REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-REV-2020/00285

In the matter between:

DR. KAREL HELEON DURR LAUBSCHER **APPLICANT**

and

CHAIRPERSON OF THE IMMIGRATION SELECTION BOARD **1ST RESPONDENT**

IMMIGRATIION SELECTION BOARD **2ND RESPONDENT**

CHIEF IMMIGRATION OFFICER **3RD RESPONDENT**

MINISTER OF HOME AFFAIRS AND IMMIGRATION **4TH RESPONDENT**

Neutral Citation: *Laubscher v Chairperson of the Immigration Selection Board* (HC-MD-CIV-MOT-REV-2020/00285) [2021] NAHCMD 502 (28 October 2021).

Heard: Determined on the papers

Delivered: **28 October 2021**

Flynote: Administrative Law – Review Application - Rule 76 – Legislation - Immigration Control Act No.7 of 1993 ('the Act')– Application for permanent residence permit – Section 26(3) – usurpation of the powers of the functionality by the court – exceptional circumstances to exist – Civil Procedure - the *Stipp* principle applied.

Summary: The applicant, a medical doctor, applied for a permanent residence permit, which application was refused by the 2nd respondent. Dissatisfied with this decision the applicant launched this review application. The applicant has been resident in Namibia for the past eight years with his family. The applicant contended that he met all the requirements laid out in section 23(3) of the Act. The respondents opposed this application, but they failed to file the record of proceedings which reflect how they reached the decision made by the 2nd respondents. This is so because the minutes of the meeting do not exist. The respondents contend that the issuance of a permanent residence permit was rejected because general medical practitioners are not scarce in Windhoek to justify the granting of this permit to a foreign national. The respondents maintained that they are not required to grant the application merely because the applicant meets the requirements but ought to consider other factors such as socio-economic and national security. The court found as follows:

Held: that for the court to assume the powers of a functionary or a decision-maker, there should be exceptional circumstances present. It is not by default nor is it automatic. These exceptional circumstances include; bias and gross incompetence or evidence that the decision is a foregone.

Held that: An applicant that seeks an order for the assumption of the powers of a functionary or decision-maker must make out a case in the founding papers. This allows for the functionary in question, in this case the 2nd respondent, to properly plead there to and meet its case. In this instance the applicant has failed in this regard.

Held further that: The maintenance of a full and proper record of proceedings gives full effect to the rights of individuals enshrined in Article 18 of the Namibian Constitution. The 2nd respondent's failure to keep minutes of its deliberations that led to the decision being reviewed, is irregular, unsatisfactory and decried.

Held: The production of the record assists the court in having an informed view regarding the relevant and/ or irrelevant considerations taken into account when the 2nd respondents refused the application. In the absence of the proceedings the court is unable to determine the question placed before court.

Held that: The respondents in the answering affidavit placed reliance on a newspaper article that never formed part of the documents in the record of proceedings. By doing this they denied the applicant his opportunity to deal with this aspect.

Held further that: The respondents failed to consider letters of experience written by the hospitals where the applicant worked which captured the experience and value the applicant would bring forth is his application was accepted.

Held: The respondents failed to consider the proposal made to the applicant to take partnership in the Eros Medical Practice, this in turn would make him an employer and would be beneficial to the medical fraternity and to Namibia as a whole.

Held that: The respondents assumed that the applicants intended activities could be conducted on his employment permit and failed to seek clarity from the applicant.

Held further that: even though the medical practice conducted by the applicant may have been the obvious activity the applicant would engage in, it does not mean that it was the only one open to him and which may have influenced the granting of the permanent residence permit.

The court upheld the review with costs and remitted the matter back to the 2nd respondent for reconsideration.

ORDER

---

1. The decision made by the Immigration Selection Board, communicated by letter dated 10 June 2020, rejecting the Applicant's application for a permanent residence permit be and is hereby reviewed and set aside.
2. The said decision is declared to be unconstitutional, invalid and of no force or effect.
3. The Immigration Selection Board is compelled to reconsider the Applicant's application for the granting of a permanent residence permit within 30 days from the date of this order.

4. The Respondents are ordered to pay the costs of this application.
5. The matter is removed from the roll and is regarded a finalised.

JUDGMENT

MASUKU J:

Introduction

[1] A decision communicated to the applicant and dated 10 June 2020 by the Immigration Selection Board is the mother to this application for review.

[2] The applicant, a medical doctor, by profession, applied in terms of the Immigration Control Act,[1] ('the Act'), for the issuance of a permanent residence permit. This application was made pursuant to the provisions of s 26(3) of the Act.

[3] What triggers the present application is a letter dated 10 June 2020, issued by the respondents to the applicant. It was terse in its terms and merely stated that, 'Your application was rejected. Applicant's intended activities in Namibia can be conducted on the employment permit.'[2]

[4] Aggrieved by this decision, the applicant approached this court to exercise its powers of review and to set aside this decision as unconstitutional, invalid and of no force or effect. The applicant accordingly moved the court to compel the 1st respondent to issue the said permit within 30 days, alternatively, to order the 1st respondent to reconsider the said application.

[5] Needless to mention, the respondents oppose this application and contend that the application for review is without merit and must be dismissed with costs.

---

[1] Immigration Control Act, Act No. 7 of 1993.

[2] Letter from the Ministry of Home Affairs and Immigration to the applicant, marked annexure 'A' to the applicant's founding affidavit.

[6] The court's remit, in the premises, is to consider which of the protagonists is on the correct side of the law in this imbroglio. Should the applicant carry the day or the respondents should. It is worth mentioning that by the nature of this litigation, no possibility exists that the parties may share the proverbial spoils. There must, of necessity, be a victor and a vanquished.

The parties

[7] The applicant is Dr. Karel Laubscher, a male adult of South African extraction. He lives in Windhoek and is a medical doctor by profession. He will be referred in this application as 'the applicant'. The 1st respondent is the Chairperson of the Immigration Selection Board, established in terms of s 25 of the Act. The 2nd respondent is the Immigration Selection Board, also established in terms of the s 25 of the Act.

[8] The 3rd respondent is the Chief of Immigration, an officer appointed by the Minister of Home Affairs and Immigration, in terms of the provisions of s 3(1)(a) of the Act. The 4th respondent is the Minister of Home Affairs and Immigration, appointed in terms of the Constitution of the Republic of Namibia. I will refer to the respondents as such. Where reference is made to a particular respondent in the judgment, he, she or it, will be referred to as cited above.

Background

[9] Very little contestation is raised by the facts of this matter. Any divergence of views would largely be confined to the application of the law to the facts. The facts acuminate to the following: the applicant is a male adult who was born in South Africa and moved to live in Namibia with his family in 2013. He has been resident here since then.

[10] As indicated above, he is a medical practitioner and is in the employ of Eros Family Practice in Windhoek. It is a fact that he did his internship at Katutura Hospital in 1990, after which he returned to South Africa. He is presently resident in Namibia on the strength of a work permit, duly issued by the 2nd respondent.

[11] He developed a wish to remain in Namibia and in this connection applied for the issuance of a permanent residence permit in 2017. This application was rejected for reasons that are unnecessary to traverse for present purposes. He again made a similar application in 2019. This application was again rejected and the decision to reject it was communicated in the letter referred to in paragraph 3 above. It is that decision that the applicant seeks this court to set aside.

The applicant's case

[12] It is the applicant's case that from the letter of rejection, the 1st respondent took the view that his application ought to be rejected because his 'intended activities in Namibia can be conducted on employment permit.' He submits that the 1st respondent appears to have assumed that his intended activities in Namibia related solely to his employment, an issue that he was not required or invited to shed light on at any stage before the rejection of the application.

[13] The applicant submits that he meets all the requirements stated in s 26(3) of the Act. In this regard, he contends, he is a person of good character, has never been convicted of any criminal offence in this Republic or in South Africa. He further contends that he has assimilated with the inhabitants of this country and is a desirable inhabitant of this country.

[14] He points out that he had, during training, deliberately done his internship in Namibia as he had wished to live in this country and had, before being granted a work permit, been visiting this country from time to time, to see some members of his extended family who live here.

[15] It is his case that he has, during his sojourn as a medical practitioner in this country attended to the medical needs of Namibians at Eros Family Practice and also assisted with services at the Lady Pohamba Emergency Unit, after hours. Furthermore, he states on oath that he provides training to Namibian medical students at the University of Namibia. Furthermore, he assists specialists in the theatre, especially Dr. Skinner, an orthopaedic surgeon at Mediclinic and Central Hospital.

[16] He further deposes that he has sufficient means to support himself and his family and owns a residential property in Namibia. In addition, he owns some properties in South Africa. He has some 30 years' experience as a qualified medical practitioner. He deposes that with his vast experience, he would still be valuable to Namibia and his stay in the country would not prejudice new entrants in the profession, as his experience would not be replaced overnight. He attached letters from the hospitals he serves, namely Eros Family Practice and Lady Pohamba.

[17] The respondents, as provided for in the rules, made discovery of the record of proceedings in this matter. Having done so, the applicant, as he was entitled to, sought special discovery in terms of rule 76(6). In this notice, the applicant sought copies of the full minutes of the meeting of the 2nd respondent at which his application was rejected. He further required copies of the written instruments appointing certain officials as members of the 2nd respondent.

[18] By notice dated 7 October 2020, the respondents replied to the notice in terms of rule 76(6) by stating that despite a diligent search, 'the respondents are unable to supply the full minutes of the meeting of the immigration Selection Board which took place on the 10th of June 2020 at which the applicant's application for permanent residence was considered and rejected. The respondents have already supplied the relevant part of the minutes as part of the review record. The remaining parts of the minutes are not relevant to the issues in the applicant's application.' No issue appears to have arisen regarding the second part of the notice.

[19] In his supplementary affidavit filed after the discovery of the record, especially the documents sought in terms of rule 76(6), the applicant takes issue with the absence of the record of any discussions by the members of the 2nd respondent as to how they arrived at the decision that his intended activities can be done with an employment permit and not the permanent residence permit applied for.

[20] It is the applicant's case that when proper regard is had to the issues mentioned above, it becomes clear that the decision made by the respondents is assailable and deserves to be set aside on review. He accordingly moved the court to grant the application for review and order the respondents to issue him with a permanent residence permit.

The respondent's case

[21] It is fair to say that the respondents contest every blade of grass traversed by the applicant. In this regard, the 1st respondent, Mr. Etienne Maritz, who also serves as the Executive Director of the Ministry of Home Affairs and Immigration, deposed to an answering affidavit. He stated that his affidavit was filed on behalf of all the respondents cited in the matter.

[22] The first point made by the deponent, is that the 2nd respondent is to comply with the provisions of ss 26 and 27 of the Act in considering and determining applications for permanent residence and employment permits. It is contended by the respondents in this regard that the above provisions confer a discretion on the 2nd respondent in dealing with applications for permanent residence and employment permits.

[23] It is the respondents' contention that the reason why the applicant's application for the issuance of a permanent residence permit was rejected, was that in the 2nd respondent's opinion, general medical practitioners, of which the applicant is one, are not scarce in Windhoek such as to justify the granting of the application in this matter. The 2nd respondent took the view that granting of this permit to foreign professionals, for the purpose of continuing to work in Namibia as general practitioners, has the potential to flood the local market and close the doors to upcoming Namibian professionals.

[24] It was contended in this regard that even if the applicant met the threshold required by the Act, the 2nd respondent still retained the discretion to reject the applicant's application. It was stated that the 2nd respondent was not bound to 'rubber stamp' all applications that seemingly met all the requirements of s 26 of the Act and in the process, do away with the consideration of other factors such as socio-economic and national security dynamics.

[25] The 2nd respondent maintained that it rejected the application because of the motivation by the applicant, namely, to continue working in Namibia as a general practitioner was not sustainable. In this connection, the market was considered by

the 2nd respondent and found not to justify the granting of the application in the circumstances. It was the 2nd respondent's further case that the Government of the Republic of Namibia (GRN) was under pressure to employ a good number of medical graduates. Reliance in this connection, was placed on a newspaper article, an edition of the Southern Times, dated 25 March 2019.

[26] It was the respondents' position that the applicant would not be prejudiced in his quest to continue working in Namibia as a medical practitioner as he would continue doing so under the valid work permit issued to him. He 'does not necessarily require a permanent residence permit to continue working in Namibia,'[3]

[27] The respondents further contested that the applicant was entitled to an attenuated hearing regarding the application. His application, it contended, constituted his representations to the 2nd respondent. The 2nd respondent further questioned the propriety of the Eros Family Practice and Lady Pohamba Private Hospital to pronounce themselves on behalf of the State in their letters supporting the applicant's application regarding the scarcity of Namibian medical professionals.

[28] It was the respondents' position that since the letters were not under oath, they had to be disregarded by the court as if they do not exist. Nothing much turned on the respondents' answer to the applicant's supplementary affidavit filed after the record of proceedings had been dispatched and filed.

Issues for determination

[29] According to the joint case management report filed by the parties and subsequently endorsed by the court, the issues which the court was called upon to determine were the following, namely, (i) whether the 2nd respondent did not properly apply its mind to the applicant's application; (ii) whether the 2nd respondent, in exercising its discretion, was entitled to consider other factors such as socio-economic or national security in addition to the requirements stated in s 26(3)(a) – (e) of the Act and lastly, whether the 2nd respondent was entitled, if it considered factors extraneous to s 26(3)(a) to (e) not to afford the applicant an opportunity to make representations in that connection.

[3] Para 20.2 of the answering affidavit.

Determination

[30] I should, at the nascent stage of this judgment, decry the notorious fact that the 2nd respondent does not appear to have kept a full and accurate record of proceedings of this matter. It stated, in response to the rule 76(6) notice that 'it is unable to supply the full minutes of the meeting of the Immigration Selection Board which took place on the 10th June 2019 at which the applicant's for permanent residence was considered and rejected.'[4]

[31] I find it highly irregular and unsatisfactory that an esteemed body like the 2nd respondent does not keep minutes of its deliberations for subsequent scrutiny, where appropriate. It is well and good for those applicants for permits, whose applications are granted. They may be over the moon with excitement over the granting of their applications and it may be a luxury for them to see what the body in question took into account in finding in their favour.

[32] Those who fall on the negative side of the decision, whose applications have been rejected, have a right in terms of the law to not only the reasons, but where appropriate, to the record in order for them to ascertain what considerations were or were not taken into account in reaching the decision which becomes a cause for their dissatisfaction.

[33] The record of proceedings plays an important part in determining the sustainability of the decision ultimately reached. In it, it becomes plain what considerations were taken into account and those that eventually influenced the decision reached. It is the production of the record that will assist the court, for instance in coming to an informed view regarding allegations that irrelevant considerations were taken into account, or conversely, that certain key considerations were not taken into account.

[4] Respondents' statement in response to rule 76(6) notice, attached to the applicant's supplementary affidavit, as annexure 'K'.

[34] It is not enough that the court should be told on affidavit what the recollection of a member or the members of the body in question is about the deliberations. This is particularly key where as in this case, the applicant was not invited to make any oral representations at all. He, like the court, is completely in the dark regarding what took place. It is the maintenance and the production of a full and proper record that gives full effect to the right to administrative justice enshrined in Article 18 of our Constitution.

[35] I can fathom no good reason why the 2nd respondent does not maintain a full record of proceedings by which it would be able to demonstrate to all and sundry, the considerations behind their ultimate decision. The decision may, in some cases be as important as the process followed before the decision. As matters stand, the court is not placed in a proper position to gauge the propriety of the proceedings and particularly the issues considered and how they were filtered into the decision ultimately given. That is totally unacceptable.

[36] In the absence of a record of proceedings, I am unable to determine the first question placed before the court for consideration, namely, whether or not the 2nd respondent failed to properly apply its mind to the applicant's application. This finding, which is adverse to the 2nd respondent, in my view, must favour the applicant in this matter.

[37] Having said this, it appears for the first time in the answering affidavit that the 2nd respondent placed reliance for its rejection of the application, on an article from the Southern Times newspaper, entitled, 'The curious case of Namibian medical graduates'. I must mention that nothing in the minutes and other documents discovered, reflects this as a fact. A copy of the newspaper was not made part of the documents, which formed part of the record of proceedings that serves before this court.

[38] It is clear, from the paucity of information before the court that what tilted the scales against the applicant was the issue of Namibian medical graduates. This was an issue, in my considered view that the applicant should have been afforded an opportunity to deal with in terms of representations, whether written or oral to the 2nd respondent, even in an attenuated form.

[39] It is apparent from the papers that the applicant has ties, with members of his extended family living in Namibia and whom he states he would visit long before he came to work in Namibia. It is on record that he has been a medical practitioner for a period of about 30 years and his involvement in the two medical institutions, his training of medical students in Namibia, were issues which were relevant to the question of Namibian medical graduates and which he may have been able to motivate before the 2nd respondent if afforded an opportunity.

[40] He was denied that opportunity as the 1st respondent contends in his affidavit that the 2nd respondent does not have to grant applicants an attenuated hearing, in deserving cases, in addition to the filing of the application. I am of the considered view that the views of the 1st respondent are incorrect and run counter to the fairness of such proceedings.

[41] It must be stated in this connection that the need for an attenuated hearing is dictated by the circumstances of the case and this one cried loudly for an attenuated hearing in view of the information taken into account and which the applicant was denied an opportunity to deal with. The fact that the board or body may be of the view that the information at their disposal is one the applicant can say nothing to convince them about is irrelevant.

[42] Megarry J pronounced the well-known dictum in *John v* Rees[5], where the following appears:

> 'As everbody who has anything to do with the law knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'

[43] That is what fairness is about after all is said and done. It is concerning that after so many years, we should still be grappling with the *audi* principle in this jurisdiction and that the 2nd respondent would still need to be reminded of its centrality and utility.

---

[5] John v Rees [1970] Ch 345 at 402.

[44] It is perhaps opportune that reference is made to the leading case in this regard and upon which Mr. Tjombe, for the applicant, placed his reliance. This is the *Frank* judgment,[6] where the Supreme Court expressed itself in the following terms:

'The first respondent's right to be treated fairly and in accordance with a fair procedure, placed the appellant under a duty to apply the *audi alteram partem* rule. This rule embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion. (See Baxter *Administrative Law* 535 *ff* and Wichers *Administrative Law* 208 *ff*.

In the context of the Act, the process for the application of a permit was set in motion by the submission of a written application by the first respondent. If on such information before it, the application is not granted, and provided the Board acted reasonably, that would be the end of the matter. However, there may well be instances where the Board acts on information they are privy to or information given to them by the Chief of Immigration (see sec 26(2). If such information is potentially prejudicial to an applicant, it must be communicated to him or her in order to enable such person to deal therewith and to rebut it if is possible. (See *Loxton v Kendhardt Liquor Licensing Board,* 1942 AD 275 and *Administrator SWA v Jooste (Edms) Bpk,* 1951 (1) SA 557 (A). However, where an applicant should have reasonably foreseen that prejudicial information or facts would reach the appellant, he or she is duty bound to disclose such information.

In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act. (Baxter, *op cit*. p 545). Consequently the Board need not in each instance give an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.'

[45] I am of the considered view that in the instant case, the issue of medical graduates and the availability of medical practitioners in Windhoek was an issue to which the applicant had a right to deal with and the 2nd respondent would no doubt have benefitted from affording the applicant an opportunity to deal with that aspect as it stood to be potentially prejudicial to his application.

[46] Section 26(3) of the Act, sets out issues that the 2nd respondent may take into account in determining the fate of an application for permanent residence. These

[6] Chairperson of the Immigration Selection Board v Frank 2001 NR 107 (SC), at 174 C-H.

include good character; assimilation of the applicant with inhabitants of Namibia and that he or she would be a desirable inhabitant of Namibia; not likely to be harmful to the welfare of Namibia; has sufficient means to cater for himself or herself and family; is not likely to pursue employment, a business or profession in which a sufficient number of persons are engaged; and conflict other laws that may arise from the granting of the application.

[47] Regarding the last but one requirement above, there was information from two recognised hospitals in Windhoek. It is clear from the answering affidavit that the 2nd respondent did not consider the letters written by the hospitals and the long term assured experience and value the applicant's permanent residence would bring to the medical table in Namibia, as it were, was not considered appropriately, if at all.

[48] This appears to have been informed by the fact that the medical centres in question did not file affidavits and merely restricted themselves to filing letters in support of the applicant's application. There does not appear to be any legal requirement, neither is it provided for in anywhere in the Act, that any statement supporting a particular application must be on oath. In any case, if that had been the view of the 2nd respondent, it should have requested the information to be placed on oath. It did not do so and possibly to the detriment of the interests of fairness and justice, not to mention the applicant.

[49] Official letters, which serve as testimonials are accepted every day and they need not be on oath. The rejection of those letters and the information contained therein without affording the applicant an opportunity to deal therewith, was also irregular. There does not appear to have been any official information relied on by the 2nd respondent to reach its decision and which dislodged the positive comments and support for the applicant's application by entities involved in the medical fraternity in Namibia. The invitation by the 2nd respondent for the court to ignore these letters, is specifically rejected.

[50] In the face of the positive comments by Lady Pohamba Private Hospital and Eros Family Practice contained in official letters that the applicant's services were in demand, it was up to the 2nd respondent to afford the applicant an opportunity to deal with information to the contrary. The applicant states that he also does medical work

with specialists at the Central State Hospital. The refusal to have regard to the said letters and instead to rely on a newspaper article to deny the applicant is totally out of order.

[51] The reliance on that article has its own evidential problems. Firstly, the author of the article did not file any affidavit confirming its status. It thus would constitute inadmissible hearsay. There is also no evidence that the article did in fact serve before the 2nd respondent and formed part of the decision made to reject the application.

[52] Another crucial issue, in my considered view, relates to the allegations by the applicant that he had been offered shares in the Eros Medical Practice.[7] This is not an irrelevant consideration in the context of the application for a permanent residence permit. I say so for the reason that it would elevate the applicant in a sense, to being an employer in the medical field and no rocket scientist would be needed to mention that this would certainly benefit the country. He states that he deferred the decision regarding the offer because of his residence status in Namibia. Any person who runs a business would need some form of security related to his residence status.

[53] The newspaper article, when read in proper context, appears to decry that 'the public health sector is hamstrung by the lack of doctors and medical specialists' and that 'The government invested heavily in public healthcare since independence, but the dearth of doctors and other public healthcare experts remains'. It also states that 'The current doctor-patient ratio is estimated at 1 – 5,000 yearly, which is below the international standard of 1:1,000.'

[54] It would accordingly appear that the 2nd respondent, if it was correct in relying to the article without affording the applicant an opportunity to deal with it, misread or misunderstood the contents article as it decries the low numbers of medical practitioners in Namibia, than the opposite, which was the basis of the decision to reject the applicant's application from the dearth of information availed to the court.

[55] I am of the considered view that the 2nd respondent is primarily bound to consider these issues stated in s 26(3) in determining the fate of an application for

[7] Annexure 'J' to the founding affidavit.

permanent residence. It may well be that there are other issues which may arise and which are relevant but are not specifically mentioned in the above subsection. If those issues would serve to disqualify or imperil the success of the application, I am of the considered view that the applicant, likely to be affected thereby, should, in fairness, be afforded an opportunity to deal with those issues and in a manner that the 2nd respondent may consider appropriate for the purpose.

[56] Another curious feature of the case relates to the 2nd respondent's reason for rejecting the application, citing the 'Applicant's intended activities in Namibia can be conducted on an employment permit.' Mr Tjombe argued and correctly so, in my considered view, that the 2nd respondent assumed that the applicant's 'intended activities' in Namibia can be conducted on an employment permit.

[57] It does not appear that the 2nd respondent sought any clarity from the applicant about his intended activities before jumping to that conclusion. Whereas medical practice may have been the obvious activity the applicant would engage in, it does not mean that it was the only one open to him and which may have influenced the granting of the permanent residence permit. A simple enquiry, even in writing, would have made a difference in that regard. This would have enabled the 2nd respondent to have all the information at its disposal when it made the impugned decision.

The appropriate order

Entitlement to an order of assumption of powers

[58] At this juncture, I need to consider whether the applicant has, in his own papers, made a case for the granting of the main prayer, namely that the court orders or directs the respondents to issue him with the permanent residence permit and not to remit the matter to the respondents for reconsideration. This is normally referred to as assumption (usurpation) of the powers of the functionary by the court.

[59] It is the applicant's case that the decision by the 2nd respondent was arrived at without the members having properly applied their minds, individually and collectively, to his application and what was required of them by s 26(3) of the Act in the consideration of the application. It is the applicant's case that in terms of the Act,

it is not a legal requirement that his activities, such as being employed and conducting his profession should not be done whilst he held a permanent residence permit.

[60] It is now settled law that the courts do not and must not lightly assume the powers of the functionary concerned, in this case, the powers of the 2nd respondent. In *Lisse v Minister of Health and Social Services*[8] the Supreme Court, cited with approval the case of *Erf One Six Seven Orchard CC v Greater Johannesburg Metropolitan Council: Johannesburg Administration and Another*[9].

[61] The court expressed itself in the following terms:

'The matter will not be sent back to the decision-maker unless there are special circumstances giving reason for not doing so. Thus for example, a matter would not be referred back where the tribunal or functionary has exhibited bias or gross incompetence or where the outcome appears to be a foregone.'

[62] In *Bato Star v Minister of Environmental Affairs*[10] O'Regan J dealt with the question in the following compelling fashion:

'In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so, a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy by those with special expertise in that field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is likely to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances, a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where a decision is one, which will reasonably result in the achievement of the goal, or which

---

[8] *Lisse v Minister of Health and Social Services* (SA 75/2011) [2014] NASC (12 December 2014)
[9] *Erf One Six Seven Orchard CC v Greater Johannesburg Metropolitan Council :Johannesburg Administration and Another* (174/96) [1998] ZASCA 91; 1999 (1) SA 104 (SCA); (29 September 1998)
[10] *Bato Star v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.

is not reasonably supported on the facts or not reasonable in the light of all the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'

[63] It thus becomes plain that the assumption of powers of a functionary or a decision-maker, is not the default position of the court and thus not automatic. In this regard, there must be some exceptional circumstances that will warrant the court to take the bulls by the horns itself and engage the usurpation mode, so to speak. Circumstances mentioned to justify the engagement of that mode include bias, gross incompetence or where the decision to be made is a forgone conclusion and appearing before that body would be a waste of time, as the die would already have been cast.

[64] It is important in my view, to mention that the allegations regarding why the court is moved to engage the usurpation mode, must be spelt out in the founding affidavit. This is so because relief sought in the notice of motion must have its foundation in the founding affidavit. This is so because a party stands or falls on the contents of the founding affidavit.[11] Furthermore, the mentioning of the grounds upon which the court is requested to side line the particular decision-making body, must be stated on oath and as such provide the body concerned a fair opportunity to deal with those allegations.

[65] It should normally be in circumstances where the decision-maker has been confronted with those allegations and has been afforded an opportunity to deal with them that the court may be properly placed to make a decision on the proper course to adopt in that case. In the instant case, the applicant does not state the grounds upon which this court may properly assume the powers of the 2nd respondent. The point is only made in the heads of argument and this is, in my considered view, improper.

[66] The respondents must be able to deal with allegations relating to exceptional circumstances that should exclude them from reconsidering the decision in the answering affidavit. The fact that they were denied this opportunity, breeds

[11] *Stipp and Another v Shade and Others* 2007 (2) NR 627 (SC).

unfairness of a kind that the court would not be at ease to overlook. I accordingly decline, even at this nascent stage to grant prayer 1 of the notice of motion. As such the only question to determine, is whether the applicant has made out a case for the matter to be remitted to the respondents for a fresh decision.

Conclusion

[67] In consideration of the issues discussed above, together with the conclusions returned thereto, I am of the considered view that the application should succeed. For the reasons advanced in the immediately preceding paragraphs, I am not persuaded that the applicant has made out a case by relevant statements in the papers, to require the court to assume the extra-ordinary step of deciding the matter itself.

[68] The proper order made out on the papers and which the respondents were afforded an opportunity to deal with, relates to the remittal of the matter to the respondents to reconsider the matter. It is that order that I find is appropriate to issue, in the circumstances. I do so without expressing any views of what the court would have done had the relevant allegations regarding the court itself assuming jurisdiction been traversed by the applicant in his founding affidavit.

Costs

[69] The accepted and settled approach to costs is that they ordinarily follow the event. There is no reason advanced or apparent from the papers that would justify the court departing from that charted course. The applicant has been successful in this matter and as such, he is entitled to his costs from the respondent.

Order

[70] The order that presents itself as being condign in this matter is the following:

1. The decision made by the Immigration Selection Board, communicated by letter dated 10 June 2020, rejecting the Applicant’s application for a permanent residence permit be and is hereby reviewed and set aside.

2. The said decision is declared to be unconstitutional, invalid and of no force or effect.
3. The Immigration Selection Board is compelled to reconsider the Applicant's application for the granting of a permanent residence permit within 30 days from the date of this order.
4. The Respondents are ordered to pay the costs of this application.
5. The matter is removed from the roll and is regarded a finalised.

_____

T. S. Masuku

Judge

APPEARANCES

APPLICANT	N. Tjombe Of Tjombe-Elago Incorporated
RESPONDENT	M. Kashindi Of Office of the Government Attorney