CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 53/08
[2009] ZACC 23

WYCLIFFE SIMIYU KOYABE	First Applicant
MARY KADENYI KOYABE	Second Applicant
ANTHONY SIMIYU KOYABE	Third Applicant
versus	
MINISTER FOR HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL OF HOME AFFAIRS	Second Respondent
DEPARTMENT OF HOME AFFAIRS	Third Respondent
with	
LAWYERS FOR HUMAN RIGHTS	Amicus Curiae

Heard on : 3 March 2009

Decided on : 25 August 2009

JUDGMENT

MOKGORO J:

[1] This case arises from the withdrawal of residence permits that had been granted to non-South Africans. It raises questions about the right to just administrative action, more particularly about the circumstances in which internal remedies must be

exhausted before applications for judicial review can be made. In this matter, the applicants seek leave to appeal against the judgment of the North Gauteng High Court, Pretoria (the High Court)[1] dismissing their request for the review and setting aside of the decision by the Director-General of Home Affairs (the second respondent) to withdraw or terminate their residence permits. The applicants also seek an order that the costs of their application in this Court be costs in the appeal.

The parties

[2] The first applicant is Mr Wycliffe Simiyu Koyabe, a Kenyan businessman. The second applicant is Ms Mary Kadenyi Koyabe, the first applicant's wife who is also Kenyan. The first and second applicants currently reside in South Africa with their adult son, Mr Anthony Simiyu Koyabe, the third applicant in this matter and their three other minor children.

[3] The Minister for Home Affairs (the Minister) is the first respondent. The second respondent is the Director-General of Home Affairs (Director-General); and the third respondent, the Department of Home Affairs (the Department).

[4] Lawyers for Human Rights (the amicus curiae), a non-governmental organisation whose objective is the promotion and enforcement of human rights in South Africa, applied and were admitted as amicus curiae.

[1] *Koyabe and Others v Minister for Home Affairs and Others* Case No 4754/2007 North Gauteng High Court, Pretoria 18 January 2008, as yet unreported.

Background

[5] The facts of this case are highly contested by the parties. The first applicant first came to South Africa in 1994 and obtained a work permit during his stay. In 1995 he married Ms Lindiwe Ngobese, a South African citizen. They divorced in 1996. After the divorce he applied to convert his work permit to an "own-business work permit". This application was refused after Ms Ngobese revealed to the Department that her marriage to the first applicant had been one of convenience.

[6] While the first applicant's appeal against that decision was pending, Mrs Willis, an "immigration agent", informed him that he would qualify for permanent residence on the basis of an exemption under the legislation then in operation, the Aliens Control Act.[2] On 13 June 1997 the first applicant was granted the exemption and permanent residence, both of which were extended to the second applicant.

[7] In 2001, Mrs Willis further advised the first and second applicants that they would qualify for South African citizenship. Both applicants successfully applied for naturalisation and within the year, were issued with temporary identity certificates. However, on 11 October 2001 the applicants were arrested for being "illegal aliens" on the basis of irregularities discovered regarding their 1997 exemptions. They were later released, pending the outcome of criminal charges due to be laid against them. It is common cause that their naturalisation was fraudulently obtained. The first applicant attributes the fraud to an official in the Department of Home Affairs.

[2] 96 of 1991.

[8] The first applicant was again arrested for fraud in connection with the 1997 exemptions. After investigations, no prosecution was initiated due to insufficient evidence.

[9] The applicants left South Africa between June and August 2002, doing so, they state, on the basis of assurances from an official within the Department that they could make a fresh start on their return, should they apply to re-enter and stay in South Africa. The respondents' version is that the applicants were compelled to leave.

[10] In November 2002 the first applicant applied for and was granted permission to return to South Africa, which he did in January 2003. Once in the country, he applied for a work permit, which was granted. He then converted his work permit to a business permit, thus enabling him to be self-employed. Although the applicant claims he made full disclosure of complications regarding his previous immigration status to the Department, the respondents dispute that the disclosure was complete.

[11] On 12 July 2005 the first applicant applied for permanent residence status for himself and his family in terms of section 27(c) of the Immigration Act[3] (the Act).

---

[3] 13 of 2002. Section 27(c) provides, in part, that:

> "The Director-General may issue a permanent residence permit to a foreigner of good and sound character who—
>
> . . .
>
> (*c*) intends to establish or has established a business in the Republic and investing in it or an established business the prescribed financial contribution to be part of the intended book value, and to the members of such foreigner's immediate family. . .".

Once the applicants had provided the Department, at its request, with an explanation regarding their previous immigration status, they were granted permanent residence permits in June 2006 and the first applicant applied for "green identity documents", issued to permanent residents and citizens. It was when he questioned the delay in the issuing of these documents that he was told that his application had been referred to Ms Sandra Franke, an official in the Department's investigation section.

[12] As part of the investigation process, the first and second applicants met with Ms Franke. On the second occasion she gave each of them a letter dated 9 January 2007. These letters informed them, among other things, that an investigation had revealed that they had previously obtained South African identity documents by fraudulent means and therefore did not qualify for permanent residence after 1 July 2005; in terms of section 29(1)(f) of the Act,[4] the first and second applicants were prohibited persons and did not qualify for visas, admission to South Africa and temporary or permanent residence permits; they were to be deported and they were entitled, under section 8 of the Act,[5] to request the Minister to review the decision to deport them.

[4] Section 29(1)(*f*) provides:

> "(1) The following foreigners are prohibited persons and do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit:
>
> . . .
>
> (*f*) anyone found in possession of a fraudulent residence permit, passport or identification document."

[5] See [50] below.

[13] Mr Koyabe's attorney accordingly advised him to submit a written request for a review of that decision under section 8(1) of the Act.[6] However, he further advised that in order to submit a meaningful request for review, it would be necessary to ascertain the reasons for the decision. Mr Koyabe's attorney wrote to the Minister, requesting the reasons for the decision to withdraw or terminate their residence permits for purposes of the review application, to which they were entitled in terms of section 5[7] of the Promotion of Administrative Justice Act[8] (PAJA).

[14] Between 11 January and 6 February 2007 there was a flurry of correspondence between the applicants' attorneys and the Department. Several letters by the applicants followed, requesting reasons for the decision to withdraw their residence permits.

[15] Ms Franke wrote to the applicants' attorneys on 7 February 2007 stating that the reasons for the decision were set out adequately in the letters of 9 January 2007. Taking this into consideration, it is clear that from 7 February 2007, the applicants had had three days to submit a request for review having been provided with all the required information. The applicants failed to do so and, therefore, Ms Franke argued, the applicants' right to a review by the Minister had lapsed.

---

[6] Id.

[7] See n 65 below.

[8] 3 of 2000.

[16] The applicants applied to the High Court for a review and the setting aside of the Director-General's decision to withdraw their permanent residence permits and status. They also sought interim relief, pending the finalisation of the main relief sought.

In the High Court

[17] The respondents relied on the provisions of section 7(2)(a) of PAJA,[9] read together with section 8 of the Act, which provides procedures for reviews and appeals.[10]

[18] It was common cause that the applicants had failed to make use of the review procedure set out in section 8(1) of the Act, "mainly or purportedly" for the reasons stated in the correspondence between them and Ms Franke. The High Court held that, based on Mr Koyabe's own allegations, all relevant facts were known to them and that the respondents' letter of 9 January 2007 "contained no mystery at all". The court furthermore found that the applicants and/or their attorneys were overly formalistic in insisting that the second and third respondents prove every allegation beyond a reasonable doubt before they were prepared to take the necessary steps towards a review.

[9] Section 7(2)(*a*) of PAJA provides:

> "Subject to paragraph (*c*), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted."

[10] See [50] below.

[19] The High Court held that the applicants had not exhausted their internal remedies as required by section 7(2)(*a*) of PAJA and concluded that there were no exceptional circumstances that would allow it to exempt the applicants from the obligation to exhaust internal remedies.[11] The court accordingly held that the applicants should first exhaust their internal remedy under section 8 of the Act as required by section 7(2)(*b*) of PAJA,[12] and dismissed their application with costs.

[20] The applicants sought and were denied leave to appeal in both the High Court and the Supreme Court of Appeal.

In this Court

[21] The applicants submit that their application for leave to appeal raises questions regarding the ambit of the right to just administrative action, protected under section 33(2) of the Constitution,[13] and given effect to in section 5 of PAJA.[14] They claim that it further raises questions about the interpretation of section 7(2) of PAJA, in the light of the right of access to courts guaranteed in section 34 of the Constitution.[15]

---

[11] Section 7(2)(*c*) of PAJA provides:

> "A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

[12] Section 7(2)(*b*) of PAJA provides:

> "Subject to paragraph (*c*), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (*a*) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act."

[13] Section 33(2) of the Constitution provides:

> "Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

[14] See n 65 below.

[15] Section 34 of the Constitution provides:

They argue that the High Court failed to consider important factors necessary for a constitutional interpretation of section 7(2) of PAJA. Specifically, they submit that they had intended to exhaust their internal remedy as required by section 7(2), but the respondents' refusal to provide reasons for withdrawing the residence permits precluded the applicants from meaningfully challenging that decision through internal review. Having been informed that the time period to apply for a ministerial review had expired, the internal remedy, they submit, was no longer available to them to proceed as they had intended. Accordingly, they argue, to permit the respondents to rely on section 7(2) to non-suit them would be contrary to the spirit of the Constitution.

[22] A remedy, the applicants argue, is exhausted not only when an applicant actually exercises the right to do so. Instead, they urge the Court to accept that exhaustion may also occur when "the time for exercising it has lapsed and the repository of the power to review refuses to entertain the review because the time has lapsed." They urge this Court to reject a holding that a person who did not exercise the right to an internal remedy may invariably not institute judicial review. This, they submit, would result in an unconstitutional ouster of a court's jurisdiction, contrary to section 34 of the Constitution.

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[23] It is their further contention that even before a ministerial review, they had a constitutional right to be furnished with reasons for the administrator's decision as well as any further information they needed. Although the respondents relied on section 8(1),[16] their decisions were also based on other provisions of the Act, notably section 8(3),[17] obliging them to provide the applicants with reasons.

[24] In the alternative, the applicants submit that they are entitled to reasons under section 5 of PAJA.[18] They argue that a finding that a person is an illegal foreigner is an adverse decision constituting administrative action as defined in section 1 of PAJA.[19] Accordingly, they submit, they were entitled to reasons under section 5 of

---

[16] See [50] below.

[17] Id.

[18] See n 65 below.

[19] Section 1 of PAJA provides:

> "(i) "administrative action" means any decision taken, or any failure to take a decision, by—
>
> (*a*) an organ of state, when—
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (*b*) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include—
>
> (*aa*) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(*a*), (*b*), (*c*), (*d*), (*f*), (*g*), (*h*), (*i*) and (*k*), 85(2)(*b*), (*c*), (*d*) and (*e*), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
>
> (*bb*) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(*d*), (*e*) and (*f*), 126, 127(2), 132(2), 133(3)(*b*), 137, 138, 139 and 145(1) of the Constitution;
>
> (*cc*) the executive powers or functions of a municipal council;

PAJA, as none of the exceptions created by sections 5(4) and 5(5),[20] was applicable in their case.

[25] It is the contention of the respondents that all decisions taken in terms of the Act are subject to review or appeal in one of two ways, the nature of the review or appeal procedure being dependent on the nature of the decision. First, in terms of section 8(1) of the Act, an official who refuses entry to any person, or finds any person to be an illegal foreigner, shall on the prescribed form inform that person that he or she may in writing request the Minister to review that decision.[21] The second procedure is found in section 8(4) of the Act.[22] It pertains to decisions other than an immigration officer's refusal of entry into the country or finding of a person to be an illegal foreigner, which materially and adversely affect the rights of that person. The aggrieved person may approach the Director-General within 10 working days of

---

(*dd*) the legislative functions of Parliament, a provincial legislature or a municipal council;

(*ee*) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(*ff*) a decision to institute or continue a prosecution;

(*gg*) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;

(*hh*) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(*ii*) any decision taken, or failure to take a decision, in terms of section 4(l)."

[20] See n 65 below.

[21] See [50] below.

[22] Id.

receiving notice of the decision. Section 8(3) makes it compulsory to be informed of the decision in the prescribed manner.[23]

[26] According to the respondents, the applicants deliberately attempted to conflate the procedures in sections 8(1) and 8(4), effectively submitting that PAJA should be applicable in respect of all decisions taken under the Act. That, submit the respondents, could not have been intended by the legislature, as it would severely compromise the speedy procedures designed to ensure that where a person has been found to be an illegal foreigner, clarity be obtained as soon as possible. They contend that the applicants have not made use of the internal remedy procedure and have avoided it, as it is not in their interests to do so.

[27] The respondents also submit that the applicants are not without remedy. They are still entitled to apply for condonation of the late filing of a review application, and may still apply to the Department to have their status as prohibited persons lifted. The effect of the High Court judgment was to defer the applicants' entitlement to approach a court, based on PAJA they contend, and did not deny them the right to be heard on the merits as the applicants aver.

[28] The respondents further submit that there is nothing in section 8(1) of the Act that entitles anyone affected by an administrative decision to reasons before an appeal. They argue that the wording of section 8 of the Act did not entail that the PAJA

[23] Id.

procedure would run concurrently with the exercise of the internal remedy provided for in section 8(1) of the Act. The applicants were in fact not in danger of being deported at the time, notwithstanding that the respondents would indeed have been entitled to do so.

[29] The respondents add that the applicants were aware of the reasons for the termination of their permanent residence permits. It is therefore reasonable to conclude that the Department's letter dated 9 January 2007, in which those reasons were spelled out, was a measure taken out of caution.

[30] Finally, the respondents interpret the Act to provide that a person found to be an illegal immigrant must make representations to the Minister for review, who then responds as a matter of urgency. The Minister would, as required by PAJA, be obliged to furnish reasons for an adverse finding. This, the respondents submit, is the point at which PAJA becomes applicable.

Application for leave to appeal

[31] A threshold requirement in applications for leave to appeal to this Court is that the case raises or is connected with a constitutional matter.[24] Also important is the requirement that there be prospects of success, and ultimately, whether it is in the interests of justice to hear a matter.[25]

[24] Section 167(3)(b) of the Constitution.

[25] *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 15. See also *African Christian Democratic Party v Electoral Commission and Others* [2006] ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC) at paras 17-8; *Phillips and Others v National Director of Public Prosecutions*

Constitutional matter

[32] The applicants raise important questions regarding the interpretation of section 7(2) of PAJA and how, in the light of this provision, section 8(1) of the Act must be read. This Court has held that "[a]s PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters."[26] Indeed at the core of the applicants' challenge is the interpretation and application of section 7(2) of PAJA in relation to section 8(1) of the Act in the light of the administrative justice protections enshrined in section 33 of the Constitution.[27] The applicants also contend that because of the existing uncertainty relating to what constitutes exhaustion of an internal remedy, a person could be denied access to courts, protected under section 34 of the Constitution. The questions raised are constitutional issues which fall squarely within the jurisdiction of this Court.

interests of justice

[2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

[26] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

[27] Section 33 of the Constitution provides:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
> (3) National legislation must be enacted to give effect to these rights, and must
> *(a)* provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
> *(b)* impose a duty on the state to give effect to the rights in subsections (1) and (2); and
> *(c)* promote an efficient administration."

[33] It is in addition necessary to consider whether it is in the interests of justice to grant the application. This matter brings to light the need for clarity regarding the relationship between section 7(2) of PAJA and section 8(1) of the Act. Given the vast number of foreign nationals who take up residence or seek refuge in South Africa, it is important to settle their rights and duties on the one hand, and those of government on the other. It is therefore in the interests of justice that this matter be heard and leave to appeal be granted. And I do so.

The duty to exhaust internal remedies

[34] Under the common law, the existence of an internal remedy was not in itself sufficient to defer access to judicial review until it had been exhausted.[28] However, PAJA significantly transformed the relationship between internal administrative remedies and the judicial review of administrative decisions. Section 7(2) of PAJA provides:

> "(*a*) Subject to paragraph (*c*), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
>
> (*b*) Subject to paragraph (*c*), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (*a*) has been exhausted, direct that

[28] *Nichol and Another v The Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA) at para 15. For an historical and analytical account of the duty to exhaust internal remedies in South African administrative law see Pretorius "The Wisdom of Solomon: The Obligation to Exhaust Domestic Remedies in South African Administrative Law" (1999) 116 *South African Law Journal* 113. Discussing the duty to exhaust internal remedies at common law, Hoexter notes the following:

> "The mere existence of an internal remedy is not enough by itself to indicate an intention that the remedy must first be exhausted . . . . [T]here is no general principle at common law that an aggrieved person may not go to court 'while there is hope of extrajudicial redress'. In fact, there are indications that the existence of a fundamental illegality, such as fraud or failure to make any decisions at all, does away with the common-law duty to exhaust domestic remedies altogether." (Footnotes omitted.)

Hoexter *Administrative Law in South Africa* (Juta & Co, Ltd, Cape Town 2007) at 479. For a further analysis of the common law duty to exhaust, as well as an argument favouring the common law approach, see Plasket "The Exhaustion of Internal Remedies and Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000" (2002) 119 *South African Law Journal* 50.

> the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
>
> (*c*) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

Thus, unless exceptional circumstances are found to exist by a court on application by the affected person, PAJA, which has a broad scope and applies to a wide range of administrative actions, requires that available internal remedies be exhausted prior to judicial review of an administrative action.[29]

[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.[30]

---

[29] The Supreme Court of Appeal has noted in *Nichol* above n 28 at para 15:

> "It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)(*c*). Moreover, the person seeking exemption must satisfy the court of two matters: first that there are exceptional circumstances and second, that it is in the interest of justice that the exemption be given."

[30] The Constitution obliges the public administration to promote certain values which foster an accountable, cost-effective, transparent and efficient administration. These values are outlined in section 195(1)*(b)*, which requires that an "(e)fficient, economic and effective use of resources must be promoted"; section 195(1)*(e)*, which requires that the needs of people "must be responded to"; section 195(1)*(f)*, which requires that public administration "must be accountable"; and section 195(1)*(g)*, which requires that "(t)ransparency must be fostered by providing the public with timely, accessible and accurate information."

See also Hoexter above n 28

> "Courts are unable to adjudicate effectively on many specialised matters, while administrative bodies are able to do this more informally, quickly, cheaply and expertly- and not necessarily any less justly." (at 52)
>
> "In the South African context, however, the advantages of speed, efficiency and expertise cannot be taken for granted as they may perhaps be in older and more established administrative systems." (at 64)

[36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function.[31] The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case.[32] Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action. In *Bato Star*, O'Regan J held that—

> "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 decisions made by those with special expertise and experience in the 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 to be

[31] In *Bato Star* above n 26 at para 45, this Court affirmed the following:

> "The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

See also Burns and Beukes *Administrative Law under the 1996 Constitution* 3rd ed (LexisNexis, Durban 2006) 471 and Pretorius (above n 28) at 115.

[32] See *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 113-4; *Chairman, Board on Tariffs and Trade v Brenco Inc and Others* 2001 (4) SA 511 (SCA) at paras 13-4; *Minister of Public Works and Others v Kyalami Ridge Environmental Association* [2001] ZACC 19; 2001 (3) SA 1151 (CC); 2001 (7) BCLR 652 (CC) at para 101; *President of the Republic of South Africa v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 219.

> 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."[33]

Once an administrative task is completed, it is then for the court to perform its review responsibility, to ensure that the administrative action or decision has been performed or taken in compliance with the relevant constitutional and other legal standards.[34]

[37] Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature.[35] The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.

[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this

---

[33] Above n 26 at para 48.

[34] Section 7(2) of PAJA. See also the preamble of PAJA.

[35] Hoexter above n 30 at 63, suggests that "where the public interest and the application of policy predominate … it becomes appropriate for appeal to lie to a suitably qualified and politically more accountable official or body." (Footnote omitted). She explains that:

> "Effective administrative appeal tribunals breed confidence in the administration as they give the assurance to all aggrieved persons that the decision has been considered at least twice and reaffirmed. More importantly, they include a second decision-maker who is able to exercise a 'calmer, more objective and reflective judgment' in reconsidering the issue."

need for flexibility, acknowledging in section 7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless.[36] Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute.

[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue.[37] Thus, where an internal remedy would not be effective and or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

[40] The principle of exhaustion of domestic remedies is recognised in international law, albeit in a different context.[38]

International law

[41] A useful analogous requirement in international law is the customary international law duty to exhaust available domestic remedies before approaching an international tribunal.[39] This international law principle was developed to provide

[36] See also section 6(1) of PAJA.

[37] *Nichol* above n 28 at paras 16-7.

[38] For an in-depth overview of this principle in international law, see Amerasinghe *Local remedies in international law* (Cambridge University Press, New York 2004).

[39] See the *Interhandel Case (Switzerland v United States of America)* Preliminary Objections, I.C.J. Reports 1959 , where the International Court of Justice stated at 27:

> "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law . . . Before resort may be had to an international court . . . it has been considered necessary that the State where the violation

states with the opportunity to address alleged violations and disputes through their own internal processes before resorting to intervention by an international tribunal. This affords states the opportunity to find their own solutions and to make beneficial use of their access to relevant facts, information as well as their familiarity with the technicalities of the dispute. In the international context:

> "A condition for the application of the local remedies rule is that it must first be determined whether those remedies exist, which implies the corresponding duty of the state to provide them. . . . Thus, the *process of exhaustion* is not the essence or raison d'etre of the rule; it is the *actual redress* for the wrong suffered that constitutes its fundamental element and ultimate purpose. Furthermore, the remedies to be exhausted include all those that are afforded under the municipal law of the accused state and are capable of addressing the alleged wrongs"[40](Footnote omitted).

[42] The approach of the African Commission on Human and Peoples' Rights (African Commission) is that a remedy must be "available, effective and sufficient" to redress the complaint.[41] In this regard, the African Commission has decided that:

---

occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system."

[40] Udombana "So Far, so Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights" (2003) 97 *American Journal of International Law* 1 at 5-6.

[41] *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) at para 31. See also *McCarthy v Madigan* 503 U.S. 140 (1992) where Justice Blackmun held at 144, that the threshold question in an exhaustion inquiry is legislative intent. Where Congress specifically mandates exhaustion, it is required. Absent this, judicial discretion governs although exhaustion principles should always be fashioned so as to be consistent with legislative intent and the statutory scheme. He held further, at 145-8 that exhaustion serves two general purposes. First, it protects agency authority, especially where action under review involves agency discretionary power or special expertise. Second, it promotes judicial efficiency by giving agency opportunity to correct its own errors and creates a record for the court.

Justice Blackmun further recognised exceptions to the exhaustion requirement where the interests of the individual in obtaining judicial intervention outweighs the institutional interest in exhaustion: (a) where it may prejudice subsequent court action (for example an unreasonable or indefinite timeframe for administrative action); (b) where there is doubt whether the agency can grant effective relief; and (c) where the administrative body is biased or has predetermined the issue.

> "A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the harm complaint."[42]

[43] In order to qualify as an available remedy, it is the approach of the African Commission that a complainant must have the ability to make use of the remedy in the circumstances of his or her case.[43] Similarly, the Inter-American Commission on Human Rights has interpreted the duty to exhaust domestic remedies as existing only when these remedies formally exist and are adequate to protect the legal interest infringed. They must also be effective to produce the result for which they were intended.[44]

[44] In a constitutional democracy like ours, where the substantive enjoyment of rights has a high premium, it is important that any existing administrative remedy be an effective one.[45] A remedy will be effective if it is objectively implemented, taking into account the relevant principles and values of administrative justice present in the Constitution and our law. An internal remedy must also be readily available and it must be possible to pursue without any obstruction, whether systemic or arising from unwarranted administrative conduct. Factors such as these will be taken into account when a court determines whether exceptional circumstances exist, making it in the interests of justice to intervene.

---

[42] *Jawara* above n 41 at para 32.

[43] Id at para 33.

[44] *Parque Sao Lucas v Brazil* Case 10.301 IACHR Report No 40/03 (2003) at para 31.

[45] *Reed and Others v Master of the High Court and Others* [2005] 2 All SA 429 (E) at para 20.

[45] Thus, as the international jurisprudence illustrates, judicial enforcement of the duty to exhaust internal remedies, in giving content to the "exceptional circumstances" exemption, must consider the availability, effectiveness and adequacy of the existing internal remedies.

The proper interpretation of section 7(2) of PAJA

[46] The applicants aver that to impose the internal remedy requirement rigidly would result in an unconstitutional ouster of a court's jurisdiction. Section 7(2)(a) of PAJA provides that a court shall review administrative action only when all relevant internal remedies provided for in any other law are exhausted. The provision therefore does not preclude courts from exercising their judicial review jurisdiction. A court must exercise its judicial review powers once one of two circumstances arises: when all available internal administrative remedies are found to have been exhausted or when exceptional circumstances are found to exist.

[47] Although the duty to exhaust defers access to courts, it must be emphasised that the mere lapsing of the time-period for exercising an internal remedy on its own would not satisfy the duty to exhaust nor would it constitute exceptional circumstances.[46] Someone seeking to avoid administrative redress would, if it were otherwise, simply wait out the specified time-period and proceed to initiate judicial review. That interpretation would undermine the rationale and purpose of the duty. Thus, an aggrieved party must take reasonable steps to exhaust available internal

[46] See *Nichol* above n 28 at para 32.

remedies with a view to obtaining administrative redress. The applicants relied in this regard on the decision in *Kiva v Minister of Correctional Services*.[47] To the extent that this decision indicates otherwise, it cannot be endorsed.

[48] This is not to say, however, that if an aggrieved party had made an attempt in good faith to exhaust internal remedies, but had been frustrated in his or her efforts to do so, a court would be prevented from granting the exemption. It is for the court to determine, on a case-by-case basis, whether circumstances exist for judicial intervention.

[49] Given the valuable purposes that the 'internal remedies' requirement fulfils, the applicants' contention that section 7(2) of PAJA should be interpreted not to require their exhaustion, but merely to impose a time-period, cannot be sustained.

Internal remedies under section 8 of the Act

[50] The Immigration Act has as its objective the important task of regulating the admission of foreign nationals to, their residence in, and their departure from South Africa.[48] In particular, section 8 of the Act provides for internal administrative review and appeal procedures regarding decisions taken in terms thereof, for those seeking to challenge administrative decisions. It is convenient to set out the provisions of section 8 in full:

[47] [2007] 1 BLLR 86 (E).

[48] See the long title of the Act.

"(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and—

(*a*) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(*b*) in any other case than the one provided for in paragraph (*a*), that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision—

(*a*) in a case contemplated in subsection (1)(*a*), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(*b*) in a case contemplated in subsection (1)(*b*), shall not be removed from the Republic before the Minister has confirmed the relevant decision.

(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.

(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.

(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.

(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision."

[51] Section 8 thus establishes two channels for review. One route is created under section 8(1) and the other under section 8(4). The procedure applicable in a particular case will depend on the nature of the administrative decision. In section 8(1), a person refused entry into the country or found to be an illegal foreigner must be notified of his or her right to request in writing that the Minister review that decision. If the affected person arrived on a conveyance about to leave the country, the request must be communicated to the Minister without delay.[49] Should the Minister's response not be obtained by the time the conveyance departs, the person shall leave and await the Minister's decision outside of the country.[50] In any other case, the affected person has three days within which to lodge a review application and may not be deported unless and until the Minister has confirmed the decision.[51] Presumably the review must occur within a reasonable timeframe.

[52] The procedure established under section 8(1) stands in contrast to that provided for under section 8(4). In all cases other than those contemplated in section 8(1), where a decision has materially and adversely affected a person's rights, the decision shall be communicated in the prescribed manner and reasons shall be furnished.[52] Under section 8(4), the affected person may, within 10 working days, request a review

[49] Id at section 8(1)(*a*).

[50] Id at section 8(2)(*a*).

[51] Id at section 8(2)(*b*).

[52] Id at section 8(3).

or appeal to the Director-General. Within a further 10 days of the receipt of the Director-General's decision, the person may seek a ministerial review or appeal.[53]

[53] An application in terms of section 8(1) is therefore more urgent and provides aggrieved parties with a direct route to the Minister. Further, a person affected by a decision falling under section 8(1)(b) is protected from deportation, pending the Minister's review and confirmation. Section 8 thus provides a detailed internal remedy structure designed to afford aggrieved persons administrative relief as a first step towards addressing their claims.

[54] The internal remedies under section 8 of the Act illustrate the value and importance of a tailored remedial structure designed to cure a specific administrative irregularity. On the one hand, a finding that a person who has entered a country to stay for specific purposes is an illegal foreigner has a material and adverse effect on that person. It is therefore in his or her interest that the decision be reviewed speedily to ensure its correctness and fairness. The state, on the other hand, has a legitimate interest in the security of its borders and the integrity of its immigration systems and must take reasonably speedy yet constitutionally compliant steps to resolve questions about the legality of the presence of foreign nationals in its territory. Section 8(1) provides this opportunity. It is thus the procedure under section 8(1) and not that under section 8(4) which is applicable in the applicants' case.

[53] Id at section 8(6).

[55] The constitutionality of section 8(1) and the time period it stipulates for a review application is however not before this Court, and this judgment remains silent on that issue. It is sufficient to emphasise that where the legislature has tailored a statutory remedy to address a specific administrative harm that remedy must be exhausted before resort is had to judicial review, under PAJA, unless exceptional circumstances exist.

Were the applicants entitled to reasons?

[56] The applicants had been notified of the decision declaring them prohibited persons in terms of section 29(1)(f) of the Act. Because the decision fell under section 8(1), Ms Franke notified them on the prescribed form of the three days within which they may request a review. Indeed, the first and second applicants indicated their intention to do so once adequate reasons had been provided.

[57] The appropriate response on the part of the applicants at that stage was to request a ministerial review in terms of section 8(1). Section 8(1) of the Act required that the applicants request an administrative review before resorting to the courts.

[58] The applicants submit that they were unable to request a review without first receiving reasons for the decision declaring them illegal foreigners. Instead, they argue, they were presented with a series of findings and conclusions of law, as opposed to reasons which, they submit, they were entitled to under section 5 of PAJA.

[59] Whereas decisions made under section 8(3) of the Act require that communication to the aggrieved person "shall be accompanied by the reasons for that decision", the Act states that a person found to be an illegal foreigner shall under section 8(1) be notified "on the prescribed form". The respondents seem to interpret this to mean that under section 8(1) they were not obliged to provide the applicants with reasons, although they had nonetheless done so. This cannot be so.

[60] Section 33(2) of the Constitution provides a right to written reasons to those whose rights have been adversely affected by administrative action. Indeed PAJA, which was enacted to give effect to this and other administrative justice rights,[54] states in its preamble that part of the purpose of giving effect to these rights is to—

> "create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function".

In keeping with this important goal, section 5 of PAJA must be viewed as giving effect to section 33(2) of the Constitution.[55] These two provisions read together

---

[54] See the long title of PAJA which states that it was enacted in order "[t]o give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto."

[55] Section 5(1) of PAJA states:

> "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." (My emphasis.)

A person who has not been given reasons for an administrative decision that adversely affects his or her rights is entitled to request reasons, which indicates a prior entitlement to reasons in the first place.

Section 33(2) provides:

entitle the applicants to reasons. The respondents were thus incorrect in their contention that the applicants were not entitled to reasons for the immigration officer's decision to withdraw their residence permits and that there was no obligation on their part to furnish reasons.

[61] The declaration that a person is an illegal foreigner under section 8(1) impacts adversely on him or her. In addition to having to leave the country, it stigmatises the person and may become a basis for denial of entry into other foreign countries. As a consequence, a person will be anxious to know the basis for the declaration, particularly in circumstances where it might be based on a misunderstanding or incorrect information. In that regard, the person may want to appeal or have the decision reviewed and set aside by a higher authority. Reasons for the finding, as in this case, are therefore important in seeking a meaningful review by the Minister and in enhancing the chances of getting the immigration agent's adverse finding overturned.

[62] Further, in our constitutional democracy, officials are enjoined to ensure that the public administration is governed by the values enshrined in our Constitution.[56] Providing people whose rights have been adversely affected by administrative decisions with reasons, will often be important in providing fairness, accountability and transparency. In the context of a contemporary democratic public service like

---

"Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

[56] See section 195(1) of the Constitution.

ours, where the principles of batho pele,[57] coupled with the values of ubuntu,[58] enjoin the public service to treat people with respect and dignity and avoid undue confrontation, the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners. It is excessively over-formalistic and contrary to the spirit of the Constitution for the respondents to contend that under section 8(1) they were not obliged to provide the applicants with reasons.

[63] Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding.[59] What constitutes adequate reasons will therefore vary, depending on the circumstances of the particular case.[60] Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.

---

[57] Batho pele, which means "People First" in Sotho, requires that public administration should serve the best interests of the public by enabling the achievement of individual rights encompassed in the provisions of the Constitution. See *Van Der Merwe and Another v Taylor and Others* [2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC) at 71. In practice this requires that the administration works towards achieving high standards of professional ethics and responsiveness to the needs of people; the provision of service which is impartial, fair, equitable and without bias and the utilisation of resources in an efficient and effective manner in order to create an accountable, transparent, and development-oriented public administration. See the Batho Pele Handbook available on the Department of Public Service and Administration website http://www.dpsa.gov.za/batho-pele/docs/BP_HB_optimised.pdf accessed 17 August 2009. See also Cloete and Mokgoro (eds) *Policies for Public Service Transformation* (Juta & Co, Kenwyn 1995) at 7-8.

[58] See *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 223-5; 263 and 307. See especially para 308 where ubuntu is defined as including the fundamental values of respect, human dignity and conformity with basic norms, with an emphasis on conciliation as opposed to confrontation. These are values fundamental in an open democratic society like ours based on equality, human dignity and freedom. See also *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 68-9 and in particular paras 113-21.

[59] See *Commissioner for the South African Police Services and others v Maimela and another* 2003 (5) SA (T) at 480.

[60] Id.

[64] In *Maimela*,[61] the factors to be taken into account to determine the adequacy of reasons were succinctly and helpfully summarised as guidelines which include–

> "[t]he factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be 'full written reasons'; the 'briefest *pro forma* reasons may suffice'. Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified."[62](Footnotes omitted.)

The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one.

Were the applicants provided with adequate reasons?

[65] When Ms Franke informed the applicants of the invalidity of their permanent residence permits, she notified them to that effect on a form prescribed under section 8(1) and also presented them each with a letter indicating more fully the basis for the decision. The letters made reference to the meeting of 30 November 2006 between them and Ms Franke, when, on the applicants' own version, she informed them that

[61] Id.

[62] Id at 481.

she was investigating the 2001 "illegal aliens" charges against them. In those letters, Ms Franke also informed them of her findings as follows:

> "I have to inform you that an investigation into your residence status in the Republic of South Africa has revealed that you have previously obtained a South African identity document by fraudulent means. In terms of section 25(3) of the Immigration Act, 13 of 2002, as amended, you therefore, did not qualify for permanent residence status subsequent to 1 July 2005. Section 25(3) clearly stipulates that permanent residence shall be issued on condition that the holder is not a prohibited person or an undesirable person.
>
> You are in terms of section 29(1)(f) of the Immigration Act, a prohibited person for being found in possession of a fraudulent identification document. As a prohibited person, you do not qualify for a visa, admission into the Republic, a temporary residence or a permanent residence permit."

[66] The contents of the letter are clear. The applicants were declared prohibited persons because they obtained their identity documents fraudulently. On that basis they had been declared illegal immigrants. Simply put, their presence in the country was unlawful and they had to leave or be deported. Considered in the context of the earlier meeting where Ms Franke discussed the allegations of fraud against them, the basis for the withdrawal of their residence permits could not have been clearer.

[67] Subsequent to receiving the letters, however, the applicants, invoking the Promotion of Access to Information Act[63] (PAIA), proceeded to request a barrage of information from the respondents. They sought, among other things, all documents held by the Department relating to its investigation into their residence status between

[63] 2 of 2000.

2001 and 2003. They also requested all documents held by the Department relating to the investigation into their residence status and related decisions.

[68] Indeed, as the High Court noted, the applicants wanted the second and third respondents to prove almost every allegation beyond a reasonable doubt before they took the required steps to seek a ministerial review. They also raised a plethora of questions regarding the decision to terminate their permanent residence status and the validity and legality of that decision. These challenges, based on section 6(2) of PAJA,[64] ought properly to have been the grounds of their review application. The

---

[64] Section 6(2) of PAJA provides:

> "A court or tribunal has the power to judicially review an administrative action if—
>
> (*a*) the administrator who took it—
>
> (i) was not authorised to do so by the empowering provision;
>
> (ii) acted under a delegation of power which was not authorised by the empowering provision; or
>
> (iii) was biased or reasonably suspected of bias;
>
> (*b*) mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
>
> (*c*) the action was procedurally unfair;
>
> (*d*) the action was materially influenced by an error of law;
>
> (*e*) the action was taken—
>
> (i) for a reason not authorised by the empowering provision;
>
> (ii) for an ulterior purpose or motive;
>
> (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
>
> (iv) because of the unauthorised or unwarranted dictates of another person or body;
>
> (v) in bad faith; or
>
> (vi) arbitrarily or capriciously;
>
> (*f*) the action itself—
>
> (i) contravenes a law or is not authorised by the empowering provision; or
>
> (ii) is not rationally connected to—
>
> (*aa*) the purpose for which it was taken;
>
> (*bb*) the purpose of the empowering provision;
>
> (*cc*) the information before the administrator; or
>
> (*dd*) the reasons given for it by the administrator;
>
> (*g*) the action concerned consists of a failure to take a decision;
>
> (*h*) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action

answers they sought were not necessary for the purposes of a review application. The reasons for the withdrawal of their residence permits were thus adequate to enable them to request a meaningful review by the Minister. The nature of the information they sought would instead have been more appropriately sought from the Minister, in the event that she confirmed Ms Franke's decision.

[69] I conclude therefore that the applicants' judicial review application was premature and that they were first required to exhaust the available ministerial review. In the light of this conclusion, the judgment makes no finding with regard to the applicants' challenge against the decision to withdraw their residence permits.

[70] In the light of the fact that the applicants had been provided with adequate reasons for the purposes of a ministerial review, the High Court held that they ought to have proceeded with the internal ministerial review under section 8 before instituting judicial review proceedings in the High Court.

Section 5 of PAJA

[71] The applicants argue that section 5 of PAJA[65] also entitles them to request reasons before review by the Minister. In the light of the finding that the applicants

---

was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(*i*) the action is otherwise unconstitutional or unlawful."

[65] Section 5 of PAJA provides:

"(1) 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

were given adequate reasons, the applicants' argument based on section 5 of PAJA falls away.

Exceptional circumstances

[72] In the High Court, the applicants sought an order granting them an exemption from the duty to exhaust available internal remedies in terms of section 7(2)(c) of PAJA.

---

reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) 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.

(3) If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

(4) *(a)* An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

(b) In determining whether a departure as contemplated in paragraph (*a*) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;
(ii) the nature, purpose and likely effect of the administrative action concerned;
(iii) the nature and the extent of the departure;
(iv) the relation between the departure and its purpose;
(v) the importance of the purpose of the departure; and
(vi) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

(6) (*a*) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

(*b*) The Minister must, within 14 days after the receipt of a request referred to in paragraph (*a*) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph."

[73] Section 7(2)(c) of PAJA permits a court to condone a failure to exhaust internal remedies in exceptional circumstances, when it is in the interests of justice to do so. The applicants show no exceptional circumstances as a basis for a claim to be exempted from exhausting the available internal remedy. Their only contention is that they had not been provided with reasons enabling them to apply for a review and that the respondents had indicated that the time period for them doing so had lapsed. In *Nichol*,[66] the Supreme Court of Appeal noted, in interpreting section 7(2)(c) of PAJA, that allegations of procedural or substantive administrative irregularities do not on their own constitute exceptional circumstances in review proceedings.

[74] Throughout this litigation, the applicants have had the benefit of legal representation. Based on the information at their disposal, a meaningful review, as this judgment finds, was thus well within their reach. I find no justifiable basis for the applicants' failure to institute ministerial review proceedings, as was required by section 8(1) of the Act read with section 7(2) of PAJA. I agree with the High Court's conclusion that no exceptional circumstances existed to warrant an exemption from the duty to exhaust internal remedies.

Submissions by the amicus curiae

[75] Lawyers for Human Rights has been admitted as amicus curiae in these proceedings. Its Refugee and Migrant Rights Project specialises in defending the rights of refugees, asylum seekers and other marginalised migrants in South Africa.

[66] Above n 28 at para 24.

The amicus curiae describes its interest in this matter as that of a party that regularly represents people detained by the Department in urgent *habeas corpus* applications. It also represents immigrants facing deportation.

[76] The amicus curiae contends that the Department has adopted a deliberate and routine strategy of raising the duty to exhaust internal remedies when court proceedings are instituted by applicants seeking orders that they be released from detention or not be deported. It argues that the proper consideration of the relationship between section 7(2) of PAJA and section 8 of the Act requires an understanding of the practical difficulties that arise when invoking internal remedies under the Act.

[77] The amicus curiae submits that many of the people who would theoretically be able to make use of the internal remedies in the Act are unable to do so in practice, and that this is the case for many who are detained at the Lindela Holding Facility.[67] Many detainees do not have access to legal counsel and are unaware of their right to lodge an internal appeal. Even where detainees are aware of their rights, the amicus curiae submits, these rights are disregarded by immigration officials. Detainees have no access to writing materials and often cannot comprehend the relevant procedures. All the prescribed forms are available only in English and there are no interpreters at Lindela. Further, when internal appeals are occasionally launched, the Minister

[67] Lindela Holding Facility, also known as the Lindela Repatriation Centre, is established in terms of section 34 of the Act. Foreign nationals arrested on immigration charges are sent to this holding facility which is operated by the private security company Bosasa (Pty) Ltd on behalf of the Department of Home Affairs.

delegates her review authority to the same officials within the detention facility, defeating much of the purpose of an objective review process.

[78] This Court is urged to hold that, properly interpreted, section 7(2) of PAJA cannot bar a court's adjudication of a *habeas corpus* petition. This is so, it is argued, because section 7(2)(a) does not speak to *habeas corpus* petitions. In the alternative, it was argued that *habeas corpus* applications always constitute exceptional circumstances. Further, and in the alternative, the amicus curiae requests the Court to decline to make a definitive ruling on this point but nonetheless to distinguish the present case from those involving urgent *habeas corpus* petitions.

[79] The amicus curiae further argued that although this matter does not involve a *habeas corpus* application or one seeking to halt an impending deportation, this Court has, in the past, been willing to provide guidance to lower courts notwithstanding the fact that the issues were moot and that this Court should provide similar guidance to lower courts in this matter.[68] A further contention is that the issues raised are unlikely ever to be reviewed by this Court because of its unsuitability and reluctance to sit as an urgent court. For these reasons, it is contended, these submissions should be given effect by this Court.

[68] In support of this submission the amicus curiae cites *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27.

[80] Amici curiae have made and continue to make and continue to make an invaluable contribution to this Court's jurisprudence.[69] Most, if not all constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and in so far as amici introduce additional, new and relevant perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.[70]

[81] The amicus curiae's submissions raise matters of concern regarding the application of section 7(2) of PAJA to vulnerable immigrants in detention. That is not the position of the applicants, who are not in detention. In addition, they have full legal representation. This is not a *habeas corpus* case. How section 7(2) should be interpreted and applied in the situation of detained foreign nationals and *habeas corpus* applications, and the extent to which the authorities must be proactive in

---

[69] See for example: *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at paras 6-9, 30-1, 42, 80, 98, 101-2 and 108; *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 9; *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 62; *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at para 17; *August and Another v Electoral Commission and Others* [1999] ZACC 3; 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) at paras 12 and 32; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 6, 15 and 58; *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 117 and 120.

[70] Budlender writes that this conception of the amicus curiae under the post-apartheid constitutional order reflects two important changes that have resulted from the advent of constitutional democracy in South Africa:

> "First, it reflects the underlying theme of participatory democracy in the Final Constitution. In matters of broad public interest, such as the interpretation of the Final Constitution, courts are more disposed towards listening to the voices of persons other than the parties to a particular dispute. Secondly, it reflects the fact that constitutional litigation often affects a range of people and interests that go well beyond those of the parties already before the court."

Budlender "Amicus Curiae" in Woolman *et al Constitutional Law of South Africa* 2nd ed. Original Service: 07-06 (Juta & Co, Cape Town 2007) at 8-1.

enabling detained people to avail themselves of their procedural rights,[71] are matters that require full ventilation in a properly prepared case on another day. This approach is consistent with this Court's reasoning in *In Re Certain Amicus Curiae Applications*[72] holding that:

> "The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence."[73]

Having said that, this judgment should not be interpreted to prejudice any potential future causes of action seeking to challenge the government's application of section 7(2) to other immigration contexts such as those involving immigrants facing imminent deportation, including those being denied access to courts when they bring *habeas corpus* applications in the practical circumstances defined by the amicus curiae.[74]

Conclusion

---

[71] See *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 83.

[72] [2002] ZACC 13; 2002 (5) SA 713 (CC); 2002 (10) BCLR 1023 (CC).

[73] Id at para 5.

[74] See [75]-[77] above.

[82] The reasons provided to the applicants on the prescribed forms, together with those contained in the letter dated 9 January 2007 were adequate for them to proceed with applications for a ministerial review of Ms Franke's decision, withdrawing their residence permits. The applicants have not shown that exceptional circumstances exist for them to proceed directly with judicial review. The applicants have therefore not yet exhausted the available internal remedy under section 8(1) of the Act and ought not to have instituted judicial proceedings in the High Court.

[83] Section 7(2)(b) of PAJA states:

> "Subject to paragraph (*c*), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (*a*) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act."

In the light of this provision, the applicants are directed to proceed within seven days of this judgment with an application for a review of the decision withdrawing their permanent residence status, before they embark on a judicial review if necessary.

Costs

[84] The applicants appeal against the costs orders in the High Court made with respect to the interim and main relief they sought in that court on the basis that the High Court misdirected itself by finding that they had no basis for launching an urgent application for interim relief. They submit that the respondents' letter dated 7 February 2007 made it clear that their deportation had been ordered; they no longer

had internal remedies; and they had to leave the Republic, all of which prompted them to launch an urgent application. They further argue that the respondents implicitly acknowledged the need for an application for urgent interim relief, when in the High Court, they made an undertaking not to deport the applicants pending finalisation of the matter. Even in the event that they were unsuccessful in this Court, the applicants submitted during oral argument, there ought to be no order as to costs.

[85] The respondents contend that at no stage have they attempted to or indicated that they would summarily deport the applicants. They argue that they are sensitive to the particular circumstances of persons who have been found to be illegal foreigners and would have given the applicants more than reasonable opportunity to wind up their affairs before deportation. Finally, they contend that due to the fact that the applicants' main application was subsequently dismissed, their initial undertakings were found not to have been necessary. It was thus appropriate for the reserved costs to have followed those of the main application. On the other hand they argued that this application be dismissed with costs.

[86] The attitude of the applicants in insisting on being provided with adequate reasons before they instituted ministerial review of Ms Franke's decision, where the basis for that decision was clearly spelt out in the letters of 9 January 2007, was not reasonable. They should at that stage have applied for ministerial review, particularly since they had benefited from legal assistance throughout. I can find no basis for a finding that the High Court misdirected itself by ordering costs against them, as the

applicants contend. The High Court's order as to costs in that court is therefore confirmed.

[87] The question of costs in this Court was particularly contentious. Although the applicants have been largely unsuccessful they have raised important constitutional questions which serve the public interest; and it is in the interests of justice that this matter be finally resolved by this Court.[75] In the same way, even though the applicants insisted on going to court despite having received adequate reasons, the over-formalistic conduct of the respondents who treated the applicants as though they have no right to reasons in the first place, was unhelpful and not without fault. Finally, although the applicants' approach to the litigation, resorting to premature judicial review might have created undue delay of the process and inconvenience to the respondents, a cost order against them would not be just and equitable. In the result, there is no order as to costs in this Court.

Order

[88] In the result, the following order is made:

1. The application for leave to appeal is granted.

2. The application of Lawyers for Human Rights to be admitted as amicus curiae is granted.

3. The appeal is dismissed.

[75] See *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14 Case No CCT 80/08, 3 June 2009, as yet unreported, at paras 16-7; *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

4. The costs order in the North Gauteng High Court is confirmed.

5. There is no order as to costs in this Court.

Langa CJ, Moseneke DCJ, Cameron J, Nkabinde J, Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Mokgoro J.

Counsel for the Applicant:	Advocate V Soni SC, Advocate S Yacoob, instructed by Chris Watters Attorneys.
Counsel for the Respondent:	Advocate G Bofilatos, instructed by State Attorney, Pretoria.
For the Amicus Curiae:	Advocate S Budlender, Advocate K Hofmeyr, instructed by Lawyers for Human Rights.