THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 242/12
Not Reportable

In the matter between:

PRINCE MANGOSUTHU GATSHA BUTHELEZI	**First Appellant**
MOSIUOA LEKOTA	**Second Appellant**

and

MINISTER OF HOME AFFAIRS	**First Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**Second Respondent**
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	**Third Respondent**
DIRECTOR-GENERAL OF THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION	**Fourth Respondent**

Neutral citation:	*Buthelezi & another v Minister of Home Affairs & others* (242/12) [2012] ZASCA 174 (29 November 2012)
Coram:	NUGENT, HEHER, TSHIQI and WALLIS JJA and MBHA AJA
Heard:	**12 NOVEMBER 2012**
Delivered:	**29 NOVEMBER 2012**
Summary:	**Immigration Act 13 of 2002 – visas – whether Minister obliged to grant – whether unreasonable delay in this case.**

ORDER

On appeal from Western Cape High Court, Cape Town (Baartman Madam J sitting as court of first instance).

The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and substituted with the following:

1. It is declared that the First Respondent unreasonably delayed her decision whether to grant or withhold the visas relevant to this case and in so doing acted unlawfully.
2. The respondents are to pay the costs of the applicants, including the costs of two counsel.

JUDGMENT

NUGENT JA (HEHER, TSHIQI and WALLIS JJA and MBHA AJ CONCURRING)

[1] The 14th Dalai Lama – spiritual leader of the Gelug school of Tibetan Buddhism, former leader of the government-in-exile of the people of Tibet after its annexation by the People's Republic of China, and an iconic proponent of world peace – has on two occasions in recent times been invited to visit this country. On both occasions the visit had to be cancelled because visas for him and members of his entourage were not timeously forthcoming. This appeal relates to the second occasion on

which that occurred. On that occasion he had been invited by the Gandhi Development Trust, various other institutions, and Nobel Laureate Archbishop Tutu. The visit was to be from 7 to 13 October 2011. By 4 October 2011 there had been no response to applications that had been made for visas and the proposed visit was cancelled.

[2] The appellants are both Members of the House of Assembly. They allege that the visa applications were dealt with unlawfully. They wish once again to invite the Dalai Lama to visit this country but say that he cannot be expected to accept without being assured that what had occurred before had been unlawful and should not be expected to recur. To that end they applied to the Western Cape High Court for various forms of declaratory relief. The respondents were the Minister of Home Affairs, the Minister of International Relations and Cooperation, and the Directors-General of those departments. The application was refused by Baartman and Davis JJ and the appellants now appeal with the leave of that court.

[3] Courts will generally decline to entertain litigation in which there is no live or existing controversy. That is principally for the benefit of the court so as to avoid it being called to pronounce upon abstract propositions of law that would amount to no more than advisory opinions. The principle so far as appeals are concerned is captured in s 21A of the Supreme Court Act 59 of 1959, which allows an appeal to be dismissed on the grounds alone that the judgment or order sought will have no practical effect or result.

[4] The application was dismissed by the court below on the grounds that there was no live controversy. That was rightly not pressed in

argument before us. Whether the authorities had acted lawfully was and remains a live issue. That they would not be called upon to reconsider their conduct if they had acted unlawfully goes only to whether a decision on that question would have practical effect. In view of the appellants' intentions it cannot be said that it will not.

[5] It is not necessary to relate the relief that was sought in the court below. Before us counsel for the appellants confined himself to three declarations, each of which was sought as an alternative to the one preceding it. First, they asked us to declare that the respondents had been obliged to issue a visa. Secondly, to declare that visas had been refused. And thirdly, to declare that the 'conduct' of the respondents was unlawful. When probed on what 'conduct' specifically was said to have been unlawful counsel could offer no more than that the Minister of Home Affairs had unreasonably delayed her decision, and I have approached the matter on that basis.

[6] The claim to the first declaration can be disposed of briefly. That claim was founded upon a construction placed by the appellants on s 10A of the Immigration Act 13 of 2002, read with ss 29 and 30.

[7] Subsection (1) of s 10A requires any foreigner who enters the Republic to produce to an immigration officer, on demand, a valid visa granted under subsection (3). That subsection provides that a visa

'(a) may, subject to any condition that the Minister [of Home Affairs] may deem fit, be granted by the Minister to any person who is not exempt … from the requirement of having to be in possession of a valid visa, and who has applied for such a visa in the prescribed manner and on the prescribed form'.

[8] Section 29 identifies certain foreigners as ‘prohibited persons’. They include persons infected with communicable diseases, members of organisations that advocate racial hatred or social violence, and so on. In addition s 30 permits the Director-General to declare certain foreigners to be ‘undesirable’. ‘Prohibited’ and ‘undesirable’ persons do not qualify for visas.

[9] The submission on behalf of the appellants was that only ‘prohibited’ and ‘undesirable’ persons may be refused visas. For the rest, once an application for a visa is made in the prescribed form, the Minister is obliged to grant it.

[10] The submission needs only to be stated to be rejected. ‘Prohibited’ and ‘undesirable’ persons do not qualify for visas. If they apply then their applications need not be considered. Applications from others must be considered, and the Minister has a discretion to grant or refuse them. That is what the language of the section says. The word ‘may’ in subsection 3(a) is not capable of meaning ‘shall’, as submitted by counsel for the appellants. Moreover, to construe it that way would give rise to absurdities so obvious they need not be enunciated.

[11] Whether the appellants are entitled to either of the alternative declarations calls for consideration only of the facts. This being an application for final relief, the facts stated by the respondents are decisive where they conflict with those stated by the appellants, except where allegations or denials by the respondents are so far- fetched or untenable that they may rejected on the papers alone.

[12] The facts alleged by the respondents are contained in an affidavit deposed to by the Director-General of Home Affairs, confirmed and elaborated upon by the Minister of Home Affairs. According to that evidence in May 2011 the Gandhi Development Trust told the South African High Commissioner in New Delhi that it wished to invite the Dalai Lama to this country to award him the Mahatma Gandhi International Award for Reconciliation and Peace on 9 October 2011. The evidence of the deponents makes it plain that the proposal raised serious concern that the visit by the Dalai Lama would put at risk the friendly relations between this country and the government of the Peoples' Republic of China (I will refer to it as China), which claims sovereignty over the territory of Tibet. It can be expected in those circumstances that the High Commissioner would have wasted no time communicating news of the proposed visit to the government. Indeed, the Minister of Home Affairs was made aware of the intended visit by no later than early June 2011. Meanwhile, the High Commissioner replied to the Trust advising that a formal application for a visa would need to be submitted at the appropriate time.

[13] On 20 June 2011, and again on 4 August 2011, the High Commissioner and senior immigration officials met with a representative of the Dalai Lama to discuss the forthcoming visit, and the requirements for the grant. On the latter occasion the High Commissioner 'encouraged' the Dalai Lama's representative to submit the visa applications closer to the time of the visit. The explanation given for that 'encouragement' was that a visa may be issued only for three months, and thus a visa issued before then would be invalid by the time the visit commenced. It is accepted by the respondents that that was not correct.

[14] On 26 August 2011 applications for visas for the Dalai Lama and members of his entourage were submitted to the High Commissioner. The applications were not accompanied by the passports of the applicants, and they did not include the prescribed fee, and it seems that other formalities had not been complied with. The office of the Dalai Lama was told that the applications would not be processed until all the formalities had been met.

[15] The Dalai Lama and members of the entourage who were to accompany him were then travelling abroad and their original passports could not then be furnished. By 20 September 2011 the passports had been furnished, the fees had been paid, and all the formalities had been met. The applications were then submitted to the Department of Home Affairs, and the Minister was advised that a compliant application had been received.

[16] The deponents explain at some length that the national interest of the country takes priority in visa applications that 'attract great public and international interest', and that the overriding consideration in 'sensitive' applications with foreign policy implications would be the best interest of the country. They draw attention to South Africa's important trade connections with China, which need to be taken account of in its foreign policy. The Director-General alleges that 'well aware of the possible implications for our relations with China … in any decision that the Minister took, and having had discussions with colleagues in DIRCO who, in the context of the One China Policy that South Africa has adopted, expressed their reservations concerning the visit of the Dalai Lama, the Minister looked into all relevant factors that would have a bearing on her decision'. He says that 'while the views of DIRCO were

being refined and finalised for input into the decision-making functions of Home Affairs' the Dalai Lama and his entourage withdrew their applications. He alleges that the Minister was 'still seized with the matter' when she was advised that the application had been withdrawn. In contrast, the Minister, while on the one hand confirming what was said by the Director-General, says on the other hand that she was 'awaiting the views that I had requested from officials in departments of state that have a direct and substantial interest in the visit of the Dalai Lama to our country, particularly DIRCO, when I was advised that he and members of his entourage had withdrawn their applications for visas'.

[17] I accept that the proposed visit raised matters of high diplomatic importance, justifiably calling for consultation, advice and consideration of the kind described in the respondents' affidavits. But that begs the question what time was required to complete that process. If the respondents mean to convey that they were not able to commence that process before compliant applications were received then that is disingenuous. But if they mean instead that four months was not sufficient for the process then their vague evidence of what was done, and the complete absence of any explanation of when it was done, falls far short of showing that they had insufficient time. On the contrary, the evidence points only to deliberate procrastination.

[18] The suggestion that the High Commissioner and senior immigration officials genuinely believed that the validity of a visa may in no circumstances exceed three months, and that a visa even for that period could not be issued with inception at the commencement of the visit, and that an application could not be considered and decided upon in anticipation of the visa being issued, is so untenable that it can be

summarily rejected. The same is to be said of the suggestion that the matter could not receive attention before a fully compliant application had been made. The only inference I can draw from their conduct is that they were intent upon procrastination.

[19] Counsel for the respondents rightly accepted that the Minister was required by law to dispose of an application for a visa with reasonable promptitude. We were asked to infer from the delay in this case that a decision to refuse the application had indeed been made and that the respondents chose not to announce it for the political implications that an announcement held. I do not think the evidence justifies that inference and for that reason a declaration that the visa had been refused is not warranted. But what is justified by the evidence is an inference that the matter was deliberately delayed so as to avoid a decision. It hardly needs saying that the Minister is not entitled to deliberately procrastinate. Procrastination by itself establishes unreasonable delay.

[20] The appeal is upheld with costs that include the costs of two counsel. The order of the court below is set aside and substituted with the following orders:

1. It is declared that the First Respondent unreasonably delayed her decision whether to grant or withhold the visas relevant to this case and in so doing acted unlawfully.
2. The respondents are to pay the costs of the applicants, including the costs of two counsel.

R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For 1st appellant:	A Katz SC D Simonsz Instructed by: Eisenberg & Associates, Cape Town Webbers, Bloemfontein
For 2nd appellant:	M du Plessis A Coutsoudis Instructed by: Nortons Incorporated, Johannesburg McIntyre & Van der Post, Bloemfontein
For 1st & 2nd Amici Curiae:	J Brickhill M Bishop Instructed by: John Smith & Associates, Cape Town Lovius Block, Bloemfontein
For 3rd & 4th Amici Curiae:	D Borgström Instructed by: Legal Resources Centre, Cape Town Lovius Block, Bloemfontein
For 2nd, 3rd & 4th respondents:	M T K Moerane SC L T Sibeko SC L Gcabashe Instructed by: Office of the State Attorney, Cape Town The State Attorney, Bloemfontein