THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1211/2017

In the matter between:

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**FIRST APPELLANT**
THE MINISTER OF HOME AFFAIRS	**SECOND APPELLANT**
ACTING CHIEF DIRECTOR: PERMITTING, THE DEPARTMENT OF HOME AFFAIRS	**THIRD APPELLANT**
and	
DE SAUDE ATTORNEYS	**FIRST RESPONDENT**
IMMIGRATION MANAGEMENT SERVICES SA CC t/a VISA ONE	**SECOND RESPONDENT**

Neutral Citation: *DG Department of Home Affairs v De Saude Attorneys* (1211/2017) [2019] ZASCA 46 (29 March 2019)

Coram: Navsa AP, Majiedt and Makgoka JJA and Carelse and Matojane AJJA

Heard: 8 March 2019

Delivered: 29 March 2019

Summary: Application to compel the Department of Home Affairs to process applications and appeals within the structure of the Immigration Act 13 of 2002 and the South African Citizenship Act 88 of 1995 after prolonged delays – Department unjustifiably challenging *locus standi* of attorneys acting on behalf of affected individuals – challenge to jurisdiction of court without merit – institutional dysfunction and failure to meet statutory and constitutional obligations criticised.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Allie J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Navsa AP (Majiedt and Makgoka JJA and Carelse and Matojane AJJA concurring):

[1] This appeal is against an extensive order of the court below, the Western Cape Division of the High Court, Cape Town, at the instance of De Saude Attorneys (De Saude), and Immigration Management Services SA CC, a close corporation trading as Visa One (Visa One), each of which specialises in providing services to foreign nationals in various applications made in terms of the Immigration Act 13 of 2002 (the Act) and the Citizenship Act 88 of 1995 (the CA). They were the first and second applicants, respectively, in the application in the court below. Before us, they were the first and second respondents, respectively.

[2] The application was directed at compelling the first to fifth respondents in the court below, namely, the Director-General of the Department of Home Affairs, the Minister of Home Affairs, the Director of Immigration Services: Western Cape, and the Acting Chief Director: Permitting of the Department of Home Affairs as well as VFS Global (VFS), which acts on behalf of the department, to make decisions within set deadlines, on what was alleged to be 473 pending applications submitted by De Saude and Visa One on behalf of their clients, in terms of the aforesaid legislation. De Saude and Visa One sought, so they said, to compel the respondents to comply with their obligations in terms of the Constitution and the applicable legislation. By the time the application was heard by the court below, the number of affected individuals - foreign nationals who were clients of De Saude and Visa One - had reduced to 323.

[3] The order appealed against reads as follows:

'1. The failure of unknown officials in the employ of the Respondents to determine and deliver, within a reasonable and lawful time, 323 applications referred to in the lists attached to the applicants' replying affidavit, more specifically in paragraph 103 of that affidavit, is hereby reviewed and set aside, the said lists contain the following applications;

1.1 14 applications for temporary residence visas in terms of the Immigration Act 13 of 2002; - set out in the list annexed to the replying affidavit as **SMDS1A**;

1.2 145 applications for internal appeals, in terms of section 8 of the Immigration Act, of temporary residence visa applications – set out in the list to the replying affidavit as **SMDS2A**;

1.3 94 permanent residence permit applications in terms of the Immigration Act – set out in the list annexed to the replying affidavit as **SMDS3A**;

1.4 50 applications for internal appeals, in terms of section 8 of the Immigration Act, of permanent residence permit applications – set out in the list annexed to the replying affidavit as **SMDS4A**;

1.5 5 applications for authorisation to remain in South Africa in terms of section 32(1) of the Immigration Act – set out in the list annexed to the replying affidavit as **SMDS5A**;

1.6 2 applications for internal appeals, in terms of section 8 of the Immigration Act, of application for authorisation to remain in South Africa in terms of section 32(1) of the Immigration [Act] – set out in the list annexed to the replying affidavit as **SMDS6A**;

1.7 5 for corrections of decisions already received from the Respondents – set out in the list annexed to the replying affidavit as **SMDS7A**;

1.8 2 applications for undesirability waiver applications in terms of section 30(2) of the Immigration Act – set out in the list annexed to the replying affidavit as **SMDS8A**;

1.9 4 exemption applications in terms of section 31 of the Immigration Act – set out in the list annexed to the replying affidavit as **SMDS9A**;

1.10 2 applications for citizenship in terms of the Citizenship Act – set out in the list annexed to the replying affidavit as **SMDS10A**.

2. Respondents are directed to determine and deliver to the Applicants the decisions on:

2.1 The applications in the lists attached to the replying affidavit as **SMDS1A, SMDS2A, SMDS5A, SMDS6A** and **SMDS7A** within thirty (30) calendar days of the date of judgment; and

2.2 The applications listed in the lists attached to the Applicants' replying affidavit as **SMDS3A**, **SMDS4A**, **SMDS8A**, **SMDS9A** and **SMDS10A** within sixty (60) calendar days of the date of judgment;

3. In the event that any of the overdue applications have been misplaced by or are otherwise unavailable to the Respondents:

3.1 The respondents are directed to notify the Applicants in writing within two (2) weeks of the date of judgment of which applications have been misplaced;
3.2 The respondents are directed to take steps at their own expense to copy misplaced applications from the offices of the Applicants, at a time that is reasonable and convenient for all parties but within two (2) weeks of the date of notification referred to in sub-paragraph (1) above; and
3.3 First Respondent and all respondents who oppose the application are directed to pay the Applicants' costs, jointly and severally, the one paying the other to be absolved, such costs shall include costs that stood over for later determination.'

[4] With the leave of the court below, only the first three of the erstwhile respondents appealed against that order. They are the first, second and third appellants in this court. The detailed background is set out below.

[5] The facts that appear in the paragraphs that follow were set out in the founding affidavit on behalf of the respondents by their principal deponent, Ms Stefanie Maria De Saude. The appellants chose not to engage on the asserted facts but to raise certain technical points, which I will deal with in due course. What was asserted by Ms De Saude appears alongside the applicable statutory provisions.

[6] Section 10 of the Act provides for a range of temporary residence permits, such as, study permits, business permits, staying with a relative, or retired persons permits. De Saude and Visa One, on behalf of their clients, acting in terms of the Act, had made 35 applications to the Department for temporary residence permits. By the time the application was heard, there were 14 such applications outstanding.

[7] Section 8(4) of the Act provides that 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. On behalf of their clients, De Saude and Visa One had lodged 185 internal appeals in terms of s 8 of the Act, related to the applications for temporary residence visas. By the time the matter was heard by the court below, the number of appeals had reduced to 145.

[8] Section 25(2) of the Act provides for one of two kinds of permanent residence permits that might be issued by the Department. There were 122 applications made on behalf of De Saude and Visa One's clients. This number had reduced to 94 by the time it was heard by the court below. The respondents lodged 74 appeals in respect of decisions made concerning permanent residence permit applications. That number had reduced to 50 by the time the court below heard the matter.

[9] Section 32(1) of the Act provides as follows:

'Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.'

There were eight applications for authorisation to remain in South Africa in terms of s 32(1) of the Act and two internal appeals lodged in relation to decisions related to such applications. The number of applications for authorisation to remain in South Africa had reduced to five by the time the matter was heard. The two internal appeals had still not been resolved.

[10] Six applications were made for corrections of decisions made by the Department. By the time of the hearing of the application in the court below that number had reduced to five.

[11] Section 30(1) of the Act gives the Director-General the power to declare categories of persons set out therein to be 'undesirable', where after they would be disqualified from a port of entry visa, a visa, admission into the Republic and from a permanent residence permit. Section 30(2), however, gives the Minister the power, upon application by an affected person, to waive any of the grounds of undesirability. There were 34 applications by affected persons for undesirability waivers, in terms of s 30(2) of the Act. Only two applications were outstanding at the time of the hearing of the matter.

[12] Section 31 of the Act permits the Minister to grant foreign nationals certain exemptions. Five such applications on behalf of respondents' clients were made and, finally, two applications for citizenship were made in terms of the CA. There were four outstanding applications for exemptions by the time the matter was heard and the two applications for citizenship in terms of the CA.

[13] According to the respondents the Department unreasonably delayed making decisions in respect of what is set out in the preceding paragraph, in some instances, for periods exceeding four years.

[14] The following statement in the founding affidavit on behalf of the respondents bears repeating:

'The problem that is the ultimate cause of this application is that the Department has, for years now, failed at a structural level to determine applications made to it in any reasonable or lawful time period, including but not limited to the 473 applications that the Applicants now bring before this Court. As shall be explained in greater detail below, applications – even simple applications – to the Department can take years to be resolved, if they are resolved at all.'

[15] The respondents insist that the present case is part of a repeated pattern of how the Department deals with applications which its officials are constitutionally and statutorily obliged to determine. In this regard they refer to an earlier decision of the Western Cape Division of the High Court in *Eisenberg & Associates & others v Director-General, Department of Home Affairs & others* 2012 (3) SA 508 (WCC) paras 73 and 86 where the following is stated:

'Despite the respondents' protestations to the contrary, the inescapable inference is that, irrespective of whether they have the best will in the world, they have dealt with the applications of the applicants' various clients in a manner which can only be described as "administrative bungling".

. . .

However, since I have found that the applicants' version is inherently credible and that the respondents' version is clearly untenable, it follows that I find that there are still 105 applications which have not yet been determined by the respondents. That is a significant amount. This also means that the lives of 105 foreigners (excluding their dependants who are also obviously affected) hang in the balance until the respondents get their house in order.'

[16] The respondents claimed that the case referred to in the preceding paragraph is but one instance of numerous cases of a similar nature. In relation thereto, they provided the following details:

‘In 2011, [Visa One] V1 and an immigration firm then known as Eisenberg & Associates (*“E&A”*) launched the application that resulted in the Cloete AJ judgment [*Eisenberg & Associates & others v Director-General, Department of Home Affairs & others* 2012 (3) SA 508 (WCC)], which I referred to above. I myself was an employee of E&A at the time.

The Cloete AJ judgment concerned only temporary residence visas applications under the Immigration Act.

A later, almost identical application by V1 and E&A concerned permanent residence permit applications under the Act. This resulted in an order by this Court, per Van Staden AJ, in favour of E&A and against the Respondents on 18 May 2012 (*"the Van Staden AJ order"*).

The Respondents failed to comply with the Van Staden AJ order, resulting in further urgent court action by V1 and E&A.

On 27 November 2012, this Court, per Savage AJ, handed down a judgment which declared that the Respondents had failed to comply with the Van Staden AJ order and directed them to comply within two weeks. This judgment – *Eisenberg & Associates and Others v the Director-General: Department of Home Affairs and Others* (WCHC 10043/11) [2012] ZAWCHC 191 – is unreported and I do not attach to avoid overburdening these papers. If required, it can be made available to this Court.

Subsequent to the Cloete AJ judgment, other firms also began taking action.

For example, in 2012 Intergate Immigration Services (Pty) Ltd (*"Intergate"*) launched a case concerning about a thousand delayed applications under case number 6078/2012 in this Court.

Intergate was granted an order against the Department by this Court, per Saldanha J, on 8 August 2012, in terms whereof the Department was ordered to decide and deliver to Intergate decisions on over 800 applications.

The Department failed to comply with that order, resulting in a further urgent application by Intergate during November 2012, under case number 21022/12 in this Court.

On 28 November 2012, Cloete AJ (as she then was) found that the Department had failed to comply with the court order granted by Saldanha J. The Department [was] ordered to comply therewith on or before 14 December 2012.

The Department yet again failed to comply with that order, and eventually after yet more litigation, the matter was finalized with Respondents being obliged to determine a final permit application before 23 August 2013.

The structural inadequacies and inefficiencies that generated the first backlog were never addressed, resulting in further litigation. Intergate, for example, sought and obtained an order from this Court, per Veldhuizen J, on 10 December 2014 that found, *inter alia*, that the Respondents had failed to comply with its legal duties under the Immigration Act.

And V1 and E&A (now known as Eisenberg de Saude, as I was then a partner at the firm) launched yet another application against the Respondents, under case number 14705/14, to compel them to make decisions on 977 overdue applications under, *inter alia*, the Act.

On 13 November 2014, this Court, per McCurdie AJ, made an order:

Reviewing and setting aside the failure of the Respondents to determine the overdue applications; and

Ordering the Respondents to determine and deliver decisions on the applications within certain deadlines.

I attach a copy of the McCurdie AJ order (*"the McCurdie AJ Order"*) as **SMDS11**. The order sought in this court application is substantially similar to the McCurdie AJ Order.

In terms of that order, the Respondents were given 30 days to determine and deliver decisions on temporary residence visa applications and appeals, and 60 days to determine and deliver permanent residence applications and appeals.

The Respondents failed to comply with that order.

Accordingly, V1 and E&A returned to court, and on 27 February 2015, another order, per Rogers J, was obtained against the Respondents.

This order, too, was ignored, leading to yet another judgment by this Court, per Rogers J (*Eisenberg de Saude and Others v Director-General of the Department of Home Affairs and Others* [2015] ZAWCHC 130 (15 September 2015)), in which he referred the failures of the Respondents to oral evidence to determine if they amounted to contempt of court.

This process is still on-going, partly because the Respondents failed to comply with the orders made by Rogers J concerning the discovery of documents in preparation for the hearing of oral evidence.

On 4 April 2016, V1 launched its own application concerning 232 applications in terms of the Immigration Act that had been unlawfully delayed.

On 20 June 2016, the Respondents (who were the same as the Respondents in this matter) agreed and undertook that all of the overdue applications would be finalised by 8 August 2016. I attach a copy of the unsigned court order embodying this undertaking as **SMDS12**.

Once again, the chronic delays of the Department meant that this order was disobeyed.

The overdue applications of V1 that are the subject of this application, arose in large part while its previous court application was still being resolved. This is, I contend, a sad testament to how slow and disorganised the Department is.

I contend that this court application is on all fours with all of the abovementioned matters and litigants who applied to this Court to, *inter alia*, compel the Respondents to make decisions on unlawfully delayed applications.'

[17] The respondents contended that prior to 2010, the Department functioned smoothly and that immigration and citizenship law practitioners, in the past, could usefully engage with the Department to resolve any problems that might arise in relation to applications made in terms of the legislation referred to above.

[18] Problems arose in 2010. The Department moved all adjudicative functions to Pretoria. Previously, applications and processes lodged in Cape Town in the categories referred to above were decided in Cape Town. The move to Pretoria caused a number of logistical problems. Whatever documents emanated from the decision were couriered through from the decision-makers in Pretoria to Cape Town. If documents did not arrive in time, it caused problems for affected persons who, in the event that they had a decision in their favour were not in a position to produce proof thereof, placing them in peril. In the event of a rejection of an application, one is required to be informed in order to lodge an appeal within the prescribed period. Given the problems that have since crept in, affected persons are in danger of not being able to comply with the provisions of the legislation in question and are in danger of arrest.

[19] In many instances, after a decision had been made the outcome was never delivered. Insofar as an applicant or affected person is concerned the application is delayed. The respondents alleged that there are many employees of the Department who are under-skilled, inefficient, uncaring and who abuse the administrative powers entrusted to them.

[20] The appointment of VFS as a service provider has been of no assistance. The adjudication process, and hence the delays, are within the Department’s area of jurisdiction and thus its responsibility. The respondents stated that they tried, for a prolonged period of time, to engage with the Department to have the aforesaid problems addressed, but to no avail. The respondents supplied details of the efforts made by them:

(a) Representatives of De Saude and Visa One regularly attended physically at the Department's regional offices, located at Barrack Street, Cape Town, as well as at the office of VFS in Cape Town, and engaged with the staff there.

(b) They visited the Department's website. Unfortunately, the website seldom worked: reference numbers that were inserted by the De Saude and Visa One in the required e-mail field, when entered, yielded no results.
(c) Attempts to call the Cape Town office of the Department usually failed. There was generally no reply. If there was a reply, one was directed to the aforesaid website.
(d) The nationwide call centre of the Department was totally useless. Even if one got through to an agent, the agent would always request to be sent a power of attorney, before further information could be released. There would then be no reply to such email. If one called again, one would get a different agent who would make the same request. This was where it ended.
The respondents emphasise that they were left with no choice but to approach the court for an order in the terms set out above.

[21] According to the respondents the introduction of VFS, far from facilitating the process, in fact impeded matters by creating a further bureaucratic barrier when one sought to engage the Department. Any query directed at VFS was met with a standard response that the matter had been forwarded to the Department.

[22] The respondents provided examples of the devastating effect of the delays occasioned by the Department's inaction. First, they point to the case of Ms Louise Batty, an Australian nurse, who has qualifications in Health Education and Promotion, Palliative Care and Community Outreach, and Psychiatric Nursing. She has a Masters degree in Primary Health Care.

[23] Ms Batty has been in South Africa since 2003, working with disadvantaged children in the Limpopo Province. She started a non-governmental charity called 'Keep The Dream'. An application in terms of s 19(4) of the Act[1] was made by Ms Batty on 4 May 2015 for a critical skills visa, so that she could become the managing director of Keep The Dream and continue with the development of the organisation. The application was declined on 9 July 2015. Ms Batty lodged an internal appeal on

[1] Section 19(4) of the Immigration Act 13 of 2002 reads as follows:
'Subject to any prescribed requirements, a critical skills work visa may be issued by the Director-General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the *Gazette* and to those members of his or her immediate family determined by the Director-General under the circumstances or as may be prescribed.'

22 July 2015. Despite the passage of over 15 months, no decision had been received from the respondents.

[24] The Department's failure to deal with the appeal has led to immense hardship. Ms Batty's existing visa expired while she was awaiting an outcome. If she left South Africa, the charity she had spent more than a decade building, to help the poorest and most vulnerable members of South African society, would collapse. She would also be declared undesirable, and barred from returning to South Africa. But because she has no visa, she cannot work. And she is constantly at risk of detention and deportation.

[25] Ms Batty's parents, who are octogenarians, are unwell in Australia. She desperately needs a visa to be prepared for the very real possibility that one of them will become seriously unwell. The delay by the appellants risk making her choose between her life's work in helping poor South African children, and being with her parents in the last stages of their lives. This is a cruel and awful position to be placed in.

[26] The following part of an e-mail by Ms Batty to De Saude sets out an immediate problem caused by the expiry of her existing visa and the failure of the Department to act:

'My business accounts have all been frozen. I cannot operate them at all and its payday for all the staff tomorrow. I am concerned as most of my staff live from pay to pay. Please as a matter of urgency, PLEASE send the bank letter addressed to FNB regarding my work permit. I was given no notice. I find out tomorrow during banking hours what the deal is however we have never had this issue.'

[27] The second example provided by the respondents is the case of Mr Dzorai Nzembe, a Zimbabwean national, who fled to South Africa in 2005 and obtained a work permit. Through hard work he went from being a casual labourer on a farm to being a senior manager, a member of the South African Institute of Managers, and vital to the success of the farm as a whole.

[28] On 23 October 2014 Mr Nzembe applied for a critical skills visa based on being a corporate general manager. His application was rejected on 4 December 2014. On 9 December he appealed that decision. No decision has yet been made.

[29] Like Ms Batty, Mr Nzembe's present visa has expired. Without it he cannot work here nor leave. He is constantly at risk of being arrested, detained and deported. He has two children, who were born on the farm at which he worked, and a wife. He was the primary breadwinner, and the family is struggling without his income. He cannot afford the school fees for his eldest son, and his youngest son has been diagnosed with cerebral palsy and requires specialist care.

[30] In addition, the respondents complain that their livelihood and that of their employees are threatened as they are unable to achieve any results for the people who approach them for assistance.

[31] The respondents accept that time should be allowed for the processing of applications and appeals, but are emphatic that the Constitution and the legislation under which the Department operates do not countenance the degrees of inaction and delay that their clients have been subjected to and the personal hardships caused thereby. They accept that permanent residence and citizenship applications could take up to eight months to process. Applications to have corrections made, on the other hand, so they contend, should take no longer than one month. Other applications and appeals under the two Acts referred to above, they submitted, should not take longer than two to three months to finalise.

[32] The applications and appeals brought by the respondents' clients have been delayed, in many instances by a number of years. The delays in all of them are way beyond reasonable periods. As pointed out by the respondents, immigration and visa status affects every aspect of a person's life, from the right to conduct a bank account to housing, employment, study and business opportunities.

[33] De Saude and Visa One contended that it was the precarious position they and their clients found themselves in and the failure, despite their best efforts, to

productively engage with Departmental officials, that compelled them to approach the court below for relief on an urgent basis.

[34] The appellants' response to the application was not to challenge the facts set out above but, at the outset, to challenge *the locus standi* of the respondents. The appellants adopted the position that De Saude and Visa One's failure to join the 473 individuals who were their clients as parties to the litigation was fatal. They insisted that the application could not be said to be in the public interest and could not be labelled a class action. The appellants, in their answering affidavits, also relied on the fact that the alleged 473 clients had not filed powers of attorney in favour of the respondents. They were adamant that the respondents, who are corporate entities, ought to have presented resolutions indicating that the litigation was authorised. It is necessary to note that there were two supporting affidavits filed by affected individuals, namely, Ms Batty and Mr Nzembe. The appellants also challenged the jurisdiction of the court below. They contended that since adjudicative functions were carried out in Pretoria and the statutory decision makers and supervisory officials were located there, the court below had no jurisdiction to hear the matter.

[35] In addition, the appellants adopted the position that this was a case of misjoinder, in that the different cases presented cumulatively, each turned on different facts and that the 473 individuals, who are geographically scattered, should not have joined together in the single application in the court below. In this regard it was pointed out by the appellants that, for instance, some of the applications were submitted in other countries, apparently by foreign nationals. Insofar as the applications for corrections are concerned, the appellants took the view that there are no outstanding decisions. They complained about the lack of particularity by the respondents in relation to the applications for corrections. They state that the precise nature of the corrections sought by the respondents' clients were not disclosed. I interpose to record that the respondents did provide the names of individuals who were affected by the appellants' inaction and provided the categories under which their applications or appeals resorted. As explained above, the appellants deliberately elected not to engage with the detailed factual averments by the respondents.

[36] In the respondents' replying affidavit they explained that the clients whom they represented in the application were without the financial means and did not have the resources to bring individual applications to vindicate their rights.

[37] The application brought by the respondents in the court below was heard by Allie J. In relation to the question of jurisdiction, she had regard to the submission on behalf of the appellants, that in terms of s 6(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), read with the definition of 'court'[2] in that legislation, there were only 4 grounds on which a court would have jurisdiction and that those grounds were lacking, in respect of the application before the court. The following, in terms of that legislation, are the bases for the exercise of jurisdiction by a competent court:

'10.1 The court in whose jurisdiction the administrative action occurred;

10.2 The court in whose principal place of business/administration is within its jurisdiction;

10.3 The court where the adversely affected party is domiciled;

10.4 The court where adverse effect of the administrative action will be experienced.'

The appellants contended that the effects of the administrative action (the lack of a decision) was experienced by affected individuals and not by De Saude and Visa One. Their clients were scattered all over the country and, perhaps, beyond our borders and were thus not domiciled within the area of the court's jurisdiction and consequently the court below did not have jurisdiction.

[38] Allie J also considered the provisions of s 21(2) of the Superior Courts Act 10 of 2013, which read as follows:

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[2] Section 1 of the the Promotion of Administrative Justice Act 3 of 2000 (PAJA) defines 'court' as follows:

'**"court"** means –

(a) the Constitutional Court acting in terms of section 167(6)*(a)* of the Constitution; or

(b) (i) a High Court or another court of similar status; or

(ii) a Magistrate's Court for any district or for any regional division established by the Minister for the purposes of adjudicating civil disputes in terms of section 2 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the *Gazette* and presided over by a magistrate, an additional magistrate or a magistrate of a regional division established for the purposes of adjudicating civil disputes, as the case may be, designated in terms of section 9A; within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced.'

'A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.'

[39] The court below took into account that the respondents were resident in and practised within the court's area of jurisdiction and that the Minister had a principal place of business within that area and reasoned that the other officials who operated outside of the court's area of jurisdiction were therefore rightly joined by the respondents. Thus, she concluded the court below had jurisdiction to hear the matter.

[40] On the question of *locus standi*, the court below expressed itself as follows:

'Applicants provided a ground for *locus standi* in the founding affidavit, namely, that their practices, consequently their livelihood and that of their employees are affected by their inability to compel a response from Respondents. The argument that litigation would be more remunerative for applicants fails to take account of the financial means of applicants' clients and amounts to litigation-baiting.

When respondents in their answering affidavit, challenged the basis for *locus standi*, applicants elaborated on the connection between the decisions not taken by respondents for unreasonable periods of time and the adverse effect thereof on their clients and why they have *local standi* to bring the application on behalf of their clients as well, who clearly don't have the resources to bring it themselves.'

[41] With reference to the decision in *Kruger v President of the Republic of South Africa & others* [2008] ZACC 17; 2009 (1) SA 417 (CC) paras 23 and 25, the court below said the following:

'In Kruger the court, correctly in my view, said at paragraph 22 that section 38 introduced a radical departure from the common law concerning *locus standi* because it expands the persons with standing beyond a direct and substantial interest and now includes people who act on behalf of people who can't act or on behalf of public interest in general.

Section 38 is consonant with the provisions of section 6(1) of PAJA which provides that any person may bring an application under that Act.

The purpose of PAJA is to ensure that just and fair administrative action occurs. A failure to give a decision over an unduly prolonged period of time constitutes unfair administrative

action. It is in the interests of justice that respondents be put to terms to take their decisions within a reasonable period of time.'

[42] Allie J found that the respondents, as immigration law specialist practitioners who service clients affected by legislation in that area, must be considered to have a real and substantial interest in ensuring that statutory functionaries fulfil their statutory duties when dealing with the different categories of individuals who submit matters for adjudication under the statutory regime. The court below went on to say the following:

'When the Department fails to deliver decisions within periods in excess of 7 years, and when further engagement by applicants with the Department become[s] circular in nature as alleged in the founding affidavits, the applicants have a real interest in ensuring that they can fulfil their legal and ethical duty to represent their clients' interests.'

Consequently Allie J held that the respondents had *locus standi* to bring the application.

[43] The court below dealt summarily with the misjoinder point raised by the appellants. It said the following:

'I am of the view, that in the absence of allegations by the respondent concerning alleged different grounds upon which the respondents may withhold decisions for an indeterminate period of time, the facts and law upon which the relief sought rests are substantially the same.

Respondents have failed to address the substantial allegations in the founding affidavit concerning the applicants' clients, who are listed as such in the last column of the lists annexed to the founding affidavit. In particular, respondents have not taken issue with the allegation that applicants and consequently their clients are entitled to a decision being made in each of their applications to the Department nor with the timeframes proposed by applicants, within which the decisions should be taken and the method of communication of those decisions proposed by applicants.'

Allie J went on to make the order set out at the commencement of this judgment. It is against the abovementioned conclusions and the order that the present appeal is directed.

[44] We were taken aback at the stance adopted by the appellants. They clearly took the view that they are entitled not to account to this court or to the public at

large for their failure to fulfil their constitutional and statutory obligations. They have left unchallenged, extremely serious assertions about their repeated and abysmal failure to process applications that the constitutional scheme and statutory regime demand. Their silence speaks volumes of prolonged institutional dysfunction as claimed by De Saude and Visa One. They limit themselves to technical challenges, asserting that they, like other litigants, are entitled to rely on technical defences. When we enquired of counsel representing the appellants whether he had been instructed to continue to persist in this stance or whether he had advised this course, he was emphatic that he and the State Attorney were acting on instructions. The attitude revealed by the appellants is thus all the more perplexing. It is necessary, however, to reveal that at the outset of proceedings before us, counsel on behalf of the appellants informed the court that the Department was overwhelmed by logistical challenges, the implication being that the bureaucratic machinery is unable to cope with incessant demands and that this dictated the inaction complained of by the respondents.

[45] If, after the application had been launched in the court below, the Department had provided the respondents with a reasonable timeframe within which they would process the applications in question, the respondents would no doubt have been constrained to accede thereto. Indeed, if that option had been suggested at the beginning of proceedings in the court below, that court would have been hard pressed not to afford the Department such an indulgence. The appellants instead chose a more obstructive path.

[46] This court has in the past recorded its appreciation for the difficulties faced by the Department. In *Rahim & others v Minister of Home Affairs* 2015 (4) SA 433 (SCA) para 2, this court recognised that South Africa has kilometre upon kilometre of porous borders which the Department has to control. It noted the obvious concern by citizens about the unregulated entry of foreign nationals as well as the obligation by the State to ensure that in dealing with foreign nationals we maintain and promote constitutional norms. Those twin concerns endure.

[47] Before commenting finally on the conduct of the Department and the attitude of the appellants in relation to the application brought by De Saude and Visa One, it

is necessary to consider whether there is merit to any of the technical defences on which they relied. First, there is the question of whether the respondents had *locus standi*. The Constitution is the starting point. Section 38 of the Constitution provides:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.'

[48] In *Freedom Under Law v Acting Chairperson: Judicial Service Commission & others* [2011] ZASCA 59; 2011 (3) SA 549 (SCA) para 19 this court noted that the Constitutional Court has repeatedly stressed that a broad approach to standing should be adopted. This approach should apply not only to instances in which constitutional rights were asserted, but also when there was a complaint about an infringement of rights other than those protected in the Bill of Rights. In *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) para 165, Chaskalson P said the following in relation to the question of standing in constitutional matters:

'. . .I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.'

[49] In *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA), this court had occasion to consider the development of our law from a repressive past to present day. It recorded that during the time of an oppressive regime, lawyers had to fight for

space in order to challenge and limit human rights abuses. Even then our courts, in cases crying out for justice, were willing to adopt a liberal approach to standing.[3]

[50] In *Ferreira*, para 166, Chaskalson P said the following:

'Although corporations do not have rights under the Canadian Charter and cannot institute Charter challenges in their own behalf, they can challenge the constitutionality of a statutory provision at a criminal trial on the grounds that it infringes the rights of human beings and is accordingly invalid. Where, as in the present case, the impugned section of the Companies Act has a direct bearing on the applicants' common-law rights, and non-compliance with the section has possible criminal consequences, they have sufficient standing in my view to secure a declaration from this Court as to the constitutionality of the section.'

[51] O'Regan J, in *Ferreira*, explained why a generous and expanded approach to standing is necessary in constitutional litigation. At para 229, she said the following:

'Existing common-law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that *nexus* is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different considerations may be appropriate to determine who should have standing to launch litigation.'

[52] In *Kruger*, para 25, the Constitutional Court held, in relation to the standing of an attorney to challenge the constitutionality of certain proclamations:

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[3] See para 38 of *Democratic Alliance & others v Acting National Director of Public Prosecutions & others*, and the reference there to *Wood & others v Ondangwa Tribal Authority & another* 1975 (2) SA 294 (A).

'As an attorney in a specialist personal injury legal firm who works regularly in this field, Mr Kruger has a direct and professional interest in the validity of the proclamations. A legal practitioner is an officer of the court. Where the practitioner can establish both that a proclamation is of direct and central importance to the field in which he or she operates, and that it is in the interests of the administration of justice that the validity of that proclamation be determined by a court, that practitioner may approach a court to challenge the validity of such a proclamation. In this case Mr Kruger has shown that he is a personal injury attorney and that the validity of the proclamations is of central importance to his field of practice. Moreover, he has established that significant legal uncertainty has arisen because of the contents of the First Proclamation and the publication of the Second Proclamation. The effect of this uncertainty is clearly adverse to the proper administration of justice. A personal injury attorney must be able to understand and engage with the legislative scheme on which he or she and his or her clients rely in order to seek compensation. The uncertainty created by the issue of the two proclamations and their effect on Mr Kruger's ability to manage his clients' affairs are reason enough to grant standing to the applicant.'

[53] *Kruger* did, however, sound the following caution, at para 26:

'In recognising the applicant's standing in this case, I emphasise that it arises because of the need for legal certainty and the administration of justice. Legal practitioners must not assume that they will be allowed to bring applications to this court for a declaration of invalidity based purely on financial self-interest or in circumstances where they cannot show that it will be in the interest of the administration of justice that they do so.'

[54] In *Kruger*, para 27, the following question was left undecided:

'It is not necessary, given this conclusion, to decide whether a litigant, when raising a constitutional challenge not based on Ch 2 of the Constitution, is entitled to act in the public interest. That question can stand over for another day.'

[55] It is true that the replying affidavit on behalf of De Saude and Visa One, misguidedly, as accepted by counsel on their behalf who admitted that he had settled the affidavit, conceded that the application was not brought in the public interest. However, it is clear from the founding and replying affidavits that the applicants whose livelihoods were threatened, seeing that they practise mainly in the field of immigration and citizenship law, were bringing the application in their own interest, but they asserted emphatically that their clients' constitutional rights were being infringed, *inter alia*, their right to administrative justice due to systemic failure.

One also has to take into account that they claimed, without challenge, that their clients were liable to arrest and/or summary deportation and were subjected to hardships as a result of departmental inertia. They also asserted, again without contradiction, that, having regard to Ms Batty's position, that poor and vulnerable children were prejudiced. It was also clear from what they said about their clients, that their unresolved status in the country, compellingly leads to financial difficulties. In Ms Batty's case, with her status in the country being in limbo, her NGO's business accounts were all frozen and she was unable to pay staff. In Mr Nzembe's case, he was unable to continue earning a salary. Why, one might rightly ask, would any of the other clients that De Saude and Visa One represent, not find themselves in similar positions. The respondents complained, generally, of large scale institutional dysfunction and that went unanswered.

[56] In *Eisenberg & Associates & others v Director-General, Department of Home Affairs & others* 2012 (3) SA 508 (WCC), para 74-75, the court, dealing with the statutory duties of officials of the Department said the following:

'As I have mentioned above, the respondents are the officials in the DHA who, generally speaking, administer the immigration regime in South Africa in terms of the Act and regulations pursuant thereto. One of the most important components of this regime is the lawful and efficient provision of temporary residence permits to foreigners who wish, for whatever reason, to enter and sojourn in South Africa.

For a foreigner in South Africa these permits are the single most important documents that they can possess. It is the basis of their legal existence in this country. Every aspect of their lives – the ability to travel freely (s 21 of the Constitution); the ability to work and put food on the table for their families (a component of the right to dignity in s 10 of the Constitution, see *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA) (2004 (2) BCLR 120) at 339B-C, 339F-G and 340G); the ability to keep their children in school (ss28 and 29 of the Constitution); and the basic right to liberty (s 21(1) of the Constitution) – is dependent on the physical possession of a valid permit.'

[57] De Saude and Visa One rightly stressed that the appellants have statutory and constitutional obligations which they failed to fulfil and with justification pointed to material parts of the preamble of the Immigration Act which reads as follows:

'In providing for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matter connected therewith, the Immigration Act aims at setting in place a new system of immigration control which ensures that –

(a) visas and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, and without consuming excessive administrative capacity;

(b) security considerations are fully satisfied and the State retains control over the immigration of foreigners to the Republic;

(c) interdepartmental coordination and public consultations enrich the management of immigration;

(d) economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated and tourism is promoted;

(e) the role of the Republic in the continent and the region is recognised;

(f) the entry and departure of all persons at ports of entry are efficiently facilitated, administered and managed;

(g) immigration laws are efficiently and effectively enforced, deploying to this end significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration;

(h) the South African economy may have access at all times to the full measure of needed contributions by foreigners.' (My emphasis.)

[58] The contention on behalf of the appellants that the respondents acted purely in their own financial interest, is without foundation. The respondents painted a picture of prolonged and enduring departmental dysfunction. The livelihood of the respondents and their employees is clearly at stake, but, their clients and others in similar situations as well as the South African public at large, have an interest in the proper administration of the Act and the CA. Indeed, courts have a mandate to uphold the Constitution and to see to it in cases properly before them, that administrative functionaries do their duty and fulfil their statutory and constitutional obligations. In the present case, De Saude and Visa One have shown, not only that their own interests are affected, but have demonstrated institutional dysfunction and

that the broader public interest, including the interest of their clients were implicated.[4] The issues raised are vital to the proper administration of justice. The Act was designed and indicated by its preamble to ensure expedition in the issuing of visas and permanent residence permits. What we have, instead, is sloth on a grand scale.

[59] In *Democratic Alliance v President of the Republic of South Africa & others* 2012 (1) SA 417 (SCA),[5] this court had cause to embark on an extensive examination of the constitutional scheme. The starting point was the founding provisions of the Constitution. Section 1*(c)* emphasises that ours is a democratic State founded, among other values, on the supremacy of the Constitution and the rule of law. Section 1*(d)* commits government to democracy, accountability, responsiveness and openness. Section 2 reaffirms that the Constitution is the supreme law and that law or conduct that is inconsistent with it is invalid and that the obligations imposed by the Constitution must be fulfilled. In para 57 of that case this court stated the following:

'[E]very citizen and every arm of government ought rightly to be concerned about constitutionalism and its preservation.'

In para 68, the following appears:

'Importantly, organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.'

In para 70 the following is said:

'[T]he same theme that suffuses all the other chapters of the Constitution . . . namely that institutions of State integral to the wellbeing of a functioning democracy have to be above reproach, have to be independent and have to serve the people without fear, favour or prejudice.'

[60] As stated in *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* [2013] ZASCA 67; 2013 (5) SA 24 (SCA), para 52, our present constitutional order requires that the State be a model of compliance. It has a duty not to frustrate the enforcement by courts of constitutional rights. In my view,

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[4] In this regard see the instructive dicta paras 41-44 of the decision of the Constitutional Court in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC).
[5] Paras 57-70.

De Saude and Visa One clearly had standing to bring the application. The defence of a lack of standing on the part of the respondents is entirely without merit.

[61] The appellants' reliance on misjoinder is also without merit. It beggars belief that the Department adopted the position that it was not shown that there was commonality in relation to the law and facts in respect of the cases of each of the respondents' clients. Was the Department seriously inviting each of the clients to launch a separate application with concomitant costs for which the taxpayer has to bear the burden? The complaint in each case and overall was that the Department failed to meet its statutory obligations to make decisions timeously. The court below rightly rejected the misjoinder defence.

[62] Insofar as jurisdiction is concerned, the court below had regard to s 6(1) of PAJA read with the definition of 'court' in that legislation, as set out in para 37 above and had regard to the relevant parts of s 21(2) of the Superior Courts Act 13 of 2010 set out in para 38 above.

[63] As stated earlier, the court below held that the Minister had a principal place of business within the jurisdiction of that court, and even though the other departmental appellants did not operate within the jurisdiction of the court below, because of the provisions of s 21, it had jurisdiction to entertain the application brought by De Saude and Visa One. The heads of argument on behalf of the appellants, incredulously, in my view, *inter alia*, assert the following:

'The Respondents cited the Minister because he is the official to whom applications for naturalisation as a citizen must be directed in terms of the Citizenship Act. Only two of the 323 applications in issue are, however, applications for citizenship in respect of which the Minister is called upon to make a decision. The remaining 321 decisions are to be made by the First and Third Appellants, neither of whom are located within the jurisdiction of the court *a quo*.

. . .

It is submitted that the Respondents cannot, as they have sought to do, consolidate separate and distinct complaints in one application and thereby confer upon a High Court jurisdiction over decision-makers over whom it would otherwise not have jurisdiction, simply because the reason for the complaint is the same.'

[64] The Minister is nominally and ultimately responsible for the actions of office bearers and functionaries within the Department. What is set out above ignores that fact and the aligned legal position. Furthermore, it is the Department that chose to accept the applications of the affected persons within the area of the jurisdiction of the court. The outcome of decisions is conveyed within the jurisdiction of the court. In addition, De Saude and Visa One (the applicants in the court below) have their offices within the area of the jurisdiction of that court. In light of the aforesaid, the attitude adopted by the appellants in relation to jurisdiction is baffling. Given what was conveyed to us at the outset by counsel on their behalf, the ineluctable conclusion is that the stance adopted in respect of the litigation was one that was deliberately obstructive and dilatory. This is further borne out by the fact that in a number of cases involving litigation with affected parties and attorneys representing them, the appellants did not rely on these technical points. The approach of the appellants, in a word, is unconscionable, especially coming from a state department. It could also, rightly, be described as disgraceful.

[65] The essential conclusions by the court below cannot be faulted. The appeal is dismissed with costs.

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M S Navsa

Acting President

Appearances:

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	Instructed by:
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	State Attorney, Bloemfontein
For the Respondents:	D Simonsz
	Instructed by:
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