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In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: 15840/2023

In the matter between:

T[...] C[...]	**First Applicant**
L[...] R[...] T[...]	**Second Applicant**
T[...] C[...] obo E[...] T[...]	**Third Applicant**
T[...] C[...] obo M[...] S[...] T[...]	**Fourth Applicant**

And

THE MINISTER OF HOME AFFAIRS	**First Respondent**
THE DIRECTOR GENERAL	**Second Respondent**

Heard: 11 December 2023
Delivered: 22 December 2023

JUDGMENT

LEKHULENI J

Introduction

[1] This application was brought on an urgent basis to compel the first respondent *("the Minister")* and the Director General of the Department of Home Affairs to abide by the court order granted by Mayosi AJ, on 20 October 2023, which order was obtained by agreement. The applicant essentially seeks a declaratory order that the Minister has failed to comply with the said order in that he failed to adjudicate the applicant's review application in terms of section 8(6) of the Immigration Act 13 of 2002 ("the Immigration Act") and to make the outcome available within 40 (forty) calendar days upon granting of the said order. The applicant also seeks an order directing the Minister to comply with the said order without any further delay and within 7 (seven calendar) days of granting this order.

[2] In addition, the applicant prays that should the Minister fail to comply with the proposed declaratory order directing his compliance, the applicant will be entitled to approach this court on the same papers, supplemented, if necessary, for an order declaring the Minister to be in contempt of court and to appear before this court to explain his non-compliance, or any further relief required. The applicant also seeks an order that the Minister be directed to pay the costs of this application on an attorney and client scale.

Factual Background

[3] The applicant asserts in his founding affidavit that in 2016, he obtained a work permit through a third party in South Africa. In 2020, he became aware that his purported work permit was, in fact, fraudulent and that that third party defrauded him. Pursuant thereto, the applicant approached the Department of Home Affairs in good faith to have the situation rectified. The applicant voluntarily submitted the impugned visa to the Department of Home Affairs, seeking a lawful resolution of the matter. Pursuant to section 29(1) of the Immigration Act, the applicant was prohibited from

qualifying for a visa or admission into the republic because of having a fraudulent permit. (prohibited persons)

[4] The applicant then applied in terms of section 29(2) of the Immigration Act through his legal representatives for a declaration of non-prohibition in terms of section 29(2) of the said Act. Section 29(2) provides that the Director General may, on good cause, declare a person referred to in subsection (1), in this case, possessing a fraudulent permit, not to be a prohibited person. The applicant applied to the Director General to be declared a non-prohibited person as per section 29(2) of the Immigration Act.

[5] On 12 April 2021, the Director General rejected the applicant's application in terms of section 29(2). On 17 August 2022, the applicant brought a review application in terms of section 8(6) to the Minister to review the decision of the Director General. In the review application before the Minister, the applicant contended that a declaration of non-prohibition must be based on the Director General's finding of good cause but that there was no apparent effort by the Director General to do so. The applicant asserted that the Director General did not comply with the mandatory and material procedure prescribed by section 29(2) of the Immigration Act. In addition, the applicant contended that an error of law influenced the rejection of his application.

[6] The Minister failed to adjudicate the applicant’s review application timeously. One year lapsed from the date the applicant submitted his section 8(6) review application and has yet to receive a response from the Minister. On 14 September 2023, the applicant brought an application in this court in which he sought an order reviewing the Minister's failure to decide within a reasonable time his review application made in terms of Section 8(6) of the Immigration Act 13 of 2002. The applicant also sought an order in this court directing the Minister to adjudicate his section 8(6) review application and make the outcome available within 30 calendar days of granting the order.

[7] On 20 October 2023, the date of hearing of the application, the parties agreed *inter se* that the Minister's failure to adjudicate on the applicant's section 8(6) review application be reviewed. The parties also agreed that the Minister would adjudicate the applicant's section 8(6) review application and make the necessary outcome available within forty calendar days of granting the order. The parties' agreement was made an order of court in terms of a draft order.

[8] Ordinarily, in terms of the draft order, the Minister should have made his decision on or before 30 November 2023, which is forty days after the order of 20 October 2023. Notwithstanding, the Minister failed to adjudicate the applicant's review application in terms of section 8(6) of the Act. The applicant avers that despite multiple correspondences with the Minister's officials, the Minister failed to respond accordingly. The applicant thus sought an order in this application directing that the Minister must comply with the order of 20 October 2023 within seven calendar days failing, he would be entitled to approach this court on the same papers to have the Minister declared in contempt of court and directed to appear before this court to explain his non-compliance and contempt.

Submissions by the parties

[9] At the hearing of this application, Ms Ristic, who appeared for the applicant, submitted that the order of 20 October 2023 was by agreement. The delay in the adjudication of the review application was unreasonable. Counsel further submitted that court orders must be respected and not flaunted with impunity. Ms Ristic contended that the applicant's attorney went the extra mile to engage the respondent's officials in good faith, and there was no positive response. Counsel implored the court to direct the Minister to comply with the order of 20 October 2023 within seven days of granting this order. Counsel contended further that the court should consider granting costs against the Minister on an attorney and client scale.

[10] Ms Shaik, who appeared for the Minister, argued that this application must be struck from the roll on the grounds of urgency. Ms Shaik further submitted that this matter was not urgent and that there was no evidence whatsoever that the applicant was threatened with deportation. Ms Shaik also challenged the manner of service of this application. According to Ms. Shaik, the Minister was not aware of this application as there was no personal service given to the Minister. She also suggested that the application should have been served personally to the Minister before holding him accountable for being in contempt of court. In her view, the Minister cannot be held in contempt if the application is served upon a clerk in his office. It was further contended that this matter came to the attention of the State Attorney when the application was served on them on 6 December 2023. Ms Shaik urged this court to remove this matter from the roll.

Applicable Legal Principles and Discussion

In limine – Urgency

[11] In urgent applications the applicant must show that he will not otherwise be afforded substantial redress at a hearing in due course. See *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137F. As discussed above, this matter was instituted on an urgent basis and heard by the urgent court. The Minister's legal Counsel impugned this procedure and submitted that the applicant should have proceeded in the normal course as there was nothing urgent in the matter. Furthermore, Ms Shaik submitted that the applicant would be afforded substantial redress at the hearing in due course. For this reason, Ms Shaik implored the court to remove the matter from the roll.

[12] It is common cause that this court made an order by agreement on 20 October 2023 that the Minister must decide on the review application of the applicant in terms of section 8(6) of the Immigration Act within forty calendar days from the date of the court order. It is also common cause that, to date, that order has not been complied with. The

Minister still needs to decide on the applicant's review application. Thus, the Minister is in breach of the court order granted on 20 October 2023. Notwithstanding, the applicant brought this application to compel the Minister to decide within 7 (seven) calendar days from the date of the court order.

[13] It must be stressed that the object of contempt proceedings is the imposition of a penalty to vindicate the court's honour consequent upon the disregard of its order and to compel the performance thereof. See *Ferreira v Bezuidenhout* 1970 (1) SA 551 (O) at 552. In *Protea Holdings Ltd v Wright & Another* 1978 (3) SA 865 (W) Nestadt J, as he then was, observed that if it is established in committal proceedings that the guilty party continues to disregard the order of court the element of urgency sufficient to justify seeking relief by way of urgent application is thereby established. I agree with this conclusion, especially considering the circumstances of this matter.

[14] It is irrefutable that the applicant is prejudiced by the delay in that his status and that of his family in South Africa remains in limbo. The bureaucratic inefficiency within the Department of Home Affairs violates his family's rights to dignity and the right to live together without the daily fear and threat of his possible deportation. Crucially, accountability, responsiveness and openness on State organs are the fundamental cornerstones of our Constitution. The failure of the Minister to comply with this court's order is a serious infringement on the integrity and the honour of this court. It also seriously infringes on the applicant's constitutional right to just, procedurally fair, and lawful administrative action envisaged in section 33 of the Constitution, read with section 3 of the Promotion of Administrative Justice Act 3 of 2000.

[15] In his application to compel the Minister to comply with this court's order dated 20 October 2023, the applicant is seeking to preserve the integrity of the rule of law, which requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, be maintained consistently. Therefore, in my view, this application is urgent in the context of all these factors. Ms Shaik's preliminary point that this matter is

not urgent must fail. I turn to consider the second preliminary point, that of the personal service on the Minister.

Was the Minister properly served the order and the application?

[16] Ms Shaik also submitted that the Minister is not aware of this application as the application was not served personally to him but to a clerk at the Minister's office. Counsel also submitted that the application was also served at the office of the State Attorney on 06 December 2023. Ms Shaik submitted that this application should have been served personally upon the Minister. For this reason, the contention proceeded, this matter must be struck from the roll as service upon the Minister is defective.

[17] It is a cornerstone of our legal system that a person is entitled to notice of legal proceedings against such person. *Interactive Trading 115 CC v South African Securitisation Programme* 2019 (5) SA 174 (LP) at 176D–F. Rule 4 of the Uniform Rules of Court regulates the service of processes. For completeness, rule 4(9) provides as follows:

> 'In proceedings in which the State or an organ of state, a Minister, a Deputy Minister, a Premier or a Member of an Executive Council in such person's official capacity is the defendant or respondent, the summons or notice instituting such proceedings shall be served in accordance with the provisions of any law regulating proceedings against and service of documents upon the State or organ of state, a Minister, a Deputy Minister, a Premier or a Member of an Executive Council.'

[18] In terms of rule 4(10), whenever the court is not satisfied as to the effectiveness of the service, it may order such further steps to be taken as it deems fit. In terms of this subrule the court has a discretion, should the circumstances demand it, to order that some further steps be taken to bring the matter to the notice of the defendant or

respondent. Importantly, section 2(2) of the State Liability Act 20 of 1957 *("the State Lability Act"),* as amended, provides as follows:

> "The plaintiff or applicant, as the case may be, or his or her legal representative must-
>
> (a) after any court process instituting proceedings and in which the executive authority of a department is cited as nominal defendant or respondent has been issued, serve a copy of that process on the head of the department concerned at the head office of the department; and
>
> (b) within five days after the service of the process contemplated in paragraph (a), serve a copy of that process on the office of the State Attorney operating within the area of jurisdiction of the court from which the process was issued."

[19] This section is bolstered by section 5(1)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002, which provides that 'any process by which any legal proceedings contemplated in section 3(1) (for the recovery of a debt against the State) are instituted, must be served in accordance with the provisions of section 2 of the State Liability Act 20 of 1957'. There are exceptions to this rule in section 5(1)(b) of the said Act. However, those exceptions are not relevant for present purposes.

[20] From a careful reading of these statutes, I do not understand them to be prescribing personal service of court process on the Minister himself. Importantly, these provisions must not be interpreted in a vacuum. There is an injunction in section 39(2) of the Constitution which enjoins courts, when interpreting any legislation, to promote the spirit, purport, and objects of the Bill of Rights. An interpretation of these provisions that better promotes the spirit, purport and objects of the Bill of Rights must be adopted. Invariably, the right implicated is the Minister's right of access to courts as enshrined in section 34 of the Constitution.

[21] A purposive interpretation of section 2(2) of the State Liability Act indicates that its objective is to ensure that the executive authority, the Minister in this case, is afforded effective legal representation by the State Attorney. See *Minister of Police and Others v Samuel Malokwane* (unreported case number 730/21 (SCA) at para 18. In the present matter, the application was not personally served upon the Minister; however, the application was served on the State Attorney who appeared in these proceedings and represented the Minister.

[22] In my view, there was proper compliance with service as envisaged in rule 4, read with section 2(2) of the State Liability Act. To my mind, the suggestion that the application must be served personally upon the Minister is fallacious and unsustainable. Ms Shaik's reliance on the decision of *Safiri and Another v Mhlanga and Others* (59307/2021 [2022] ZAGPJHC 277 (4 May 2022) is misguided and misplaced. In that case, the applicants sought an order declaring the Minister of Police to be in contempt of an order of court which required the Minister to effect arrest on a party who disregarded a court order. The Minister of Police was not a party to the original application and was not aware of the court order to effect the arrest.

[23] Contrastingly, in this case, the order of 20 October 2023 was obtained with the consent of the Minister. After the order was granted, it was served on Ms Shaik, representing the Minister, on 1 November 2023 by email. The Sheriff also served the said order on the Director General on 06 November 2023. On 08 November 2023, and in abundance of caution, the Sheriff served the order on the Minister via the State attorney's office. Thus, this case is distinguishable from *Safiri and Another v Mhlanga and Others.*

[24] I find it strange and opportunistic to argue that the Minister is not aware of this application. As I mentioned, the 20 October 2023 order, was obtained by agreement with the Minister. Before this application was instituted, there were several email exchanges between the officers representing the Minister and the applicant’s attorneys.

These officials were informed that the applicant intended to bring this application. The application was hand delivered at the office of the State Attorney on 6 December 2023. Pursuant to that service, Ms Shaik appeared at the hearing of this matter and represented the Minister. In my view, there was proper service of the application and the order of the 20 October 2023 upon the Minister. The second point in *limine* Ms Shaik raised, stands to fail. I turn to consider the matter on the merits.

The applicant's application on the Merits

[25] In *Secretary of the Judicial Commission of Inquiry into allegations of State Captur, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC) at para 37, the Constitutional Court confirmed the requirements for contempt of court application as set out by the Supreme Court of Appeal in *Fakie NO v CII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). The court noted that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor, (b) the contemnor was served with the order or had knowledge of it, and (c) the alleged contemnor failed to comply with the order. The court observed that once these elements are established, wilfulness and mala fides are presumed, and the respondent bears an evidentiary burden to establish a reasonable doubt. Contempt will have been established if the respondent fails to discharge this burden.

[27] In the present matter, the respondent did not file any opposing affidavit. The averments in the applicant's affidavit are uncontroverted. On the evidence placed before the court, there can be no doubt that the Minister is in contempt of court. It needs no repetition that on 20 October 2023, this court granted an order by agreement between the applicant and the Minister that the latter would adjudicate the applicant's section 8(6) review application within forty calendar days. Notwithstanding that the order was obtained by consent, the order was served on the Minister's attorneys and on the Minister's office by the Sheriff. In my view, the inevitable conclusion in the

circumstances is that the Minister was aware of the order and knew exactly what it required of him.

[28] In *Pheko v Ekurhuleni City* 2015 (5) SA 600 (CC) at para 66, the court stated that a 'presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and willfulness are presumed unless the contemnor can lead evidence sufficient to create a reasonable doubt as to their existence. Contempt will be established if the contemnor is unsuccessful in discharging this evidential burden.'

[29] As demonstrated above the three elements in this matter have been established. The Minister bore an evidentiary burden to refute the allegation of contempt. The Minister did not file any answering affidavit. In the final analysis, I am of the view that the applicant has succeeded in establishing that the Minister failed to comply with the court order dated 20 October 2023.

Costs

[30] The applicant's Counsel has sought costs against the respondent on an attorney and client scale. Counsel argued that the conduct of the Minister in disregarding a court order clearly attracted a punitive cost order instead of the normal order.

[31] It is trite that the question of costs is a matter of the court's discretion. Generally, costs follow the result, and successful parties should be awarded their costs. This rule should be departed from only where good grounds for doing so exist. *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 3 SA 692 (C). One of the fundamental costs principles is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. See *Union Government v Gass* 1959 4 SA 401 (A) 413. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue

of costs and then make such order as to costs as would be fair in the discretion of the court.

[32] Whilst I note in this matter that the respondent failed to comply with this court's order, I believe that the costs on a party and party scale would indemnify the applicant for all the costs incurred in bringing this application.

Order

[33] In the result, the following order is granted:

33.1 It is ordered that the first respondent has failed to comply with a court order dated 20 October 2023, which was granted by agreement in terms of which the first respondent ought to have determined the first applicant's review application made in terms of Section 8(6) of the Immigration Act 13 of 2002 within 40 days from date of court order.

33.2 The first respondent is directed to comply with the order dated 20 October 2023 within 10 (ten) court days of this order.

33.3 Should the first respondent fail to comply with this second order directing his compliance, then the applicant shall be entitled to approach this court on the same papers supplemented if necessary for an order declaring the first respondent to be in contempt of court and to appear before the court to explain his non-compliance or any further relief required.

33.4 The first respondent is ordered to pay the cost of this application on a party and party scale.

LEKHULENI JD
JUDGE OF THE HIGH COURT

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