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

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No.: 459/2017

In the matter between:

THE DIRECTOR-GENERAL
DEPARTMENT OF HOME AFFAIRS **First Appellant**

MINISTER OF HOME AFFAIRS **Second Appellant**

And

NURUL ISLAM **First Respondent**

WAGEEMA ISLAM **Second Respondent**

EMIRATES AIRLINES **Third Respondent**

Neutral citation: *The Director-General, Department of Home Affairs and another v Islam and others* (459/2017) [2018] ZASCA 48 (28 March 2018)

Coram: Maya P, Majiedt, Mbha and Van Der Merwe JJA and Rogers AJA

Heard: 20 February 2018

Delivered: 28 March 2018

Summary: Immigration Act 13 of 2002 – foreigner issued with a valid spousal visa subsequently found in possession of a fraudulent visa in breach of s 29(1)(*f*) of the

Act – deemed a prohibited person and not entitled to a port of entry visa or admission into the Republic – high court has no authority to order the Department of Home Affairs to allow him entry into the Republic and to re-issue his spousal visa – such order violates separation of powers – requisites for the grant of an interim interdict against the exercise of statutory powers restated.

ORDER

On appeal from: Western Cape High Court, Cape Town (Salie-Hlophe J sitting as a court of first instance):

1 The appeal is upheld with no order as to costs.

2 The order of the high court is set aside and replaced with the following:

'The application is dismissed with no order as to costs.'

JUDGMENT

Maya P (Majiedt, Mbha and Van der Merwe JJA and Rogers AJA concurring):

[1] This is an appeal, with leave of this Court, against the judgment of the Western Cape High Court, Cape Town (Salie-Hlophe J). It follows urgent application proceedings launched by the second respondent, Mrs Wageema Islam, on behalf of the first respondent, Mr Nurul Islam.[1] The latter, a Bangladeshi citizen, is a holder of a spousal visa issued by the South African Department of Home Affairs (DHA). Mrs Islam is a South African citizen and, according to her, the visa was issued on the strength of her Muslim marriage to Mr Islam which they concluded in 2008.[2]

[2] The litigation was prompted by DHA's refusal to allow Mr Islam entry into the

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[1] The third respondent, Emirates Airlines, played no role in the proceedings both in the high court and on appeal.

[2] The appellants disputed the marriage but nothing turns on that for purposes of this appeal. In any event it was common cause that Mr Islam was a holder of a valid spousal visa which would, of necessity, have been issued on the basis of his spousal relationship with a South African citizen or permanent resident.

country at the Cape Town International Airport after he was found in possession of a fraudulent visa (the decision). The Islams essentially sought an order allowing Mr Islam admission into South Africa (the Republic) pending the determination of his request to the second appellant, the Minister of Home Affairs (the Minister), to review the decision[3] or, in the event that the Minister confirmed the decision, pending a judicial review which would be launched within ten days thereof.

[3] The high court granted an order directing the appellants to (a) permit Mr Islam to enter and remain in the Republic subject to reasonable terms and conditions as prescribed by them, pending finalisation of the matter; (b) re-issue his spousal visa within 21 days from the date of the order; and (c) if they were unable to re-issue the visa, to file affidavits stating the reasons for their non-compliance. It is this order against which the appellants appeal.

[4] The background facts, most of which may be gleaned from the appellants' answering affidavits to which there was no reply, are simple. On 8 January 2016, Mr Islam applied for a spousal visa in terms of s 11(6) of the Immigration Act 13 of 2002 (the Act).[4] The application was successful. On 2 February 2016 he was issued with a visa with reference number [...]which he received two days later. On 3 March 2016, he left the country temporarily to visit his ailing mother. Upon his departure, the immigration officer who examined his passport wrote 'refer on arrival'

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[3] In terms of s 8 of the Act.

[4] In terms of s 11(6) of the Immigration Act 13 of 2002 by an entity designated by the department, Via Facilitation Services. These provisions read:
'Notwithstanding the provisions of this section, a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the visas contemplated in sections 13 to 22: Provided that –

(a) such visa shall only be valid while the good faith spousal relationship exists…'.

(b)

on the date stamp affixed to the passport. The note was an indication that Mr Islam's travel documents raised concerns that would have to be addressed on his return. And the concerns were not addressed at that stage as DHA does not deny a foreigner the right to depart to his country of origin on a direct flight and defers queries until the person seeks to re-enter the country to avoid delaying the departure of an entire flight.

[5] On 10 June 2016 DHA's permitting section issued an alert regarding visa labels that had been fraudulently produced. This was circulated on its Movement Control System at all South African ports of entry and would automatically appear on the computer screen once the relevant DHA officials logged into the system. The alert read:

'*IMPORTANT NOTICE: VISA LABELS ISSUED FRAUDULENTLY*

Officials must be on the look-out for visa labels starting with control number [...] and [...]. These visa labels were issued fraudulently. If found, those in possession of these visa labels must be dealt with according to the Immigration Act and Regulations.'

[6] On 30 June 2016 Mr Islam returned to South Africa on an Emirates Airlines flight from Dubai which landed at the Cape Town International Airport. He presented the immigration officials with a passport which was endorsed with a visa with reference number [...] and control number [...], one of the alert numbers, purportedly issued by DHA under s 18 of the Act. Upon this discovery, the immigration officials referred him to the Inspectorate Office for further verification. It was duly established that the visa endorsed on his passport was not the one which had been validly issued to him and had not been issued by DHA. It was therefore a fraudulent document.

[7] Mr Islam was accordingly refused entry into the country under s 29(1)(*f*) of the Act. In terms of these provisions a foreigner, ie an individual who is not a citizen, [5] who is found in possession of a fraudulent visa, is deemed a prohibited person and does not qualify for a port of entry visa or admission into the Republic. His passport was confiscated and he was informed that he would be boarded on the flight on which he had arrived and removed from the country.[6] He was handed and signed various forms prescribed by the Act.[7] These documents mainly informed him that he had been refused entry into the country and the reason for that decision. They also informed him

[5] In terms of s 1 of the Act.

[6] In terms of s 35(10) of the Act, which provides that '[a] person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission in the prescribed manner, as well as for any costs related to such detention and removal incurred by [DHA].'

[7] (a) Form 1 titled 'NOTIFICATION REGARDING RIGHT TO REQUEST REVIEW BY MINISTER [Section 8(1); Regulation 7(1) Part A: In respect of a person refused admission at a port of entry'; (b) Form 2 titled 'NOTICE OF DECISION ADVERSELY AFFECTING RIGHT OF PERSON [Section 9, read with section 8(3); Regulation 6] Part A: In relation to port of entry'; (c) Form 6 titled 'INTERVIEW BY IMMIGRATION OFFICER OF PERSON NOT HAVING SATISFIED IMMIGRATION OFFICER THAT HE OR SHE IS NOT ILLEGAL FOREIGNER [Section 7(1)(*g*) read with section 9(3)(*d*); Regulation 6(6)'; (d) Form 37 titled 'NOTIFICATION TO A PERSON AT A PORT OF ENTRY THAT HE OR SHE IS AN ILLEGAL FOREIGNER AND IS REFUSED ADMISSION [Section 7(1)(*g*) read with sections 34(8) and 35(10); Regulations 33(10) and (14)]' and (e) Form 38 titled 'DECLARATION TO MASTER OF SHIP OR PERSON IN CHARGE OF CONVEYANCE THAT PERSON CONVEYED IS ILLEGAL FOREIGNER AND NOTICE TO MASTER OF SHIP OR PERSON IN CHARGE OF CONVEYANCE REGARDING HIS OR HER OBLIGATIONS WHERE PERSON CONVEYED IS REFUSED ADMISSION [Section 7(1)(*g*) read with sections 34(8) and 35(10); Regulations 33(1) and (14)]'. These documents were all published in *GG* No 37679 dated 22 May 2014.

of his right to ask the Minister to review the decision in terms of s 8(1) of the Act or to make representations to the first appellant, DHA's Director-General (the DG) to review the decision in terms of ss 8(3) and (4) of the Act.[8]

[8] On 4 July 2016 the respondents successfully brought an urgent application, without notice to the appellants, in the high court before Samela J. The object of the application was two-fold. It was to interdict Mr Islam's allegedly imminent deportation and to have DHA ordered to allow him entry into the country pending the final determination by the Minister of the review of the decision, or if the review failed, pending the final determination of a judicial review of the Minister's decision. But the respondents' respite was short-lived. Samela J subsequently set aside the order on the same day at the instance of the appellants, who sought its reconsideration, as it

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[8] Section 8 of the Act governs internal administrative review and appeal procedures relating to decisions made in terms of the Act and reads:
'(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and-
(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or
(b) in any other case than the one provided for in paragraph (*a*), that request shall be submitted to the Minister within three days after that decision.
(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision-
(a) in a case contemplated in subsection (1)(*a*), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or
(b) in a case contemplated in subsection (1)(*b*), shall not be removed from the Republic before the Minister has confirmed the relevant decision.
(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.
(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.
(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.
(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.
(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.'

transpired that the respondents had not disclosed to the court why DHA refused him entry into to the country. Furthermore, Mr Islam could in any event not have been removed from the country. This was so because he had already approached the Minister to have the decision reviewed and s 8(2)(*b*), which prohibited his removal from the country until that process was finalised, had automatically kicked in. But the Islams were not discouraged by the set back. Two days later they returned to the high court and launched the proceedings which have resulted in this appeal.

[9] The crisp issues on appeal before us were the appealability of the interim interdict granted by the high court and, if it was appealable, whether the Islams had met the requirements for its grant. The argument advanced on their behalf was that the interdict was not final in effect and was therefore not appealable as it allowed the appellants to approach the court on affidavit should they be unable to comply with its terms to persuade the court otherwise. Regarding the merits, it was argued that there was no proof that Mr Islam possessed a fraudulent visa in the absence of an investigation report prepared by the appellants to that end.

[10] At the outset, I agree with the appellants that the interim interdict is appealable. Traditionally, under common law, an interim order was not appealable except where it was shown that it was (a) final in effect as it could not be altered by the court which granted it; (b) definitive of the rights of the parties in that it granted definitive and distinct relief; and (c) was dispositive of at least a substantial portion of the relief claimed in the main proceedings.[9] The test has since evolved. So whilst the traditional requirements are still important considerations, the court may in appropriate circumstances dispense with one or more of those requirements if to do so would be in the interests of, having regard to the court's duty to promote the spirit, purpose and

[9] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J – 533A.

objects of the Constitution[10] eg where the interim order 'has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable'.[11]

[11] The order clearly meets all the traditional requirements. First, it is final in effect. The very manner in which it is couched renders it so as it commanded Mr Islam's admission into the country and the re-issue of his spousal visa, with no limiting provision for the institution of a judicial review if the internal review failed or its lapse if the judicial review was not launched. Once these processes were put in place they could not be reconsidered by the court or simply revoked by DHA. Mr Islam's status in the country and the compendium of rights and obligations flowing therefrom would be determined in terms of his visa under the Act. Thus, he would be entitled to challenge any decision that sought to withdraw his visa by way of review in terms of s 8(4) and (6) of the Act and thereafter, if that failed, by judicial review.

[12] Second, the interdict was definitive of the parties' rights as it gave Mr Islam the right to enter and remain in the country and be issued with a valid spousal visa; an entitlement to which attached various rights, including the right to apply for permanent residence. Third, it was dispositive of the very essence of the relief sought by Mr Islam in the ministerial review – an overturning of the decision that he was a prohibited person so that he could enter and remain in the country.

[13] Furthermore, as will be shown later in the judgment, the interim interdict was

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[10] See *S v Western Areas Ltd & others* 2005 (5) SA 214 (SCA) paras 25-28. See also *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A); *Philani-Ma-Afrika & others v Mailula & others [2009] ZASCA 11;* 2010 (2) SA 573 (SCA); *Nova Property Group Holdings v Julius Cobbett* [2016] ZASCA 63; 2016 (4) SA 317(SCA); *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 (6) SA 279; 2016 (9) BCLR 1133 (CC).

[11] *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 CC.

granted in direct contravention of the provisions of the Act, which deal with the control and regulation of the presence of foreign nationals in the Republic. Further, it disregarded the appellants' executive powers and obligations and the requirements for its grant were not met. It should therefore not have been granted in the first place. For that reason alone it would be in the interests of justice to hear the appeal.

[14] As to the merits, the test for the grant of an interim interdict is trite. The applicant must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted; (c) the balance of convenience must favour the grant of the interdict; and (d) the applicant must have no other available remedy.[12] Where the relief is sought against the exercise of statutory power, as here, the Courts may grant it only in exceptional cases, in the clearest of cases when a strong case for that relief has been made out.[13]

[15] The first question is whether the Islams established a prima facie right although open to some doubt. Their case was predicated on the unsubstantiated allegations that it was the validly issued spousal visa which Mr Islam presented to the immigration officer and was declared a fraudulent document when he sought re-entry into the country. DHA had produced no evidence to show that Mr Islam was in possession of a fraudulent visa and thus had no legal basis to refuse him entry into the country, so they asserted. In their words, 'the visa presented by [Mr Islam] to DHA upon his arrival on 30 June 2016 unequivocally evidences a prima facie right, if not a clear right'.

[16] But this account may be given short shrift. It cannot stand in light of the

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[12] *Setlogelo v Setlogelo* 1914 AD 221; *Webster v Mitchell* 1948 (1) SA 1186 (W).
[13] *Gool v Minister of Justice & another* 1955 (2) SA 682 (C); *National Treasury & others v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) paras 44 and 45.

appellants' contrary version that Mr Islam produced a passport endorsed with a visa that was unknown to DHA. Importantly, the Islams left the appellants' version, which was anything but a bare denial or far-fetched, unchallenged as they did not file a replying affidavit. Interestingly, it came to light at the hearing of the appeal that the ministerial review had failed and that the decision was announced shortly before the high court hearing. The Islams took no steps to have the Minister's decision judicially reviewed as undertaken in their notice of motion. Mr Islam simply returned to his country of origin.

[17] Surprisingly, it appears from the high court's brief judgment that it rejected the appellants' uncontested evidence out of hand, merely on the basis that Mr Islam had previously been issued with a valid visa which had not been withdrawn and thus remained extant. And on that basis the court held, '[f]or that reason alone, based on that common cause fact, this Court finds that [Mr Islam] has established a prima facie right to enter and remain in the Republic'. Needless to say, this was an incorrect appraisal of the evidence which resulted in a material misdirection on the part of the court. The court did not exercise its discretion judicially.

[18] As pointed out above, the provisions of s 29(1)(*f*) of the Act divested Mr Islam of the right to be issued with a port of entry visa or admission into the Republic once he was found in possession of the fraudulent visa. The order of the high court compelling the appellants to allow him entry into the Republic and to re-issue his spousal visa (relief which, incidentally, was never sought by the Islams) was in direct conflict with these statutory provisions. Its implementation would have adversely impacted various other provisions of the Act.[14] And, ironically, it would also have

[14] Such as ss 9(3)(*d*), 9(4)(*b*) and 10(1), which respectively require a valid passport and visa to enter or depart the Republic, and ss 32, 34(1) and 35(5), which respectively authorise the deportation, arrest or removal from the country of an illegal foreigner.

rendered Mr Islam an illegal foreigner, ie a foreigner who is in the Republic in contravention of the Act.[15] This result would give rise to its own host of negative sequelae for the Islams including an obligation on the DG to deport Mr Islam.[16] He would also be exposed to the risk of being convicted for entering the country in contravention of the Act and sentenced to a term of imprisonment or a fine.[17]

[19] In sum, Mr Islam's possession of a fraudulent visa could not vest him with a prima facie right to the interim interdict he was granted. This finding dispenses with the need to consider the other requirements for the grant of an interim interdict and the appeal should succeed on this basis alone. But I think it is important to reiterate the warning sounded in *National Treasury v Opposition to Urban Tolling Alliance*,[18] even though it relates to the balance of convenience enquiry (which the high court did not conduct at all). There, the Constitutional Court did not merely endorse the common law position which constrains courts to grant temporary interdicts against the exercise of statutory power only in exceptional cases, where a strong case is made out for the relief sought. The Court took the principle further and said:

'Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself ... [W]hen a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought. The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be

[15] In terms of s 1 thereof.
[16] In terms of s 32(2) of the Act.
[17] In terms of s 49(1) of the Act.
[18] Fn 11 paras 44-47.

called separation of powers harm.'

[20] Regrettably, it does not appear that the high court heeded this caution. The Islams' case is, by any stretch of the imagination, a far cry from the 'exceptional cases' or 'clearest of cases' envisaged in the decisions mentioned above. The high court completely ignored the State's legitimate interest in the security of its borders and the integrity of its immigration systems which it achieves by regulating the admission of foreign nationals to, their residence in, and their departure from the Republic under the Act.[19] It made an order which it had no authority to grant, in total disregard of the appellants' powers and duties under the Act. By so doing it breached the doctrine of separation of powers. The need for Courts to scrupulously guard against such intrusions cannot be overemphasized.

[21] The appellants did not press for a costs order both in the high court and on appeal, rightly so having regard to the nature of the proceedings.[20] I am satisfied in all the circumstances that the Islams should not be mulcted with the costs of the proceedings.

[22] The following order is made:

1 The appeal is upheld with no order as to costs.
2 The order of the high court is set aside and replaced with the following:
'The application is dismissed with no order as to costs.'

MML MAYA

PRESIDENT OF THE SUPREME COURT OF APPEAL

[19] The Act's Preamble.
[20] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

APPEARANCES:

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1ST & 2ND RESPONDENTS:	Adv. S Sethene
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