

SOUTH AFRICA / JUDGMENT

Maier and Another v Minister of Home Affairs and Another (4145/2022) [2022] ZAWCHC 264 (15 December 2022)

[2022] ZAWCHC 264**COURT**

Western Cape High Court, Cape Town

BEFORE

V C Saldanha

CASE / FILE NUMBER

4145/2022

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Case****No: 4145/2022****In**

the matter between:

JAKOB
MAIER First
Applicant
MARIA
JOHANNA LAUB-MAIER Second
Applicant
And
THE
MINISTER OF HOME AFFAIRS First
Respondent
THE
DIRECTOR GENERAL, Second
Respondent
HOME

AFFAIRS

Coram: Justice V C Saldanha

Heard: 3 November 2022
Delivered
electronically: 15 December 2022

JUDGMENT

SALDANHA J:

- [1] On 3 November 2022 I made the following order in the above matter:
1. The decisions purportedly taken on 17 September 2021 and 4 October 2021 respectively, rejecting the applicants' respective permanent residence applications lodged on 30 September 2016, are reviewed and set aside.
 2. The decisions described in paragraph 1 are substituted and the second respondent is directed to issue a permanent residence permit in terms of Section 27(e)(ii) of the Immigration Act 13 of 2002, as amended, to each applicant within 10 (ten) days of the granting of this Order.
- [2] The respondents are directed to pay the costs of the application on an attorney and client scale, jointly and severally, the one paying the other to be absolved.
- [3] These are the reasons for the order.
- [4] The respondents, the Minister of Home Affairs and the Director General of Home Affairs, literally threw in the towel on the day before the hearing of the application, through their counsel's filing of belated heads of argument in which they conceded the substantive merits of the review application. The only issue that remained for determination was whether this court should, in terms of Section 8(1)(c)(ii)(aa)[1] of the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA"), substitute its own order in place of the decisions of the respondents that were to be set aside, and to direct that they issue permanent resident permits to each of the applicants within ten days of the granting of the order. Respondents also resisted an order of costs against them on an attorney and client scale, as they tendered no more than costs on a party and party scale
- [5] It is therefore necessary to set out the background to the application, and in particular to highlight what was no less than egregious conduct on the part of the second respondent in the application, that led to the punitive order of costs. I might at this stage state that the court had seriously considered making an order of costs *de bonis propriis* against the second respondent, for the manner in which he had conducted this litigation and in the handling of the applicants' application for permanent resident status.

[6] The applicants (“the Maiers”) are elderly German citizens who had wished to retire in South Africa in the remaining years of their lives. The first applicant, Mr Maiers, reached 80 years in November 2022, while the second applicant, Mrs Maiers, is 78 years old. They are described as euro millionaires, and between

the two of them have a wealthy asset base on which to live out their retirement.

[7] In the application they sought, in terms of Section 6(1)[2] of the PAJA, to have reviewed and set aside the decisions made by the second respondent on 17 September 2021 and 4 October 2021

respectively, in which he rejected the first and second applicants’ permanent residence applications which they had lodged on 30 September 2016, in terms of Section 27(e)(ii)[3] of the Immigration Act 13 of 2002 (“the Act”) and its attendant Regulations and government notices. They also

requested of the court to substitute its decision for those of the second respondent, and to direct him to issue to them permanent

residence permits in terms of Section 27(e)(ii) of the Act within ten days of its order. The application was initially brought on an urgent basis, but by agreement between the parties was postponed to the semi-urgent roll.

THE

LEGAL FRAMEWORK

The Immigration Act and Regulations

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

‘Residence on other grounds - The Director-General may, subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good and sound character who –

. . .

(e) intends to retire in the Republic, provided that such foreigner proves to the satisfaction of the Director-General that he or she –

(i) has the right to a pension or an irrevocable annuity or retirement account which will give such foreigner a prescribed minimum payment for the rest of his or her life; or

(ii) has a minimum prescribed net worth . . .’

[9] Immigration Regulation (“IR”) 24(11) of the Immigration Regulations published on 22 May 2014 (GN R413, GG 37679) and as amended on 29 November 2018 (GN R1328, GG 42071) (“Regulations”)

provides as follows:

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

[10] The notice published in Government Gazette 37716 (GN R451) of 3 June 2014 provides as follows:

‘MINIMUM AMOUNTS AS PAYMENTS PER MONTH FROM PENSION OR IRREVOCABLE ANNUITY OR RETIREMENT ACCOUNT IN RELATION TO RETIRED PERSON VISA OR PERMANENT RESIDENCE PERMIT

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

Minimum Payment Per Month R 37 000.00 Minimum Net Worth R37 000.00’

BACKGROUND

FACTS

- [11] The applicants claimed that for many years it had been their dream to retire in South Africa. During October 2011 they purchased Erf 8[...] M[...], for an amount of R[...], situated at 2[...] G[...] A[...], T[...] V[...], wherein they resided when in South Africa. They attached a copy of the Deed of Transfer, no. T[...], to their founding affidavit.
- [12] On 30 September 2016, and at the same time, they both applied for permanent residence (“PR”) permits in terms of Section 27(e)(ii) of the Act, as the basis on which they intended to retire in South Africa, with the prescribed minimum net worth of R37 000 per month as prescribed by the Regulations. They attached a copy of their PR applications to the founding affidavit, and contended that they had submitted all the necessary documentation and were fully compliant with the Act and its regulatory requirements.
- [13] Inasmuch as they applied in terms of Section 27(e)(ii) of the Act, they both had to prove in their PR applications that they had a minimum net worth of R37 000.00 per month. In this regard they stated:
- (i) Mr Maier had a one hundred per cent ownership of a company in Germany, P[...] G[...], that develops, manufactures and sells silicone moulds. The nominal stock and capital value was €[...]. Attached to the application was a letter, dated 29 April 2016, headed “Certification” by a Mr Thomas Keller, a ‘Steuerberater’, in which he certified that they were preparing his income statement as well as his financial accounting and the annual financial statements of his companies. Mr Keller stated that, based on the numbers, they were able to certify that the first applicant received a monthly income in excess of R[...] from the shares he owns in the company P[...] G[...]. The original documents in the German language in the application

in respect of both applicants were translated into the English language by a certified translator.

(ii) The second applicant confirmed that she owned a property in Germany, situated in T[...], S[...], which yielded a monthly rental income of €[...], which equalled about R[...], depending on the current exchange rate. She attached a copy of the relevant documentation in respect of the lease agreement with the application, and which likewise included a certified letter, dated 29 April 2016, from Mr Thomas Keller. He confirmed that she received a monthly income in excess of R[...] from the lease of commercial and private real estate which belonged to her.

[14] The applicants also claimed that they held a joint account in Germany, with a balance in excess of R[...]. They also attached a letter, dated 14 April 2016, from the bank S[...] M[...] - L[...] - M[...], addressed to both of the applicants, in which it was confirmed that the credit balance in the account was in excess of R[...].

[15] The applicants claimed that at the time they lodged their PR applications, they had both owned assets that yielded more than the minimum prescribed nett worth of R37 000 per month and were therefore compliant with the provisions of Section 27(e)(ii) of the Act.

[16] On 17 September 2021 the DG rejected the application of the first respondent, and on 4 October 2021 likewise rejected the application of the second respondent. That was almost 4 years after they had submitted their applications.

[17] In the letter of rejection, the DG did so for the same reason in respect of both applicants. The rejection notices read:

‘You failed to produce adequate proof that you have a right to a pension or an irrevocable annuity or retirement account which will give you a prescribed minimum payment for the rest of your life. Therefore you do not qualify for permanent residence in terms of section 27(e) of the Immigration Act.

[1] ‘(ii) In exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;.. ’

[2] ‘(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

[3] ‘27. Residence on other grounds

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

...

(e) intends to retire in the Republic, provided that such foreigner proves to the satisfaction of the Director-General that he or she –

(i)....

(ii) has a minimum prescribed net worth; . . .’

- [4] ‘Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.’
- [5] ‘The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.’
- [6] ‘Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.’
- [7] ‘Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.’
- [8] ‘[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 ss (4), which in turn is piggybacked onto ss (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 rank 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.'

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