# THE SUPREME COURT OF APPEAL
# OF SOUTH AFRICA

Reportable

CASE NO: 160/04

In the matter between :

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| **NICHOLAS CARL STEWART LITTLEWOOD** | First Appellant |
| **HEATHER LITTLEWOOD** | Second Appellant |
| **EMMA LOUISE LITTLEWOOD** | Third Appellant |
| **NICHOLA KATE LITTLEWOOD** | Fourth Appellant |

and

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| **MINISTER OF HOME AFFAIRS** | First Respondent |
| **THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS** | Second Respondent |

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| **Before:** | **HOWIE P, NAVSA, MTHIYANE, NUGENT & PONNAN JJA** |
| **Heard:** | **11 MARCH 2005** |
| **Delivered:** | **22 MARCH 2005** |
| **Summary:** | **Review – application to Minister of Home Affairs for exemption from s 23 of the Aliens Control Act 96 of 1991 – failure to consider whether 'special circumstances' existed – decision set aside.** |

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## J U D G M E N T

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**NUGENT JA**

NUGENT JA:

[1] The Littlewood family – Nicholas Littlewood (I will refer to him as Littlewood), his wife Heather, and their two minor daughters – are British citizens who are living in this country. Littlewood alleges that when he took steps to renew his passport (which seems to have been towards the end of the year 2000) he discovered, for the first time, that the permanent residence permits that had been endorsed in the passports of him and his wife – ostensibly by the Department of Home Affairs – were not authentic. Without valid permits their presence in South Africa was prohibited by s 23 of the Aliens Control Act 96 of 1991[1] and they were liable to be deported. At the time the discovery was made the Littlewoods had been in South Africa for more than two years. They had severed their ties in Britain, they had established a home, Littlewood had established a small business, and the children were settled at school.

[2] The family was caught in a dilemma. At that time the authorities would generally not entertain applications for permanent residence unless they were made while the applicant was in his or her country of origin. Thus the Littlewoods were not able to regularise their position unless they first uprooted their settled existence and returned to Britain .

[3] However, s 28(2) of the Act authorised the Minister of Home Affairs to exempt any person from the provisions of s 23 – whether for a specified or an unspecified period, and on such conditions as he or she might impose – if the

[1] The Act was superceded by the Immigration Act 13 of 2002 on 12 March 2003 but nothing turns on this.

Minister was satisfied that there were 'special circumstances' which justif[ied] his or her decision'.[2]

[4] In an attempt to resolve their dilemma the Littlewoods applied for such an exemption in about the middle of 2001 . The terms in which the exemption was sought do not appear expressly from the application but it was accepted by all the parties before us that it was limited to a temporary exemption from the provisions of s 23 while an application was made for the right to permanent residence.

[5] Acting on the advice of officials in his department the Minister refused the application. The Littlewoods were advised of the decision, and given the reasons for it, in a letter from the Minister dated 26 October 2001. Aggrieved at the Minister's refusal the Littlewoods applied to the High Court at Pretoria for his decision to be set aside. That application, which came before Maluleke J, was also unsuccessful, and they now appeal with the leave of this court.

[6] In support of their application to the Minister the Littlewoods advanced the following explanation for their presence in South Africa.

[7] The Littlewoods have relatives in this country whom they were accustomed to visit from time to time. The last visit that they made from Britain extended from 18 October 1997 (when they arrived) until the evening of 9 January 1998 (when they departed).

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[2] The provision to that effect in s 28(2) was inserted by s 15 of Act 76 of 1995.

[8] At that time Littlewood had been working for about fifteen years in a specialised field of concrete paving. Before that he had qualified and worked as an electrician on the English coalfields. His brother-in-law owned a construction business in Pretoria and Littlewood was invited to join the business. By the time the visit came to an end he had decided to accept. Before his departure Littlewood completed an application to the South African authorities for a temporary residence permit for twelve months and for a work permit, and once he was in London he delivered it to the High Commission.

[9] Early in May 1998 Littlewood was advised by the High Commission that the application had been turned down. At about the same time, according to Littlewood, he was approached to join a French paving firm (Ellis Beton Décoratife) that was operating in South Africa. He told the firm that he had been refused a work permit but he was told that the firm would arrange for the necessary permits to be issued to him and his family after their arrival in this country.

[10] On the strength of that assurance, said Littlewood, he entered South Africa on 26 July 1998 on a business visa that was valid for three months, to take up the position with the French firm. He was followed a month or so later by his family who entered the country on visitors' visas valid for three months.

[11] The Littlewoods allege that soon after their arrival their passports were handed to Mr Robin le Fevre, the local representative of the French firm, who was to arrange for the issue of permanent residence permits. The passports were

later returned, endorsed with permanent residence permits that purported to have been issued by the Department of Home Affairs.

[12] In about September 1999 Ellis Beton Décoratife terminated its South African operations, Le Ferve left the country (his present whereabouts are unknown) and Littlewood commenced business on his own account. It was thereafter, when arranging to renew his passport, that Littlewood discovered that their permits were not authentic.

[13] The Littlewoods' application to the Minister for a temporary exemption from the provisions of s 23 was accompanied by a supporting memorandum that incorporated, amongst other things, the above account of how the family came to be in South Africa, but the memorandum contained an error. It was said in the memorandum that Littlewood arrived to take up the position with the French firm in about June 1997, when in truth he arrived on 26 July 1998. (His arrival on that date is confirmed by the records that are kept by the Department of Home Affairs.) The significance of that error appears later in this judgment.

[14] The reasons for the Minister's decision are recorded in the letter that I have referred to, which was drafted by departmental officials, and accepted by him. (That is not unusual government practice.) It was noted in the letter that Littlewood had not mentioned in his supporting memorandum that he had applied for, and been refused, a work permit on an earlier occasion (the occasion referred to in paragraph 9), and that Littlewood had worked for Ellis Beton Décorotife and commenced his own business without a valid permit, and it was

pointed out that possession of a fraudulent permit was a serious offence and that it was the responsibility of a visitor to this country to adhere to the law. The letter then continued as follows:

'The Department of Home Affairs also cannot be held responsible for actions between private individuals, which has now resulted in the predicament in which your client finds himself.'

The Minister went on to say that he

'…unfortunately must insist that Mr Littlewood and his family make arrangements to leave South Africa within twenty-eight (28) days from receipt of this letter and lodge the prescribed work permit application at the South African High Commission in London. The said office will be requested to treat the application with discernment and once received, it will be expedited, the outcome of which must please not be anticipated.'

[15] The court *a quo* was of the view that the Littlewoods' exemption application was 'dealt with in a manner that was lawful, reasonable and procedurally fair' and that the Minister had refused the application 'on a consideration of all the information furnished by [Littlewood] and the information in the records of the department.' In my view the reasons advanced by the Minister in his letter show the contrary.

[16] There are two features of the reasons that were proffered by the Minister that are material for present purposes. First, there is no suggestion in his letter that the Littlewoods' explanation for their presence in South Africa was false and that their application was turned down on those grounds. (A false explanation might, by itself, have justified a refusal, but the veracity of the explanation is not material to this appeal.) Secondly, it is apparent from the

passage from the letter that I have quoted that the explanation was not weighed at all before the application was turned down. The application was turned down for no reason but that the Department of Home Affairs saw the possession of a fraudulent permit as a serious offence that had caused a predicament for which it was not responsible. But that begs the question whether the circumstances that had arisen – albeit that it was not attributable to fault on the part of the department – constituted 'special circumstances' justifying the granting of an exemption. It is apparent from the reasons advanced in the letter that the Minister – on the advice of his officials – failed to apply his mind to that question at all. (The departmental memorandum that accompanied the recommendation to the Minister, and the affidavits that have been filed in these proceedings, take the matter no further.)

[17] The Minister was not called upon to decide whether his department was at fault but rather whether 'special considerations' existed justifying an exemption. The effect of his failure to apply his mind to that question was that he failed altogether to exercise the discretion conferred upon him by the Act and his decision must be set aside.

[18] It is well established that only exceptionally will a court substitute its own decision for that of an official to whom the decision has been entrusted.[3] It cannot be said in the present case that the proper decision is a foregone

[3] *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) 75H-76H; per Van Heerden JA in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban* 1986 (2) SA 663 (AD) 680E-H; *Premier, Mpumalanga v Executive Committee, Association of State-aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) paras 50 and 51.

conclusion, nor that the Minister has disabled himself from properly making it, nor are there any other grounds for substituting our decision for his. The proper course is to remit the matter for re-consideration by the Minister.

[19] There is one further matter that is relevant to the costs. In the answering affidavits that were filed in this matter an official in the Department of Home Affairs – Mr Vorster – launched a stinging attack upon the honesty of the Littlewoods, alleging that they were party to fraudulently securing the invalid permits. That prompted a robust response from the Littlewoods for which they were rebuked by the court *a quo*.

[20] Vorster's attack was founded solely on the statement in the supporting memorandum that Littlewood entered South Africa to take up a position with Ellis Beton Décoratife in about June 1997. Vorster reasoned that if Littlewood entered the country in June 1997, and soon thereafter the inauthentic passport endorsements were made, then the fact that he then lodged an application for temporary residence with the High Commission (in early 1998) showed that he must have been aware that the endorsements were invalid.

[21] That reasoning is impeccable but the premise is unsound. In truth Littlewood did not arrive in June 1997 but in July 1998 and he drew attention to the error in a supplementary affidavit that was filed before Vorster deposed to his affidavit. Moreover, when Vorster deposed to his affidavit, a printout from the department's own records, confirming the correct date, was already part of

the record. Why Vorster, in those circumstances, overlooked the true facts is left unexplained.

[22] No doubt a litigant – even one who has been provoked – ought always to conduct litigation with decorum. But so, too, ought a public official exhibit courtesy and restraint in his official dealings – even with a person whom he disbelieves – and refrain from alleging fraud without considerable reflection. The appellants have asked for a special costs order on account of Vorster's ill-considered attack but I do not think we should grant such an order. The appellants have been recompensed by replying to Vorster in kind, which was itself inappropriate, and there matters should be left to lie.

[23] The appeal is upheld with costs. The order of the court *a quo* is set aside and the following order is substituted:

> 'The Minister's decision is set aside. The application for an exemption, supplemented by such information as may be required for a proper consideration of the application, is remitted to the Minister for re-consideration. The costs of the application are to be paid by the respondents.'

R W NUGENT
JUDGE OF APPEAL

HOWIE P )
NAVSA JA )
MTHIYANE JA ) CONCUR
PONNAN JA )