

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

CASE NUMBER: 18669/2021

1. REPORTABLE: **NO/YES**
2. OF INTEREST TO OTHER JUDGES: **NO/YES**
3. REVISED.

DATE: 17 April 2024

SIGNATURE

TINA KLEMENC

APPLICANT

and

HEAD OF IMMIGRATION INSPECTORATE

FIRST RESPONDENT

O.R TAMBO INTERNATIONAL AIRPORT

SECOND RESPONDENT

THE MINISTER OF HOME AFFAIRS

THIRD RESPONDENT

**THE DIRECTOR-GENERAL OF THE DEPARTMENT
OF HOME AFFAIRS**

FOURTH RESPONDENT

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 14h00 on 17 April 2024.

JUDGMENT

MBOWENI AJ

1. INTRODUCTION

- 1.1. This is an application compelling the Respondents to return the Applicants passport that was seized pursuant to her being in possession of a fraudulently obtained permanent residence visa("hereinafter referred to as "visa").
- 1.2. The Applicant furthermore seeks an order reviewing and setting aside the decision taken by the Respondents in terms of Section 29(1)(f) of the Immigration Act 13 of 2002("the Act") to declare her as a prohibited person.
- 1.3. In the alternative, the Applicant prays that the court do not declare her to be a prohibited person in terms of Section 29(1)(f) of the Immigration Act.
- 1.4. The Applicant also sought condonation for the late filing of her review application, together with her failure to exhaust the internal remedies in terms of Section 9 and 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") respectively.
- 1.5. In the alternative, in the event that prohibitions do occur by operation of law, to be declared not to be a prohibited person because section 29(1)(f) of the Act does not apply to persons unaware of the fraudulent nature of documents they possess.
- 1.6. The Applicant also seeks an order that the Respondents pay the costs of the application.

2. Background:

- 2.1. The Applicant has resided in South Africa since 2008. The Applicant is a Slovenian national and the lawful wife of a South African citizen, Octavian Ionescu since 19 January 2009.
- 2.2. The Applicant previously held a visa in terms of section 11(6) of the Act (known as a “spousal visa”) which expired on 08 November 2017.
- 2.3. The Applicant applied to the Respondents to renew this spousal visa.
- 2.4. The applicant applied to the Respondents to renew this spousal visa. After an initial rejection, she appealed to the third Respondent (“the DG”). She apparently applied personally without the input of any immigration advisor.
- 2.5. The Applicant secured the services of an immigration practitioner to keep track of her appeal.
- 2.6. She employed the services of Mr. William Dixon of Pieter Coetzee Attorneys.
- 2.7. According to the Applicant Mr. Dixon appeared to be a legitimate immigration expert.
- 2.8. The Applicant was not concerned about irregularity as she had a valid claim via her husband to a spousal visa.
- 2.9. The Applicant states that at no stage did she or her husband have any personal contact with the Respondents officials.
- 2.10. In January 2018, Mr. Dixon informed the Applicant that her visa was ready and that he will collect it on her behalf. The visa was inserted in the Applicant's passport.
- 2.11. The visa collected by Mr. Dixon had the control number B[...], and it is this visa that was subsequently discovered to be fraudulent.

- 2.12. The Applicant states that she was not aware of any fraud.
- 2.13. The Applicant states that the First Respondent does not contend that the Applicant is guilty of fraud or any other irregular conduct. Rather, the Respondents claim that the mere possession of a fraudulent visa by a foreigner is sufficient for him/her to be prohibited in terms of section 29(1)(f) of the Act.
- 2.14. The Applicant claims that she only became aware of the fraud when it was brought to her attention on 14 July 2019, when she was arrested at the check-in counter at O.R Tambo International airport.
- 2.15. It was at this time that the Applicant's passport was seized.
- 2.16. The Applicant was criminally charged but on 22 July 2019 the charges against her were dropped after she apparently demonstrated that she was unaware of the fraudulent nature of the visa.
- 2.17. The Applicant in support of her legitimate standing and application for a spousal visa referred to an affidavit by the Respondents' officials confirming that:
- 2.17.1. The visa in her passport was fraudulent;
- 2.17.2. That the Applicant's actual visa application (the one which she filed) was granted. She did not collect it, because she thought that the visa supplied by Mr. Dixon was in fact the visa she applied for.
- 2.18. The Applicant later discovered that she has been declared a prohibited person in terms of Section 29(1)(f) of the Immigration Act.
- 2.19. After the criminal charges were withdrawn, the Applicant sought to obtain the return of her passport.

2.20. Correspondence was exchanged between the Applicant ,her husband and various officials within the Department.

2.21. On or about 08 October 2020,the Respondents for the First time notified the Applicant that she is a prohibited person(“despite the fact that the criminal matter was withdrawn in court”).

2.22. The First Respondent also informed the Applicant that she can only be given her passport when she is on her route out of the Republic since she does not have the authority to be in the Republic.

2.23. The Applicants attorneys wrote to the Respondents on 04 February 2021 enquiring:

2.23.1. Whether there are any internal appeals which must be exhausted when is a person prohibited under section 29 of the Act?

2.23.2. If there is a right of appeal ,in terms of which section of the Act such rights exist?

2.23.3. Whether the Department was willing to accept an appeal?

2.24. The Applicant states that there was no substantive answer from the Respondents to the above questions.

2.25. The Applicant states that she had no choice but to approach this court for protection and the orders, she seeks.

2.26. The Applicant states that the matter was not previously opposed by the Respondents and the matter was set down on the unopposed roll of 01 December 2021,and on that date Judge Bam directed the Respondents to “within 30 calendar days of that order respond, in writing ,to the Applicant”.

2.26.1. Request for the return of her passport; and

2.26.2. Internal appeal against their decision that the applicant is a prohibited person in terms of section 29(1)(f) of the Immigration Act.

2.27. The Applicant filed an appeal with the Respondents.

2.28. There was however no response from the Respondents following the order of Judge Bam.

2.29. The Applicant therefore submits that the following questions fall to be determined by this court:

2.30. Are prohibitions under section 29(1) of the Act administrative action?

2.31. If they are, has the Applicant made out a case for the judicial review of her prohibition?

2.32. And if they are, has the Applicant (to the extent necessary) justified or condoned:

2.32.1. The exhaustion of her internal remedies; and

2.32.2. The timeous filing of this judicial review application?

2.33. If prohibitions are not administrative action but rather operate ex lege, does the Applicant qualify as a prohibited person?

2.34. Should the Applicants passport be returned to her?

3. **The Applicants case:**

3.1. The Applicants case is that she was not afforded any notice or opportunity to make representations to the Respondents prior to being declared undesirable.

3.2. In addition to the aforementioned, the Applicant states that she was permanently banned from South Africa without a hearing or a fair process of any kind and therefore she was prevented from presenting evidence that she was not complicit in any fraud.

3.3. The Applicant furthermore states that the First Respondent justifies the absence of any fair process by contending that even innocent people can be banned from South Africa, and that prohibitions under section 29 of the Act occur *ex lege*, that is, by operation of law rather than administrative action.

3.4. The Applicant states that the First Respondent has refused to return her passport notwithstanding that there is no basis for him to hold it, even if the Applicant was correctly prohibited.

3.5. The Applicant does not contend that the visa itself is not fraudulent.

3.6. She contends that there is a distinction between finding that the visa is fraudulent, on the one hand, and deciding that the Applicant is responsible for the fraud and should thus be permanently banned from South Africa, on the other hand. It is the latter issue that is before the court.

4. **The Respondents case:**

4.1. The Respondents contend that the prohibition in terms of section 29(1)(f) is not an administrative action as contemplated in PAJA.

4.2. This position they argue stems from the fact that section 29(1)(f) applies *ex lege* to a foreigner who is found in possession of a fraudulent visa amongst the documents listed in the said provision.

4.3. Further to the above the Respondents states that section 29(1)(f) does not require of the Director General and or the Minister to take any administrative decision in the exercise of public power because its operation takes place automatically upon the discovery of fraud in relation to any of the documents listed in the said section, including a visa.

4.4. The Respondent furthermore contends that the Applicant must exhaust the Departmental internal remedies before coming to court, and that the Applicant has not provided a full explanation for the delay in filing her review application.

5. **The Legislative Framework:**

5.1. **Section 29(1)(f) of the Immigration Act states that:**

5.2. *Anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document is prohibited [person] and [does] not qualify for a port of entry visa, admission into the Republic, a visa, or a permanent residence permit”.*

5.3. Section 29(2) of the Act states that:

5.4. “the Director-General may, for good cause declare a person referred to in subsection (1) not to be a prohibited person.

5.5. The Applicants Counsel therefore argued that the prohibition under section 29 of the Act bans a foreigner from entering and remaining in South Africa. The ban is permanent ,unless and until the ban is uplifted by the Director-General “for good cause” in terms of section 29(2).

5.6. The First Respondent contends that the Applicant was prohibited by operation of law in terms of section 29(1)(f) of the Act.

5.7. The Applicant therefore interprets the actions of the Respondents that the prohibition is automatic, and the affected party is not afforded any of the protective rights and procedures set out in the South African administrative law. *No notice, no opportunity to make representations, no reasons, no explanation of the impact of the decision or of any rights of appeal.*

5.8. The Applicant argues that such an approach is incorrect and that a finding that a person is prohibited under section 29(1) of the Act constitutes administrative action in terms of PAJA.

5.9. Section 1 of PAJA defines “administrative action” in relevant part as:

“any decision taken, or any failure to take a decision, by-

(a) *an organ of state, when-*

(i) *exercising a power in terms of the Constitution or a provincial constitution; or*

(ii) *exercising a public power or performing a public function in terms of any legislation; or*

(b) *a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person, and which has direct, external legal effect.”*

5.10. It is therefore the Applicant's case that all of these elements are present in the case of prohibitions. They are decisions of an administrative character taken by a government official, in fulfillment of a public function (immigration control) in terms of empowering legislation (the Act) which directly, externally and adversely affects the legal rights of the person concerned (by banning the Applicant from South Africa), and it does not fall within any of the exclusions listed in section 1 of PAJA.

5.11. In the case of *Najjemba* and *Koyabe*, the court held that a decision to prohibit an individual constitutes administrative action.

5.12. The affected individual is entitled to adequate notice of the nature and purpose of the proposed action, a reasonable opportunity to make

representations ,a clear statement of the action ,adequate notice of any rights of appeal ,as well as adequate reasons or notice of the right to request reasons. The right to be heard before a decision is made is enshrined in the maxim of natural justice *audi alteram partem*.

5.13. In the case of *Zondi v MEC for Traditional and Local Government Affairs* ,the Constitutional Court emphasized the importance of the audi principle:

“The right to notice before an adverse decision is made is a fundamental requirement of fairness. Notice provides a person affected with an opportunity to make representations as to why an adverse decision should not be made. It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations.”

The timeous filing of this application:

6. The applicants review application was filed late, and she states that that she was not aware of the prohibition until 8 October 2020, although she also refers to the Kistan affidavit that was filed as early as July 2019.
7. The Applicant states that even though she was aware of the Kistan affidavit, she was not aware of the implications as an administrative decision.
8. Even though I agree with the Respondents that this version is quite difficult to accept since the Applicant always had the support of an attorney, the Applicant is the only party that has suffered prejudice as a result of the Respondents actions.
9. I am therefore of the view that the condonation should be granted as it's in the interest of justice.
10. The Applicant has been without her passport for more than four years, communicating with the department without any progress.

Exhaustion of Internal Remedies:

11. The Applicant enquired from the Respondents and VFS whether there is any internal appeal process that she can exhaust.
12. The Applicant then filed an internal appeal through the court where Judge Bam made an order that the Respondents advise the Applicant within thirty (30) days which the Respondent did not respond to.
13. There is no ground to allege that the Applicant failed to exhaust the internal remedies.

Application:

14. The most important question before me is whether the prohibition can be regarded as administrative action.
15. There must be a decision to declare a person prohibited.
16. That decision is taken by an organ of state, exercising a public power performing a public function in terms of any legislation...
17. In this instance the decision is taken in terms of Section 29(1)(f) and 29(2) of the Immigration Act.
18. The Respondents were exercising a public power in terms of legislation.
19. There is no other conclusion that I can draw that the actions of the Respondents are administrative action and not *ex lege*.
20. The Applicant was not afforded an opportunity to make representations before the decision to declare her undesirable was made.
21. It is not disputed by the Respondent that the Applicant was in contact with their offices, asking questions and seeking solutions on how to reclaim her passport.

22. The Constitutional court has held ,” *once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful.*”

23. The Respondents does not dispute that Applicant was criminally charged with fraud by the, but the charges were withdrawn.

24. In my view, once the charges were withdrawn, the Applicants passport should have been immediately returned to her as that was the basis of the charge and arrest.

25. In *Najjemba* the court held that:

“On the surface, it appears that the Minister’s decision is solely based on the finding and conclusion that the applicant obtained a fraudulent work visa. Counsel for the applicant argued that section 29(1)(f) cannot rationally or lawfully be held to apply to persons who are innocent of wrongdoing. In other words, it cannot apply to an innocent party who has been found in possession of a fraudulent visa or to a person who was unaware or not complicit in obtaining such a visa. I agree that this could never have been the intention of legislature. Therefore, it was incumbent for both the DG and the Minister to determine whether the applicant was complicit in the acquisition of a fraudulent work visa.”

26. In the case of *Goldberg*, the court was called upon to decide whether the appellant was “found in possession” of various ivory items. The court stated that the word “*possession*” *comprises a physical element of control together with a mental element and that a person cannot possess unwittingly, i.e. without the necessary mental element.*

27. Once it is accepted that there is a mental component-that is, an element of awareness – in being found in possession, the First Respondents case cannot stand.

The return of the Applicants Passport:

28. Section 31 (1)(a) of the Criminal Procedure Act 51 of 1977 provides that when criminal proceedings are terminated, articles seized in connection with those proceedings “shall be returned to the person from whom it was seized”.

29. The Applicants passport was seized in connection with the “fraudulent visa”.

30. The fraudulent charges were dropped and therefore the Applicants passport must be returned.

31. The Applicant is not able to move around without her passport and that on its own is unconstitutional.

Conclusion:

32. There is no reason for the Applicant to have obtained a fraudulent visa from an agent.

33. The Applicant is the lawful spouse of a South African citizen and have been issued with a valid spousal visa before.

Order

The following order is granted:

1. The application for condonation is granted.
2. The decision to declare the Applicant a prohibited person in terms of Section 29(1)(f) is reviewed and set aside.
3. The Respondents are to return the Applicants passport to her immediately, cancelling the fraudulent visa.
4. The Respondents is to bear the costs of the application on the scale as between attorney and client.

L.J MBOWENI

**ACTING JUDGE OF THE HIGH COURT,
PRETORIA, NORTH GAUTENG**

Date of Hearing: 05 February 2024

Date of Judgment: 17 April 2024

Appearances:

For the Applicant:

Instructed by

Adv D Simonsz

MC Taggart Labuschagne Inc Attorneys

For the First Respondent:

Instructed by:

Adv M Rantho

State Attorney