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JUDGMENT

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

(Inlexso Innovative Legal Services) awb

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION HELD AT JOHANNESBURG

CASE NO: 51908/2021

DATE: 2021-12-08

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED

In the matter between

S M Applicant

and

MINISTER OF HOME AFFAIRS 1st Respondent

DIRECTOR GENERAL, DEPARTMENT OF

HOME AFFAIRS 2nd Respondent

CONTROL IMMIGRATION OFFICER 3rd Respondent

J U D G M E N T

VICTOR, J: The applicant in this matter is Mr S M. He launched an urgent application interdicting the respondents who are the Minister of Home Affairs, the Director General

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Department of Home Affairs and the Control Immigration Officer. The interdict is to stop the respondents from deporting him from the Republic of South Africa and also directing them from to remove any adverse comment on his profile on the MCS, which is the Movement Control System and also that they be ordered to amend the conditions on the applicant's visa with reference to number JHB246114/2021/TRBR by deleting the first condition and to issue a new visa with the deletion of the first condition currently on the applicant's permit and that the respondents should be ordered to pay the costs jointly and severally, the one paying the other to be absolved.

The background facts are as follows: Mr M is Pakistani national. He is also the sole director and manager of S Unique Furniture Designs and Manufacturing company, a company in which is registered in accordance with the laws of the Republic of South Africa.

On 19 September 2012, Mr M arrived in South Africa seeking protection against political threats to his life back in Pakistan. On his arrival he did the right thing, he presented himself to the South African authorities and requested an opportunity to apply for an asylum. His application was received and he was given a temporary Asylum Seekers permit while his country conditions were being investigated.

The permit with which he was issued entitled him to work and study in the Republic of South Africa. While he was

here, he saw opportunities to use the technical skills that he had learned back home to manufacture and design unique pieces furniture and that is how he took the opportunity and started building up his business by manufacturing furniture which he sold to make a living. He did that for five years until 2018, when he saw that his business was growing and he then incorporated his business in accordance with the requirements of the Department of Trade and Industry, the CIPLA Division.

Being an Asylum Seeker it was very difficult for him to open bank accounts with that permit and then he applied for a passport at the High Commission of Pakistan here in South Africa. He did not cancel his asylum permit, but when he obtained his passport it remained valid and is only due to expire in September 2030.

In January 2020, he met and fell in love with a South African woman, one Ms A and they got married. Before their marriage, the two of them intended to make sure that his residency in South Africa was secure, so he applied for a temporary residence permit using his now growing business as substantiation and in support of that residence permit. She was mentioned as his wife on that application as well as the fact that she was running the business.

The application was accepted and approved by the respondents and a temporary visitor's visa was issued until 2024. So this visa is still in place and the two conditions are

that he can reside in South Africa and the other one being that he could conduct business as a secondary activity. Unfortunately, the relationship did not work out and he could not continue to live with Ms A.

On 29 September 2021, he was visited at his shop by the third respondent who informed him that he had been tipped off that he, the applicant was no longer staying with his wife and that this was a contravention of the permit condition. The third respondent would not engage when the applicant tried to explain that he was still married. He was told to report to head office but he received a call from the second respondent postponing that meeting. He waited for another date and on the following date he was not feeling well and the third respondent said that he would come to the applicant's workplace, and that happened on 22 October 2021 and he was issued with a letter which ordered him to depart from the Republic of South Africa. He was given 14 days to pack up and leave.

The letter also stated that the applicant no longer lived with his wife and that she filed for a divorce. Despite the fact that he had not yet received the divorce summons, the third applicant was hearing nothing of it. The provisions of the letter had to be complied with. At the time of deposing to the affidavit, he has not received any divorce papers and he submits that this fact mitigates against the allegation that he is

divorced and therefore cannot be ordered to leave the country.

He fears that he will be arrested because of the terms of the letter. He was not given an opportunity to appeal or in any other way deal with legal process or have any meaningful engagement with the respondents. He was therefore forced to approach the court.

In the answering affidavit the respondents submit that after the conclusion of the marriage, it was a specific condition that he should reside with his wife and conduct a business as a secondary activity. The applicant of course understood it the other way around. On 29 September 2021, the third respondent informed him that the visitor's visa was cancelled as from 22 October 2021 and caused the lapse of a temporary visa and the DHA-57 letter served on him instructed him to depart from the Republic of South Africa within 14 days.

A further submission by the respondents is that in terms of section 11(6)(a) the spousal visa will only be valid while a good faith spousal relationship exists between the holder of the visa and the spouse, and of course in this case the relationship between the applicant and his wife seems to have broken down irreparably.

In a supplementary affidavit the Mr Makhanye on behalf of the third respondent states that he wishes to draw the Court's attention to the condition on the visitor's visa and moreover to point out that on 4 November 2019, the applicant

was granted a spousal visa due to the fact that it was to expire on 21 May 2021. The visa was granted premised on those two conditions which I have already referred to.

It seems to me that this is case which must be viewed through the prism of the Constitution pertains to a proper interpretation of the Immigration Act.

In this case the applicant has spent many years in the Republic of South Africa contributing to the economy and running a business where he is able to provide for his wife and also for his own commitments to others including workers.

The applicant is not being granted an opportunity to proceed with such legal process as he is entitled to. He has not been given a proper hearing. The third respondent's employee who came to his business to tell him that he had to leave the Republic of South Africa and served the letter on him refused to engage with him in a meaningful way.

But in any event, the applicant is entitled to a fair hearing, although this is not a review application. The decision in my view requires two things, that the decision itself must be rational and that procedure leading up to the deportation or notice letter to leave the country, must also be fair and reasonable. In this case, neither of the two benchmarks have been met and the applicant is in these circumstances entitled to pursue his full legal process before he is ordered to leave the country.

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In the result, the urgent application succeeds in the terms set out in the notice of motion. I am going to ask Mr Motseme to do a draft order and a cost order will also follow. The respondents are ordered to pay the cost of this application jointly and severally on the party and party scale.

VICTOR, J

JUDGE OF THE HIGH COURT

DATE: 30 December 2021