Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO: HC-MD-CIV-MOT-GEN-2021/00094

In the matter between:

P[…] L[…] **APPLICANT**

and

MINISTER OF HOME AFFAIRS AND IMMIGRATION
RESPONDENT

Neutral Citation: *P L v Minister of Home Affairs and Immigration* (HC-MD-CIV-MOT-GEN-2021/00094 [2021] HAHCMD 168 (19 April 2021).

CORAM: MASUKU J

Heard: **25 March 2021**

Delivered: **19 April 2021**

Flynote: Civil procedure – final interdict which is mandatory in nature – requirements – doctrine of separation of powers – propriety of the court granting relief sought when the Minister of Home Affairs and Immigration has not been presented with an application and has not made a decision on the application in question – Costs – the *Biowatch* principle applied.

Summary: The applicant approached this court seeking a mandatory interdict compelling the Minister to issue temporary travel documents to his children who are in South Africa and born to him and his partner through surrogacy. The applicant wrote a letter to the Minister's legal practitioners, suggesting that the Minister issues the emergency travel documents, pending a matter between the parties which awaits judgment. The Minister declined the suggestion and proposed that the parties await the judgment. This prompted the applicant to launch an urgent application compelling the Minister to issue the travel documents, in what is a final mandatory interdict.

Held: that the applicant ought to have filed an application for the issuance of the travel documents before the Minister in terms of the law and then requested to him to consider the application on an expedited basis if necessary.

Held that: the Minister, in view of the manner the matter developed, did not make a decision on an application for issuance of travel documents that would be the basis of the court reviewing and setting same aside.

Held further: that to give in to the entreaties of the applicant in the present circumstances, would amount to the court impermissibly violating the doctrine of separation of powers and thus arrogating upon itself powers that the law has decreed should rest in the Minister.

Held: that although the court appreciates its role as the upper guardian of all minors, it would be precipitous for it and would amount to judicial overreach for it to grant the order prayed for, lying as it does, within the constitutional mandate of the Minister, the court being able to intervene on review.

Held that: because of the importance of the matter and to avoid inducing a chilling effect in litigants approaching the court to determine their constitutional rights, it was appropriate in the circumstances, to issue no order as to costs.

ORDER

1. The applicant's non-compliance with the forms and service provided for in the Rules of this Court is hereby condoned and the matter is enrolled as one of urgency.
2. The application to compel the Minister of Home Affairs to grant emergency travel certificates to the minor children born on […] 2021 in this matter, is hereby dismissed.
3. The alternative application directing the Minister of Home Affairs and Immigration to allow the Applicant to enter Namibia with the minor children aforesaid, in the care and custody of the Applicant is refused.
4. There is no order as to costs.
5. The matter is removed from the roll and regarded as finalised.

JUDGMENT

MASUKU J:

Introduction

[1] This is an application brought on urgency and in which the applicant approached the court seeking the following relief:

'1. Condoning the applicant's non-compliance with the forms and service provided for by the Rules of this Honourable Court and hearing the matter as one of urgency as contemplated by Rule 73.

2. Directing the respondent to issue emergency travel certificates to P[…] and M[…] D[…]-L[…], born on […] 2021, the two minor daughters of the applicant.

3. Alternatively. Directing the respondent to allow the applicant to enter Namibia with P[…] and M[…] D[…]-L[…] born on […] 2021, the two minor children in the care and custody of the applicant.

4. Costs of this application on a scale of legal practitioner and client.

6. Such further and/or alternative relief as the Court may deem fit.'

[2] It is pertinent, to mention very early in the judgment, that respondent, the Minister of Home Affairs and Immigration, opposes this application. The task of the court, in this judgment is to determine which of the parties is on the correct side of the law.

The parties

[3] The applicant describes himself as a male Namibian adult, in the employ of the Namibia University of Science and Technology, based in Windhoek. He states further that he brings this application on behalf of his minor daughters mentioned above, in his capacity as their father and lawful guardian.

[4] The respondent is the Minister of Home Affairs and Immigration, Safety and Security. He is appointed in terms of the provisions of Article 32(3)(i) (dd) of the Namibian Constitution, ('the Constitution'). He has his appointed address that of the Offices of the Government Attorney, Sanlam Centre, Windhoek.

Background

[5] The facts giving rise to this matter appear fairly common cause. I will, in attempt, not to burden this judgment, state the pertinent ones. The applicant is in a same-sex relationship with one E[…] G[…] C[…] whom he met in Netherlands where both were studying. They subsequently got married in South Africa in 2014 where they acquired immovable property.

[6] They decided to start a family and through the instrumentality of a surrogacy arrangement, a male child was born to them in South Africa in […] 2019. They later decided to move to Namibia and in that connection, the applicant moved an application for the granting of Namibian citizenship by descent to the said minor child[1]. The Minister filed a counter application in that matter seeking an order that the applicant subjects himself to a DNA test as proof of paternity of the

[1] HC-MD-CIV-MOT-GEN-2019/00473.

child in question. Judgment in that matter was reserved and is, in terms of the court order issued, due for delivery in August 2021.

[7] The applicant and his partner decided that they should expand the family. In this regard, they were able, in terms of South African law, to secure a surrogacy mother and the twins who are sought to be brought into Namibia were born from that arrangement. In anticipation of the birth of the children and to ease their transit to Namibia, the applicant's legal practitioners wrote a letter to the Minister dated 23 February 2021, suggesting that the Minister issues emergency travel documents to the twins, pending delivery of the judgment in case No. 2019/00473. This was requested in order to avoid the applicant and the children being stuck in South Africa and to also avoid further litigation on the matter. I will return to this letter later.

[8] By letter dated 23 February, 2021, the respondent's legal practitioners replied to the letter from the applicant's legal practitioners. The respondent refused to issue the emergency travel documents on the terms suggested by the applicant. In the meantime, the applicant moved to South Africa in order to be present at the birth of the children. It is at that point, after the birth that he moved the current application, seeking the relief stated earlier in this judgment.

<u>The applicant's case</u>

[9] It is the applicant's case that the stance adopted by the Minister in this case is not only unreasonable, but it is also 'callous, disrespectful, irresponsible and downright malicious' in view of its consequences.[2] It is the applicant's case that he applied for the issuance of birth certificates for the children in South Africa and these were issued on [...] 2021. The applicant complains that he is presently in South Africa because of the intransigence, if I may call it that, of the respondent to allow him and the children in question entry into Namibia.

[10] The applicant further contends that because of the attitude adopted by the Minister, he is unable to travel with the children to Namibia and may also not leave

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[2] Para 23 of the applicant's founding affidavit.

them behind as they are dependent on him. He accuses the Minister of 'trapping' him in South Africa and in the process, alienating him from his family who remained behind in Namibia. 'This would amount to the respondent forcibly separating me from my children, an egregious violation of our most fundamental rights, as I describe below.'[3]

[11] The applicant consequently accuses the Minister of violating not only the Constitution, but also international law, which is binding on Namibia. In this particular connection, the applicant mentions the United Nations Convention on the Rights of the Child which he claims is being violated by the Minister's stance. It is unnecessary, at this juncture, to delve into the provisions mentioned in this regard.

[12] Finally, it is the applicant's case that he has satisfied the rights of a final interdict. In this regard, he deposes, he has a right to be with his children, who in terms of the birth certificates (unauthenticated I should mention), identify him 'clearly and unequivocally as their father.'[4] It is his further contention that at the very least, he has a right to be with the children since they are under his care and parental responsibility rests with him. He also states that he has a right to come home with them and without let or hindrance on the part of the respondent.

[13] The applicant further deposes that the respondent's refusal to his reasonable proposal, is not only unlawful and unconstitutional but it also places him in an untenable position in which he is unable to return home with his children. A real prospect, he further states, is that the children may be rendered stateless and may be taken away from him at the border despite him having their valid birth certificates. Furthermore, he is required to return to Namibia and resume work and normal life as he cannot stay indefinitely in South Africa.

[14] Lastly, it is the applicant's case that he has no alternative remedy open to him than to move the present application. It is his case that he requested the court to hand down the judgment earlier if at all possible but the court had not responded. This was corrected by a supplementary affidavit as the applicant's

[3] Para 25 of the applicant's founding affidavit.
[4] Para 39 of the applicant's founding affidavit.

depositions in relation to the latter issue are incorrect. The court undertook, with the many judgments due, to do its level best to deliver the judgment at the earliest opportunity, which could not be identified at the time.

The respondent's case

[15] In his opposing affidavit, the Minister took a point of law *in limine.* He contended that the applicant acted on the Minister's letter dated 15 March 2021 and brought this urgent application. In this regard, the Minister contended that the applicant approached the court without having sought the Minister's reasons and seeks to review the decision in question. The respondent further criticised the applicant for having sought a final interdict, and not one that was interim in nature and effect.

[16] The Minister further pointed out that the effect of granting a final interdict, as prayed for by the applicant, would have the deleterious effect of rendering similar matters pending before this court, moot, especially case number 2019/00473. He accordingly argued that the relief sought by the applicant is incompetent in the circumstances.

[17] On the merits, the Minister denied that the children in question, are fathered by the applicant and states that the applicant has consistently failed to subject himself to a DNA test and to provide results that prove the paternity of the children as he claims. In this regard, reference was made to the provisions of s 95(2) of the Child Care Protection Act, 2015, ('CCPA), which gives this court, in its capacity as the upper guardian of all minors, a right to order a parent, child or putative parent or potential blood relative, to be submitted to a physical procedure if that is in the best interests of the child. The Minister contended that if the applicant subjected himself to a DNA test together with the minor children, it would remove any doubt regarding the issue of paternity and bring the children within the realms of Art 4(2) of the Constitution.

[18] It was the Minister's further case that the rights claimed by the applicant in this case are derogable in terms of the laws of this Republic. He further contended

that it is common knowledge that Namibian travel documents are issued to Namibian citizens. There is nothing, he stated, before court, to prove that the children in question are the applicants' minor children. It would only be in cases where there is evidence that they are Namibians by descent that he would in law be obliged to issue Namibian travel documents to them.

[19] In reference to the surrogacy agreement entered into in South Africa by the applicant in part, the Minister stated that it was clear that the children would be genetically related to at least one of the commissioning parents. Because only the gamete of one male can fertilise an egg, he has to be convinced on credible evidence in this case that it was the gamete of the Namibian male that did so. It is only once that has been proved that he would, in terms of the law, issue certificates of citizenship by descent and Namibian travel documents.

[20] The Minister further pointed out in his opposing affidavit that the applicant had not made application either for citizenship or for the issuance of travel documents for the children in question. He continued in this regard and deposed that, 'Furthermore, it is respectfully not within the purview of the court to usurp my jurisdiction by ordering me to issue emergency travel documents (ETDs) especially where there are legal issues pertaining to paternity that are in dispute and still need to be resolved. That is the dispute in the Yona matter and has a bearing on this matter.'[5]

[21] It was the Minister's further contention that there is no proof of genetic evidence linking the children in this matter to the applicant. In this further connection, he stated that the birth certificates emanate from South Africa, which is a jurisdiction with a legal regime on surrogacy that does not exist in Namibia. Finally, the Minister states that he has not refused to consider the applicant's request but has requested conclusive evidence that the children in question are born of a Namibian citizen. This, he maintains is so because of the Citizenship Act, No. 14 of 1990, the Births, Marriages and Deaths Registration Act, No. 81 of 1990. Additionally, these laws give no guidance on the registration of children born in the manner before court.

[5] Para 5.3 of the answering affidavit.

[22] There are other issues that the Minister raises in response to the applicant's assertions but I do not find it necessary, to consider them all. Those that I have captured above constitute the main plank upon which the Minister has opposed the application. It will, in the circumstances be necessary, to proceed to deal with the arguments raised and make a determination on the propriety or otherwise of granting the relief sought by the applicant.

Argument

[23] Ms. Katjipuka, for the applicant, commenced her argument by reference to the Preamble to the Constitution, and submitted in that regard, that the case before court touches upon very important constitutional values included in the Preamble, such as inherent dignity, equal and inalienable rights, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status. She urged the court to place these fundamental constitutional principles at the centre of the case.

[24] It was her submission that the respondent's approach to the matter has served to violate the applicant's right to family as he is a father to the children as evidenced by the birth certificate. He has a duty to perform parental responsibilities to the children in question. It was also her argument that the applicant has a right to return to Namibia in accordance with Art 21(1)(i) of the Constitution and that this right is being infringed by the stance adopted by the Minister, as the applicant is unable to return to Namibia, with his children.

[25] Ms. Katjipuka passionately argued that the Minister's stance in this matter is informed by discriminatory views that he holds regarding persons who are in a same sex marriage. It was her submission that if the same scenario unfolded in relation to persons who are in a hetero-sexual relationship, the hurdles that the Minister seeks to place in the applicant's way, would have been stored away.

[26] A submission was further made that the applicant has a right not to be separated from his children, a right which is recognised by the United Nations

Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, to which Namibia has acceded to. The essence of these instruments is that, 'a child shall not be separated from his or her parents against their will'[6] and 'no child shall be separated from his parents against his will.'[7] It was argued on the applicant's behalf that the Minister's action serve to violate these rights and that the court should, on that account, come to the applicant's rescue by issuing the relief prayed for by the applicant.

[27] Ms. Katjipuka also argued that the Minister's stance in this matter offends against the dignity of the applicant and the children. Furthermore, it was her argument that the primary consideration in this matter should be what is in the best interests of the children, namely, for them to come home and to be integrated in their family and not to be left in a sea of uncertainty regarding their citizenship in a foreign land.

[28] It is not possible, with the time available at my disposal, to record every argument so powerfully conveyed by Ms. Katjupuka suffice to mention that it was her contention that the applicant's stance has left the applicant in a catch 22 situation regarding the children. He does not know whether to come home to be joined with the family, including his spouse and the elder son who is in Namibia, or to come to Namibia, risking the arrest and possible enforced separation from the children. This, it was submitted is a grave injury to the applicant that should entitle him to the relief sought.

[29] It was also submitted that the applicant has no similar protection available to him than to approach the court in the manner he has and to seek the relief that he has sought. It was submitted that the respondent, in a callous manner, spurned what was a reasonable proposal by the applicant, namely to allow the children into Namibia pending the decision in the other matter. The court, it was argued, was eminently entitled, in the circumstances to grant the relief sought.

[30] Not to be outdone, Mr. Ncube, for the respondents, emerged from his corner, guns blazing. He urged the court to dismiss the application as it has no

[6] Article 9 (1) of the United Nations Convention.

[7] Article 19(10 of the African Children's Charter.

merit. He argued that the relief sought by the applicant is incompetent for the reason that the applicant seeks to obtain a final interdict without seeking to review the decision made by the respondent.

[31] It was his further contention that the applicant has not proven that he is the father of the children in question so as to entitle the Minister to issue the relevant documents for them. It was also his argument that the decision of the Minister was informed by the best interests of the children in the sense that if proved that the applicant is the father of the children as he alleges, it would be proper for the Minister to act within the dictates of Art 4(2) and grant them citizenship by descent.

[32] It was Mr. Ncube's further argument that s 95 of the CCPA creates a presumption that a person who like the applicant refuses to submit to a paternity test, is concealing the truth concerning the parentage of the child in issue until the contrary is proven. The applicant, in the instant case, is covered by that presumption, he submitted. His proof of paternity of the children would be the basis upon which the Minister could lawfully issue travel documents to the children.

[33] Mr. Ncube also proceeded on an outlandish presentation of the principles of international law and how they should be properly applied in this matter. He contended that although Namibia is monist, when one considers the provisions of Art 144 of the Constitution, Namibia still has the trappings of dualism.

[34] I would not like to enmesh myself in that debate in this matter, interesting as it may be. All I can say is that the court has a duty of fidelity to the Constitution, giving effect to the words and spirit, contained therein. I would be extremely uneasy to land myself in a situation where in interpreting the Constitution and the law, I subvert what appears to be the clear intention of the framers of the Constitution in enacting Art 144.

Determination

[35] The task of the court at this juncture is to determine whether the applicant is entitled to the relief he seeks. In doing so, sight must not be lost of the arguments advanced by the parties, as recorded above. I am of the view that the first issue to determine is whether the respondent is correct that the relief sought by the applicant is incompetent as alleged. In this regard, it is important to note that the respondent says that he has not refused the application and that in granting the relief prayed, the court would in effect be usurping the powers entrusted in the Minister by Parliament.

Propriety of granting the relief

[36] In dealing with this aspect, it is in my view important to have regard to the exchange of correspondence between the Minister and the applicant. The applicant as recorded earlier, wrote a letter to the Minister suggesting a route to bringing the children back to Namibia. That route, according to the applicant, was reasonable and one that would minimise the costs. It is important for this purpose to highlight the important aspects of the said letter.

[37] The letter is dated 23 February 2021 and it is addressed to the Government Attorney. It reads as follows:

'Dear Sir,

We refer to the above matter.

As you are aware the parties are awaiting judgment in the above matter, expected to be handed down on 4 August 2021.

We hold instructions to inform you that Mr L[…] and his partner (our clients) are expecting the birth of their twins via surrogacy, on […] 2021. Mr L[…] will travel to South Africa to be present for the birth and hopes to travel back with the children when it is appropriate to do so.

Attached please find the South African court order confirming our clients' parentage as well as a letter from the obstetrician and gynaecologist of Dr Birdsey, recommending our clients' presence at the birth of their children, marked "A" and "B" respectively.

Since the outcome of the above-mentioned case will likewise apply to the twins, we would like to propose the following:

- that pending the judgment, the Namibian High Commission will issue emergency travel documents to the twins to enable them to travel back with Mr L[…], to avoid the three of them being stuck in South Africa;
- that in the event the Court finds against our clients, which may lead … not to rely on the mere fact of the issue of the emergency travel documents in support of any claim for Namibian citizenship of the twins.

We would appreciate if you could present this proposal to your clients and revert with your instructions in this regard at your earliest convenience.'

[38] The Government Attorney respondent by letter dated 15 March 2021 in the following terms:

'1. We refer to the above matter and to your letter dated 23 February 2021.

2. Our instructions are that the surrogacy agreement without proof of genetic parentage falls outside the scope of Namibian law. This is the issue that is at the centre of the pending proceedings before the High Court.

3. Our clients are therefor not amenable to issue the travel documents whilst the issue is still pending before the High court and will therefore await the court's pronouncement.

4. We trust that you will find the above in order.'

[39] It was after the receipt of this letter that the applicant proceeded to approach the court for the relief sought. It would appear to me that the letter written to the Government Attorney was a proposal regarding the issuance of emergency travel documents to the children, pending the judgment in the other matter, which the Minister refused to accede to. This resulted in the applicant approaching this court for the relief sought.

[40] It is interesting that the relief sought from the court is not identical to the proposal made to the Minister in the letter quoted above. In the letter, the applicant sought the issuance of emergency travel documents to the children, pending the judgment in the other matter. This was envisaged by the applicant to be an interim arrangement without prejudice to the Minister to refuse the children in issue citizenship once the pending judgment went against the applicant.

[41] In the notice of motion, however, the applicant seeks what appears to be a final order, which is not contingent on the judgment in the other matter. It would appear that although the applicant had in mind seeking to negotiate a temporary

order, when he moved the application, he applied for what appears to be a final order, not subject anymore to the pending judgment. That the applicant sought a final order, can be seen in the allegations made on oath, including the applicant alleging that he is entitled to a final interdict, setting out the terms thereof in his papers. It is difficult at this stage to say without fear of contradiction that the applicant can be said to have a clear right, for starters, which is a very high standard indeed.

[42] More importantly, it seems to me, the applicant did not file any application before the Minister in terms of the law seeking the issue of travel documents to the children, whether temporary or otherwise. There was thus no application presented to the Minister with all the necessary information that would have assisted the Minister in deciding on the application. What was placed before him was a proposal, not based on any merits of the application relating to the children in question, but on the outcome of the other matter.

[43] Ms. Katjipuka, in addressing this query argued that the applicant had dealt with the Minister on previous occasions where he had not succeeded and therefor anticipated the Minister's possible stance on the proposal. I am of he considered view that it is improper and also unfair of the applicant to second-guess the Minister. This was a new issue and had to be dealt with as such, granting the Minister an opportunity to deal with it.

[44] As a result, it appears correct that the Minister did not, in this matter have placed before him any application for the issuance of travel documents for the children, which is the normal procedure that is followed when such applications are made. As a result, the Minister was not placed in a position where he had to consider an application relating to the children's travel documents on its merits, subject to him, if necessary, requesting whatever information he may have considered necessary to make a determination on the application.

[45] I am of the considered view that the Minister did not make any decision on the application for travel documents of the children in its own right. The proposal, which was not an application, placed the Minister in a position where he was faced

with a *fait accompli* with him being requested to instruct the Namibian High Commission in South Africa to issue the emergency travel documents. This, it must be stated, was not an arrangement to be done based on the fact that there was an application properly lodged before the Minister.

[46] I am of the considered view that if an application had been placed before the Minister, with all the requisite information required by statute or regulations, the Minister would have been placed in a position where he would have made a decision on the application relating to the children in issue on its merits. If he made a decision on that substantive application, that would have been a decision that the applicant, if it went against him, or was in any manner unsatisfactory, that is the decision that the applicant would have been entitled at law to bring to the court on review. This has not happened.

[47] The effect of the current application is that the applicant is moving the court to usurp the functions of the Minister and compel him to issue emergency travel documents to the children. This court has not been imbued with such powers. Parliament, in its wisdom, and for reasons of policy, placed the powers of issuing of such documents in the Minister and not the courts. Courts only intervene in certain circumstances and check on the proper exercise of the powers by the Minister when a party is aggrieved thereby.

[48] The Minister, together with the technocrats in his office have policy guidelines that they follow in dealing with applications such as that for issuance of emergency travel documents. If the court issues an order to compel the Minister, without him having had an opportunity to deal with the application in the normal course, that may be detrimental as the court would issue the order in the dark, without the Minister having brought his mind to bear on the merits of the application. This would certainly result in judicial overreach, which would be a subversion of the doctrine of separation of powers.

[49] In this regard, courts must be very careful and exercise judicial restraint and thus avoid being drawn by tempting circumstances and facts to exercise powers in the first instance, which properly vest in the other organs of State. Matters such as

the application under consideration, as stated earlier, are best left to the Executive organ of State, in this instance, the Minister.

[50] It is only where there is some disgruntlement with the Minister's decision that the court would be placed appropriately, to exercise its powers of review and set aside the Minister's decision. That threshold was not reached in this particular matter. I would, for that reason, be loath to interfere at this stage, where there is no application before the Minister, and consequently, no decision made by him on the particular application or that of the legislature.

[51] Having said this, it is not lost to the court's mind that the matter in issue touches upon the interests of minor children and other important constitutional principles that were referred to by counsel, particularly the applicant's counsel. It must be pointed out though that the same Constitution provides for the separation of powers and the reality of realms and spheres of operation for the organs of State. The court would not, in terms of the doctrine, regardless of how well intentioned it may be, cross the lines and violate the doctrine of separation of powers where the matter falls within the domain of the executive, as in this case, or that of the legislature.

[52] In this connection, Mr, Ncube acknowledged the importance and urgency of the matter and stated that the Minister would be amenable to dealing with the matter on an expedited basis if the application were placed before him in the proper manner and form. It would only be once that step has been followed and the applicant derives no joy from the Minister's decision that the applicant would be appropriately placed to escalate the matter to this court on review.

[53] This is a decision that I arrive at with a very heavy heart, understanding as I do, that it involves the issue of minor children and what the applicant's counsel referred to as their possible statelessness. This submission must, however, be considered in the light of the fact that the children were born in South Africa, and according to the papers, to a South African mother, pursuant to an order issued by a South African court.

[54] This court, being an upper guardian of minors would naturally be concerned by matters such as this. I also issue the order below with a full heart, considering that in all matters before the court, the court should not, whatever the circumstances, close its eyes to the constitutional principles applicable and take the bull by the horns as it were, when a fundamental principle such as the separation of powers has the real prospect of a fracture being visited upon it.

[55] In closing, it would be appropriate to refer to the timeless remarks made in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others*[8]*.* There, the following seminal remarks, which have been quoted with approval in this jurisdiction,[9] were made regarding the question of judicial review, namely:

> 'The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision. To do otherwise would be contrary to the doctrine of separation of powers in terms of which the legislative authority of the State is vested in the Legislature, the executive authority in the Executive and judicial authority in the courts.'

[56] It is important to note that if regard is had to the applicant's notice of motion, if it may, for any reason be held that the letter referred to above from the Minister's legal practitioners, constituted a decision by the Minister, which I have found is not, there is nothing in the relief sought that would suggest that the applicant seeks to set aside that decision. The impression created is that the Minister did not, at any stage, deal with this matter. All that is sought from the court is an order compelling the Minister to issue the travel documents in issue.

Conclusion

[8] *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) BCLR 1239 (C) at 1259 D-E.

[9] *Tjirovi v Minister of Land Resettlement and Others* (HC-MD-CIV-MOT-REV-2017/00086) [2018] NAHCMD 56 (16 March 2018).

[57] In view of the discussion and the findings above, I am of the considered view that the application cannot, in the circumstances, succeed. It is, in my considered opinion, liable to be refused. Granting it would, as held above, constitute an impermissible encroachment by the court into the domain of the Executive organ of the Namibian State.

Costs

[58] The ordinary rule that applies in matters is that the costs follow the event. Having said so, it is also recognised that in matters of costs, the court exercises a discretion, depending on the attendant circumstances. The principle known as the *Biowatch* principle[10] has been accepted in this jurisdiction as applicable. Its import is that courts are generally reluctant to mulct an unsuccessful party in costs in constitutional matters against the State. This is so because people should not be afraid to approach the courts for the declaration or pronouncement on their constitutional rights by the looming prospect of being mulcted in costs should they be unsuccessful.[11]

[59] I am satisfied that although the applicant has been unsuccessful in this round of proceedings in obtaining the relief sought, there is no question that he was on a mission to desecrate the processes of the court. To mulct him in costs would certainly have a chilling effect on him and other litigants desirous of approaching the courts for some relief that finds its being in the provisions of the Constitution. Mr. Ncube is a strong convert in this regard.

Order

[60] Having regard to what has been stated above, it would appear to me that the order that commends itself as appropriate to issue in this matter, is the following:

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[10] *Biowatch Trust v Registrar Genetic Resources and Others* 2005 (4) SA 111 (T).

[11] *Kambazembi Guest Farm CC v Minister of Lands and Resettlement* (SA 74/2016) [2018] NASC (27 July 2018).

1. The applicant's non-compliance with the forms and service provided for in the Rules of this Court is hereby condoned and the matter is enrolled as one of urgency.
2. The application to compel the Minister of Home Affairs to grant emergency travel certificates to the minor children born on [...] 2021 in this matter, is hereby dismissed.
3. The alternative application directing the Minister of Home Affairs and Immigration to allow the Applicant to enter Namibia with the minor children aforesaid, in the care and custody of the Applicant is refused.
4. There is no order as to costs.
5. The matter is removed from the roll and regarded as finalised.

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T. S. Masuku

Judge

APPEARANCES:

APPLICANT:	U. Katjipuka Of Nixon Marcus Public Law Office (Windhoek)
RESPONDENT:	J. Ncube Of Office of the Government Attorney