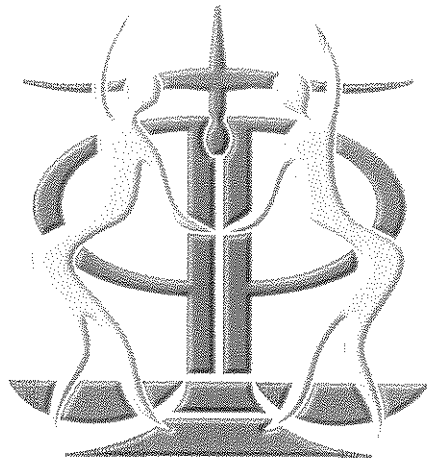


REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION
182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH
AFRICA, 1996 AND SECTION 8(1) OF THE PUBLIC PROTECTOR ACT,
1994



PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO 21 OF 2011/2012

Unconscionable Delay

REPORT ON AN INVESTIGATION INTO ALLEGED ABUSE OF POWER AND
MALADMINISTRATION BY THE DEPARTMENT OF HOME AFFAIRS IN RESPECT OF
AN APPLICATION FOR THE RENEWAL OR EXTENSION OF WORK AND OTHER
PERMITS SUBMITTED BY MR M VAN HILLEGONDSBERG AND FAMILY

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Executive Summary

- (i) The Public Protector conducted an investigation into an allegation of abuse of power and maladministration by the Department of Home Affairs (the Department) in respect of an application for the renewal or extension of work and other permits submitted by Mr M van Hillegondsberg, (the Complainant) and his family. The Complainant alleged that:
- (a) He was dissatisfied with the way in which his various applications for permits have been handled by the Department of Home Affairs since 1996. He and his family have applied for work, temporary residence and study permits since 1999. These permits were granted on a yearly basis and extended annually. One such work permit reflects the following conditions: "HA APPR. 20/3/3 dated 2000.02.04 TO CONDUCT OWN BUSINESS: 'HELDER WATER', SOMERSET WEST...";
 - (b) He and his family had applied each year for an extension, the last such application being on 4 March 2003, when they had applied for the renewal of their work, temporary residence and study permits, however, up to date, the Department has not informed them of any decision regarding this application;
 - (c) He attempted on several occasions to address the *impasse*, and again in December 2009. Following this, the Department sent him a letter dated 5 January 2010, requesting the submission of certain documentation. The Complainant stated that he duly submitted the required documents as evidenced by an Acknowledgement of Receipt from the Department.
 - (d) Regardless of the above-mentioned permit conditions relating to the conducting of a business, and the fact that their application for renewal of 4 March 2003 was still pending, the Department informed him on 10 June 2010 that he would be charged with contravention of permit requirements by conducting a business.

- (e) The Department ensured his arrest and detention on the afternoon of 18 June 2010, just prior to a weekend. He was released on Monday, 21 June 2010 despite verbal and written requests by the office of the Public Protector to hold further action in abeyance pending the Public Protector's investigation and report;.
- (f) His son, Ludo, was fined an amount on R 3000 at the Cape Town International Airport by immigration officials for allegedly contravening the Immigration Act on 27 June 2011, en route to Malaysia;
- (g) On 13 July 2011, Ludo was refused permission by Qatar Airways to board his return flight to South Africa based on information received from Cape International Airport that he was not allowed back in the South Africa, as a result of which he incurred extra costs.
- (h) Finally, the Complainant states that they adopted two South African children in 2001 by order of the Cape Town High Court. He mentions however that as a result of the above-mentioned delays, inaction and treatment on the part of the Department, the family has been severely prejudiced and traumatised.

(ii) The Public Protector's findings are as follows:

Maladministration

- (a) The Department's failure, since 2003, to adjudicate on the merits, the Complainant and his family's applications for extension of temporary permits lodged on 4 March 2003 in terms of section 26(6) of the Aliens Control Act, 1991, constitutes an undue delay and amounts to maladministration, which in turns contravenes the right to procedurally fair administrative action envisaged in section 3 of the Promotion of Administrative Justice Act, 2000.

- (b) The failure by the Department to adjudicate the 2003 applications has deprived the Complainant and his family of the opportunity to apply for permanent residence and amounts to injustice and prejudice, which in turn is maladministration.
- (c) The inaction during 2006 on the part of the then Director-General and Deputy Director-General when the above-mentioned failure was brought to their attention, amounts to maladministration as well as a contravention of the constitutional requirement encapsulated in section 181(3) of the Constitution to assist the Public Protector. These senior officials further failed to act in accordance with Section 195(1) of the Constitution which requires public administration to be governed by the democratic values and principles enshrined in the Constitution, including that services must be provided fairly, equitably and with accountability.
- (d) The failure, by the current Minister and the Department, to provide a response to the Public Protector's Amended Provisional Report submitted on 19 August 2011 to date, despite having two requests for an extension granted, the last of which was the end of October 2011, and despite two reminders submitted on 18 November 2011 and 23 January 2012 respectively, constitutes further maladministration that contravenes section 181(3) of the Constitution.
- (e) The conduct of the former Minister of Home Affairs vis-à-vis the Complainant is also *prima facie* found to have been non-responsive and constitutes maladministration. This goes against the spirit of section 33 of the Constitution, as well as section 3 of the Promotion of Administrative Justice Act.
- (f) The delay by the current Minister and the Department to respond on time to the Public Protector's provisional report of 12 July 2010 constitutes maladministration, and does not meet the constitutional requirement contained in section 181(3) that organs of state must assist institutions that strengthen constitutional democracy.

Abuse of power

- (g) When the Department failed to respond to a request by the Public Protector to hold action against the Complainant in abeyance pending finalisation of its investigation, it did not meet the constitutional requirement encapsulated in section 181(3) of the Constitution to assist the Public Protector. This amounts to abuse of power.
 - (h) The conduct of the Department in resorting to criminal proceedings when it has failed to adjudicate, on the merits, the 2003 renewal applications, and to meet with the Complainant to discuss the 31 May 2010 application, after being requested to do so, amounts to abuse of power. The conduct alleged to constitute a breach of permit conditions arose directly from the failure to adjudicate the renewal applications.
 - (i) The actions of Home Affairs officials at the Cape Town Airport that resulted in Ludo not being allowed back into the country in July 2011, until the intervention of the Public Protector South Africa, amount to abuse of power. These actions traumatised a young man who ended up stranded outside the country, and contravened section 33 of the Constitution, as well as section 3 of the Promotion of Administrative Justice Act.
- (iii) The appropriate remedial action to be taken in terms of section 182(1) (c) of the Constitution is as follows:
- (a) The Minister must exercise her powers in terms of section 31 of the Immigration Act to provide a remedy to the Complainant and his family in relation to permanent residence, in particular, subsection (2)(b) and (c), and any other applicable provisions of the Act, or other relevant law/s;
 - (b) The Department should consider withdrawing the charges against the Complainant and his wife which stem from the Department's maladministration

as a result of its failure to deal properly with the applications lodged with it in 2003.;

- (c) The Minister must consider withdrawing the fine imposed against Ludo on 27 June 2011;
- (d) The Department should provide a systemic remedy by conducting an inquiry into the reasons for which the 2003 application was not processed within a reasonable time, and the failure to co-operate in the Public Protector process; and
- (e) The remedial action is to be finalised within a month from the date of this report.

REPORT ON AN INVESTIGATION INTO ALLEGED ABUSE OF POWER AND MALADMINISTRATION BY THE DEPARTMENT OF HOME AFFAIRS IN RESPECT OF AN APPLICATION FOR THE RENEWAL OR EXTENSION OF WORK AND OTHER PERMITS SUBMITTED BY MR M VAN HILLEGONDSBERG AND FAMILY

1. INTRODUCTION

- 1.1 “*Unconscionable Delay*” is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 It is submitted to the Honourable NA Dlamini, Minister of Home Affairs.
- 1.3 The report is also submitted to the Speaker of the National Assembly, Honourable M V Sisulu, MP.
- 1.4 A copy of the report is also provided to the Complainant in terms of section 8(3) of the Public Protector Act.
- 1.5 The report relates to an investigation into allegations of:
 - 1.4.1 Maladministration by the Department of Home Affairs (the Department) in respect of applications and representations made for the renewal or extension of work and other permits by Mr M van Hillegondsberg (the Complainant) and his spouse (Dutch nationals living in South Africa since April 1996); and
 - 1.4.2 Abuse of power by officials in the Department which resulted in the Complainant’s incarceration on 18 June 2010, and other resultant consequences.

2. THE COMPLAINT

- 2.1 The Complainant initially approached the then Public Protector, Advocate Selby Baqwa, on 13 September 2001, regarding various applications for permits. On 18 February 2007, the Complainant advised the Western Cape Provincial Representative of the Public Protector, Advocate Gary Pienaar as follows by email:

"I am convinced you did everything in your power to be of assistance in this matter. I have been slow to recognize that that was not enough. You feel free to close your file".

- 2.2 Since the matter had remained unresolved, the Complainant approached the current Public Protector, Advocate T N Madonsela, through the Western Cape Provincial Office on 10 June 2010. He lodged fresh complaints relating to the manner in which the Department has allegedly handled his various applications for permits dating back to 1996. There had been interaction between the Public Protector's Office and the Department since 13 September 2001 until 2007 when the Complainant indicated that his file could be closed, as indicated above. The salient aspects of his complaints are as follows:

- 2.2.1 The Complainant is dissatisfied with the way in which his various applications for permits were handled by the Department since 1996. The family has applied for work, temporary residence and study permits since 1999. These permits were granted on a yearly basis and extended annually. One such work permit reflects the following conditions. "HA APPR. 20/3/3 dated 2000.02.04 TO CONDUCT OWN BUSINESS: 'HELDER WATER', SOMERSET WEST..."
- 2.2.2 The Complainant asserted that they had applied each year for an extension – the last such application being on 4 March 2003 when they had applied for the renewal

of their work, temporary residence and study permits, but to date the Department has not informed them of any decision regarding this application.

- 2.2.3 The Complainant alleged that he attempted on several occasions to address the *impasse*, and again in December 2009. Following this, the Department allegedly sent him a letter, dated 5 January 2010, requesting the submission of certain documentation. The Complainant stated that he duly submitted the required documents and relied on a document entitled "*Acknowledgement of Receipt*".
- 2.2.4 He alleged further that regardless of the abovementioned permit conditions relating to the conducting of a business and the fact that their application for renewal of 4 March 2003 was still pending, Mr S Fortuin of the Department's Cape Town Office informed him, on 8 June 2010, that he would be charged with contravention of permit requirements by conducting a business.
- 2.2.5 The Cape Town Office of the Department, apparently under instruction of an official, Mr Mellet, ensured the arrest and detention of the Complainant on the afternoon of 18 June 2010 just prior to the weekend, despite verbal and written requests by the Public Protector's Office to Mr Fortuin to hold further action in abeyance pending the investigation and report.
- 2.2.6 The Complainant also mentioned that his son, Ludo, had applied to a South African university to study in 2011, but that the application would not be considered without a permanent residence permit. The deadline was stated to be 2 September 2010. Currently, Ludo is studying at the University of Stellenbosch, and travelled to Malaysia on 27 June 2011, and was to have returned to South Africa on 14 July 2011. The Complainant indicated that Ludo was fined an amount of R 3000 by Immigration Officials at the airport for contravening the Immigration Act. The fine was allegedly payable at the South African High Commission in Kuala Lumpur or on his return to South Africa.

2.2.7 On 13 July 2011, Ludo was refused permission by Qatar Airways to board his return flight based on information sent to them from Cape Town International Airport that he was not allowed back into South Africa, as a result of which he incurred extra costs. He set out the circumstances in an email that he sent to his father and mother on 13 July 2011 as follows:

"When I left Cape Town on 27 June, the Immigration officer told me that I have received a R 3000 fine for overstaying my visitor's permit, but I did not need to pay the fine immediately, because they are aware of the fact that my residence permit application is still pending. I was told that I should go to the South African embassy in Kuala Lumpur to confirm me [sic] presence in Malaysia and ask them if the fine can be permanently waived. The official gave me a receipt of [sic] the fine and said it was very important to visit the embassy and show them the receipt, and that everything would be sorted out there. I visited the embassy 3 times. The first time I went [to] the embassy (4 July) they had know [sic] idea who I was and had no knowledge of my circumstances, and did not seem to be informed by CT International about my case. I handed in my passport and documents (including the receipt of [sic] the fine and the confirmation of my pending permit). I was told that the embassy will contact Home Affairs in South Africa to find out about me and see what they can do. On Friday (8 July) I returned to [the] embassy to pick up my passport (as I needed it to go to Sabah, a state in Malaysia). They did not have anything to tell me, and did not really understand what was going on or what was needed. On 13 July I went to the embassy again to try to get some clarity on what was going to happen next. The embassy told me that they did not have the power to waive my fine and could not take any action without confirming with Home Affairs in South Africa. I left the embassy still confident that I would be able to return to SA, because the embassy told me there were no problems with my passport and [I] should be able to return, and that the fine what [sic] have to be discussed with HA back in SA. I went to the airport and checked in [at] 18:55, 1 hour and 40 min before departure (the flight had been moved 20 min earlier on very short notice). I wanted to check-in, but there was a problem and a Qatar Airways official was called. The Qatar Airways official then told me that I was not allowed to board the

flight. They told me that on 6 July they received an e-mail from CT International that said I was not allowed to board the flight unless I had an official letter from the embassy that stated that I visited the embassy and that I am allowed to return to SA. I was surprised by this as I was not informed that I needed this document. And clearly the embassy was not informed either, otherwise they would have told me about it on 8 or 13 July. I then called Mr Andre van de Venter, a diplomat at the Kuala Lumpur embassy who I met there (and the father of the friend I stayed at for a night) to ask him to send an e-mail to Qatar Airways to tell them I was at the embassy. Qatar Airways then sent this e-mail to CT International to confirm if the documentation was sufficient. CT said it was not. They wanted an official document from the embassy stating I visited the embassy and that I am allowed to return to South African [sic]. At 20:15 I was told by the Qatar Airways official that I may not board the flight. Period. I returned to Kuala Lumpur, and I am now staying at the home of the Van de Venter's"

[Ludo was only allowed permission to return to South Africa after a meeting held with Mr L R Ndou of the Public Protector's office, the Director-General of the Department and the Deputy Director-General: Immigration Services, Messrs M Apleni and J McKay respectively, on 16 July 2011. At this meeting, the Director-General indicated that he would only allow Ludo back into the country on condition that he would apply for a separate study permit on his return since he was then aged 19].

- 2.2.8 Finally, the Complainant stated that they adopted two South African children in 2001 by order of the Cape High Court. He mentioned however that as a result of the above-mentioned delays, inaction and treatment on the part of the Department, the family has been severely prejudiced and traumatised.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The institution of the Public Protector was established in terms of Chapter 9 of the Constitution and its additional operational requirements are governed by the Public Protector Act. It was established to strengthen constitutional democracy.
- 3.2 In terms of Section 182(1) of the Constitution, the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice. Following an investigation, the Public Protector can report on that conduct and take appropriate remedial action.
- 3.3 It is also important to note that section 6(4) (c) of the Public Protector Act provides that the Public Protector shall be competent at any time prior to, during or after an investigation, to make an appropriate recommendation regarding the redress of the prejudice resulting there from or make any other appropriate recommendation she deems expedient to the affected public body or authority. Furthermore, in terms of section 8(1) of this Act, the Public Protector may in the manner she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated.
- 3.4 It is evident that the complaint falls within the mandate of the Public Protector.
- 3.5 A matter which also merits discussion in this regard is the issue of whether the *sub judice* rule is applicable in this instance, since criminal charges have been brought against the Complainant and his wife¹.
- 3.5.1 In a blog entitled **Constitutionally Speaking, Judiciary, Don't hide behind (nonexistent) *sub judice* rule**, Pierre de Vos, Claude Leon Foundation Chair in

¹ This issue was raised in passing at a meeting between Mr McKay and Mr Ndou of the Public Protector's office on 15 July 2011.

Constitutional Governance at the University of Cape Town writes that the *sub judice* rule should not be invoked to avoid accountability. He states the following:

3.5.1.1 The rule has been substantially changed by the Supreme Court of Appeal (SCA) to bring it in line with the values and norms enshrined in the Constitution.

3.5.1.2 He gives an example of the Minister of Police who invoked the rule in response to the South African Human Rights Commission's findings and remedial order in the case of Chumani Maxwele, a jogger who was alleged to have "given President Zuma's motorcade the middle finger". The Commission had found in that case that the Special Protection Unit had violated several of Mr Maxwele's rights and called on the Minister, on behalf of members involved, to apologise to Maxwele and to take steps to ensure that the South African Police Service acts in terms of the Constitution and the law.

3.5.1.3 He goes on to say:

"Reacting to the HRC's findings, the Minister's spokesman claimed that because Mr Maxwele had instituted civil proceedings against the SAPS the sub judice rule applied. The SAPS had accordingly refused to participate in the investigation and would not abide by the HRC's ruling."

Now, it is an established rule of the common law that the proper administration of justice may not be prejudiced or interfered with and that to do so constitutes the offence of contempt of court. As the SCA has found, the sub judice rule is important as the integrity of the judicial process is an essential component of the rule of law. If the rule of law is itself eroded through compromising the integrity of the judicial process then all constitutional rights and freedoms are also compromised."

The crime of contempt of court thus includes contempt ex facie curiae (out of court) and this entails, first, cases where publication of an opinion will violate the dignity, repute or authority of the court (either by criticizing or insulting a particular judicial officer or the judicial system as a whole) and, second, statements which prejudice the administration of justice in pending proceedings. It is this latter aspect that has become known as the sub judice rule.

But in the Midi Television case the SCA stated that the broad scope of this rule which was in force in the pre-democratic era has been severely curtailed by the Constitution. In that case, dealing with the sub judice rule in the context of pre-publication censorship, Nugent JA, writing for a full bench of five judges, summarised the new position as follows:

[A] publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account but, more important, the interests of every person in having access to information. Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

If one applies these basic principles to the case at hand, it must be clear that the sub judice rule is not applicable here. The Minister would have to convince us that there would be a demonstrable and substantial prejudice to the administration of justice if he apologised to Mr Maxwele as requested by the HRC. He will further have to show that it would not be in the interest of society as a whole to obey the request of a Chapter 9 body because the risk

to the administration of justice would far outweigh the harm done to the credibility and the dignity of the Chapter 9 institution.

This will obviously be impossible to show. Given the fact that section 181 of the Constitution states that other organs of state – including ministers – through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions, I cannot think of an example where the Minister would be allowed by the sub judice rule to ignore the HRC and to refuse to institute the remedial action proposed by it in a certain case.

Besides, how the minister could possibly argue that complying with the findings of the HRC – which dealt with the violation of Mr Maxwele's constitutionally guaranteed rights to human dignity, to freedom and security of the person, to privacy, to freedom of expression and peaceful/unarmed demonstration – could possibly influence the parallel civil proceedings – which deals with a civil claim against the Police – is hard to fathom.

The HRC has already published a finding in which it concluded that Mr Maxwele's rights have been infringed. Nothing the Minister can do or say will change that. A court dealing with the civil claim of Mr Maxwele will not be swayed by the finding of the HRC as it will have to hear the evidence presented to it and make its own finding on whether damages should be paid.

The fact that the HRC has found that Mr Maxwele's rights have been infringed can also not be tendered in the civil case as proof that Mr Maxwele is entitled to be compensated financially as a result of any damages suffered. The two issues are therefore entirely different enquiries, and no substantial prejudice to the civil trial can possibly arise through the correct exercise of its rights jurisdiction by the Human Rights Commission".

- 3.5.2 In the present case, it is clear that the Public Protector's enquiry or investigation relates to the conduct of the former and current Minister of Home Affairs and former and current officials of the Department and whether such conduct constitutes maladministration and abuse of power. The test used in this case is on a balance of probabilities.
- 3.5.3 In the criminal case against the Complainant and his wife, the court would be looking at their conduct, to determine whether the state has proved beyond reasonable doubt, that they have committed offences in terms of the Immigration Act. The Public Protector makes no such finding, and the issues to be determined are therefore completely different.
- 3.5.4 Based on the above therefore, it is clear that the issue of *sub judice* does not arise in this matter, and the Public Protector can make findings and take appropriate remedial action within the meaning of section 181(2) of the Constitution.

4. THE INVESTIGATION

- 4.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act and comprised the following:
- 4.2 An analysis of the complaint and supporting documentation submitted by the Complainant;
- 4.3 An analysis of the responses to the complaint and the Provisional Report with supporting documentation by the Department; and
- 4.4 Consideration of the legal and regulatory framework, perusal of documentation provide by both the Complainant and the Department.

5. LEGAL AND REGULATORY FRAMEWORK

5.1 The Constitution

- 5.1.1 Section 28(1) in the Bill of Rights, provides, amongst others, that every child has the right to a name and a nationality from birth; to family care or parental care, and to basic nutrition, shelter, basic health care services and social services.
- 5.1.2 Section 33 provides, amongst others, that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- 5.1.3 In terms of Section 181(3), other organs of state must assist and protect the Public Protector to ensure the independence, impartiality, dignity and effectiveness of that institution.
- 5.1.4 Section 195(1) provides, amongst others, that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that services must be provided impartially, fairly, equitably and without bias; and public administration must be accountable.

5.2 Aliens Control Act, 1991 (repealed on 12 March 2003)

- 5.2.1 Section 26(1) provided for the following categories of permanent residence permits: a visitor's permit, work permit, business permit, study permit, work seeker's permit and medical permit.
- 5.2.2 In terms of section 26(6), the Director-General (Home Affairs) could from time to time extend the period for which a permit was issued under subsection (3), and a permit so altered was deemed to have been issued under the said subsection.

5.3 Immigration Act, 2002

5.3.1 This Act commenced on 12 March 2003 and repealed the Aliens Control Act, 1991.

5.3.2 The Act governs the admission, residence in, and departure from, the Republic of South Africa of foreigners. The preamble to the Act states as being amongst its aims, the setting in place of a new system of immigration control which ensures that temporary and permanent resident permits are issued as expeditiously as possible, and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, and that the international obligations of the Republic are complied with.

5.3.3 Section 53(2) of the Act provides that any permit issued in terms of the previous Act for a determined period shall continue in force and effect in accordance with the terms and conditions under which it was issued, but may only be renewed in terms of the current Act, provided that the Department may waive the requirement to submit a new application, and for good cause may authorise a permit to be renewed in terms of the previous Act.

5.3.4 In terms of section 27(g) of the Act, the Director-General may issue a permanent residence permit to a foreigner of good and sound character who is the relative of a citizen within the first step of kinship.

5.3.5 Section 31(2) of the Act provides as follows:

“Upon application, the Minister may under terms and conditions determined by him or her-

(a) ...;

(b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided the Minister may-

- (i) *exclude one or more identified foreigners from such categories; and*
- (ii) *for good cause, withdraw such rights from a foreigner or a category of foreigners;*
- (c) *for good cause, waive any prescribed requirement or form; and*
- (d) *for good cause, withdraw an exemption granted by him or her in terms of this section."*

5.4 Promotion of Administrative Justice Act, 2002

5.4.1 In terms of section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA), in regard to procedurally fair administrative action affecting any person, the following is stipulated:

- "3(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*
- (2)(a) A fair administrative procedure depends on the circumstances of each case."*

5.5 International Covenant on Civil and Political Rights²

5.5.1 Article 23 stipulates:

- "(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state".*

Article 24 stipulates:

- "(1) Every child shall have, ...the right to such measures as are required by his status as a minor, on the part of the family, society and the State".*

² South Africa has ratified or signed this and the other three international and regional instruments mentioned hereunder.

5.6 The African Charter on Human and Peoples' Rights

5.6.1 Article 18 stipulates:

"(1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral³".

Article 29 imposes the duty on an individual:

"(1) To preserve the harmonious development of the family and to work for the cohesion and respect of the family; ...".

5.7 The United Nations Convention on the Rights of the Child

5.7.1 Article 3 of the Convention stipulates:

"(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration⁴.

5.8 The African Charter on the Rights and Welfare of Children.

5.8.1 The relevant provisions of this Charter have already been referred to above.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The Complainant highlighted the following pertinent dates and events:

6.1.1 April 1996: Complainant, his spouse and son Ludo (3 years old) arrive in South Africa on visitors' permits.

6.1.2 July 1996: Extension of visitor's permit for another 3 months.

³ This is repeated word for word in Article 18 of the African Charter on the Rights and Welfare of Children.

⁴ The African Charter on the Rights and Welfare of Children has a similar provision in Article 4. See also Article 18 relating to the Protection of the Family.

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- 6.1.3 December 1996: They start working for H2O International, a business in water filtration.
- 6.1.4 1996-1999: Attempts to get temporary residence/work permit from within South Africa and fails.
- 6.1.5 June 1998: Johan Oktober (22 months old⁵) from Steinthal Children's Home in Tulbagh is placed in their care.
- 6.1.6 May 1999: Complainant establishes his own business in water filtration, called Helderwater.
- 6.1.7 June 1999: Thembisa Masina (4 years old⁶) from Steinthal Children's Home is placed in their care.
- 6.1.8 September 1999: Repatriation to the Netherlands. They have to leave Thembisa and Johan with friends. In the Netherlands, they apply for a work permit to conduct own business which, according to a Mrs van Dyk of the Department in Paarl, will take no longer than 6 to 8 weeks.
- 6.1.9 November 1999: Complainant returns to South Africa on a visitor's permit. Thembisa is placed back in the children's home against agreements made before they left. The Department in Pretoria does not respond to numerous requests about the status of their application.
- 6.1.10 February 2000: Work Permit (own business) is granted only after a journalist of the Cape Argus makes enquiries at the Department in Pretoria about the case. Permit is issued in May 2000 when Complainant was forced to go back to Holland to pick it up himself. Permit covered Complainant, spouse and son.
- 6.1.11 April 2000: Complainant has an interview with the Minister of Welfare, Mr Z Skweyiya to ask him to help them in their endeavour against the Department of Welfare and Steinthal Children's Home to get Thembisa back in their care and to keep Johan in their care. Mr Skweyiya orders Steinthal Children's Home and the Department of Welfare to place Thembisa back in their care.

⁵ Aged 14 at the time of this report

⁶ Aged 16 at the time of this report

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- 6.1.12 August 2000: High Court Case against the Department of Welfare in Worcester and Steinthal Children's Home to obtain an interdict to be able to keep Thembisa. Case number: 5539/2000.
- 6.1.13 November 2000: High Court Case against the Department of Welfare in Worcester and Steinthal Children's Home to be able to keep Johan. Cost order is granted. Case number: 6114/2000.
- 6.1.14 January 2001: Official adoption of Thembisa.
- 6.1.15 January 2001: Submission of application for Permanent Residence Permit at the Department in Worcester. Application is not processed, request to waive fees was denied.
- 6.1.16 February 2001: Renewal of Complainant's work permit (own business), temporary residence permit for spouse and Ludo at the Department in Worcester.
- 6.1.17 March 2001: Official adoption of Johan.
- 6.1.18 February 2002: Renewal of Complainant's work permit (own business), temporary residence permit for spouse and study permit for Ludo at the Department in Caledon.
- 6.1.19 March 2003: Application of renewal of Complainant's work permit (own business), temporary residence permit for spouse and study permit for Ludo is submitted to the Department in Cape Town. Permits have never been issued.
- 6.1.20 2001-2007: The then Public Protector's Provincial Representative of the Western Cape, Adv. Pienaar, is involved in the case.
- 6.1.21 May 2005: The Complainant hands a letter to the Personal Assistant of the then Minister of Home Affairs, Mrs Mapisa-Nqakula, in which he asks for a meeting. This letter was never responded to⁷.
- 6.1.22 March 2006: Letter from Adv. Pienaar to the then Director-General of the Department requesting a meeting. This letter was supplemented by another from Dr Tinus Schutte from the National office of the Public Protector indicating a change of venue. No action is taken.

⁷ Although the letter did not contain any telephone numbers, address or other particulars, it did contain at the top, a facsimile number.

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- 6.1.23 November 2006: The former Public Protector issues a subpoena for the then Deputy Director-General of the Department to appear at the office of the Public Protector. The official never adhered to this.
- 6.1.24 October 2007: The Complainant has an interview with the then parliamentary spokesperson of the DA, Mr Lowe, who subsequently writes a letter to the then Minister of Home Affairs. The letter was not responded to.
- 6.1.25 September 2009: Complainant approaches the Customer Service Centre of the Department in Pretoria. Correspondence results eventually in a referral to Mr De Wet of the Department's Immigration Services in Cape Town.
- 6.1.26 4 January 2010: Mr De Wet orders them to hand in a new application for temporary residence before 29 January 2010.
- 6.1.27 5 February 2010: Request for postponement of deadline is granted verbally. [A letter from the Department dated 12 February 2011, indicates the date when the verbal request for postponement was made as being 1 February 2010, and the new deadline as 29 April 2010].
- 6.1.28 31 May 2010: Handing in of new application for temporary residence.
- 6.1.29 4 June 2010: Parliamentary spokesperson of DA, Mrs Kaylan, sends a letter to Mrs Reyneke of the Department's Director-General in Pretoria. Mrs Reyneke advised that the Cape Town office would handle their case.
- 6.1.30 8 June 2010: Meeting with Mr Fortuin, Head of the Department's Investigation Unit of IMS, Cape Town. Mr Fortuin orders their arrest on the basis of section 49 (residing illegally in the RSA). During this meeting, Mr Fortuin discovers that their application of March 2003 is still pending, (no document of rejection is found) and that they are therefore not illegally in South Africa. He then decides to change the arrest to contravention of permit requirements.
- 6.1.31 10 June 2010: Meeting with Mr Fortuin at which he prepares the arrest, documents are filled in and signed, fingerprints are taken, etc. He also puts a stamp in Ludo's passport that allows him to leave SA on the 15th of June for a visit to the Netherlands.

- 6.1.32 10 June 2010: Meeting with the Public Protector's office in Cape Town, in which it is decided to involve the Public Protector. A complaint is made to take steps against the Department.
- 6.2 An email from Advocate Gary Pienaar, the then Provincial Representative of the Public Protector in the Western Cape, dated 19 December 2006, addressed to the Complainant states:

"Please note that since we last spoke when the meeting with the DDG: National Immigration, Ms Makola, was cancelled due to her resignation from the Department, I have managed to speak to two officials from the Department.

They have shown me a copy of a briefing report prepared for Ms Makola, and they have promised to me a copy of your entire file. However, I will receive this only at some point during late January 2007, when I will be able to adequately study the situation from their side.

However, I am informed that, as was evident from the briefing report, the Department takes a very different view of your experiences compared to your view. They are of the opinion that you have never lodged a complete application for permanent residence, because you at all times refused to pay the required fee. They are adamant that as you were advised at the time and in terms of the law then, the prescribed fee could not be waived.

Moreover, I was informed that, perhaps because of some sympathy for you and your family's personal circumstances, you have already received extraordinarily generous treatment, having been granted three or four temporary permits or exemptions without payment of the fees, in order to afford you time to lodge a permanent residence application from within the country. I am informed that such leniency has never been shown before. I am also informed that the Dept will show me records that the agent you used in your most recent application lodged in

Cape Town, was uncooperative and so were you, that the Department claims that it tried repeatedly to obtain necessary outstanding documentation or other information, but that this was not forthcoming from either of you. On the contrary, the agent could not be reached and you refused to assist them.

The Department is, accordingly, of the view that you should take the law of the land more seriously and comply with it to the best of your ability. On the positive side, I am led to believe that the applicable fee for a permanent residence application has been substantially reduce[d] to about R2500.

.....

In the meantime, the legality of your presence in South Africa is apparently under time pressure, as the officials informed me that you are currently in South Africa on a visitor's visa that expires within 3 months of your date of entry. This visa may, I am informed be extended by a further 3 months on request. After any such extension expires, you will be obliged to leave the country. However, you will require the special permission of the Minister to allow you to lodge a permanent residence application from within South Africa. I am informed that such permission has never before been granted. Moreover, I am advised that the Department's perception that you have failed to make the best use of the opportunities presented by the abovementioned permits and exemptions, may well incline the Minister's advisor/s to not view your request favourably.

In the present circumstances, I believe it is my responsibility to advise you that, due to the law as it stands and the emerging time constraints and the delay until we have sight of the file, this Office may not be in a position to assist you further in the time available. It appears that it would be most advisable if you were to procure the services of your attorney, Mr Eisenberg, to lodge the outstanding permanent residence application without further delay, and to assist you to request the Minister's consent to doing so from within the country"

- 6.2.1 It appears that there was no response to this email as Advocate Pienaar wrote to the Complainant on 2 February 2007 as follows:

"Please advise me if you have received the email below"

- 6.2.2 On 12 February 2007, Advocate Pienaar once again wrote to the Complainant as follows:

"As the two emails below have not been returned by the server, it is assumed that you have received them.

Please note that we are considering the possibility of requesting the Minister to exercise any discretion she may have to allow you to lodge your updated application for permanent residence from within the country. However, we can do so only if you indicate that you are either willing to or have already lodged such an application.

On the basis of the available information, this seems to be the only option available to this office, as the Department has indicated that the application fee cannot be waived and the application previously submitted cannot now be accepted as it is now severely outdated.

As you will no doubt appreciate, time is now of the essence.

Should you not respond to this email by Friday 16 February 2007, it will be assumed that you no longer require any assistance from this Office and your file will be closed."

- 6.2.3 The Complainant responded by email dated 18 February 2007 as follows:

"I am convinced you did everything in your power to be of assistance in this matter. I have been slow to recognize that that was not enough. You feel free to close the file".

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- 6.3 Affidavits were received from officials of the Department responding to the Public Protector's provisional report dated 12 July 2010, including attachments that were submitted later on request.
- 6.4 Numerous verbal and written communications were conducted with the Complainant and officials of the Department over the years by the Public Protector.
- 6.4.1 On or about 13 September 2001, the Complainant approached the Public Protector with, amongst others, a complaint about his dissatisfaction regarding the Department's refusal to exempt him from paying the prescribed fee in respect of his application for permanent residence. Subsequently, he raised his dissatisfaction with his application for a work permit.
- 6.4.2 On 29 May 2000, a work permit was issued to M van Hillegondsberg which reflected the conditions of the permit as being: "HA APPR. 20/3/3 dated 2000.02.04 TO CONDUCT OWN BUSINESS: 'HELDER WATER', SOMERSET WEST, PERMIT VALID UNTIL; 2001.02.04, TO BE RENEWED IN S.A. JOINED BY SPOUSE AND CHILD".
- 6.4.3 On 9 February 2001, the Department issued a Certificate of Exemption from the provisions of section 23(b) of the then Aliens Control Act, 1991 and the Complainant acquired a right of temporary sojourn, work and / or study in the Republic. The exemption was valid for a period of 12 months from the date of issue and was stated to be granted to enable the van Hillegondsberg family to decide whether they wanted to settle permanently in the Republic of South Africa. The Certificate further stated that, if they wished to settle permanently in South Africa, the exemption certificate would have enabled them to submit an immigration application from within the Republic of South Africa. Alternatively, if they did not wish to settle permanently in South Africa, but wished to remain in the Republic of South Africa, applications for appropriate temporary residence permits had to be submitted before the expiry date of the certificate.

6.4.4 Meanwhile, the Public Protector raised further complaints by the Complainant regarding alleged delays in processing the Complainant's application for permanent residence and newly required separate applications for work/temporary residence/study permits with the Office of the Director-General of the Department on 6 May 2002. On 5 August 2002, the Department responded that it had decided to extend the validity of Mrs Van Hillegondsberg and their child's exemption certificate in accordance with the validity period of the Complainant's temporary work permit. These certificates stated that they had "...acquired a right of temporary sojourn, work and/or study in the Republic" from 9 February 2002 and further that:

"IMPORTANT

This exemption certificate is valid until 4 March 2003, which is in accordance with the validity period of Mr Mathijs van Hillegondsberg's temporary work permit. Further renewals of this exemption will not be considered and all the Van Hillegondsberg family members must apply for appropriate temporary residence permits before the expiry date of this certificate, unless they have obtained the right to permanent residence status by that time".

6.4.5 The Complainant submitted applications for the renewal of their work, temporary residence and study permits on 4 March 2003 but the Complainant claims that the Department did not inform them of the decision regarding the application.

6.4.6 The Complainant addressed a letter in May 2005 and hand-delivered it to the personal assistant of the then Minister of Home Affairs, Ms Mapisa-Nqakula. He expressed concern about the "continued illegal status of [his] wife, [his] eldest son and [himself], while [his] two adopted children have South African Citizenship and the self-established livelihood that [they] are all dependent upon is entirely South Africa based." Accordingly, he requested a meeting with the then Minister.

- 6.4.7 After he had complained to the Public Protector regarding the relevant Minister's failure to respond to his letter, the Public Protector addressed a letter dated 14 March 2006 to the Director-General of the Department, detailing the history of the complaint. The letter also raised the issue that the Complainant's family's temporary permits expired during 2003 and that his applications for renewal/extension had allegedly received no response. Hence the Complainant's reference to his family's current and "continued illegal status", in his letter to the former Minister. It was further raised that the Complainant and his spouse had been permitted by the High Court to adopt two South African children, which according to them, should be an important factor to be taken into account in the consideration of their application for a permanent residence permit. In this regard, it was indicated that the Complainant had on two previous occasions endeavoured to apply for permanent residence. Accordingly, it was indicated that the Complainant requested a meeting with the Minister to request her urgent assistance in addressing their 'illegal' status in the country given the non-renewal of the permits, and to discuss possible application for an exemption from certain requirements for an immigration permit in terms of section 31 of the Immigration Act, 2002.
- 6.4.8 Finally, the Public Protector requested to meet with the Director-General to discuss the aforesaid and the Minister's proposed response.
- 6.4.9 On 28 March 2006, the personal assistant to the Director-General advised that the matter had been forwarded to the Deputy Director-General: Immigration for attention and finalisation. In view of the fact that several reminders yielded no response, a letter dated 5 May 2006 was addressed to the Deputy Director-General of the Department inviting her to a meeting with the then Public Protector on 30 May 2006. This meeting was postponed at the Department's request. After some delays, this meeting would have taken place on 4 October 2006. On 13 November 2006, the former Public Protector issued a directive to the Deputy Director-General: Immigration to appear before him in terms of section 7(4) of the Public Protector Act on 7 December 2006 at 10h00. However, the relevant Deputy

Director-General left the employ of the Department before she could appear before the Public Protector.

6.4.10 Subsequently, Adv G Pienaar of the Public Protector's Western Cape Provincial Office had a meeting with two officials of the Department. The officials took a very different view of the Complainant's experiences. They advised that the Complainant never lodged a formal application for permanent residence, because he had at all times refused to pay the required fee and that in terms of the law then, the fee could not be waived. The officials also expressed the view that the Complainant had already received extraordinary generous treatment, having been granted three or four temporary permits or exemptions without payment of fees, in order to afford him time to lodge a valid permanent residence application from within the country. The officials further indicated that the agent that the Complainant used in the 2003 application lodged in Cape Town, was uncooperative and so was the Complainant, in that the Department claimed that it had tried repeatedly to obtain the necessary outstanding documentation or information, but this was not forthcoming from either of them. It is important to note however, that these communications appear to have been verbal. The only written copy provided is one addressed to Ms Kriel (the Complainant's agent) dated 23 October 2003. The letter, signed by Mrs V Venter, states as follows under the Heading:

"BUSINESS PERMIT:	MATHIJS VAN HILLEGONDSBERG
VISITOR'S PERMIT:	PATRICIA C. M. POELMAN
STUDY PERMIT:	LUDO S. VAN HILLEGONDSBERG

The above-mentioned applications dated 04 March 2003 have reference.

Kindly provide this Department with the following documents in order to finalise this application:

- (a) Forms BI-1739 duly completed in order to obtain 30 days to await the appropriate permits.*
- (b) Audited financial statements.*

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- (c) Copies of South African employee's [sic] Identity documents.
- (d) Certification by a chartered accountant to confirm that R2500 000-00 value is invested as part of the book value of the business, and at least one of the following criteria are met
- (i) Business track record to prove entrepreneurial skill;
 - (ii) Proof that the business contributes to the geographical spread of economic activity;
 - (iii) Proof that at least five citizens or residents shall be employed;
 - (iv) Proof that the business in question is in one of the following sectors
 - I. Information and communication technology;
 - II. Clothing and textiles;
 - III. Chemicals and biotechnology;
 - IV. Agro-processing;
 - V. Metals and minerals;
 - VI. Automotive and transport;
 - VII. Tourism; or
 - VIII. Crafts
 - (v) The export potential of the business; or
 - (vi) Calls for or involves a transfer of technology not previously generally available in the Republic.
 - (vii) The financial or capital contributions of R2500 000-00 for the establishment of a business shall originate from abroad and may include intangibles generally accepted in terms of accounting principles as business assets and shall be in the form of foreign capital.
 - (viii) The business permit may be withdrawn if the business no longer maintains the capitalisation of R2500 000-00.
- (e) On application, the Department shall reduce the capitalisation of R2500 000-00 on the basis of a recommendation of either the Department of Trade and Industry or the Department of Science and Technology or on the basis of a recommendation of another organ of state.

(f) *Explanation why there was such a decrease in salaries. How will your client turn this to profit?*

As this information was submitted to you on 28 August 2003, it will be appreciated if you submit the outstanding documents/information at your earliest convenience..."

6.4.11 The Complainant, together with his spouse, visited the Public Protector's office in Cape Town on 10 June 2010, and stated that his application for extension of his work permit was still pending, and that he had not received a response thereto. He stated that the application was complete otherwise the Department would not have issued an Acknowledgement of Receipt. He further mentioned that, he had on several occasions in the past, attempted to address the impasse, and again in December 2009. Following this, the Department sent him a letter dated 5 January 2010, requesting the submission of certain documentation. He states that he duly submitted the required documents as evidenced by another "Acknowledgement of Receipt". Irrespective of the aforesaid, they were issued on 10 June 2010 with a notice that they were being detained for having contravened section 49(6) of the Immigration Act, 2002. They were requested to report at the police station by a time to be communicated to them later by telephone to be charged or taken to the senior state prosecutor to make representations.

6.4.12 The Complainant indicated that the official dealing with the matter was Mr S Fortuin and the Manager was Mr Patric Mellet. The Provincial Representative of the Office of the Public Protector, Cape Town, Advocate R van Rensburg telephoned Mr Fortuin (Mr Mellet was unavailable), and explained that a complaint had been lodged with the Public Protector and sought clarity as to the current action taken against the Complainant and his family. Mr Fortuin advised that an SAP 496 notice was issued warning the Complainant and his spouse to appear in court the next day as they had contravened section 49(6) of the Immigration Act by operating a business without having applied for a permit to conduct such a

business. He said that the complainants had been charged. When asked for the police CAS number, he could not provide one. It was indicated to Mr Fortuin that the Public Protector considered requesting the Department to hold any action in abeyance until finalisation of the Public Protector's investigation. Mr Fortuin responded that he would require same in writing.

6.4.13 Mr Fortuin's explanation was put to the Complainant, and his wife, and they responded that their understanding was that the work permit included permission to conduct their own business, and that their 2003 application for extension of this permit was still pending. While still meeting with the Complainant at about 16:00 on 10 June 2010, another official of the Department telephoned the Complainant on his mobile phone directing him to meet him at the police station at 17h00. Advocate van Rensburg telephoned Mr Fortuin and reminded him of the interim arrangement and queried why another official had telephoned the Complainant while there was an interim arrangement. When further asked why the Complainant had to go to the police station, Mr Fortuin responded that they had to be formally charged and warned to appear in court. When it was put to Mr Fortuin that this version contradicted what he had said in the first telephone conversation, he responded that he was under the impression that it had already been done. Mr Fortuin was again requested to hold any action in abeyance until 11 June 2010 by when a written communication would be addressed to him, to which he agreed. On 11 June 2010, a letter to that effect was emailed and faxed to Mr Fortuin (and he was telephonically alerted to the transmissions). The letter dated 11 June 2010, addressed to Mr Fortuin and signed by Adv Van Rensburg, reads as follows:

"Our telephone conversations on 10 June 2010 regarding the above-mentioned matter refer.

It is confirmed that the above-named complainants have lodged a fresh complaint with the Public Protector regarding alleged undue delay to process an application for extension of a work and other permits since 2003 and matters connected

thereto. A preliminary investigation is being conducted in terms of section 7 of the Public Protector Act, 1994.

It is further our understanding that your office contemplates charging the complainants for contravening the Immigration Act, but that you have not issued them with SAP 496 notices yet.

Accordingly, by direction of the Public Protector of the Republic of South Africa, Adv T N Madonsela, we urge you to hold any action against the complainants in abeyance until we have concluded our investigation and issued a report.

It is my understanding from our telephone conversations that you will adhere to such request when it has been communicated to you in writing. Please confirm same as a matter of urgency."

- 6.4.14 The Department did not respond to this letter. Instead, it facilitated the arrest and detention of the Complainant on the afternoon of Friday 18 June 2010, just prior to the weekend. The Complainant was released on Monday 21 June 2010.

7. THE RESPONSES TO THE PROVISIONAL REPORT OF THE PUBLIC PROTECTOR

- 7.1 Section 7(9) of the Public Protector Act, 1994, provides that if it appears to the Public Protector during the course of an investigation that an adverse finding pertaining to any person may result, the Public Protector shall afford such person an opportunity to respond in connection therewith, in any manner deemed expedient under the circumstances. The Public Protector therefore compiled a provisional report setting out the history of the matter and suggesting certain remedial action therein to the Department. The report was signed on 12 July 2010, and sent to the office of the Minister of Home Affairs on 13 July 2010 for the Minister's comments.



- 7.2 Enquiries to the Department elicited the response that the provisional report had been sent to their legal section for a response. A response was finally sent on 31 March 2011. The response was in the form of an affidavit by the Chief Director: Inspectorate, Mr Modiri Matthews. To this affidavit, were attached two other affidavits, one by the Director IMS: Head of Immigration Western Cape, Mr Patric Tariq Mellet, and the other by the Assistant Director: Immigration Inspectorate, Mr Shaun Clement Fortuin.
- 7.3 The pertinent issues raised by Mr Matthews in his affidavit are the following:
- 7.3.1 Mr van Hillegondsberg had his Temporary Work Permit for **Conducting Own Business** with expiry dated 19 April 2001 extended to 4 February 2002 and then again to 04 March 2003. Since 2003, Mr Van Hillegondsberg has not had legal status in the Republic of South Africa;
- 7.3.2 The last permit the Department issued to the family was extended until 4 March 2003 with the condition "*All the van Hillegondsberg family members must apply for appropriate temporary residence permits before the expiry date of this certificate*";
- 7.3.3 There was *contact* by the Department with Mr van Hillegondsberg's immigration practitioner on 23 October 2003 requesting outstanding documentation. No response was received;
- 7.3.4 Correspondence was sent to the immigration practitioner on 10 September 2004. No response was received. Further, the Department denies that there was no further communication between itself and the Complainant as there was correspondence which was issued to the Complainant after March 2003 to which no responses were received from either the Complainant or his agent;
- 7.3.5 Mr van Hillegondsberg was also contacted on 6 October 2004, but he claimed his lawyer told him not to respond because he felt he was a victim of the Department's incompetence;

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- 7.3.6 The various applications submitted by Mr van Hillegondsberg, did not fully comply with the regulations. The permits he received were discretionary permits to be used as exemptions;
- 7.3.7 The Department's position is that the van Hillegondsbergs have refused to comply with a request to submit the required documentation to consider their applications for permits;
- 7.3.8 The van Hillegondsbergs were given an opportunity to regularise their stay at the beginning of 2010, and they refused to submit the required documentation. A discussion took place between them and the provincial head of immigration, on 14 December 2009 and 4 January 2010 respectively, where it was pointed out to them that no application for permanent residence would be considered until their temporary residence permits were resolved. Certified documentation was requested and a deadline of 29 January 2010 was given. This was however not complied with. An additional letter was sent to them on 12 February 2010 giving them until 29 April 2010 to submit an application;
- 7.3.9 An incomplete application, dated 29 May 2010, was submitted. They were then charged for being in the country illegally. Mr Van Hillegondsberg was requested to appear in court on 14 June 2010. An arrest warrant was therefore issued against him and he was subsequently arrested on 18 June 2010;
- 7.3.10 It is the Department's contention that from 2006 until December 2009, Mr van Hillegondsberg was untraceable;
- 7.3.11 The Department denies that the Complainant submitted the requested documents to the Department and puts him to the proof thereof;

- 7.3.12 The Complainant's failure and non-compliance with the requests made by the Department led to him being charged due to the fact that he was viewed as being an illegal foreigner and in contravention of the immigration laws of the Republic; and
- 7.3.13 The Department denies, through the office of the Inspectorate, Cape Town, that there was any undertaking that was given to the Western Cape office of the Public Protector, to withhold or defer any possible arrest which would be effected upon the Complainant.
- 7.4 The pertinent issues raised by Mr Mellet in his affidavit are the following:
- 7.4.1 He joined the Department on 3 May 2010, and did not begin his investigation in 2003, when the family became illegal foreigners a second time, but in 1996 when they first entered South Africa as tourists. The van Hillegondsbergs have been mobile over years, and their interactions with the Department have crisscrossed four different offices of the Department;
- 7.4.2 The family entered South Africa as tourists in 1996 and contravened the law by making South Africa their home without the necessary permits and establishing a business illegally. They arrived in South Africa on 8 April 1996 and should have left on 8 July 1996, but did not. After being detected four years later, they chose to pay admission of guilt fines and were given orders to leave South Africa, which were duly executed within 14 days. They were clearly told that if they wished to reside, work or conduct a business in South Africa, they should apply for the necessary permits in the Netherlands;
- 7.4.3 Mr van Hillegondsberg had run an unregistered business before being legally entitled to do so, in that he and Ms PCM Poelman [his wife] had registered a business as a close corporation-ECOWATER SYSTEMS (CAPE) CC (CK99/20532/23) on 16 April 1999. Later, when seeking legal status, they

changed the name of the business, on 15 February 2000, to HELDERWATER CC, to coincide with his new permit application in the Hague (at the time not yet approved), and went into partnership with Martha Sophia Nienaber, a South African citizen;

7.4.4 On leaving South Africa, the van Hillegondsbergs ignored the Department's instruction, and after making an application in the Netherlands, returned to South Africa under the pretext of coming on holiday and had established themselves in the country and once more engaged in business illegally (Helderwater CC established 15 February 2000, three months before a permit had been granted). The Department intervened again and Mr van Hillegondsberg had to return to the Netherlands and await the outcome of his application. The Department on humanitarian grounds allowed Ms Poelman and her son to remain in South Africa to await the outcome;

7.4.5 Mr van Hillegondsberg was given a conditional permit to run his own business in South Africa on 29 May 2000 until 19 April 2001 when the meeting of the conditions would be reviewed on his tendering a new application for an extension. This was the first time that Mr van Hillegondsberg was legally entitled to be in South Africa with his wife and child for the purpose of residence and work;

7.4.6 In 2001, as his permit was about to expire, Mr van Hillegondsberg applied through the Worcester office of the Department for permanent residence status based on him and his wife having controversially taken two South African children out of a children's home where Ms Poelman had been volunteering and then rushing through an adoption of the two children in unusual circumstances at the magisterial court in Tulbagh. No regard was given to the best interests of the children in terms of whether the van Hillegondsbergs had a criminal record, nor what their immigration status in South Africa was;



- 7.4.7 On being made aware of the stringent requirements for an application for permanent residence and after interviews with him and his wife, as well as security checks over six months, Mr Van Hillegondsberg is recorded in the Department's records as becoming agitated and abusive towards staff at the Worcester office. The requirements are standard as in the Immigration Act, and include a police clearance. He failed to lodge the application since he left the office and refused to pay the prescribed fee, or to provide birth certificates, a marriage certificate, a police clearance certificate, two sets of fingerprints, medical and radiological reports. Mr van Hillegondsberg argued that he did not have to pay the prescribed fees as he was now a relative of the two South African children in his care and should be given automatic exemption and permanent residence in an over-the-counter once-off transaction;
- 7.4.8 Mr van Hillegondsberg then successfully applied for the extension of his existing permit at the Worcester office to 4 February 2002. His wife and son's Temporary Residence Permits were extended on 9 February and they were exempted from the provisions of section 23(b) of the Aliens Control Act for a period of twelve months – until 9 February 2002;
- 7.4.9 On 30 January 2002, Mr van Hillegondsberg applied at the Caledon office of the Department for a third extension of his conditional Temporary Work Permit (own business). It was found that Mr van Hillegondsberg was no longer meeting the own-business conditions upon which his permit's adjudication had been based. In accordance with immigration law, adjudication is a continuous process with conditions attached. These conditions are continually reviewed to see if the applicant is compliant. If, on review of financial and other business documents, or through the Department's investigations, conditions of the permit are found to have been breached, the person is asked to leave South Africa. Mr van Hillegondsberg had not provided all of the necessary documentation for such a review and was in breach of his permit. Mr AF van Niekerk of the Department

requested Mr van Hillegondsberg to tender the requisite documentation in support of the application for an extension. Mr van Hillegondsberg chose not to respond;

7.4.10 Nonetheless, the Department took a tolerant approach in that he was accommodated under strict conditions and he received his final extension which would expire on 4 March 2003, with full knowledge of a warning that if he did not produce the required information on his next application, renewal would not be considered;

7.4.11 The sparse documentation at the disposal of the Department showed his business to be an unviable concern. Bank statements showed that the van Hillegondsbergs were in a bad state of debt and were a liability to South Africa. In the meantime, Ms Poelman and her son's permit had expired and the Director-General of the Department made a very simple temporary ruling in keeping with the facts of the case, including the ample proof that the van Hillegondsbergs were always given adequate and timely responses although they deliberately chose not to meet requirements. The ruling was to simply adjust their legal status to be synchronised with that of Mr van Hillegondsberg, and all three family members would cease to have legal status on 4 March 2003. This meant that they should return to the Netherlands if they had not legally changed their status before the expiry date. (He goes on to quote the condition imposed regarding no further renewals of the extension already alluded to above);

7.4.12 The rule applying to all renewals is that an application must be tendered 30 days before expiry. The family did not comply with this condition. Mr van Hillegondsberg simply submitted an incomplete application requesting another extension of the Temporary Worker's Permit until 4 March 2004. This was done on the actual date of expiry of 4 March 2003. He refused to cooperate with officials and failed to report with his family on the following day, since they now acquired illegal status, to apply for a Form 20 (under section 7(1) read with section 32(1), as well as Regulation 26(2) of the Immigration Act,-Authorisation for



an Illegal Foreigner to Remain in the Republic Pending Application for Status) which would cover their status while an application was being adjudicated. The fact that Mr van Hillegondsberg cannot produce a record of a Form 20 for any time during his illegal status speaks volumes in proving his disregard for process and underscores the fact that no attempt was made to complete a full application allowing him to be granted a Form 20. The disregard of the Director-General's conditional exemption was a further contravention of the very explicit proviso given in writing by the Director-General that governed the entire family's leave to remain;

7.4.13 The Department still attempted to assist the van Hillegondsberg at this point even though they should have faced immediate deportation. At this stage, the business financials were looking very shaky, with no value being added to the South African economy, and no employment opportunities emerging for South Africans. The family had overdrafts and the income was much less than an average working family at times. The financial and other information in the hands of the Department showed that Mr van Hillegondsberg's business was not feasible;

7.4.14 Mr van Hillegondsberg had made undertakings to employ two South African citizens full-time and five part-time, a requirement in such applications. It was queried why there was no evidence of this undertaking being carried out. Audited financial statements, "CVs, IDs and SACs" of staff were requested, and an explanation of the huge decrease in salaries originally presented was requested by adjudicators. Mr van Hillegondsberg then hired an Immigration Consultant, Ms H S Kriel. On contacting Mr van Hillegondsberg, who was now an illegal person, officials were told to deal with his agent;

7.4.15 A request was made to his agent on 15 March 2003 to submit on behalf of her clients, audited financial statements, proof of registration at South African Revenue Services, and to clarify if the business still existed. There was no response. Communication again took place with Ms Kriel on 23 October 2003,

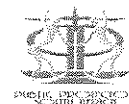


requesting outstanding information and again there was no response. Contact was made with her right through to September 2004 without response to requests;

7.4.16 Finally, on 26 October 2004, Ms Amanda Troost of the Department managed to get hold of Mr van Hillegondsberg who had gone to ground and he responded that his lawyer (no name provided) had advised him to refrain from any comment because he was a victim of the incompetence and corruption of the Department of Home Affairs. Ms Troost was told by Mr van Hillegondsberg to get “proper authorisation” to further deal with their problem;

7.4.17 From this point, the van Hillegondsbergs’ incomplete application could not be accepted as an acceptable submission in terms of legal requirements. The van Hillegondsbergs were illegally in South Africa and were conducting business illegally. They have subsequently over the last seven years remained in an illegal status and have moved abode. The Department thus has no pending application by them since 2003;

7.4.18 With no response to officials from the van Hillegondsbergs who had gone to ground and were now illegal, the matter was handed over to Gideon Christians from “CTRO” Inspectorate for investigation in 2005. According to the Department’s records at the time, the family was deemed untraceable until the Public Protector contacted the Department on their behalf in March 2006. A detailed response to the Public Protector’s enquiry outlining the facts was made on 1 June 2006 by the Department’s Paarl Regional Office Manager explaining the van Hillegondsbergs’ *modus operandus*. It was made abundantly clear that the van Hillegondsbergs’ circumstances were entirely of their own making and that they faced criminal charges under the Immigration Act. It was also demonstrated that the Department had gone out of its way to accommodate them with previous exemptions where they had shown complete disregard to conditions of issuance of those exemptions. The Department was satisfied that everything had been done to assist the van Hillegondsbergs and that their legal status had to



be addressed. At this point, the van Hillegondsbergs again went to ground and could not be traced;

7.4.19 The matter remained dormant until December 2009 when the van Hillegondsbergs resurfaced in what seems to have been an attempt to test the waters at the Department by enquiring about making a new application. On 15 December 2009, Ms Petra Coetzer of the Cape Town Regional Office contacted the van Hillegondsbergs to remind them that they were in the country illegally and had failed in all past undertakings to provide required documents. They were also called to an interview by Acting Deputy Director Mr JJ de Wet with Ms Coetzer in attendance, and were apprised of the gravity of their situation as illegals and requested to make a new application. This was followed by a letter confirming what was required;

7.4.20 On 5 January 2010, Acting Deputy Director Mr JJ de Wet, communicated with the van Hillegondsbergs in writing that they must hand in a new application for temporary residence permits complete with documentation before 29 January 2010, as they were presently in South Africa illegally. The letter outlines specifically a list of 14 documents required to be handed in with the new application for this to be acceptable as a submission. The letter concludes by saying: *"Although you are in violation of the Immigration Act, 2002 (Act No: 13 of 2002) and there is prima facie evidence to prosecute you, this letter gives you until 29 January 2010 to cooperate with the Department to finalize the matter expeditiously"*. The deadline came and went without any cooperation;

7.4.21 Having missed the deadline, the van Hillegondsbergs contacted the Department on 1 February 2010 and indicated that they were unable to complete the application and needed more time. As a result, the Department again extended the deadline and reemphasised the urgency of them needing to be legalized. A letter was sent to them by Acting Deputy Director de Wet on 12 February 2010 which also made it clear to them that they must submit a complete application.

They were further reminded to register their adopted children for South African identity documents. The new deadline was 29 April 2010, some three months after the original deadline. No other applicant has ever been treated with such leniency. Again this deadline was not adhered to;

7.4.22 A month after failing to adhere to the final deadline of 29 April 2010, the van Hillegondsbergs resurfaced on 31 May 2010 having not fulfilled the request for the required documents, and attempted to make a new application outside the framework presented to them, and also choosing to bypass the officials already dealing with the case. The reason they did this was that they had heard that the officials dealing with their matter were no longer there, and Ms Poelman expressed the view that with the publicity around the FIFA Soccer World Cup, they believed that with the right publicity the Department would be forced to be more lenient in its requirements. Mr van Hillegondsberg emphasised that they were a “special case” and did not have to follow the same regulations as others;

7.4.23 On discovering that they had once again lodged another incomplete application at the front desk of the Cape Town Regional Office, Mr Mellet, as the new Director of Immigration asked the Immigration Inspectorate to review the van Hillegondsberg file. They were contacted on 8 June 2010 by means of a FORM 23 notice, to come in and discuss their action on 18 June 2010. They came in on 10 June 2010 and it was explained to them, by Officer Shaun Fortuin, that none of the applications in the Department’s records, since 2003, could be considered to be a complete application. They were advised that their actions were contrary to the Immigration Act and that they would no longer be allowed any more grace as six months had passed without progress where the Department had bent over backwards to assist them. They were reminded of their previous commitment, and told that the deadlines had passed, and the matter would have to go to court for resolution strictly in accordance with breach of the Act. They were then informed that they were being lawfully detained for the purpose of laying charges, opening

a docket and taking the matter to the police to register. Thereafter, they would need to report to court on the date set;

7.4.24 A case docket was opened and charges put to them, but during this process, at the busy offices on the 5th Floor at Barrack Street Department of Home Affairs, they ran away. It later transpired that they made their way to the offices of the Public Protector where they told only part of the true story. They did not report back to the Inspectorate official but the process was nonetheless completed and registered in terms of section 49(1)(a) and 49(6) of the Immigration Act – CAS 567/06/2010 and they were notified of their court appearance;

7.4.25 The Department has insisted that the law should take its course, and no special treatment be afforded to the van Hillegondsbergs. The case is in the hands of the National Prosecution Authority. The Department charges that section 49(1)(a) and (6) have been breached and seeks prosecution for this infringement. They note that this is not the first infringement of this nature by the van Hillegondsbergs. On a previous occasion, they had paid admission of guilt fines and had to leave South Africa. This record is contained in the Movement Control System used at Ports of Entry; and

7.4.26 There are presently no applications for the van Hillegondsbergs with the Department that would constitute a complete application, and in terms of the 6 month extension. Where information is lacking, the Department believes that unprecedented and reasonable time and opportunity had been extended to the van Hillegondsbergs and their lack of cooperation with officials and disregard for the laws of the country have continued for an unreasonably long time. No extenuating circumstances came to the fore justifying continuous delays and there was no evidence of any miscarriage of justice.

7.5 The pertinent issue raised by Mr Fortuin in his affidavit is that at no stage in June 2010 did he agree to stop the investigation against the van Hillegondsbergs, nor did he receive a request to do so by the Public Protector.

- 7.6 On being requested to provide copies of documents and correspondence referred to in Mr Matthews Modiri's statement, and the accompanying affidavits, the Department through Ms Valentia Lackay, provided the following information on 18 and 19 July 2011:
- 7.6.1 A document titled CONTEXT OF ATTACHMENTS;
- 7.6.2 The letter to Ms Kriel dated 23 October 2003 already referred to above; and
- 7.6.3 A Form BI-1098 with the title RESULT OF APPLICATION FOR TEMPORARY RESIDENCE PERMIT/CHANGE OF CONDITIONS OR PURPOSE/RENEWAL OF EXISTING PERMIT.
- 7.6.3.1 Where it says **"Application refused for the following reasons"** there are handwritten notes with different dates. The first note reads:
- "This is an existing business. Where is the audited [illegible word] statements SARS, UIF, Copies of employment contracts [there is also something illegible]".*
- To the left appears the word *Received* and an illegible date.
- 7.6.3.2 The second note reads:
- "Why [illegible word] decrease in salaries?"* followed by an illegible phrase.
- 7.6.3.3 The third note, date stamped 28-08-2003 reads:
- "L Kriel notified of outstanding documents 28/8/03".* This is followed by what looks like *"to submit within 5 w/c days"* followed by a signature.
- 7.6.3.4 Item C in the form, which reads **"Applicants to leave the country on or before"** is left blank. Below that, a space for a signature is provided with the words **"pp Director General: Home Affairs"**. No signature is appended here. The only signature appears under the handwritten notes relating to L Kriel being informed of outstanding documents.

AND ATTACHMENTS BY GOVERNMENTAL/PROFESSIONAL BODIES)

Mr. to continue as "Holder Water Share"
Mrs. to continue her husband's share
to take up studies Klemm
Primary School grounds n. St. Isidore
Supplying the Attached

DEPARTMENT OF HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA
Office of the Director General
2003-06-11

Signature: Regional District Representative

DECISION

A. Approved and:

1. Employment with
2. Accompanying husband
3. Accompanying parents
4. Study etc.

B. Application refused for the following reasons:

C. Applicant(s) to leave the country on or before:

D. Director General Home Affairs

7.7 The document titled CONTEXT OF ATTACHMENTS reads amongst others as follows:

"Noting that 'Standard Operating Procedures' of the department based on the Immigration Act establishes [sic] that an application which is incompletely filled out or lacks the required documentation, is an incomplete application for purposes of adjudication. It thus has to be rejected.

In terms of the Immigration Act 2002 (Act No. 13 of 2002) Immigration Regulations Sections 6 and 8 an invalid application is an application which is made after there is no longer 30 days left to expiry.

An application is no longer valid when six months have lapsed since application and outstanding documents have not yet been submitted.

Sec 6) A foreigner who is in the Republic and applies for a change of status or conditions relating to his or her temporary residence permit, or for an extension for the period for which the permit was issued, shall submit his or her application at least 30 days prior to the date of the expiry of the permit: the application shall only be accepted within the validity period of the permit and upon the foreigner having demonstrated to the satisfaction of the Director-General that good cause exists for acceptance of the late application.

Sec 8) The individual terms and conditions contemplated in section 10(5) of the Act with regard to a temporary residence permit shall relate to-

- c) the submission of-*
 - i) outstanding documents, which had to accompany the application, within a specified period not exceeding six months;*

Immigration Regulations, 2005 – Annexure C: 6 Interactions with Department

An Immigration Practitioner shall-

- a) respond to a request for information from the Department within such reasonable time as specified by the Department;*
- b) ...*
- c) Not submit applications under the Act or Regulations without the required supporting documentation.*

7.8 There is a footnote to this document which reads as follows:

- "1. On 4/03/2003 a late application was submitted by Ms Kriel on behalf of the Von [sic] Hillegondsbergs, in contravention of the requirements of the Act, requiring submission 30 days before expiry, and also contravening the expressed written notification by the Director General that no more renewals of previous permits will be considered and no more exemptions would be granted and that the van Hillegondsbergs must regularise their stay by making the applications for the appropriate TRPs before the expiry date. This failure already made the application invalid.*
- 2. On 4/03/2003 there was no existing permit to renew, given the contents of the Director General's communication to the Von [sic] Hillegondsbergs, and thus the wrong form (BI-1738 –ie: 'Extension of validity (renewal) of an existing permit' is the type of application made by the von [sic] Hillegondsbergs. The Director General had advised a year previously that such an application would not be considered and that the appropriate application should be submitted.*
- 3. Communication with Ms Kriel began in earnest from 15 March 2003 according to an internal investigation carried out by Ms J Britz to attempt to get Mr von [sic] Hillegondsberg to submit a proper valid application with the correct documentation (this report is attached in 4 parts)*



4. *A RESULT OF APPLICATION FORM (adjudication) was stamped for beginning of process on the same day as submission, indicating efficiency by the department. (BI-1098 attached) Adjudication requires two different officials making input – a recommender and an approver. In the DECISION section the Approval field is blank and the REJECTION field is complete with many remarks showing a number of questions and outstanding submissions which are noted in black and red denoting checks and re-checking. The final note in the REJECTED section of the document says that Ms Kriel was notified on 28/8/2003 that the application could not go forward due to outstanding documents. The official stamp in the REJECTED box is date [sic] 28/08/2003 which is in keeping with the 6 months limitation in the Immigration Act. According to the attached investigation report, there was no response from Ms Kriel.*
5. *Officials continued to pursue Ms Kriel who had violated the Immigration Act and Regulations on a number of counts, as had her clients the von [sic] Hillegongsbergs. A further attachment is a letter to Ms Kriel on 23 October 2003 which also got no response. Further follow ups of the von [sic] Hillegondsbergs because of their illegal status continued into 2004 according to the investigation carried out by Ms Britz in 2006.*

This shows that the von [sic] Hillegondsbergs had never submitted a complete and valid application in 2003 and that efforts by Home Affairs to assist them nonetheless, also received no appropriate responses. The von [sic] Hillegondsberg were serial lawbreakers in terms of the Immigration Act.”

7.9 In his response to the affidavits from Home Affairs, the Complainant stated:

- (a) At no point during the past 15 years did the Department ever take the initiative to make contact with them;
- (b) On 14 September 1999, they were repatriated, as it turned out later, unlawfully. In August 1999, after all previous attempts to obtain the required permits had

- failed, they had requested a meeting with the Head of Immigration, Mr van Niekerk. The family presented itself (including the foster children) at his office and gave him a detailed account of their situation, activities and efforts to date. He assured them that the matter would be attended to. A week later, he told them that the matter was out of his hands and that he had instructions from Pretoria to repatriate them;
- (c) A Mrs van Dyk from the Paarl office gave them the assurance at the time that their application was “cut-and-dry” and would be processed and issued within six weeks. Based on that assurance, they had booked return flights with a two-month validity, expecting to return to South Africa by the end of October 1999. In spite of the fact that Pretoria received the original of their application on 22 September 1999, via Diplomatic Mail, they never received feedback on the processing status – not even when the then South African Ambassador to the Netherlands, Mr Carl Niehaus, had written a letter to request a response after they had waited in the Netherlands in vain for seven weeks. Mr van Hillegondsberg returned to South Africa to prevent his livelihood from going bankrupt, and to secure a future for his foster children who were on the verge of becoming the biggest victims of it all;
- (d) The reason why the exemption certificate was issued for the wife and child was to rectify an oversight by the Department as a result of which they had unwittingly and unknowingly become “illegal” residents. When the Complainant handed in his 2002 renewal application, the Department had failed to inform them that the wife and son would, henceforth, have to submit separate applications (the previous single permits had covered all three of them);
- (e) The Department wants to create the impression that they have been feverishly trying unsuccessfully to obtain documents from the Complainant and even gives dates on which this was done. He responds that this does not explain why he has in his possession a copy of an Acknowledgement of Receipt, on which handwritten notes regarding the “O/S” documentation have been ticked off, and



in the top corner is written "now what?". According to him, the Department ticked off the outstanding documents when they were submitted by his agent. A copy of the Acknowledgement appears below.



Vanessa 10/4 B

14/4 asked Don't know.

15/4 found on BL-136 Her Doc BY

Deane Maw WHAT?

DEPT OF / VAN
HOME AFFAIRS
SINDELANGE SAKH
CAPE TOWN

REPUBLIC OF SOUTH AFRICA
DEPARTMENT OF HOME AFFAIRS

ACKNOWLEDGEMENT OF RECEIPT
[Section 26 (6) of Act No. 96 of 1991: Regulation 18 (4)]

04-03-03 11:02

EXT: WF 1520.00
SUB TTL 1520.00
TOTAL 1520.00
CASH 1520.00

m Van Hillegondsberg
+ Family

PURCHASE 1
02A OR4539

DEPARTMENT OF HOME AFFAIRS
PRIVATE BAG 28031
CAPE TOWN 8001
2003-03-04
CAPE TOWN

04-03-03 11:02

EXT: WF 425.00
SUB TTL 425.00
TOTAL 425.00
CASH 425.00

PURCHASE 1
02A OR4540

DEPT OF / VAN
HOME AFFAIRS
SINDELANGE SAKH
CAPE TOWN

04-03-03 11:03

EXT: SP 1140.00
SUB TTL 1140.00
TOTAL 1140.00
CASH 1140.00

PURCHASE 1
02A OR4541

103

ation for the extension of the period of validity/alteration of conditions
on 26 (6) of the Aliens Control Act, 1991, refers.

Permit dated 4/3/03

ation is presently receiving attention.

note that if your application is not successful you will have to
Republic of South Africa on or before the date notified to you in
the Department.

fail to comply with paragraph 3 above you will in terms of section
Act, be dealt with as a prohibited person under the Act.

rests with you to enquire about the outcome of your applica-
six (6) weeks from the date of issuing this receipt.

applied for a permit to take up employment or commence study
note that this receipt is not a work/study permit. You must
await the outcome of your application before commencing any
activity.

Officer/Director-General

of s. Audited financial
Statements.

Turnover profits & loss

Employees old & new

Service establishment
contracts

- (f) He disputes that the permits that were issued to him were mere exemptions that did not comply fully with the regulations. He asserts that if one is awarded a permit, it can only be on the basis of compliance with the legal requirements

of such a permit, in other words, that the applicant falls within a category or group that the law is making provision for.

- (g) The family was finally referred to Mr J de Wet in December 2009, after a lengthy correspondence with the “CSC call centre”, again initiated by them. According to the Complainant, this correspondence took the form of emails and telephone calls. [The earliest correspondence in this regard is dated 1 September 2009, to which the call centre responded on 2 September 2009];
- (h) He had an initial meeting with Mr. de Wet in December 2009, and the latter asked him to return in January 2010, and to bring his wife along. After some discussion, it became clear to them that Mr de Wet was not interested in the history of the matter and was unwilling to consult the extensive file. He just assumed, incorrectly, that they had no legal status;
- (i) He was however willing to “assist” by “regularising their status” and provided them, through Mrs “Coetsee” with a list of documents that were required. When they learned that they had to submit five years of audited financial statements for the business, they questioned him about this as it had never been a requirement with the earlier applications with the business being a close corporation, nor could they find any reference to this in the law. After being threatened with deportation, they relented;
- (j) After finding a reputable firm of Chartered Accountants prepared to draw up the financial statements, they were given a deadline until the end of May 2010.
- (k) He disputes that the application dated 29 May 2010 was incomplete. He asserts that the official who took the application could and would only have given them an “Acknowledgement of Receipt” when they had indeed provided her with all the required documentation. She allegedly took about twenty minutes to go through the paperwork and tick it off against the list contained in Mr De Wet’s letter. Further, that on the wall, in capital letters were notifications

stating: "NO APPLICATIONS WILL BE ACCEPTED WITHOUT THE REQUIRED DOCUMENTATION OR PAYMENT OF FEES";

- (l) They have in their possession a date stamped "Acknowledgement of Receipt" confirming that they submitted applications in compliance with the prescribed Departmental requirements. A copy of Mr De Wet's letter was attached to the application;
- (m) The Complainant also provided the Public Protector with a copy of an email written by his wife dated 3 June 2010, and addressed to Mrs Hendricks. [This is six days before the meeting with Mr Fortuin]. The letter states inter alia:

"I kindly request you to allow us to make an appointment with you in order to finalise our application [for] temporary residence. As the successor of Mr de Wet, you are now the person we have to talk to. If Mr de Wet was still the Acting Deputy, he would have sat down with us, together with Mrs Coetzer, go through our application, make sure everything is in order, and if so, give his approval"

A copy of the "Acknowledgement of Receipt" referred to in (k) above appears below.



GLP-S, 617-1329



DEPARTMENT: HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

ACKNOWLEDGEMENT OF RECEIPT

[Section 10 of the Immigration Act, 2002 (Act No. 13 of 2002): Regulation 7]

Ms Y Abrahams hereby ^{DHA-135} confirms that an application was taken in on

31 May 2010

Signature: [Signature]
Date: 30/05/10

To: VAN HILLEGONDSBERG
+ wife and child

MATHIAS

14-07-1957

Sec 15

1. I hereby acknowledge receipt of your application dated 02 JUNE 2010 for *a first application/renewal/subsequent permit/change of condition(s)/change of status of your temporary residence permit.
2. The onus rests with you to enquire about the outcome of your application within 30 days from the date of this receipt.
3. If applied for a change of status to take up employment or to commence study or to conduct a business, you should note that this receipt does not grant you the right to take up such activities and if you do so, you will be in contravention of the Immigration Act, 2002 (Act No. 13 of 2002), and an illegal foreigner liable to deportation. You must, therefore, await the outcome of your application before commencing any work/study/business activities.

Regional Director/Consular Officer

Date

*Delete whichever is not applicable.

DEPARTMENT OF HOME AFFAIRS	
CAPE TOWN CAMP	
2010-05-12	
CAPE TOWN	(78)

- (n) He states that the Department does not mention that on 2 June 2010, he returned to the Barrack Street offices to enquire about the reason why they had not received, as indicated when they handed in their application, an SMS confirming their case reference number, to indicate that their application had been captured on the system. He says he was told that there was a backlog and that he could expect the SMS later during the week. To date, the SMS has not been received. He received the "Acknowledgement of Receipt" on which is hand-written the note: "Ms Y Abrahams hereby confirms that an application was taken in on 31 May 2010" with her signature, and signed in her capacity as Regional Director/Consular Officer, and date stamped 2 June 2010. [A perusal of the Acknowledgement of Receipt that appears above seems to indicate that it is for the application submitted on 31 May 2010, but acknowledgement was only done on 2 June 2010, and apparently stamped on 12 June 2010];
- (o) He also denied that he was charged with being in the country illegally. However, he was charged with running a business without the proper authority;
- (p) On 8 June 2010, Mr Shaun Fortuin admitted, after the Complainant and his wife had urged him to study the file more closely, that they had never been in the country illegally. Shortly thereafter, he declared in front of his two colleagues that "the Department has failed them" and asked them to come back with their son, Ludo, so that the latter could be given a 90-day permit, which would give the Department time to sort out the other permits;
- (q) He disputes that he and his family were untraceable. He states that the Department could have easily located them because of the following:
- (i) They had placed an article in the Mail & Guardian newspaper;
 - (ii) The Public Protector issued a subpoena for the then Deputy Director General to appear in his office;
 - (iii) Their business has for years had a website with their contact details;
 - (iv) They are registered in the phone directory;

- (v) They are registered with SARS and the Chamber of Commerce;
 - (vi) Motor vehicles are registered in his name; etc.
- (r) Regarding the Department's assertion that the Complainant never submitted the requested documents to the Department and puts the Complainant to the proof thereof, he states that the Department issued an Acknowledgement of Receipt and ticked off the outstanding documents when they were submitted by his agent, Ms Kriel. Further, the Department is unable to produce any documentation to support their claim that the application was ever adjudicated nor can they provide proof that the outcome was ever communicated to them. Adjudication would have been followed by an action: the issuing of a permit or a deportation order, neither of which took place.
- (s) His son, Ludo, like his parents, has been eligible for permanent residence status for the last decade. The Department has been refusing to comply with the provisions of the Immigration Act. Like his parents, he is still under the protection of his last permit, since his application for the extension of his study permit, to date, was never responded to.

7.10 These responses were then incorporated in an Amended Provisional Report of the Public Protector which was sent to the Minister on 19 August 2011, for the Minister to respond by 2 September 2011.

7.11 The Minister, by letter dated 31 August 2011, requested an opportunity to study the report in order to provide a response within the next 21 days. No response was received within the 21 days.

7.12 Subsequent to that, the Director-General of the Department, Mr Apleni, wrote a letter dated 14 October 2011 to the Public Protector in which he stated that he was in the process of finalising the matter, and that the Department's response would be received by the end of October 2011.

7.13 No response to the Amended Provisional Report was received from the Department despite reminders on 18 November 2011, and 23 January 2012.

8. EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

- 8.1 It is common cause that the Complainant and his family had applied for renewal of their work, temporary residence and study permits on several occasions. One such work permit dated 24 February 2000 permitted the Complainant to conduct his own business. The Complainant applied for extension of his work permit and other permits on 4 March 2003 before the previous permits/exemptions had expired. The Department is not on record as having considered this application. They allege that they required supporting documentation, which the Complainant and his agent refused or failed to supply. According to the Department, this information was required by the adjudicators. The letter dated 23 October 2003, addressed to Ms Kriel attests to this. No proof was however provided for the other requests made.
- 8.2 From May 2005, both the Complainant and the Public Protector raised the anomaly of the Complainant's alleged illegal status in light of their adoption of two South African children, with the then Minister of Home Affairs and the Director-General respectively. The Public Protector further highlighted the concern that the Complainant's family application in 2003, for the renewal/extension of permits, had received no response. Neither the former Minister nor the then Director-General responded to these communications. The matter was delegated to the then Deputy Director-General for the National Immigration Branch. This official turned out to be equally uncooperative.
- 8.3 The Department has not formally responded to the Public Protector as to the status of the Complainant's application for renewal of their work, temporary residence and study permits. The Complainant also claims not to have been informed of any decision regarding this application.

- 8.4 The Department asserts that the last permit issued to the family was extended until 4 March 2003 with the condition that *"All the van Hillegondsberg family members must apply for appropriate temporary residence permits before the expiry date of this certificate."* From a copy of the said permit, it is clear that this was a condition of the permit. It is also clear that the Complainant waited until the date of expiry of the permit to submit an application for an extension.
- 8.5 The Department further asserts that there was contact by the Department with the Complainant's immigration practitioner on 23 October 2003 requesting outstanding documentation, and that no response was received. They also allude to further correspondence that took place with the Complainant and his agent up to and including October 2004, when the attitude of the Complainant made them come to decision that the family's incomplete application could not be regarded as an acceptable submission in terms of legal requirements. As already stated, the only proof provided is the copy of the letter to the agent dated 23 October 2003.
- 8.6 By 2006, the Complainant was aware that there was at least intimation from the Department that his application for permanent residence was incomplete as Advocate Pienaar, formerly of this office, indicated to him by email dated 19 December 2006 that:

"[The Department] are of the opinion that you have never lodged a complete application for permanent residence, because you at all times refused to pay the required fee. They are adamant that as you were advised at the time and in terms of the law then, the prescribed fee could not be waived".

[It should be noted however that this is a reference to the 2001 application, and the Complainant's complaint about non-adjudication relates to the 2003 application].

- 8.7 The "Acknowledgement of Receipt" that the Complainant relies on as indicating that outstanding documents were submitted, supports his assertion to some extent. At the bottom right hand corner, is handwritten "*o/s audited financial statement, Turnover Profit and Loss, Employees old & new, service establishment contracts*". To the left of these is written "*Gave IN*" and a long tick precedes all the handwritten words. This can therefore be interpreted to mean that some outstanding information has been handed in. This however, could not have been all the outstanding information, as evidenced by the letter to Ms Kriel dated 23 October 2003.
- 8.8 The Department however stated that their position is that the family have refused to comply with a request to submit the required documentation to consider their applications for permits. They stated that as early as 30 January 2002, when the Complainant made an application for a third extension of his conditional Temporary Work Permit, it was found that he was no longer meeting the own business conditions upon which his permit's adjudication had been based, and that the Department nonetheless took a tolerant approach and accommodated him under strict conditions and extended his permit to 4 March 2003. This despite the fact that the sparse documentation at the disposal of the Department indicated that the family were in a bad state of debt and were a liability to South Africa.
- 8.9 The Department further stated that the family did not comply with the condition attached to the extension of 30 January 2002, electing to submit an incomplete application requesting another extension of their Temporary Workers Permit on the actual day of expiry itself, namely 4 March 2003. Further, that the Complainant refused to comply with officials and failed to report with his family the following day to apply for a FORM 20, which would have authorised them to remain in the Republic pending their application for status. The Department states that the family faced deportation at this point but they attempted to assist them.

- 8.10 They further state that at this point, the business financials were looking quite unstable, with no value being added to the South African economy, and no employment opportunities emerging for South Africans. Information showed that the business was not feasible. The Complainant had undertaken to employ two South African citizens full-time, and five part-time. The Department queried why no evidence of this undertaking was provided. Audited financial statements, CVs, IDs and SACs of staff were requested, and an explanation of the huge decrease in salaries originally presented was requested by adjudicators.
- 8.11 It is not clear why however, if the Complainant refused or failed to submit the required documents, the matter was not adjudicated on the basis of the available documents. At this point, a reasonable person would expect the Department to have adjudicated the application especially if the Complainant or his agent failed or refused to submit supporting documentation.
- 8.12 It is also not clear why, if the Complainant and his family did not apply for a FORM 20, the Department did not apply the law, as by then, they were deemed to have been illegal in the country.
- 8.13 The Department then sets out the attempts that were allegedly made to ensure that the Complainant and his agent submit the required documentation such as financial statements, proof of registration at SARS, and clarification that the business still existed. The Department provided a copy of the letter dated 23 October 2003, but no other proof.
- 8.14 The Department also asserted the following:
- (a) The Standard Operating Procedures establish that an application which is incompletely filled out or lacks the required information is an incomplete application for purposes of adjudication, and has to be rejected;
 - (b) The Immigration Act and Regulations provide that an application not made at least 30 before expiry is invalid;

- (c) An application is invalid after six months has lapsed since date of application without outstanding documents being submitted;
- (d) In addition, the late submission by Ms Kriel, of an application in contravention of the requirements of the Act (which requires submission 30 days before expiry) and in contravention of the express written notification by the Director-General that no more renewals of previous permits would be granted and that the family must regularise their stay by making applications for the appropriate Temporary Residence Permits before the expiry date, also made the application invalid. There was therefore no existing permit to renew given the Director General's communication to the van Hillegondsbergs, coupled with the fact that the wrong form was used. (BI 159G) is the application actually made by the Family); and
- (e) A RESULT OF APPLICATION FORM (adjudication) was stamped for beginning of process on the same day of submission, indicating efficiency by the Department. Further, adjudication requires two different officials making input – a recommender and an approver. In the DECISION section the Approval field is left blank and the REJECTION field is complete with many remarks showing a number of questions and outstanding submissions denoting checks and re-checks. Finally, that the final note in the REJECTED section of the document says that Ms Kriel was notified on 28/8/2003 that the application could not go forward due to outstanding documents.

8.15 The conduct of the Department regarding all these issues contradicts and nullifies all the statements mentioned immediately above.

8.15.1 A perusal of the copy of the FORM BI 1098 provided does not prove that the application was rejected. At the most, all it indicates is that Ms Kriel was informed that there were outstanding documents. Had the application been rejected, one would expect to see a formal signature in the applicable section at the bottom of the form.

- 8.15.2 Despite the submission of the application falling outside the required period of 30 days before expiry, the Department treated it as a valid application. As late as October 2003, it continued to request outstanding information from the Complainant and/or his agent. In its letter of 23 October 2003, the Department requested the Complainant to submit *"Forms BI 1739 duly completed in order to obtain 30 days to await the result of the appropriate permits"*. This can be construed to mean that according to the Department, the family had submitted applications for appropriate permits. This was some eight months after submission of the application, and the Department had by then more than enough time to look at the applications.
- 8.15.3 This view is further supported by the fact that the "Acknowledgement of Receipt" dated 4 March 2003 refers to the application as being for *"the extension of the period of validity/alteration of conditions [of] TOB, TRP & TSP"*.
- 8.15.4 Had the Department intended to reject the application for all the above-mentioned reasons, they would have properly rejected the application as per FORM BI-1098 and not treated the application as an incomplete one that still required the submission of outstanding information.
- 8.16 The Department further stated that after informing Ms Troost in 2004, that she had to obtain proper authorisation to further deal with their problem, the family's incomplete application could not be regarded as an acceptable submission in terms of legal requirements. This argument is not convincing. The appropriate way to deal with such an application, as well as an allegedly uncooperative client would be to deal with the matter on the merits, as set out in the reasons the Department has submitted in item 8.10.1(a) to (e).
- 8.17 The Complainant again approached the Department in September 2009 to address the situation. On 5 January 2010, the Department instructed him to submit certain documents in order to regularise the family's temporary residence status. After he had allegedly verbally obtained an extension for a deadline, the Complainant

handed in the documents on 31 May 2010. He was subsequently arrested and charged. In this regard however, it should be noted that the Complainant must have been aware of the extended deadline of 29 April 2010, as a letter was written to him on 12 February 2010 by Mr Jurie De Wet. The letter states very clearly:

"1. My letter of 05 January 2010 and your conversation with Ms P Coetze on 1 February 2010 has [sic] reference.

6. You are hereby granted an opportunity until 29 April 2010 to submit a complete application in terms of section 15 and section 13 of the IMMIGRATION Act, 2002 (Act No. 13 of 2002) to legalize the stay of your family in the Republic of South Africa"

8.18 The Complainant stated however that when this deadline approached, he became aware that his auditor could not provide the audited financials by the new deadline, and he therefore asked for another extension, which was granted verbally by Mr de Wet. It is clear that the Complainant did not comply with the deadline of 29 April 2010, and if there was a subsequent extension given verbally, it was not confirmed in writing, unlike the first one.

8.19 The Department stated that when the new Director of Immigration, Mr Mellet became aware that the family had once again submitted another incomplete application, he asked the Immigration Inspectorate to review the van Hillegondsberg file, after which they were contacted on 8 June by means of a FORM 23 notice. However, on 3 June 2010 at 12h44, Patricia Poelman wrote an email addressed to a Mrs Geneva Hendricks in which she requested the latter to allow the family to sit down with her in order to finalise their application for temporary residence. She further indicated that as the successor to Mr De Wet, she was now the person they had to talk to, and further that had Mr De Wet still been the Acting Deputy, he would have sat down with them to make sure that everything

is in order, and if so, given his approval. At the bottom of the email, she asked Mrs Hendricks to confirm receipt thereof.

8.20 On 7 June 2010, at 9h30, the Complainant wrote an email to Mrs Hendricks as follows:

"Following this morning's telephone conversation I am resending my wife's email of last Thursday. Could you kindly call us today for an appointment?"

8.21 On 8 June 2010 at 12h07, the Complainant wrote to Mr De Wet as follows:

"As I understand from Mrs Ebrahim of Edward Nathan Sonnenberg Attorneys you confirmed by telephone that our matter was to be dealt with by Mrs Hendricks.

Emails (see below) and telephone calls remain unanswered.

As you are aware, we handed in a complete application (in accordance with your list of requirements)

Mrs Burnett whom I visited at the Bellville office confirmed – after speaking to the Cape Town Office that the application was captured on the system and that a case reference number was allocated.

We did not receive the number via sms. Nor did we receive a form – upon handing in the application – to regularize our status.

According to Mrs Burnett this is irregular, as Mrs Abrahams both has the authority and duty to hand out this form.

We find it extremely disturbing to experience a total lack of cooperation from the Department.

We once again appeal to you to please use your influence for the benefit of a positive resolution of this matter."

8.22 Having regard to the above, it is not clear why the Department did not respond to this appeal from the family to sit down with them and go through their application

and supporting documentation, since the Department was of the opinion that the application was incomplete. Instead, it resorted to a FORM 23 notice on 8 June 2010.

8.23 It is further not clear why, when Mr Fortuin, (by the Department's own assertion) informed the Complainants that none of their applications on record since 2003 could be regarded as a complete application, when they had twice, only a few days earlier, requested to sit down with officials of the Department to go through the application that was submitted in May 2010, the Department did not do so. Instead, the Department decided to institute criminal charges against the Complainant and his wife. The fact that the Department had accepted an application after the extended deadline of 29 April should be regarded as tacit acceptance of the application. A perusal of the "Acknowledgement of Receipt" does not support the Department's assertion that the Complainant made two different applications in 2010.

8.24 The Department denies ever having given an undertaking to the Public Protector that the criminal charges would be stayed until the finalisation of the report by the latter. The office of the Public Protector however wrote a letter under the signature of Advocate R van Rensburg in which he stated:

"...by direction of the Public Protector of the Republic of South Africa, Adv T N Madonsela, we urge you to hold any action against the complainants in abeyance until we have concluded our investigation and issued a report.

It is my understanding from our telephone conversations that you will adhere to such request when it has been communicated to you in writing. Please confirm same as a matter of urgency."

8.25 The letter was faxed on 11 June 2010 at 12h26 to facsimile number 021 462 1148. According to Mr van Rensburg, it was followed by a telephonic and email



confirmation. The Department's denial of any such request can therefore not be true. The Department did not respond to this letter.

8.26 The Complainant and his wife indicated that they have adopted two South African children, for whom by all accounts, they have been responsible since their adoption⁸. The Department seeks to impute an improper motive for the adoption of the children. Without in any way passing judgment on the reasons for the adoption, the fact remains that the Complainant and his wife have taken on the responsibility of looking after the two children from an early age, and the children form part of the family. The Constitution as well as regional and international instruments which South Africa has ratified and /or signed, place great emphasis on the protection of the family, and the interests of the child which are regarded as paramount. Regardless of how blame should be apportioned for the non-finalisation of this matter, few would disagree that it needs to be finalised in a manner that will take the adopted children's best interest into account. The best interests of the children should now take precedence over the actions of the Complainant or of the Department.

9. CONCLUSION

9.1 The Complainant and his family lodged applications for the extension of various permits on 4 March 2003 in terms of section 26(6) of the Aliens Control Act, 1991, before expiry of their permits, albeit on the date of expiry. The Department accepted the applications, and from the letter dated 23 October 2003, it is clear that they regarded the applications as valid. Had this not been the case, the Department would have indicated same in the said letter. The application was also not rejected, a fact which is borne out by a perusal of the copy of the FORM BI-1098 which they provided.

⁸ The Complainant indicates that even before the adoption, they never received any form of social assistance from the State, which means that they have looked after the children from the time they were placed in their care.

- 9.2 The Complainant was however aware, from emails sent by Advocate Pienaar, that there was a problem with one of his applications. Advocate Pienaar's email however dealt with the 2001 application, and not the 2003 application.
- 9.3 The Department should have dealt with the applications on the merits and finalised them on that basis in the face of what they perceived to be uncooperative behaviour on the part of the Complainant and/or his agent, which they failed to do.
- 9.4 The Department's failure to deal with the matter on the merits, in light of what they perceived to be recalcitrance on the part of the Complainant and/or his agent, directly contributed to the current status of the family, including that of the son, Ludo. This has resulted in criminal charges⁹ being brought against the parents, and the son being fined an amount of R3000 on exiting the country. This has also resulted in Ludo, being denied permission to board a Qatar Airways flight on 13 July 2011, on his return to South Africa, which has further caused him to incur extra costs.
- 9.5 The Complainant has not proved that between 2007 and September 2009, he did all in his power to follow up on the applications or to find out what was required for the applications to be finalised.
- 9.6 The Complainant and his wife adopted two South African children who have been under their care and guardianship officially since 2001.
- 9.7 When the Public Protector South Africa brought the alleged failure to attend to the matter to the attention of the then Director-General and Deputy Director-General, they did not only fail to act, but also neglected to respond to the Public Protector. Accordingly, these senior officials did not meet the constitutional requirement encapsulated in section 181(3) of the Constitution to assist the Public Protector.

⁹ On 22 June 2011, the clerk of the criminal court indicated that the matter was struck off the roll on 14 February 2011, and that no reason therefore was indicated in the file. The latest information is that the Complainant and his wife appeared in court on 4 November 2011, and the matter was struck off the roll since the docket could not be found.

- 9.8 The available evidence shows that the former Minister failed to respond to the Complainant's letter of May 2005 in which he highlighted the anomaly regarding his alleged illegal status vis-à-vis the South African citizenship of his adopted children and wherein he requested her audience. Similarly, it is difficult to contemplate how the Minister, in this regard, could have abided by the values and principles enshrined in the Constitution including fair service delivery and accountability as required in Section 195(1) of the Constitution.
- 9.9 The failure by the Department to respond to a request by the Public Protector South Africa to hold action against the Complainant in abeyance pending finalisation of its investigation, again did not meet the constitutional requirement encapsulated in section 181(3) of the Constitution to assist the Public Protector.
- 9.10 The former Minister and senior officials of the Department were aware that the Complainant and his spouse had adopted two South African children in 2001, which according to them, should be an important factor to be taken into account in the consideration of their application for a permanent residence permit. The request by the Complainant for a meeting with the Minister to request her urgent assistance in addressing their 'illegal' status in the country given the non-renewal of the permits and to discuss possible application for an exemption from certain requirements for an immigration permit in terms of section 31 of the Immigration Act, 2002, were not responded to. Failure to act in this connection did not take into account the rights of the two adopted children in terms of section 28(1) of the Constitution, and the emphasis placed on the family and the best interests of the child by international and regional instruments, which South Africa has ratified and/or signed. This conduct also fails to take into account South Africa's international obligations.
- 9.11 In this regard, it is clear that the Director-General of the Department may in terms of section 27(g) of the Immigration Act issue a permanent residence permit to a foreigner of good and sound character who is the relative of a citizen within the first step of kinship. This factual scenario is applicable to the Complainant's case.

Moreover, it seems the Minister was able to provide a remedy to the Complainant and his family in terms of Section 31(2) of the Immigration Act, but failed to do so.

- 9.12 The Department has not shown that it has taken the best interests of the adopted children into account when dealing with the Complainant and his family, especially as from June 2010, when it could have taken the opportunity to make sure that the applications submitted in May 2010 met all the requirements.
- 9.13 It has taken the current Minister and the Department an inordinately long time to respond to the Public Protector's provisional report of July 2010. After perusing and incorporating the Department's response of 31 March 2011, and the Complainant's response thereto, an amended provisional report was sent to the Minister on 19 August 2011, requesting her response thereon. The Minister requested an opportunity to study the report in detail and to provide her response within the next 21 days by letter dated 31 August 2011. This, however, did not happen. On 14 October 2011 the Director-General of the Department wrote to the Public Protector indicating that he was in the process of finalising the matter and that the Department's response would reach the Public Protector by the end of October 2011. To date no response has been received, despite two reminders submitted on 18 November 2011 and 23 January 2012, respectively.
- 9.14 To date, the Complainant's 2003 application has not been officially rejected or properly adjudicated.
- 9.15 The Complainant's assertion that the Department has not, in the past 15 years, taken the initiative to contact him and his family is not true, as evidenced by the note in FORM BI-1098 dated 28 August 2003, and the letter to his agent dated 23 October 2003.

10. FINDINGS

10.1 Maladministration

- 10.1.1 The Department's failure, since 2003, to adjudicate on the merits, the Complainant and his family's applications for extension of temporary permits lodged on 4 March 2003 in terms of section 26(6) of the Aliens Control Act, 1991, constitutes an undue delay and amounts to maladministration, which in turn contravenes the right to procedurally fair administrative action envisaged in section 3 of the Promotion of Administrative Justice Act, 2000.
- 10.1.2 The failure by the Department to adjudicate the 2003 applications has deprived the Complainant and his family of the opportunity to apply for permanent residence and amounts to injustice and prejudice, which in turn is maladministration.
- 10.1.3 The inaction during 2006 on the part of the then Director-General and Deputy Director-General when the above-mentioned failure was brought to their attention, amounts to maladministration as well as a contravention of the constitutional requirement encapsulated in section 181(3) of the Constitution to assist the Public Protector. These senior officials further failed to act in accordance with Section 195(1) of the Constitution which requires public administration to be governed by the democratic values and principles enshrined in the Constitution, including that services must be provided fairly, equitably and with accountability.
- 10.1.4 The failure, by the current Minister and the Department, to provide a response to the Public Protector's Amended Provisional Report submitted on 19 August 2011 to date, despite having two requests for an extension granted, the last of which was the end of October 2011, and despite two reminders submitted on 18 November 2011 and 23 January 2012 respectively, constitutes further maladministration that contravenes section 181(3) of the Constitution.

10.1.5 The conduct of the former Minister of Home Affairs vis-à-vis the Complainant is also *prima facie* found to have been non-responsive and constitutes maladministration. This goes against the spirit of section 33 of the Constitution, as well as section 3 of the Promotion of Administrative Justice Act.

10.1.6 The delay by the current Minister and the Department to respond on time to the Public Protector's provisional report of 12 July 2010 constitutes maladministration, and does not meet the constitutional requirement contained in section 181(3) that organs of state must assist institutions that strengthen constitutional democracy.

10.2 Abuse of power

10.2.1 When the Department failed to respond to a request by the Public Protector to hold action against the Complainant in abeyance pending finalisation of its investigation, it did not meet the constitutional requirement encapsulated in section 181(3) of the Constitution to assist the Public Protector. This amounts to abuse of power.

10.2.2 The conduct of the Department in resorting to criminal proceedings when it has failed to adjudicate, on the merits, the 2003 renewal applications, and to meet with the Complainant to discuss the 31 May 2010 application, after being requested to do so, amounts to abuse of power. The conduct alleged to constitute a breach of permit conditions arose directly from the failure to adjudicate the renewal applications.

10.2.3 The actions of Home Affairs officials at the Cape Town Airport that resulted in Ludo not being allowed back into the country in July 2011, until the intervention of the Public Protector South Africa, amounts to abuse of power. These actions traumatised a young man who ended up stranded outside the country, and such actions contravened section 33 of the Constitution, as well as section 3 of the Promotion of Administrative Justice Act.

11. REMEDIAL ACTION

11.1 The remedial action that should be taken as envisaged in terms of section 182(1)(c) of the Constitution is the following:

11.1.1 The Minister must exercise her powers in terms of section 31 of the Immigration Act to provide a remedy to the Complainant and his family in relation to permanent residence, in particular subsection (2)(b) and (c) and any other applicable provisions of the Act, or other relevant law/s;

11.1.2 The Department should consider withdrawing the charges against the Complainant and his wife which stem from the Department's maladministration as a result of its failure to deal properly with the applications lodged with it in 2003;

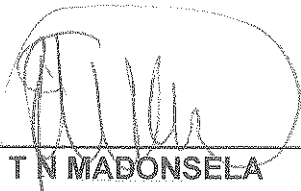
11.1.3 The Minister must consider withdrawing the fine imposed against Ludo van Hillegondsberg on 27 June 2011;

11.1.4 The Department should provide a systemic remedy by conducting an inquiry into the reasons for which the 2003 application was not processed within a reasonable time; and

11.1.5 The remedial action is to be finalised within a month from the date of this report.

12. MONITORING

- 12.1 The Public Protector will monitor the remedial action in terms of this report within 1 month of its signature, and thereafter, every three months.



ADV T N MADONSELA

PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE:

16/04/12

Assisted by Adv R van Rensburg, Provincial Representative: Western Cape and Mr L R Ndou, Executive Manager: Service Delivery