8(4) to a decision 'as contemplated in terms of s 8(3)' must be understood to refer to a decision which materially and adversely affects the rights of the aggrieved person and which has been communicated to them together with 'adequate' reasons for it, in the sense outlined in the preceding paragraphs ie a decision which is accompanied by intelligible and informative reasons which explain the 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, thereby placing them in a position to launch a 'meaningful' and rational appeal or review against such decision.

44. Without being provided with adequate reasons for the decision ie with an explanation of how, with reference to the factual circumstances and the legal principles or policy applicable, the decision-maker arrived at his/her decision, not only will the affected person be unable to put up a rational and meaningful appeal or review, but the DG will be unable to consider and determine the merits of such appeal or review, and will thus not be able to exercise the powers afforded to him/her in terms of s 8(5) to confirm, reverse or modify the decision of the functionary concerned. That will in turn make it impossible for the Minister to

[49] *Department of Land Affairs and Ors v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para [53].
[50] *Endumeni* n 44 at para [26].
[51] In the prescribed manner.

exercise similar powers on any further appeal or review to him, in terms of s 8(6) of the Act.

45. It would thus completely stultify the domestic review and appeal process which is provided for in terms of s 8, if an aggrieved party was compelled, notwithstanding a failure to provide adequate reasons (or even any reasons at all as the appellants would have it), to nonetheless engage in such a process, as it would be utterly futile to do so. Without knowing or understanding why the decision-maker arrived at a wrong conclusion and decision an aggrieved party would be unable to motivate why it should be set aside and reversed or altered in any way. Inevitably, the outcome of such an exercise would be a foregone reaffirmation of the original decision, for without any explanation of why the original decision-maker may have erred the DG and thereafter the Minister is surely not going to be in a position to reverse or modify his decision. Such an interpretation would effectively nullify the right to just administrative action which an aspirant immigrant has, and make a mockery of the process for making application for permanent residence and the domestic remedies which are provided for in the legislation in the event of a refusal thereof.

46. In my view, unless the provision is interpreted to mean that aggrieved parties will only have a *duty* (as opposed to a right) to review or appeal an adverse decision of an immigration official internally if it has been communicated to them with adequate reasons, and not in instances where they are not provided with such reasons, aspirant immigrants will be vulnerable to the capricious whim of immigration officials, who will not be capable of being held accountable for their decisions. As Brand JA mused in *Judicial Service Commission v Cape Bar Council*[52] it is difficult to think of a way that one might be held to account for one's decisions other than to give reasons for them. Immigration officials should understand that they are required to treat applications by foreigners for permanent residence with the necessary diligence and care and they should be transparent and accountable in their dealings by providing an informative and adequate explanation for their decisions in regard thereto, and if they fail to do so

[52] 2013 (1) SA 170 (SCA) at para [44].

there will be consequences. By holding that it is only where an adverse decision in terms of the IA is substantiated by adequate reasons that an aggrieved party will be compelled to first exhaust an internal process of review or appeal, one will prevent unnecessary delay, costs and waste of resources associated with a futile process and will allow deserving applicants to approach a Court directly for relief in terms of PAJA. In my view, adopting such a position will strengthen accountability and encourage immigration officials to take responsibility for their decisions.

47. Before moving on I wish to express a word of caution. The interpretation which I have adopted in relation to ss 8(3) and 8(4) must not be understood as granting a licence to aspirant immigrants (or other foreigners), who may be dissatisfied with decisions whereby their applications for temporary visas or permanent residence permits have been refused, to rush to Court to review such decisions, without ado, on the grounds that according to them inadequate reasons, or no reasons, were provided for such decisions. Although s 8(3) of the IA provides that any decision must be 'accompanied' by the reasons for it, ss 5(1) and 5(2) of PAJA provide that where reasons have not been given at the time of a decision being taken the affected party may request the furnishing thereof within 90 days from becoming aware of the decision, whereupon the administrator shall furnish 'adequate' reasons, in writing, within 90 days. Notwithstanding that the provisions of s 5(2) of PAJA are phrased in permissive terms, aggrieved parties will be expected in instances where adequate reasons were not provided at the time of the decision, to formally request such reasons, as was done in this matter, and will surely not be permitted to go to Court without doing so. Only in instances where pursuant to this inadequate (or no) reasons are provided, will an aggrieved party possibly be entitled to approach a Court to exempt them from exhausting their internal remedies, and to review the decision in question. And of course, whether exemption should be granted is a matter which must be determined in each case on the basis of the facts and circumstances which are before the Court at the time.

48. Given that no reasons, let alone proper ie adequate and informative reasons, were given to first and third respondents, there were in my view consequently no decisions ‘as contemplated’ in subsection 8(3) which were subject to review or appeal in terms of s 8(4) at their instance, and it must follow that they were not under any obligation to exhaust the domestic remedies which were provided for in terms of these subsections, before approaching the Court.

49. As far as second and fourth respondents are concerned, the decision to refuse their applications for permanent residence was taken by the DG and not the DDG, and reasons were provided to them in respect thereof. The difficulty which I have is that, on my reading of s 8 no domestic or ‘internal’ remedy of review or appeal is provided for in respect of decisions which are taken at first instance by the DG, and the DG is obviously not in a position to hear an appeal or review against his own decision, so the provisions of s 8(4) cannot find application in instances where the decision was taken by him/her. Logic dictates that if there is to be an internal remedy of review or appeal from the decision of the DG it can only lie to the Minister.

50. Although s 8(6) provides for a right of appeal or review to the Minister, it is one which can only be exercised in regard to a decision by the DG ‘as contemplated in terms of s 8(5)’ ie in respect of a decision on appeal or review to the DG in terms of subsection (4), which in turn is piggybacked on subsection (3). Thus, as I read the section as a whole, no internal right of appeal or review lay in respect of the decision which was taken by the DG, to refuse the applications for permanent residence by second and fourth respondents. The only right of appeal or review which lay to the Minister in regard to their applications was a secondary one which would have accrued had the original decision been taken by a functionary of a ranking lower than the DG. In a nutshell, had the DDG given adequate reasons in regard to the rejection of the applications of first and third respondents, they would have had a right of appeal to the DG and thereafter to the Minister, in the event that the decision on appeal or review to the DG had gone against them, but second and fourth respondents did not have the option of a ministerial review or appeal open to them. In the circumstances I do not agree

with the view expressed by the Court a *quo* that an appeal in terms of s 8(6) was available to the respondents.

51. In the result, the point of law which was taken by the appellants in terms of rule 6(5)(d)(ii) namely that the respondents should be non-suited for failure to exhaust their domestic remedies was, in my view, without merit.

(iii) Ad exceptional circumstances

52. Even if I were to be wrong in regard to the interpretation which I have adopted in respect of the relevant subsections of s 8, and the respondents did have recourse to a domestic appeal or review remedy before they approached the Court, I am of the view that there were exceptional circumstances present which, in the interests of justice, merited exempting them from exhausting such remedies.

53. Exceptional circumstances are circumstances which are out of the ordinary and which require the immediate intervention of the Court in the matter which is before it.[53] What will constitute such circumstances will depend on the facts of each particular matter and the nature of the administrative action in question.[54] In *Koyabe* the Constitutional Court recognized that such circumstances will be present where an internal remedy would not be effective or its pursuit would be futile.[55]

54. In my view such considerations are present in this matter. As I have already pointed out, without being provided with any reasons any attempt on the part of first and third respondents to appeal or review the rejection of their applications would have been ineffective and futile, as they would not have known what they needed to put before the DDG by way of supplementary, outstanding or fresh 'proof' or documentation, in order to satisfy him that they fulfilled the prescribed financial requirements. As far as the remaining respondents are concerned, as spouses their applications were dependent upon the outcome of the principal applications which had been made by first and third respondents. Expecting them

[53] *Nichol* n 34 at para [16].
[54] *Koyabe* n 24 at para [39].
[55] *Id*.

to engage in any self-standing review or appeal of the refusal of their applications would also have been futile and would have served no purpose. Without any realistic prospect of first and third respondents being able to put up a meaningful review or appeal, as they were utterly uninformed as to why their applications had failed, the applications by second and fourth respondents would have been equally futile and doomed to fail, as they were contingent upon the outcome of the applications of first and third respondent. Thus, little purpose would have been served in expecting them to seek a review or appeal of their decisions, at that point in time.

55. As the DG pointed out in his letter of rejection to second applicant, until his spouse became a permanent resident he did not begin to qualify for permanent residence in terms of s 26(b) of the Act. In this regard, in terms of the aforesaid section only someone who has been the spouse of a permanent resident for 5 years is eligible for consideration.

56. That brings me to the reasons which were provided in respect of fourth respondent. The contention by the DG that she made application for permanent residence under an 'incorrect' category of the IA, in terms of s 26(b) instead of s 27(e), and that the contents of her application were incorrectly directed at satisfying the requirements of the former instead of the latter, was wrong. Under cover of a letter from his attorneys dated 16 January 2015, Mr Dornseifer gave notice to the Department that he was making application for permanent residence in terms of the 'retired category' (sic) of the Act ie in terms of s 27(e) thereof, and that his wife was making application in the 'spousal category'. The form which he and his wife duly completed and submitted in support of their application ie Form 18 (B1-947) provided on the first page thereof that in the case of married couples or spousal partners, where the spouse was party to the application both were required to sign the Form and attend upon an interview. Thus it appears that the Form itself was intended to be used in combined applications by spouses, where one might make application for permanent residence in terms of any one of the categories allowed for in terms of s 27 (ie on

the grounds of an offer of permanent employment,[56] extraordinary skills or qualifications,[57] the establishment of a business in SA,[58] refugee status for more than 5 years,[59] or an intention to retire in SA[60]) and the other might make application in terms of s 26(b) on the grounds of their spousal relationship. In the Form which they filled in Mr Dornseifer was reflected as the principal applicant, who was in the country in terms of a retired person's visa, and his wife was reflected as his spouse, who was accompanying him in terms of a spousal visa.

57. Thus, from the contents of the covering letter and the Form, as well as the supporting documentation which was supplied in substantiation of the prescribed financial requirements for Mr Dornseifer's application it must have been clearly apparent that he was applying on the basis of retirement in terms of s 27(e) of the Act, whilst his wife was applying as his spouse in terms of s 26(b), and not that she was making her own, separate application for permanent residence on the basis of retirement. In this regard, inasmuch as she was only in receipt of a monthly pension in the amount of R 17 390.86 she obviously did not qualify in her own right for consideration, as her earnings were well below the R 37 000 threshold. But of course, as in the case of second applicant, her application was contingent upon the outcome of her husband's application.

58. In my view, aside from the futility of expecting any of the respondents to exhaust their domestic remedies, there were a number of other circumstances present which were of an exceptional nature, which justified the matter being heard by the Court. In the first place, a factor which weighs very heavily with me is the wholly unacceptable manner in which the respondents were treated. Their applications (which were lodged in 2015), were never afforded the courtesy of a response for almost 2 years, during which time letters of demand and even Court orders were ignored. When decisions were finally forthcoming, it was only after a further order holding the DG to be in contempt, and then such decisions were still not accompanied by the reasons which were statutorily required, save in the

[56] S 27(a).
[57] S 27(b).
[58] S 27(c).
[59] S 27(d) rtw the Refugees Act of 1998.
[60] S 27(e).

case of the spousal applications of second and fourth applicants. And in respect of second applicant, reasons were only provided *after* the application for review had already been issued.

59. Furthermore, as far as first and third respondents were concerned no reasons, within the meaning understood by that term ie no adequate and proper reasons were submitted, only the conclusion to which the DDG had come, couched within the language of the subsection concerned. In terms of PAJA,[61] in the absence of any reasons being furnished in respect of first and third respondents (notwithstanding repeated requests in this regard), and in the absence of evidence to the contrary, it was to be presumed as a matter of law that the decision to refuse their applications for permanent residence was taken without 'any good reason'. In my view, in such circumstances it was not in the interests of justice to allow the Department to take the utterly cynical approach that, notwithstanding the contemptuous and inept manner in which they had treated the respondents over a period of 2 years, the respondents should not be allowed to put their case before the Court before making use of domestic remedies which were useless to them.

60. It was conceded before the Court a *quo* as well as in this Court that, on the strength of the documentation which they submitted in support of their applications, and in the absence of any answering affidavits gainsaying the evidence contained therein, both the principal applicants (first and third respondents) clearly met the financial requirements that were prescribed for the obtaining of permanent residence permits on the grounds of retirement, in terms of s 27(e). Similarly, as far as their spouses (second and fourth respondents) were concerned, appellants' counsel conceded of her own accord that at the time when their applications were submitted they too met the requirements for obtaining a permanent residence permit in terms of s 26(b), inasmuch as they had both been in 'good faith spousal relationships' with first and third

[61] S 5(3).

respondents for more than 5 years[62] and immediately on the grant of permanent residence to their husbands they would automatically qualify for it as their spouses.

61. We were however nonetheless adjured by appellants' counsel not to have regard to the merits of the respondents' applications when considering whether exceptional circumstances were present sufficient to justify exempting them from exhausting their domestic remedies, as this would be tantamount to putting the cart before the horse. In my view, the appellants' reliance on the relevant dictum in this regard in *Nichol*[63] is misplaced. In *Nichol* Van Heerden JA held that 'merely because' an applicant had a strong case on the merits did not entitle him *per se* to be exempted from exhausting any internal remedies which he may have had. The learned judge did not suggest that the merits of an aggrieved party's case should always be left wholly out of account when considering whether or not sufficient cause exists to excuse him/her from utilizing domestic remedies, particularly not in a case such as this, where the merits of the applications for permanent residence were effectively conceded, given that the contents thereof were not contested in any way whatsoever. In my view it would be manifestly unfair to shut one's eyes to these circumstances. Equally, I can think of other situations where, for example, the Department might want to refer to the merits of an application for permanent residence in order to bolster its argument as to why it would be wholly inappropriate to exempt an applicant from exhausting his internal remedies. In my view the merits may, in appropriate situations, be of relevance in relation to whether or not exceptional circumstances are present.

62. I am thus of the view that this was a matter where the Court a *quo* was entirely justified in holding that the respondents should be exempted from exhausting their internal remedies, if they had any.

(iv) <u>Ad substitution and the order made</u>

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[62] First and second respondents were married on 7 June 2010 and third and fourth respondents on 13 February 1998.

[63] Note 34 at para [24].

63. Having granted the respondents exemption from exhausting any domestic remedies which they had the Court a *quo* went on to order that the appellants were to issue permanent resident permits to all the respondents in terms of the relevant provisions of ss 26 and 27 of the Act. The Court did not set out, with reference to the relevant provisions of PAJA, the grounds for its implicit finding that the decisions of the appellants were reviewable and liable to be set aside. In addition, although this was also not set out in express terms in the judgment it is evident that in making the order which it did the Court a *quo* was not only of the view that the review had to succeed, but also that the matter should not be remitted to the appellants for reconsideration, as a substitution was warranted.

64. In the light of what has been set out above insofar as the principal applicants (first and third respondents) are concerned the decisions of the appellants were reviewable on a number of grounds in terms of PAJA and the Court a *quo* was correct in setting them aside. In the absence of any 'good' reasons for them[64] the decisions were arbitrary and capricious[65] and were not rationally connected to the information which was before the decision-maker (the DDG) at the time.[66] They were also liable to be set aside on the grounds that they were taken without a mandatory and material condition (ie the furnishing of adequate reasons) which was prescribed by an empowering provision, being complied with[67] and/or on the grounds that they were taken in a procedurally unfair manner[68] (in that they were taken without adequate reasons for them being furnished). It could similarly be said that, as a result, the decisions which were made in respect of the subsidiary applications of the remaining respondents, were also arbitrary and capricious.

65. The appellants vigorously challenge the order which was made directing that they should grant permanent residence permits to the respondents. They point out that in terms of PAJA, when a Court sets aside an administrative decision it

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[64] In terms of the presumption which came into operation by way of s 5(3) of PAJA, following the failure to provide adequate reasons, as required in terms of s 5(2).
[65] Contra s 6(2)(e)(vi) of PAJA.
[66] Contra s 6(2)(f)(ii)(cc).
[67] Contra s 6(2)(b).
[68] Contra s6(2)(c).

may only substitute it with its own in exceptional circumstances[69] and in *Trencon*[70] the Constitutional Court held that substitution is an extraordinary remedy and remittal will invariably be the 'prudent and proper' course to adopt.[71]

66. In addition, they remind us that when determining whether the circumstances are exceptional the Court should be deferential to the organ of state which took the decision concerned, out of respect for the separation of powers[72] and so that the Court does not impose itself into policy-laden or 'polycentric' areas over which the relevant functionary may have expertise which the Court does not. [73]

67. In *Trencon*[74] the Constitutional Court held that before a Court can make an order in substitution of the decision of an administrative entity it must be in as good a position as the entity in regard to taking such a decision, which must be a 'foregone conclusion' ie there should only be one proper and inevitable outcome and it would be a waste of time to order the administrator to reconsider the matter.[75] In considering whether to make such an order the Court must also have regard for other relevant factors such as the level of (in)competence of the administrator or any bias on its part, as well as the effects of any delay which has already occurred, and which is still to occur, in the event that the matter were to be remitted.[76]

68. Clearly, in the absence of any reasons for the rejection of first and third respondents' applications and in the absence of any contrary evidence in relation to the factual information which they submitted in substantiation thereof, there was only one proper and inevitable conclusion that the Court could come to ie that they satisfied the financial requirements which were prescribed at the time. No further information or factual or technical enquiry was needed before one inevitably arrived at this conclusion, as it was self-evident from the papers. In

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[69] S 8(1)(c)(ii)(aa).
[70] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd & Ano* 2015 (5) SA 245 (CC).
[71] At para [42].
[72] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Ors* 2004 (4) SA 290 (CC) at paras [45]-[46].
[73] *Id*.
[74] Note 65.
[75] *Id,* para [49].
[76] *Id*, para [48].

addition, there was no question of the exercise of any outstanding discretion by any functionary, or any policy issue by an immigration official being at play.

69. In the circumstances the Court a *quo* was in as good a position as the appellants to make a determination on the merits of the applications of first and third respondents and for that matter of the contingent applications of the remaining respondents, which, as spousal applications, were automatically bound to succeed in the event that the principal applications succeeded. Once again, in their case there was no suggestion that the outcome of their applications was dependent on any further information or factual or technical enquiry which needed to be carried out, before a decision could be made, or any issue of policy.

70. In the result, remitting the matter to the Department would have been nothing more than an unnecessary waste of time and resources and would have exposed the respondents to a possible further frustration of their rights and of being kept out of obtaining permanent residence (for which they undoubtedly qualified), for another lengthy period of time, at considerable further personal and financial cost.

Conclusion

71. There is one final matter which was not expressly dealt with by the Court a *quo*, which needs to be addressed, before concluding. In terms of the notice of motion which was filed the respondents sought to review the rejection of the first, third and fourth respondents' applications for permanent residence. The rejection of second respondent's application was not expressly included. The reason for this obviously is that as at the date when the review application was launched (16 May 2019), a decision in respect of second respondent's application for permanent residence was still outstanding. It was only taken a week later (on 23 May 2017), whereafter it was communicated to the second respondent.

72. For some unknown reason the notice of motion was never formally amended to include a review of the decision to reject second respondent's application for permanent residence. This notwithstanding, the matter proceeded before the

Court a *quo* on the basis that it was properly seized with a review of the decisions to reject all of the respondents' applications, including that of second respondent, and this much is also evident from the judgment a *quo*.

73. On appeal before us however the appellants contended, somewhat opportunistically, that inasmuch as there was no application before the Court a *quo* to review and set aside the decision to reject second respondent's application for permanent residence, the Court a *quo* erred in making an order in this regard.

74. It is evident that, notwithstanding the failure to amend the notice of motion to cover second respondent, the decision to reject his application was covered in the various affidavits which were filed as well as in the argument which was made before the Court a *quo,* as well as in the heads of argument which were filed on appeal. In my view this is an instance where as a matter of justice and fairness the notice of motion is to be taken as having been amended to make provision for a review of the rejection of second respondent's application, in addition to those of the other respondents, as well as a prayer for similar relief as in the case of the others.

75. Finally, although there was no appearance before us on behalf of third and fourth respondents, who we were informed were compelled to return to Germany in the interim as their temporary visas had to be renewed, and first and second respondents appeared before us in person, it is evident that the respondents were assisted by attorneys and counsel until shortly before the appeal was heard, when they withdrew, apparently because of a lack of funds. In the circumstances a costs order in respect of costs incurred to date of withdrawal of the respondents' legal representatives is warranted.

76. In the result, I would make the following Order:

The appeal is dismissed, with costs.

M SHER

Judge of the High Court

I agree. It is so ordered.

P GOLIATH, DJP

Judge of the High Court

I agree.

PAL GAMBLE

Judge of the High Court

Attendances:

Date heard: 30 July 2019
Appellants' counsel: Advs K Pillay SC and A Nacerodien
Appellants' attorneys: State attorney (Cape Town)
Respondents: First and Second Respondents in person