

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE - PORT ELIZABETH)

CASE No. 500/09

NOT REPORTABLE

In the matter between:-

NASEER AHMED BHATI

Applicant

and

MINISTER OF HOME AFFAIRS

Respondent

JUDGMENT

Van der Byl, AJ:-

[1] On 23 April 2009 I dismissed the Applicant's application with costs on the basis that reasons for my decision would be furnished at a later stage.

Those reasons appear from what follows.

[2] The Applicant was on 5 March 2009 granted, as a matter of urgency, by agreement between the parties, an order in terms of which a decision of the Respondent to the effect that the Applicant is ordered to leave the Republic on 6 March 2009 was suspended pending the finalization of this application.

[3] It is, as is apparent from the founding papers, the Applicant's case -

(a) that he, as a Pakistani national, clandestinely arrived in South Africa on an undisclosed date to seek asylum;

(b) that he was on 20 February 2003 granted an Asylum Seeker Temporary Permit (**Annexure NAB 2**) in terms of section 2 of the Refugees Act, 1998 (Act 130 of 1998), which granted him the right to reside temporarily in the Republic for the purpose of applying for asylum in terms of that Act, but which required him to leave the Republic on or before 27 March 2003 or such later date as may be duly authorised by a Refugee Status Determination Officer if his application for asylum is rejected;

(c) that, as indicated by him in his replying affidavit, the aforesaid date was, as is apparent from the back side of the Asylum Seeker Temporary Permit which was not disclosed in his founding affidavit, extended from time to time;

(d) that, although it appears from the back side of that Permit that it was last extended to 7 July 2003, there are other asylum permits issued to him, but that he *"lost the copies thereof"*;

(e) that he during his stay in the Republic met a lady, Ruth Desire de Grass, who is a South African citizen who he married on 20 April 2006;

(f) that he then by virtue of his marriage launched an application for a temporary residence permit at the Port Elizabeth Regional Office of the Department of Home Affairs which was issued to him on 31 (sic) April 2006, valid until 30 April 2008, by an officer in the Department who was later dismissed for having committed *"misconduct which relates to the issuing of work permits to persons who are alleged not to have complied with the legal requirements for such*

permits”;

(g) that he on 29 April 2008 submitted an application for the renewal of his temporary residence permit which was received by the Department under file No. PE564/08;

(h) that he was, however, despite having reported to the Department on various occasions thereafter, “*not assisted*” by the Department on this application;

(i) that on the occasion of one of his visits he was handed a letter (**Annexure NAB 5**) in which he was required to appear on his pending application at the Department on 27 August 2008 so as to furnish the Department with documentary proof that he complied with all the requirements for the permit;

(j) that he did submit “*all the required documentation*”, but that he was on 20 February 2009 handed the order (**Annexure NAB 1**) to leave the country by 6 March 2009.

[4] The relevant portion of **Annexure NAB 1** reads as follows:

“You are hereby notified that as an illegal foreigner in contravention of the provisions of the Immigration Act 2002, (Act No. 13 of 2002), you are guilty of an offence for which you may be charged in a court of law.

However, as you have undertaken to leave the Republic voluntarily you are hereby ordered to leave the Republic by 24h00 hours on 6 March 2009, failure of which a warrant of for your deportation will be issued in terms of section 34 of the said Act and you will be detained and/or charged pending your removal.”.

[5] In view of these facts, relying on the provisions of section 8 of the Immigration Act, 2002,

it is the Applicant's contention that he should have been informed in writing on a prescribed form that he may in writing request the Minister to review a decision that he is an illegal foreigner or that he should otherwise have been allowed the right to make an application to the Director_General for the review or appeal of such a decision.

[6] Accordingly, so it is furthermore contended, the "*decision*" that he was an illegal foreigner constitutes "*administrative action*" envisaged in the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), and that the Respondent, through his officials, breached his constitutional rights by not having given him notice of the decision and not having afforded him the opportunity to submit representations.

[7] The Respondent's version differs materially, factually and legally, from the Applicant's approach in this matter.

[8] As is apparent from the answering affidavit, the Respondent's case is based on the following facts:-

[9] In **the first place** it is averred, as opposed to the Applicant's allegations that he entered the country illegally, that, according to a questionnaire (**Annexure ISK 1**) completed by the Applicant on 5 December 2008 in respect of his marriage, the Applicant indicated that he entered the country on 7 February 2003 for the Cricket World Cup. On a question posed in the questionnaire whether he ever applied for asylum or refugee status, he for some inexplicable reason denied that he has ever so applied for asylum.

[10] In **the second place** it is averred that, although the Applicant was granted an Asylum

Seeker Permit on 20 February 2003 which granted him the right to remain in the country until 27 March 2003, he never pursued and in fact abandoned his application for such asylum so that he was, at the latest, unlawfully in the country from 28 March 2003.

[11] In **the third place** it is averred that, as is apparent from **Annexure NAB 4**, the permit for which he sought extension on 28 April 2008 was already an extended permit. Although an application for the extension of a temporary residence permit must refer to the "*source of the original temporary residence permit*", his application referred to an old passport without indicating the page number which is already, so it is contended, an irregularity. The passport in which **Annexure NAB 4** is affixed is a passport issued to the Applicant in Lahore, Pakistan, on 6 November 2002 from which it appears that the extended permit was issued to him on 31 May 2006 (and not 31 (sic) April 2006, as alleged). At that time his old passport must obviously have been expired at the time he entered the Republic. It accordingly follows that had a temporary residence permit previously been issued to him it should have been recorded in his passport. His passport, however, contains no such indication.

[12] In **the fourth place** it is averred that it would appear that the batch from which this permit was issued (which was, incidentally, issued by a certain Ms. Hange) was issued to Ms. Hange on a date after the permit was issued to the Applicant. It, furthermore, appears that the file number under which the permit was issued is a file allocated to an Egyptian national by the name of Kamal Mohamed and that no file exists in respect of the Applicant. The fact that no file has been created in respect of the Applicant is an indication that the permit was issued fraudulently. This is one of the reasons why Ms. Hange had been dismissed for fraudulently issuing permits.

[13] In **the fifth place** it is averred that, because the Applicant had at the time already been unlawfully in the country for three years (ie., as from 27 March 2003 until 26 April 2006, he would not have qualified in terms of section 48 of the Immigration Act, 2002, for a temporary residence permit.

[14] In **the sixth place** it is averred that **Annexure NAB 5** was handed to the Applicant so as to afford him, against the background of the apparent fraudulent issue of his temporary residence permit, the opportunity to provide proof of any initial application for a temporary residence permit which preceded the permit issued in 2006, but the Applicant has to date failed to provide such proof.

[15] In **the seventh place** it is averred that **Annexure NAB 1**, designed to facilitate voluntary departures from the country, was handed to the Applicant on 20 February 2009 because he, after having been explained that should he fail to leave he could be charged for contravening the Act, agreed to leave the country as an illegal foreigner.

[16] In **the eighth place** it is averred that in the circumstances no formal communication envisaged in section 8 of the Act was required and that it would only have been necessary on his failure to have left the country, whereupon, he would have been informed in terms of section 34 of the Act of a decision to be deported from the country.

[17] In his replying affidavit the Applicant indicated -

(a) that his temporary residence permit was actually issued on 31 May 2006 and was valid

until 30 May 2008;

(b) that **Annexure ISK 1**, being a document, although filled in in relation to his marriage, which was not filled in by him, "*might be one of many documents*" he was made to sign;

(c) that his asylum permit was extended on various occasions as is apparent from the back side of form **Annexure NAB 2**, and indicated that he lost copies of permits issued after the last date to which his permit was extended;

(d) that, if he was unlawfully in the country, he would not have been allowed to enter into a marriage and that he as a matter of fact used his asylum seeker temporary permit to get married;

(e) that his temporary residence was not fraudulently issued to him or that any of the irregularities in processing in his application was as a result of any fraudulent conduct on his part;

(f) that he did not sign **Annexure NAB 1** voluntarily, but was forced to sign the form and never undertook to leave the Republic voluntarily;

(g) that his application for the extension of his temporary residence permit was never considered or, had it been refused, it should have been communicated to him in accordance with section 8(3) of the Immigration Act, 2002, which would have entitled him to take the matter

on review or appeal;

(h) that he in effect seeks a review of the decision of the Respondent not to extend his temporary residence permit.

[18] Mr. Nepgen who appeared on behalf of the Respondent in effect raised two contentions in his opposition to the relief claimed by the Applicant -

(a) **firstly**, that the Applicant irregularly and incorrectly seeks to make out a case in reply which was not made out in his founding affidavit, namely, that he was in effect seeking to review the decision of the Respondent not to extend his temporary residence permit and that he was lawfully in the Republic by virtue of an extension of his asylum seekers temporary permit; and

(b) **secondly** -

(i) that **Annexure NAB 1** does not constitute a decision as envisaged in the Promotion of Administration of Justice Act, 2000, but only affects the Applicant in so far as it sets a date before which he must voluntarily depart from the Republic, it being common cause that he is an illegal foreigner, which date the Applicant does not take issue with and which does not adversely affect his rights and has no direct or external legal effect;

(ii) that section 8(3) of the Immigration Act, 2003, is not available to the Applicant at this stage of the process and may only be available should a decision be taken to deport him upon which he would be required to be given

notice in terms of the said section 8(3).

[19] As far as the first of Mr. Nepgen's contentions is concerned, it is trite that an applicant is required to make out his or her case fully in his or her founding affidavit (see: ***Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) t 368B-369A; Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635H-636C; Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (T) at 205E***). The Applicant's founding affidavit contains no facts set out in such a complete fashion that it can not even remotely be seen as an application to review a decision not to consider his application for extension of his temporary residence permit or to compel the Respondent to consider his application (see: ***Victor v Victor 1938 WLD 16; Riddle v Riddle 1956(2) SA 739 (C) at 748; Van Aswegen v Van Aswegen 1967(1) SA 571 (O) at 574***). As a matter of fact the evidence shows, as is apparent from **Annexures NAB 5** and **ISK 6**, that it was in the course of the consideration of the Applicant's application for the extension of his temporary residence permit that on 13 August 2008 his attention was drawn to the irregularities in relation to the issue of his temporary residence permit, that he was informed that the Respondent has come to the conclusion that he did not qualify for the permit, that it had been fraudulently issued and that any foreigner who is in possession of a fraudulent permit does not qualify for a temporary residence permit. In these circumstances he was invited to provide within 14 days proof that his application for a temporary residence permit complied with all the legal requirements.

It is, apart from the Applicant's attempt to make out a new case in his replying affidavit, quite clear that his application for the extension of his temporary residence permit was indeed considered.

[20] This brings me to the second of the contentions raised by Mr. Nepgen.

In this regard there appear to be some factual disputes on the papers, particularly, in so far as it is denied by the Applicant that he ever agreed to voluntarily depart from the country and that he was forced to sign **Annexure NAB 1** (which, incidentally, is an allegation not raised in his founding affidavit as one would have expected him to have done under all the circumstances.

This is in my view a matter where the principles enunciated in *Plascon_Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634F-635B* should be applied, namely, to consider the matter on the allegations made in the respondent's opposing papers and the allegations contained in the founding papers which are not in dispute.

[21] In doing so, I must say that I in any event have grave doubts on the truthfulness of the Applicant's allegations made in both his founding and replying affidavits in so far as he, for instance, failed to disclose relevant facts in his founding affidavit, such as, that he was, for example, forced to sign **Annexure NAB 1**.

[22] In argument it is submitted by Mr. Booi who appears on behalf of the Applicant, relying on the decision in *Gamevest (Pty) Ltd v Regional Land Claims Commissioner, Northern Province and Mpumalanga 2003(1) SA 373 (SCA)*, that the issue of **Annexure NAB 1** indeed constitutes "*administrative action*" because it has been issued in compliance with provisions of the Immigration Act, 2002, and the regulations made thereunder.

In the *Gamevest case* the Court attempted to set out the types of actions which may in principle

be regarded as administrative actions envisaged in the Promotion of Administrative Justice Act, 2000, with which I with respect agree.

I am, however, unable that any of those actions can find application in the circumstances of this matter.

It is, as is apparent from the facts to which I have already referred to, clear -

(a) that the Applicant was on 13 August 2008 requested to submit proof that his application for the extension of his temporary residence permit complied with all the legal requirements;

(b) that he failed to do so or failed to submit such proof;

(c) that it was, therefore, common cause on 20 February 2009, being the date on which **Annexure NAB 1** was handed to him that he, not being in possession of a temporary residence permit or any other authorization authorizing him to be in the country, was an illegal foreigner;

(d) that he, thereupon, agreed to leave the country on 6 March 2009, being a date 14 days as from 20 February 2009, being the period prescribed by regulation 39(17) of the regulations promulgated in terms of the Immigration Act, 2002, in Government Notice R1480 of 25 November 2002.

It is for these reasons I dismissed the Applicant's application with costs on 23 April 2009.

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P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANT

ADV M BOOI

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DATE OF HEARING

23 April 2009

JUDGMENT DELIVERED ON

28 April 2009