IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 041947/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 16 August 2023

Signature

In the matter between:

BORIS GEORGE SAVVAS	**1st Applicant**
TAMY APARECIDA YASUE	**2nd Applicant**

And

THE MINISTER OF HOME AFFAIRS	**1st Respondent**
THE DIRECTOR - GENERAL: DEPARTMENT OF HOME AFFAIRS	**2nd Respondent**

JUDGMENT

SETHUSHA-SHONGWE AJ

Introduction:

[1] This matter started as an urgent application against the Department of Home Affairs (DHA), both the Minister and the Director General cited (DG), for hearing on 06 December 2022 for an interim relief pending an appeal/review to the Director General (DG), for a Spousal visa. The Applicants served the Respondents with this application for an interdict. The Respondents failed to file and serve a notice to oppose until the day before the hearing. On 06 December 2022 both counsel agreed to stand the matter down until the next Thursday, however the presiding Judge Thusi J, was not in agreement with both counsel and proceeded to grant a Rule Nisi with a return date of 2 March 2023.The order, called upon the Respondents to show cause why the order should not be made final. The order reads as follows:

"1.1 Pending the reconsideration by the Director General of the application by Tamy Aparecida Yasue of a spousal visa or residence permit, and any further internal or judicial appeals, or reviews that might ensue, Tamy Aparecida Yasue, holder of Brazilian Passport No F[...] is hereby granted the right to:

1.1.1 Move in and out of the Republic of South Africa as if she were a permanent resident and all persons commanding border posts or any part of entry of the RSA are hereby required to give effect to this order.

1.1.2 Subject to the requirements of the South African Revenue Services, to work and do business in the Republic."

1.2 Without in any manner derogating from a foregoing order, the first or second Respondents and any person commanding any border post or port of entry are ordered to issue forthwith and on demand whatever "visa" or "permit" might be needed to give better effect to the aforegoing orders.

1.3 In the event of the spousal relationship aforesaid ending for any reason whatsoever, (a) the aforegoing provisions of this order shall lapse and be of no further force and effect and (b) the applicants, separately, shall be obliged, to advise the Department of Home Affairs in a manner to be designated by the said Department, accordingly.

1.4 It is declared that Tamy Aparecida Yasue has been in a permanent spousal relationship with Boris George Sawas (RSA ID 5[...]) since 13 March 2020.
The matter is to proceed further in terms of Rule 6(5)(d)(ii)."

[2] 28 February 2023 the Applicants enrolled the matter in terms of rule 6(11) for hearing on 2 March 2023 on urgent basis, amongst other relief sought by the Applicants was that the Respondents should be ordered to issue under section 11(6) of the immigration Act to the 2nd Applicant within 3 working days thereof a visa, unlimited as to time, alternatively for a period of 3 years which include the terms of a work and business visa, alternatively the Respondents be ordered to issue and deliver letters to the same effect. Further the applicants sought relief for the Rule Nisi granted by the court on 6 December 2022 to be confirmed on 2 March 2023. Khumalo J, struck the matter from the roll due to lack of urgency with costs. Barn J extended the rule Nisi to 2 May 2023 hence the mater came before me.

[3] The Applicants approached the court under rule 6(12) and sought an order in the main that pending the finalization of an appeal (inclusive of any domestic and judicial reviews and appeals) by 2nd Applicant which is current in terms of section 8 (3) and section 8(4) of the Immigration Act against the 1st applicant instance refusal of what is referred to as a "spousal visa" the 2nd Applicant be free or entitled to travel in and out of the Republic as well as to work and do business".

[4] The Respondents opposed the application on the basis that the second Applicant did not meet the requirements for a spousal visa and that the department of Home Affairs was correct to reject the 2nd Applicant's application for a spousal visa. And that the order granted on 6 December 2022 should not have been granted, it ought to have failed and be dismissed, thus, they pray that the rule nisi be discharged with costs.

Factual background:

[5] The second Applicant is a Brazilian national who came to South Africa as a visitor or tourist in February 2020. In March 2020 the Applicants lived together as husband and wife, in these proceedings in can be accepted that they have been in a

"spousal relationship" since then. Owing to the pandemic and backlogs within the Department of Home Affairs (DHA), the second Applicant was unable to renew her visitor's visa. She and the first Applicant tried many options to regularise her status in the country, for instance they decided to marry, so many options were explored but eventually decided to apply to the Department of Home Affairs (DHA) for a spousal visa as prescribed by the law.

[6] The application for a spousal visa was rejected by the Department of Home Affairs (DHA) on the grounds that the second Applicant had not been in a spousal relationship with the first Applicant for two years. And further the second Applicant was required to file an appeal/review to the DG within ten (10) days of the rejection letter through the Visa Facilitation Services Centre (VFS). The second Applicant lodged the appeal/review through the Sheriff, which was contrary to the prescribed procedure. Thus, the DG contends that there is no appeal/review before it. The Applicants insist that service through the sheriff is sufficient and proper whereas the Respondents contend that it is a prescribed procedure to lodge the appeal/review through the VFS.

Legislative frame:

[7] It must be born in mind that the legislative frame work in this matter involves to a greater extent, the Constitution of the Republic of South Africa, specifically, section 21 (1) to (4) dealing with freedom of movement and residence. The Immigration Act 13 of 2002 (The Act), specifically section 11 (6) dealing with that a visitor's visa may be issued to a foreigner who is a spouse of a citizen or permanent resident.
Regulation 3 (1) and (2) providing for a permanent relationship and provides that an Applicant for a visa in terms of the Act who asserts in her application to be a spouse, must prove to the satisfaction of the DG that he or she is a spouse to a citizen.

Discussion:

[8] The Applicants contended that the application for a spousal visa was rejected without a valid reason in that there is no law that prescribes a period of two years for

the spousal relationship to have subsisted at the time when the spousal application is made. The Applicants conceded in their founding affidavit that at the time of making the spousal visa application they had not been in a permanent spousal relationship for two years. In their supplementary heads, the Applicants concede that the Rule-Nisi was granted without hearing the DHA, for the DHA to show cause why the Rule-Nisi should not be made final. The Applicants also contend that the DG has not responded to the appeal/review that they have served and filed through the sheriff. Hence, they rushed to court to obtain an interim interdict.

[9] On the other hand, the Respondents contend that, the application for spousal visa was rejected because the Applicant's spousal relationship was less than two years in existence at the time the application was lodged and refers to Regulation 3(2)(a)(i) of the Regulations to the Act. The Respondents further contend that the appeal/review was supposed to have been lodged through the VFS, which system is known to the applicants. Alternatively, the respondents, argue that the Applicants could simply have served a fresh spousal visa application, after the first was rejected, because then the Applicants qualified as their relationship was more than two years old.

[10] What is known as the *Plascon-Evans* Rule is relevant in this matter. In motion proceedings wherein factual disputes arise, therefore, relief should be granted only if the facts stated by the Respondent, together with admitted facts in the Applicant's affidavits, justify the order. Simply put the court should decide the matter on the respondent's version. I am of the considered view that granting of the interim interdict was erroneous and premature. The effect of the order is such that the DHA is interdicted from properly exercising control over the movement of foreign nationals in and out of the country. In actual fact the interim order subverts the DHA's duty to properly consider and determine conditions of visas, such as permits to work or do business.

[11] For the Applicants to succeed to obtain an interdict, the following requirement must be met; (a) prima facie right though open to some doubt, (b) a well-grounded apprehension of irreparable harm should the interim relief not be granted, (c) a favourable balance of convenience, (d) the absence of any alternative remedy. In my

view the applicants have not made allegations demonstrating any or all of the requirements of an interim relief pending review despite the clear interdictory consequences of the order as granted. The application does not establish that the second applicant, being a foreigner, has a prima facie right which ought to be protected. The rights as alleged in relation to the second applicant are subject to compliance with any statutory requirements attached to the temporary or permanent residence permit. The application fails to allege any harm which is imminent or demonstrate how the harm will ensue, in order to justify the order granted. The applicants simply failed to apply for a visitor's visa for a period longer than 90 days as prescribed in the Act. The application does not demonstrate that the balance of convenience is in favour of the order granted, which is essentially an interdict against the exercise of statutory powers.

[12] Simply put the applicants did not meet the requirements of a spousal visa as provided for in terms of the legislation. The requirement for a spousal visa includes, inter alia, that the relationship must have subsisted for not less than two years. The applicant conceded that their relationship was less than two years at the time of the application for spousal visa. The application was rejected on that basis, which was quite correctly so rejected. See Regulations 3(2)(a)(i) of the Regulations to the Act. The second Applicant failed to lodge the appeal/review in the prescribed manner, thus, there is no appeal/review before the DG to be considered. The Applicants are aware that the process of lodging through the VFS does exist, the first application for a spousal visa was lodged through the VFS, it is now surprising that they decided to lodge or serve through the sheriff. Because there is no appeal/review pending, paragraph 1.1 of the interim order is impossible to implement or execute.

[13] The interim order granted offends against the separation of powers principle. The duty to achieve the object and purpose of the Act is entrusted in the executive. Clearly the DHA is better suited than the court to make a decision in respect of the rights granted by the court order. In ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others*** 2012 (6) SA 223 (CC), it was held that for as long as the interim order is in place, the order has the effect of preventing the national executive from fulfilling its statutory and budgetary responsibilities. Before making an order of such a nature a court was obliged to consider - in addition to the

usual common-law requirements for the granting of an interim interdict the doctrine of separation of powers, which barred the judiciary from meddling in legislative or executive unless the intrusion was constitutionally mandated. Such interference, in my view, was unwarranted except where there was proof of unlawfulness, fraud or corruption. In the present case the high court had, by preventing the DHA from performing its statutory duties meddled in fiscal affairs, and done so without even touching on the issue of separation of powers. In the circumstances this court is justified to interfere with the interim order. See also South African Association of personal injury ***Lawyers v Health and Others*** 2001 (1) SA 883 (CC) where the principle of separation of powers is discussed.

[14] In my view, the application was not urgent. The only basis for urgency was the allegation of the right to a spousal relationship and the apparent plans to travel together in the near future. The second Applicant could have made an application for a visitor's visa for a longer duration with conditions permitting departure and entry. Therefore, the matter was not urgent as the Applicants had substantial redress in due course. The declaratory order was unnecessary as it was not in dispute that the Applicants are in a permanent spousal relationship since March 2020. In any event, at the time of the spousal visa application the relationship had not subsisted for at least two years.

Relief:

[15] The interim order cannot be made final as the Respondents showed on a balance of probabilities that the order offends against all the principles mentioned above and is not just and equitable. The interim order ought not to have been granted, therefore, the Rule-Nisi should be discharged with costs.

Conclusion:

[16] Having considered all the submissions by both counsel, I conclude that the rule stands to be discharged, I make the following order:

The application is dismissed and the interim order is discharged with costs.

N.C. SETHUSHA-SHONGWE
Acting Judge of the High Court,
Pretoria

Appearances

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Date of the hearing: 2 May 2023
Date of judgment: 16 August 2023

Judgment transmitted electronically