# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 576/06

In the matter between :

**DIRECTOR GENERAL : DEPARTMENT OF HOME AFFAIRS** **First Appellant**

**MINISTER OF HOME AFFAIRS** **Second Appellant**

and

**MAVERICKS REVUE CC** **Respondent**

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| **Before:** | **HOWIE P, NUGENT, PONNAN, MLAMBO JJA & HURT AJA** |
| **Heard:** | **15 NOVEMBER 2007** |
| **Delivered:** | **28 NOVEMBER 2007** |
| **Summary:** | **Immigration Act and Regulations – corporate permit – whether work permit for a corporate worker attracts the fee payable for a general work permit contemplated by s 19 – discretion to require security for repatriation – whether properly exercised.** |
| **Neutral citation:** | **This judgment may be referred to as *DG Department of Home Affairs v Mavericks Revue CC* [2007] SCA 149 (RSA)** |

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## J U D G M E N T

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**NUGENT JA**

NUGENT JA:

[1] The skills shortage, so it seems, extends to exotic dancing. The respondent wishes to bring 70 exotic dancers to this country, mainly from Russia and Ukraine, to work at its revue bar in Cape Town. It has permission from the Department of Home Affairs to do so in the form of a 'corporate permit' issued to it under the Immigration Act 13 of 2002. But the first secretary in the consular section of the embassy in Moscow, Ms Loving, has declined to issue work permits to the dancers unless each pays a fee of R1 520 and provides a cash deposit of US $2 000 as security for repatriation. The High Court at Cape Town (Fourie J) set aside the imposition of the two conditions and the appellants now appeal against its order with the leave of that court.

[2] The entry of foreigners to South Africa is regulated by the Immigration Act, the Immigration Regulations,[1] and the Regulations on Fees.[2] That statutory regime, so far as it is material to the present case, is rather confusing, and perhaps it is even defective.

[3] A foreigner who is not the holder of a permanent residence permit is permitted to enter and sojourn in South Africa only if he or she is in possession of a valid 'temporary residence permit' (ss 9(4) and 10(1) of the Act). A 'temporary residence permit' is defined to mean 'a temporary residence permit contemplated in section 10'. Section 10(2) provides, in turn, that upon application in the prescribed manner and form, 'one of the temporary residence permits contemplated in sections 11 to 23 may be issued to a foreigner.'

[4] Sections 11 to 23 provide for the issue of various kinds of permit: a visitor's permit, a study permit, a work permit, and so on. Each of those permits,

[1] Published under Government Notice R. 616 in Government Gazette 27725 of 27 June 2005.
[2] Published under Government Notice R. 615 in Government Gazette 27725 of 27 June 2005.

except one, purports to be a residence permit as ordinarily understood. The exception is the permit provided for in s 21 – called a 'corporate permit' – which is not a residence permit at all.

[5] A 'corporate permit' is applied for by a 'corporate applicant' ('a juristic person that conducts business, not-for-gain, agricultural or commercial activities within the Republic'[3]) and permits the corporate applicant to 'employ foreigners who may conduct work for such a corporate applicant' (s 21(1)). What has given rise to the difficulty in this case is that it is not clear how the foreigners concerned are to acquire the right to enter and sojourn in this country.

[6] Reg. 18(6) envisages that a 'person employed by the holder of a corporate permit' will apply for a 'work permit' and it lays down various requirements that such an application must meet. Yet the Act does not create a category of work permit that is expressly apposite. Ms Loving and the department take the view that the 'work permit' referred to in that regulation is a work permit envisaged by s 19 of the Act. Because the schedule to the Regulations on Fees stipulates a fee of R1 520 for an application for a work permit that is issued under s 19 Ms Loving has insisted on that fee being paid.

[7] The court below held that the work permit envisaged by reg. 18(6) is not a work permit contemplated by s 19 of the Act but is one that is *sui generis* (by which I understand the court to mean that it is not one of the permits provided for in ss 11 to 23). Since no fee for such a permit is stipulated in the Regulations on Fees it held that no fee is payable.

[3] Definition of 'corporate applicant' in s 1.

[8] There is some support for the department's view in the definition section of the Immigration Regulations. That defines a 'work permit' to mean 'the relevant permit contemplated in s 19 of the Act.' The trouble is that none of the work permits provided for in s 19 of the Act are relevant to corporate workers. There are also other clear indications that the work permit envisaged by reg. 18(6) is not such a permit.

[9] Section 19 provides for the issue of four kinds of work permit – a 'quota work permit', a 'general work permit', an 'exceptional skills work permit' and an 'intra-company transfer work permit'. I need deal only with a 'general work permit' because it is accepted by the appellant that the other three permits have no application in this case.

[10] A general work permit may be issued to a foreigner only if, amongst other things, 'the prospective employer satisfies the Director-General that despite diligent search he or she has been unable to employ a person in the Republic with qualifications or skills and experience equivalent to those of the applicant' (s 19(2)). That is not a requirement for the issue of a corporate permit. It follows that a foreigner who is permitted to be employed under a corporate permit will not necessarily qualify for a general work permit under s 19, which is the first indication that reg. 18(6) refers to a work permit of a different kind. The second indication, as pointed out by the court below, is that the criteria to be met when applying for a s 19 work permit (those criteria are contained in reg. 16) are different to those that must be met when applying for a work permit under reg. 18(6) from which it is apparent that the regulations have different permits in mind. The third indication, also mentioned by the court below, is that s 21(5) distinguishes corporate workers from workers who hold s 19 work permits, in so

far as it provides that 'the holder of a corporate permit may also employ foreigners in terms of s 19'. And finally, if it was intended that corporate workers would qualify for and be issued with general work permits there would be no need for corporate permits to be issued at all.

[11] I agree with the court below that the work permit that is envisaged by reg. 18(6) could not have been intended to be a work permit issued under s 19 of the Act. I do not think we need to decide whether it is a '*sui generis* work permit' that is permitted implicitly by the Act – it might also be that there is simply an inadvertent lacuna in the Act. It is sufficient for present purposes to say that an application for a work permit envisaged by reg. 18(6) does not attract any fee stipulated in the Regulations on Fees and the finding of the court below on that issue cannot be faulted.

[12] Ms Loving's insistence upon payment of a repatriation deposit in respect of each of the dancers has its foundation in reg. 18(6)(b)(iii). That subsection provides that an application for a work permit to be issued to a person employed by the holder of a corporate permit must comply with various requirements that include

'at the discretion of the Director-General, proof of a valid return air ticket, a deposit or a written undertaking by the employer accepting responsibility for the costs related to the deportation of the applicant and his or her dependant family members, should it become necessary…'

[13] That regulation needs to be seen in the context of the corporate permits to which it relates. When the Director-General is asked to issue a corporate permit he or she is required by s 21(2) to 'determine the maximum number of

employees to be employed in terms of a corporate permit' after having considered, amongst other things

'the financial guarantees posted in the prescribed amount and form by the corporate applicant to defray deportation and other costs should the corporate permit be withdrawn, or certain foreigners fail to leave the Republic when no longer subject to the corporate permit.'

[14] Although it is not expressly so stated I think it is implicit that the posting of financial guarantees is a pre-requisite for the issuing of a corporate permit. Reg. 18(5) provides that those financial guarantees may, at the discretion of the Director-General, take either of two forms: a 'deposit in respect of each corporate worker', or a 'written undertaking [by the corporate employer] in lieu of the deposit'. In the present case the respondent furnished written undertakings that I must assume were acceptable to the department.

[15] Ms Loving and the department understand reg. 18(6)(b)(iii) to mean that an applicant for a work permit may be required to furnish an additional repatriation deposit or written undertaking hence the insistence in this case upon deposits of US $2 000. I find it rather anomalous that a duplication of security for repatriation may be required when a work permit is applied for (duplicating the security that was provided by the employer when obtaining a corporate permit) and perhaps the regulation is open to another interpretation. But that is not a matter that we need to decide. I have assumed for present purposes that the regulation does allow for further security to be demanded at the discretion of the Director-General.

[16] It is common cause that the discretion to require payment of a repatriation deposit was delegated to Ms Loving by the Director-General. It is alleged by the respondent that Ms Loving was instructed by the department to ask for a

repatriation deposit in all cases of this kind and that she simply executed that instruction and exercised no discretion at all. That allegation was met with a bald denial by the Office Manager of the office of the Department of Home Affairs at Cape Town (the deponent to the appellants' answering affidavit) without any supporting evidence of Ms Loving. I do not think a bald denial by a stranger with no apparent knowledge of the facts can carry any weight. The court below found that by merely executing an instruction Ms Loving failed to exercise any discretion at all with the result that her decision was unlawful and in my view that finding was correct.

[17] The court below set aside the imposition by Ms Loving of each of the conditions and also declared that 'the applicants for work permits to be employed by [the present respondent]…are not required to pay the fee of R1 520 prescribed in respect of a work permit issued in terms of section 19 of the [Act] or any fee at all' but it gave no directions relating to the fate of the applications. It was submitted on behalf of the appellants that if we dismiss the appeal we should remit the matter to the Director-General for reconsideration of all the applications for work permits by foreign workers recruited by the respondent from abroad and give appropriate directions in that regard. I see no reason to make such an order. The conditions having been set aside the applications will necessarily require reconsideration in accordance with law and we need give no directions as to what that entails.

[18] The appeal is dismissed with costs that are to include the costs of two counsel where two counsel were employed.

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

HOWIE P)

PONNAN JA)

MLAMBO JA)

HURT AJA)