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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2016/14517**

(1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

.....  
DATE

.....  
SIGNATURE

In the matter between:

**SABINA ILYAAS BHAYAT  
(born HANIF SHAIKH)**

**APPLICANT**

**And**

**MINISTER OF HOME AFFAIRS  
MR MALUSI GIGABA**

**FIRST RESPONDENT**

**DEPARTMENT OF HOME AFFAIRS  
MR MKUSELI APLENI**

**SECOND RESPONDENT**

**SAUDI ARABIAN AIRLINES**

**THIRD RESPONDENT**

**ARM-ANALYTICAL RISK  
MANAGEMENT**

**FOURTH RESPONDENT**

**ACSA – AIRPORTS COMPANY OF**

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**J U D G M E N T**

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**TWALA AJ**

[1] Applicant brought this application on urgent basis seeking an order in following terms:

- A. That this application be heard in terms of Rule 6 (12) as a matter of urgency and that the time limits as set out in the Rules pertaining to service and filing be departed with;
- B. That Sabina Ilyaas Bhayat, born 16 July 1987 with current Indian Passport number N..... be released into the Republic of South Africa (“the Republic”) forthwith from wherever she is being detained;
- C. The Respondents be interdicted from deporting the above named Sabina Ilyaas Bhayat pending finalisation of the investigation into the reason for her refusal into the Republic by the First and Second Respondents and finalisation of an internal review of the First and Second Respondents’ decision;

- D. Interdicting and restraining the Respondents from unlawfully removing the said Sabina Ilyaas Bhayat from the Republic.
- E. Directing the First and Second Respondents to pay the costs of this application in the event of opposition on an attorney and client scale.

[2] The First and Second Respondents filed their opposing papers to this application.

[3] Due to the urgency of the matter, I made an order dismissing the application, with the applicant to pay the costs thereof. The reasons for my judgment are to appear hereunder.

[4] Applicant contends that he is the husband of Sabina Ilyaas Bhayat (born Hanif Shaikh), an Indian National with Passport Number N2..... She was issued with her previous Indian Passport under her maiden name with Passport Number F4..... She is also a holder of a South African Relative Permit issued to her by the office of the second respondent on 8 May 2015 with an expiry date of 7 May 2020.

[5] It is contended further that there are two (2) minor children born of the marriage between the applicants, the youngest being two (2) years old and the other is six (6) years old.

- [6] The applicants left the Republic on the 13 April 2016 to attend a religious pilgrimage in Saudi Arabia and returned to the Republic on the 27 April 2016 aboard a Saudi Airline flight from Jedda. On arrival at OR TAMBO International Airport, at the Immigration Desk, the applicant was stopped by an Immigration Officer and was taken into the Immigration Office where she was advised that she would not be allowed to enter the Republic. She was subsequently escorted to the facility of the fourth respondent where she was advised that she was to be arraigned for deportation.
- [7] The applicant was never furnished with proper reasons as to why she was refused entry into the Republic and arraigned for deportation.
- [8] The first and second respondents contend that the matter is not urgent for the applicant has not exhausted all the internal remedies available to her in terms of section 8 of the Immigration Act. Applicant is refused entry in the Republic for she was in possession of a fraudulent permit. She was issued with the notification regarding the right to request the review by the Minister of Home Affairs of the decision of the Immigration Officer. Further, applicant was issued with a notification that she is an Illegal Foreigner and is Refused Admission in the Republic.

- [9] It is the first and second respondents' contention that, according to the Department's Movement Control System, the applicant, Ms Sabina Hanif Shaikh, the holder of Indian Passport number F4....., last travel details were recorded on the 24 March 2008 when she entered the Republic at OR Tambo International Airport. Further, that the purported Relative's Visa endorsed on page 9 of passport number F4....., bearing reference number T..... and control number a0..... is a fraudulent visa which was not issued by the Home Affairs Department; Directorate: Permit Functional Services and Visa Management. Its details were fraudulently captured on the Movement Control System by user-id B..... on 16 May 2015. There is no record that an application with reference number T..... was submitted at a VFS office.
- [10] Counsel for the applicant contends that the applicant was not given adequate notice and reasonable explanation why she is not allowed to enter the Republic. Her constitutional rights to freedom and her right to human dignity have been infringed by the respondents. She is married with two minor children and she is on forced separation from her family by the behaviour of the respondents.
- [11] Counsel for the respondents argues that the matter is not urgent for the applicant has not exhausted all internal remedies available to it. The laws of the Republic prohibit someone to enter the Republic if that person is found to be using fraudulent documents. Applicant is

not detained by the Republic but is in the hands of the airline that brought her to the Republic. Applicant has the right to apply for the review of the decision of Immigration Officer by the Minister of Home Affairs in terms of Section 8 of the Immigration Act, Act 13 of 2002 (“the Act”) as amended. Applicant has chosen not to exercise her right to review the decision in terms of the Act.

[12] Section 12 of the Constitution of the Republic of South Africa, Act 108 of 1996 (*the Constitution*) provides as follows:

“12 *Freedom and Security of the person*

(1) *Everyone has the right to freedom and security of the person, which includes the right-*

a) *Not to be deprived of freedom arbitrarily or without just cause;*

b) *Not to be detained without trial;*

c) *To be free from all form of violence from either public or private sources;*

d) *.....*

[13] I agree that this matter deserves the urgent attention of this Court for the freedom of an individual is in issue in this case. However, section 36 of the constitution provides for the limitation of such rights in certain instances.

[14] Section 36 of the Constitution provides as follows:

*Limitation of rights*

*“36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

- a) The nature of the right;*
- b) The importance of the purpose of the limitation;*
- c) The nature and extent of the limitation;*
- d) The relation between the limitation and its purpose; and*
- e) Less restrictive means to achieve the purpose.*

*(2) Except as provided in subsection (1) or in any other provision of Constitution, no law may limit any right entrenched in the Bill of Rights”.*

[13] It is apparent from the papers that applicant has been denied entry into the Republic in terms of section 29 (b) (vi) of the Act. She is a prohibited person by virtue of the fact that she is in possession of a fraudulent relative visa. It is my view therefore that applicant is not in unlawful detention but is detained by operation of the law of general application. She has been interviewed by an Immigration Officer and was informed of the decision and the reasons therefore. Form 5 was completed and she signed it acknowledging receipt thereof.

[14] Section 8 of the Act provides as follows:

- (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), the request shall be submitted to the Minister within three days after that decision;*
- (2) .....
- (3) .....

[15] I agree with the respondents’ contention that the applicant has not exhausted all the internal remedies available to it in terms of the Act. She has not applied to the Minister for review of the decision of the Immigration Officer as prescribed by the Act. She cannot therefore approach this Court for relief on urgent basis and/or at all unless she has exhausted the internal remedies as provided by the Act otherwise her application is premature.

[16] Section 7 of the Promotion of Administration of Justice Act, Act 3 of 2000 (PAJA) provides as follow:



*“7. Procedure for judicial review*

- 1) .....
- 2) (a) *Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.*
- (b) *Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*
- (c) *A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice”.*

[17] I agree with Counsel for the Respondents that the applicant’s action before this Court is premature and that this Court may only review the decision of the respondents if exceptional circumstances exist and on application by the applicant. However, the applicant has not shown

the existence of exceptional circumstances and there is no application before this Court which justifies the exemption of the applicant from the obligation to exhaust the internal remedies available to it in terms of the Immigration Act.

[18] In the circumstances, I confirm the order I made at the hearing of this matter which is the following:

- A. The application is dismissed
- B. The applicant to pay the costs of this application.

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**TWALA  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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Date of Hearing:

**29 APRIL 2016**

Date of Judgment:

**24 MAY 2016**