IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***24th November 2017*** Signature: _____

CASE NO: 2017/41653

In the matter between:

MECNER: DANIEL	Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL: DEPT OF HOME AFFAIRS	Second Respondent
JAYNARAJAN: NISHAAL	Third Respondent
SEBOGA: BANYAMME	Fourth Respondent

JUDGMENT

ADAMS J:

[1]. This is the return day of a *rule nisi* in an urgent application.

[2]. On Sunday, the 19th November 2017, at about 21H00 I granted a provisional order in the following terms:-

1. Permitting the matter to be heard as one of urgency and dispensing with the time limits relating to the service of affidavits.

2. Interdicting the officials of the second respondent located at the International Section of O R Tambo International Airport from deporting the applicant.

3. Ordering the officials of the second respondent located at the International Section of O R Tambo International Airport to permit the applicant entry into the Republic of South Africa.

4. Prayers 1, 2 and 3 above shall act as a *rule nisi* and the second respondent is called upon to show cause on Thursday, the 23rd November 2017, in this court why the order should not be made final.

5. Cost reserved.

[3]. The aforementioned provisional order was premised on a previous order granted by this Court (Mia AJ), which provided thus:

1. The decision of the second respondent declaring the applicant to be a prohibited person as contemplated by the provisions of s 29 of the Immigration Act, 13 of 2002 ('the Act'), is hereby set aside;

2. The applicant is hereby declared not to be a prohibited person in terms of provisions of s 29 (2);

3. The applicant is permitted to enter the Republic of South Africa on condition that the applicant obtains a visa as contemplated by s 10 and / or s 11 of the Act for the prescribed period in order to allow the applicant to apply for a business visa;

4. The respondents are hereby ordered to forthwith and within no more than 48 hours of the granting of this order, update and amend their records so as to reflect the import and intent of paragraphs 1, 2 and 3 hereinabove.

[4]. My order of the 19th of November 2017 was pursuant to an urgent application issued on that day on behalf of the applicant, who had arrived in the country on a flight from Dubai. He arrived at approximately 11H30, and on his arrival he was refused entry into the country, the reason given to him for such refusal being that his visa is invalid. This is not the first time that the applicant experienced problems in relation to the visa on which he attempted to enter the country. The said visa was supposedly issued by the Department of Home Affairs at its Pretoria Head Office on the 8th of March 2015, with a 'permit expiry date' of 19th March 2019. The problems with the visa started for the applicant during or about August 2015 when it was established that the visa was invalid and a forgery. Before then the applicant had apparently travelled into and out of South Africa on the visa on at least two occasions. However, during August 2015 when the trouble with the visa manifested itself and started causing problems for the applicant, he was declared a prohibited person as contemplated by s 29 of the Act. He was in fact then deported.

[5]. The application heard by Mia AJ was a review application in terms of s 6 the Promotion of Access to Administrative Justice Act, 3 of 2000 ('PAJA'), and in terms of her order the applicant's status as a 'prohibited person' was uplifted.

That application did however have very little, if anything, to do with the validity or otherwise of the applicant's visa. In fact, the order of Mia AJ was premised on the assumption that the said visa was a forgery and fraudulently obtained. The applicant's founding affidavit in the PAJA application was also clearly premised on the fact that the visa is a fraud. In that regard, he states the following at par [16] of his founding affidavit: 'At the outset, I emphasise to the court that I was unaware my visa was fraudulent'.

[6]. There can be no doubt that the visa is fraudulent. It was fraudulent during 2015 and it is a fraud now. The applicant seems to suggest that he was under the impression that the invalid visa had now somehow been regularised. This thinking defies logic – how is it possible to think, as the applicant would have us believe he did, that a visa, which by all accounts was invalid and a fraud during August 2015, and therefore to be regarded as *pro non scripto*, could magically transform itself into a valid official visa? Moreover, the order by Mia AJ makes it abundantly clear that there is an onus on the applicant, whose 'prohibited person' status was uplifted by the order, to obtain a valid business visa. How, in these circumstances, could the applicant believe that he had a valid visa to enter South Africa?

[7]. I do not agree with the submission by Mr Cohen, Counsel for the applicant, that the allegation by the Department of Home Affairs that the applicant is in possession of a fraudulent visa is absurd, factually incorrect and vexatious in the light of the order by Mia AJ. As I indicated above, a valid visa does not follow as a fact the fact that the 'undesirable person' status had been uplifted. The applicant was still required to obtain a valid business visa as he was ordered to do by Mia AJ. The criticism against the affidavit on behalf of the Department of Home Affairs is, in my view, not warranted. What is absurd is the fact that the applicant knowing full well that he is not in possession of a valid visa, takes a chance and arrives in the country on a fraudulent visa in the hope that he would be able to enter the country undetected.

[8]. I also cannot agree with the submission by Mr Cohen that because the applicant had travelled out of the country and back on two occasions on the visa demonstrates that the visa was valid. Those occasions were before the fraud was detected. After the fraud was detected, the visa, it is common cause, is invalid. How the applicant can claim that the visa is now valid boggles the mind and is difficult to comprehend.

[9]. I find myself in agreement with the submissions on behalf of the Department that the applicant, when moving the ex parte application on Sunday, the 19th November 2017, ought to have disclosed the fact that the visa is a fraud. He ought not to have side – stepped the issue as he did.

[10]. For these reasons and understandably so, the respondents did not comply with the court order of the 19th November 2017, which resulted in a further urgent application by the applicant to have certain members of the second respondent declared to be in contempt. This contempt application was moved on Tuesday, the 21st November 2017. This time around there was opposition by the State, and its Counsel advised me at the brief hearing of the matter that the Department of Home Affairs required more time to file opposing papers. Pursuant to this request, I granted the following provisional order:-

1. Dispensing with the form and service relating to the service of affidavits and hearing the application as one of urgency and permitting the matter to be heard as one of urgency;

2. Placing the third respondent and the fourth respondent (one Nishaal Jaynarajan and one Banyamme Seboga, officials in the employ of the second respondent) in contempt of the court order of the 19th November 2017;

3. Imposing such sentence upon the third and fourth respondents as to this Court seems meet;

4. Suspending the provisions of paras [2] and [3] above on condition that the said respondents comply with the order;

5. The respondents shall not deport the applicant pending the *rule nisi* return date on the 23rd November 2017;

6. This application is postponed to the 23rd November 2017 to be heard together with the *rule nisi*;

7. The respondents shall file an answering affidavit by 16H00 on the 22nd November 2017; and

8. Cost reserved.

9. In view of what I have state supra the applicant was not entitled to the interim relief granted to him on the 21st November 2017. He should not have brought that application as he knew or ought to have known that he has no right to be in the Republic of South as he is not in possession of a valid visa. As I stated, this aspect of the matter has no relevance to the fact that his 'undesirable' status had been uplifted by the order of Mia AJ, What the applicant should have done was to apply afresh for a new validly issued visa.

10. Mr Cohen has also applied that the matter be referred to oral evidence. I am of the view that such a referral would not serve any purpose. By all accounts, and even on the version of the applicant, the visa is invalid. In any event, this is the urgent court and the applicant should have anticipated at the very least this factual dispute, if it is a dispute.

11. In these circumstances, the applicant was not entitled to bring the application on the 19th November 2017 and the subsequent application on the 21st November 2017. He also had no right to the interim relief he obtained pursuant to the first application. Similarly, the application to have the officials of the second respondent placed in contempt of court, should not have been launched and stands to be dismissed.

12. As regards costs, I can think of no reason why the cost should not follow the suits.

Order:

Accordingly, I make the following order:-

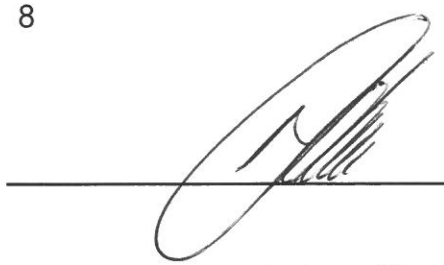
1. The *rule nisi* issued against the first and second respondent on the 19th November 2017 be and is hereby discharged.

2. The applicant's urgent application of the 19th November 2017 against the respondents is dismissed.

3. The applicant shall pay the cost of the respondents relating to the urgent application of the 19th November 2017.

4. The applicant's urgent application dated the 21st November 2017 against first, second, third and fourth respondents is dismissed.

5. The applicant shall pay the cost of the first, second, third and fourth respondents relating to the urgent application dated the 21st November 2017.



L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

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HEARD ON:	19th, 21st and 23rd November 2017
JUDGMENT DATE:	24th November 2017
FOR THE APPLICANT:	Adv S Cohen
INSTRUCTED BY:	Thomson Wilks Incorporated
FOR THE RESPONDENTS:	Adv
INSTRUCTED BY:	The State Attorney