

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 47389/12

In the matter between:

MDS NDT CONSULTANTS (PTY) LTD

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
10/4/2013	
APPLICANT	SIGNATURE

And

10/4/2013

NATIONAL MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

DIRECTOR GENERAL OF THE DEPARTMENT
OF HOME AFFAIRS

SECOND RESPONDENT

JUDGMENT

TLHAPI J:

- [1] This application was for interim relief pending the finalization of a review application to be instituted in terms of the Promotion of Administration of Justice Act 3 of 2000 ('PAJA') against the first and second respondents, for rejecting the appeal ('the impugned decision'), lodged in terms of *sections* 8(3) to 8(7) of the Immigration Act, 13 of 2002 ('the Act'). Although this matter

was to be heard as one of urgency in the urgent court on the 27 August 2012, due to the volume of papers it was given a special date and was heard on 10 November 2012.

The following orders were sought:

- “
- 2.1 that applicant shall be allowed and be authorised to retain in applicant's employ all applicant's current employees, and that applicant may utilizes such employees for purpose of all applicant's business operations;
 - 2.2 that applicant be entitled and authorised to take ail actions, and to act as if applicant has been awarded a new corporate permit as applied for in annexure "A5" annexed to the founding affidavit;
 - 2.3 that respondents be prohibited from instituting any further investigations into the business operations of the applicant, without reasonable cause or grounds therefore;
 - 2.4 that the respondents shall honour all corporate worker authorisation certificates, all visa applications, and all other authorisations that may be applied for by the applicant, workers in the applicant's employ and workers to be employed by the applicant in the ordinary course of applicant's business, as if the corporate permit was lawfully issued by the respondents;

2.5 the respondents shall grant to the applicant new corporate workers authorisation certificates and new visas for foreign workers to be applied for, as if the corporate permit application dated 19 August 2011 was granted, and as is such corporate permit was issued by the respondents, in the ordinary course of business;

2.6 applicant shall be entitled in all respects to continue with applicant's business in the normal course of business;"

The application was opposed.

- [2] The founding affidavit was deposed to by Mr Alan Joshua Armitage, a director of the applicant. He averred that the applicant operated as a 'service provider in the engineering and construction industry'. The applicant contracted with its clients on specific projects and for a specific period of time, by providing employment to foreign skilled workers, in accordance with the specific needs of the client and, in particular where no such skilled services could 'be provided by a South African company or entity'. In certain instances and depending on the facts of each contract, applicant may fall under section 198 of the Labour Relations Act, 66 of 1995. Furthermore, it was contended that the applicant had the 'capability, the know-how and it managed and supervised the services and outcome of such projects. The refusal of a corporate permit would severely jeopardise the engineering and construction contracts concluded by the applicant with its clients and that this would lead to 'grave prejudice and damages suffered by both.

[3] The applicant had been issued with corporate permits since 2004 to 2008 for a specified period, in respect of a certain number of individuals. The 2008 corporate permit for 5000 employees was valid for a period of 36 months and expired on 18 November 2011. On 19 August 2011 applicant applied for a corporate permit to be valid for a period of 5 years and which permit would allow applicant to employ 5000 foreign skilled workers.

[4] The applicants had from time to time addressed queries raised by the respondents about the nature of their business and whether it was a labour broker or not.

They contended that they were not into the labour broking business because the foreign skilled workers were employed in terms of a fixed term contract, with a guaranteed minimum remuneration of 180 hours being paid by the applicant; they supervised work performance and outcome and engaged in disciplinary issues related to the skilled workers; they provided food transport accommodation, medical treatment and insurance cover as obliged by the corporate permit.

[5] On 8 September 2011 applicants were informed of an impending preliminary investigation into possible violations of the Act, in respect of corporate permits issued to the applicant. With regard to its application certain documentation was requested and these were annexed to the application of 19 August 2011 (listed in paragraph 42.1 to 42.4.14) of the founding affidavit. The applicant contended that the additional documentation requested went far beyond what

was required for consideration of the application for a corporate permit and although the documentation was provided, the respondents were informed that there was no basis for the investigation. According to the applicant it had a legitimate expectation and an entitlement to the issue of a corporate permit on the same basis upon which previous corporate permits had been granted by the respondents and, for the same business of the applicant which had not changed. This had been the case despite the first respondent's policy relating to labour brokers.

- [6] The applicant averred that the investigations into its business and, the refusal to grant a new corporate permit was undertaken for extraneous and *mala fide* reasons. This came to light when the respondents' inspectors paid a visit to Sasol to investigate the issuing of alleged fraudulent visa stamps in the passports of the applicant's employees and, instructions were given to Sasol to remove all foreigners from the site. The applicant was informed that shortly thereafter a company known as Global Migration had called Sasol to assist with its permit problems. There was a possibility that a previous disgruntled employee of the applicant was responsible for the vexatious conduct by the respondents on the applicant. The official responsible for the issue of visa stamps at OR Tambo Airport confirmed to Sasol and the first respondents the validity of the visa stamps.
- [7] The decision to refuse the application was *mala fide* in that it was based on the contents of a policy document which in the opinion of the applicant had to be set aside because it was *ultra vires*. The applicant contended that the second respondent was not allowed in the exercise of his discretion to issue the permit, to be influenced by a predetermined policy and procedure, and

that in as far as it contended that such conduct was unlawful and unconstitutional, the applicant was entitled to approach the court for relief in terms of PAJA

- [8] The applicant averred that it was a corporate applicant as defined in section 1 of the Act and that it had observed and complied with the requirements set out in section 21 of the Act with regard to the factors to be considered by the second respondent in its consideration of applicant's application. According to the applicant, the second respondent was confined to the considerations in sections 21(2) and 21(3) of the Act and, in this regard the corporate permit should have been granted and not refused.
- [9] Furthermore, the applicants averred that it was necessary to bring this application because the court order of 18 November 2011 had the effect of only pending the internal appeal process.
- [10] The applicant averred that the appeal decision was based on incorrect conclusions relating the entities MDS NDT Consultants (Pty) Ltd and MDS International Skills (Pty) Ltd and their business purposes. The fact that they worked in association with each other, did not mean that the latter was the alter ego of the former. The applicant dealt with the employment contracts and the MDS International Skills (Pty) Ltd managed payroll issues, furthermore it later offered its local clients labour broking services which were discontinued in August 2011 . The other factor to consider was that the purpose of business of the applicant changed with time to deal specifically with the employment of foreign skilled workers. The two companies operated

independently of each other.

- [11] The respondents put up several grounds upon which it maintained the application should fail.

Mr Ronney Marhule, for the second respondent averred that the applicant had not annexed a copy of the respondents full reasons ('RM3') for the impugned decision to the founding affidavit. It was contended that the applicant had out of context paraphrased such reasons, and had failed to demonstrate in what respects the decision was 'not justifiable, irrational, unreasonable or unlawful. It had therefore failed to make out a *prima facie* case for the relief sought.

- [12] It was averred for the respondents that the purpose for which the relief in the first application of 18 November 2011 was given had been fulfilled, that is, for the business of the applicants to continue operating 'pending exhaustion of the internal appeal procedures'. Furthermore that any reliance on the expired permit for the continued employment of foreign skilled workers constituted unlawful conduct.

The relief now sought in sub-paragraphs 2.1- 2.7 of the notice of motion, had the same effect sought in the urgent application of 18 November 2011. In this matter the applicant sought an 'extension of its expired corporate permit, alternatively the grant of a corporate permit that would enable it to conduct its business operations as if a corporate permit had been granted under section 21 of the Act'.

- [13] The respondents contended that they were entitled to raise the *res judicata*

exception because on a proper consideration of the relief sought, it was the 'same relief, between the same parties and based on same grounds' therefore the matter falls to be dismissed.

- [14] According to the respondents, holders of corporate permits are issued with authorisation certificates which enable them to manage distribution and immigration compliance processes in respect of their large foreign based work force, this being subjected to 'intermittent inspections by the second respondent's officials. A Departmental Directive 22 of 5 June 2007 ('the 2007 Directive') to immigration officers qualified the circumstances under which an application for a corporate permit was to be considered. This was followed by another Directive issued on 29 October 2008 ('the 2008 Directive'). The latter was motivated by a High Court ruling which was aimed at creating a 'uniform policy' in the consideration of applications for corporate permits between the respondents, the Departments of Labour, and Trade and Industry. According to the respondents the issue of the validity and application of the directives were sufficiently justified in 'RM3'

- [15] The respondents averred that there were no reasonable prospects of success in the intended review application and that the previous grants of a corporate permit could not give rise to any legitimate or reasonable expectation to be granted a corporate permit if the present application was not compliant with the criteria in section 21 of the Act. It was contended that it was clear from the business undertaking of the applicant, acting in association with MDS International Skills (Pty) Ltd, as described in documents in support of the application and letters from its clients annexed thereto, that the employment

relationship was that of a labour broker and not one contemplated within the meaning of section 21 of the Act.

- [16] While the respondents have raised several grounds upon which it opposed the application and maintained that this matter be dismissed, I shall deal with only two of those issues being, whether the applicants have made out a case for the relief sought and the issue of separation of powers.
- [17] I understand the application to be that by means of an interim interdict, the applicant seeks to preserve the status quo of its business as existed prior to the expiry of its corporate permit, by the granting of a temporary permit or an extension of the expired permit, pending the finalization of the intended review of the impugned decision of 15 June 2012, rejecting applicant's internal appeal.

It was trite that in order for the applicant to succeed it had to satisfy the requirements of an interim interdict and it had to make out a prima facie case that there were prospects of the impugned decision being set aside on review.

- [18] The impugned decision was incorporated into the respondents' answering affidavit. In the founding affidavit the issues that were to be reviewed are set out in paragraphs 69 to 86 under the heading "The Appeal Decision". It was submitted for the respondents that failure by the applicant's to deal with the impugned decision would make it difficult for this court to find that it had a prima facie prospect of success on review. I am in agreement with this submission.

[19] The issues raised by the applicant under the heading relate to the following conclusions arrived at by the first respondent:

1. That the applicant was a labour broker;
2. That the applicant, namely MDS NDT CONSULTANTS (PTY) LTD and MDS INTERNATIONAL SKILLS (PTY) LTD are one entity;
3. That the directives and policies were ultra vires;
4. That the refusal to grant the corporate permit was arbitrary and/or capricious and or based on an error of law and of fact;

[20] It was clear to me that in dealing with aspects 1 and 2 of paragraph 19 above, and from paragraphs 18 to 30 of 'RM3', that the respondents reasons and conclusions were based on the interpretation and understanding of the documents annexed to the application for a corporate permit and the applicant's grounds of appeal.

[21] My understanding of the decision and the answering affidavit was that, the respondents denied that the applicant was a corporate applicant within the meaning of the Act. According to them, and in order to qualify the applicant had to be:

1. the entity which was the employer of the employees in its own

business undertaking; and

2. be the same entity which was in control of the particular undertaking for which the foreign skilled workers were required and not that the workers be made available for employment in a client's undertaking; and
3. that the applicant should be the same entity/undertaking which engaged with the Departments of Trade and Industry and Labour on issues of compliance.

In the answering affidavit and with regard to point 3 above it was contended that the applicant would not have had to rely on confirmation by its clients that they had complied with the requirements of the Departments of Trade and Industry, before applying for a corporate permit, that is, if it qualified in terms of section 21 of the Act.

- [22] In the heads of argument for the applicant submissions were made that applicant had not been given an opportunity to explain the difference in the two companies; that certain parts of the impugned decision (pages 602-604) had not been part of the original decision; that the first respondent had incorrectly applied certain labour law decisions in its decision. These issues should have raised serious concerns for the applicant about how the appeal was dealt with. The applicant was in possession of the said decision and yet it chose not to fully address the issues raised in the impugned decision in the founding affidavit. If incorrect facts were taken into account in consideration of the application as submitted, then the applicant had a duty to point out such

occurrence to the court and this in my view would assist towards establishing an *prima facie* right.

[23] In my view the applicant should have properly dealt with the issues raised by the first respondent around its relationship with MDS International, as viewed from the documents annexed to the application for a corporate permit and the relevance of Annexure 7 to this application as raised by the respondents in the answering affidavit. The respondents averred that there were letters from clients which formed part of the application which suggested that the employment of foreign skilled workers was not such as contemplated in section 21(1). In reply this suggestion was simply denied and no explanation was given regarding the content of such letters and how the content should have been interpreted.

[24] Again, the applicant disavowed being a labour broker and yet it stated in its papers that in certain instances some of the contracts with clients could fall under section 198 of the Labour Relations Act. It was submitted that the first respondents decision went against government policy on the issue of labour brokers. I presume that by saying so was meant, it did not matter if applicant was indeed a labour broker, because nothing in the Act prevented it from qualification as a corporate client. In this regard, no case was made out on the papers. Furthermore the applicant raised *mala fides* in the conduct of the second respondent. In the founding affidavit mention was made of a disgruntled employee but the applicant failed to point out in the impugned decision how these allegations against this employee and conduct of some of the officials of the respondents were used to influence the impugned decision to the prejudice the applicant. The issues raised in the impugned decision and

the applicants response thereto was the case which the respondents had to answer to in this application.

In my view, and in order to enable me to determine whether the applicant had established a *prima facie* right, it was important that the impugned decision in particular to be addressed, even if it meant having to repeat its case and submissions in the intended review application. After all I am not to determine the merits in the main application, mine is to establish whether a *prima facie* right exists even if same was open to doubt. It was not for me to determine why the issue of labour broking should play or not play a role in the consideration of a corporate permit application. It was for the applicant to show the court that there were prospects in the review by dealing with the grounds upon which it based its case. In addressing the *prima facie* right in the founding affidavit, the applicant referred to annexures (A21, A22, A23, A24.etc.) and did not in the founding affidavit deal with how these would be relevant, for purposes of dealing with the relief sought.

- [25] In dealing with points 3 and 4 of paragraph 19 above, I have to examine what the impugned decision stated .

In “RM3” the first respondent stated that in considering the application for a corporate permit the respondents were mindful of the objective of the Act as set out in its preamble, the provisions of section 21 read with Regulation 18 of the Act. The recommendations from the Departments of Trade and Industry and Labour, had to be considered in order to determine whether the applicant qualified to receive a corporate permit.

[26] Section 21 provided:

- “
- (1) *A corporate permit may be issued by the Director-General to a corporate applicant to employ foreigners who may conduct work for such corporate applicant.*
- (2) *After consultation with the Departments of Labour and Trade and Industry, the Director-General shall determine the maximum number of foreigners to be employed in terms of a corporate permit by a corporate applicant, after having considered:-*

The directives provided:

“if the core business is labour hire or equivalent, the applicant will not qualify for a corporate permit

“.....a corporate permit may only be considered if the corporate applicant intends to employ foreigners to conduct work for such applicant and provided that such foreigner complies with the aims of the Act, namely to increased skilled human resources”

and

The impugned decision:

“Paragraph 39:MDS Consultants persist that they are entitled to be granted a corporate permit, quite apart from the directives....the corporate permits which were issued to it on previous occasions ought

not to have been granted in the light of the nature of its business undertaking....On this basis alone, the facts as objectively set out above, demonstrate that MDS Consultants could not be granted a corporate permit after due consideration of the Department's obligation under the Act..

Paragraph 41 : At the time of applying for a new corporate permit, MDS Consultants knew that the 2007 and 2008 directives were in place"

Paragraph 43 : The contention that the 2008 directive is not compatible with the Act is incorrect..... the directive is entirely consistent with, and was designed to give expression to the objective of the Actaimed precisely to make sure that that the legislative intent is enhanced....to give practical intent to the intention behind the Act as stipulated in paragraphs (d), (h), (i) and (j) of the Pre-amble which indicated the parameters in terms of which officials must act when deciding applications of corporate permits."

[27] In the founding affidavit the applicant stated:

" Paragraph 45: The only reason for the refusal of the corporate permit was that the applicant is allegedly a labour broker. That decision rested upon the validity of the policy document referred to above, which the applicant contends is ultra vires and which should be set aside. There is no legal basis or ground in the Act in any event, for flatly refusing applications for corporate permits by labour brokers.the applicant is not a labour broker in the normal sense of the word, that there is a

difference of opinion regarding the meaning of a labour broker, and that the respondents are acting mala fide."

Paragraph 83:the applicant persists with its claim that the 2008 directive alternatively policy is ultra vires and accordingly unlawful"

Having regard to the above paragraphs in the founding affidavit, and in the impugned decision, it is my view that the applicant has failed to justify the basis upon which it believed that the conclusions of fact and law, based on the documents before it were *ultra vires*. The applicant has also failed to show how the respondents failed to exercise their discretion properly.

- [28] Whether the applicant may suffer irreparable harm and prejudice depended on whether it had on the papers first established a *prima facie* right. In the founding affidavit the applicant contended that it stood to lose R19 273 846 over a period of two years should the worker authorisations remain valid and, that should the applicant cease to exist and close its doors this would result in a loss per annum of R17 280.00. It stated further that the irreparable harm would filter down to the employees and clients and that the employees would lose their livelihood and their employment. It further contended that if the temporary interdict was not granted the consequences would be irreversible and applicant's business relationships would break down. The respondents have stated that the applicant has continued to operate its business without a corporate permit and this was denied. The respondents contended that "RM3" demonstrated that the contracts of employment annexed to the application for a corporate permit and to this application would have expired by the time this application was heard. This was not disputed.

[29] I have already indicated the difficulty presented by applicant's failure to deal with the impugned decision. This also affects those factors addressed by applicant in dealing with the balance of convenience and absence of or an alternative remedy. It was submitted for the respondents that the grant of the interim order would entail lengthy litigation which would have the effect of 'subverting the regulatory framework in the Act to the prejudice of the respondents.

In the urgent application before Bertelsman J a case was been made out for the extension of the permit because some of the contracts were still valid. In this matter the applicant has failed to demonstrate which worker authorisations and employment contracts remained valid or which projects were not completed or were still ongoing after the expiration of the permit and notification of the impugned decision. If the corporate permit and all the contracts of employment which were annexed to the application for the permit and the founding papers had expired, then the purpose for which the permit was procured had fallen away and any extension of the permit to accommodate the situation as prayed for in prayer 2.1 of the notice of motion would constitute a nullity. In the urgent application before Bertelsman J , the corporate permit was extended to allow the process of appeal before the first respondent to be finalized. In these circumstances the application was not about preserving the status quo, it is about the court being requested to step into the shoes of the second respondent and grant a corporate permit.

[30] It was submitted for the applicant that a case had been made out warranting the limitation of the separation of powers and of enabling the court to develop

the law. It was submitted for the respondents that section 21(1) of the Act enjoined the second respondent to consider the application for a corporate permit and did not provide 'either expressly or by necessary implication for a court of law to grant an extension of a permit that has expired or, the grant of a temporary permit 'in circumstances where an application therefore has been rejected or at all'. The relief sought was in essence unlawful in that it constituted a contravention of the principle of separation of powers. I am in agreement with this submission. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at paragraph [44] the following is said:

"The common-law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for the relief has been made out. 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 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"

Paragraph 46

".....when 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.

Paragraph 47

“.....A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimants case may be granted only in the clearest of cases and after a careful consideration of separations of powers harm..... “

(my underlining)

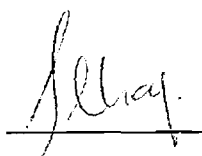
[31] In my view the manner in which the orders sought have been couched demonstrate that the court is required to usurp the regulatory functions of the respondents to such a degree that it would amount to unlawfulness. The applicants have not demonstrated that it had current employees, neither did it demonstrate that it had current projects (except for mentioning names without providing details) or clients whose interests had to be balanced against those of the applicant and the respondents. Of importance is that the impugned decision stated that the decision was taken within the confines of what was presented to it by the applicants and, applicants, as I have already found have not made out a case for the relief sought on an interim basis. The application should fail for the reasons above.

[32] I am also not satisfied that the applicant made out a case for urgency, the facts speak for themselves. The corporate permit expired in November 2011, the impugned decision was made on 15 June 2012 and the applicant still deemed it necessary to engage the first respondent after such decision was made and only issued the urgent application in August 2011 to be heard on

27 August 2012. The matter was then moved to November 2012.

[33] In the result the following order is given.

The application is dismissed with costs to include the costs of two counsel.

A handwritten signature in black ink, appearing to read 'Tlhapi V. V.', is written over a horizontal line.

TLHAPI V. V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	20 NOVEMBER 2012
JUDGMENT RESERVED ON	:	20 NOVEMBER 2012
ATTORNEYS FOR THE APPLICANT	:	McMENAMIN, VAN HUYSSTEEN & BOTES INC
ATTORNEYS FOR THE RESPONDENT:		THE STATE ATTORNEYS