REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 10043/11

In the matter between:

EISENBERG & ASSOCIATES	**First Applicant**
YUNG-LI YEN	**Second Applicant**
FOKELINA WIJNGAARDEN	**Third Applicant**
IMMIGRATION MANAGEMENT SERVICES SA t/a VISA ONE	**Fourth Applicant**

and

DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	**First Respondent**
DEPARTMENT OF HOME AFFAIRS	**Second Respondent**

DIRECTOR OF IMMIGRATION SERVICES:

WESTERN CAPE **Third Respondent**

Judgment:	**SAVAGE, AJ**
Counsel for Applicants:	**Adv. D Simonsz**
Instructing Attorney:	*Eisenberg & Associates*
Counsel for Respondents:	**Adv. G Papier**
Instructing Attorney:	*State Attorney*
Date of Hearing:	31 October 2012
Judgment delivered:	27 November 2012

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DEPARTMENT OF HOME AFFAIRS **Second Respondent**

DIRECTOR OF IMMIGRATION SERVICES:

WESTERN CAPE **Third Respondent**

Heard: 31 October 2012

Delivered: 27 November 2012

JUDGMENT

SAVAGE AJ

Introduction

[1] The applicants seek a declaration that the first respondent, the Director-General of the Department of Home Affairs, is in contempt of an order of this court granted by Van Staden AJ on 18 May 2012 ("the order"); alternatively, a declaration that the Director-General's failure to comply with the order is inconsistent with the Constitution and unlawful. In addition, an order is sought that the first and fourth applicants within one week file certain internal appeal applications, which applications are to be determined by the respondents within one month of date of the order.

[2] The first and fourth applicants are an immigration attorney and a company specialising in immigration matters respectively, representing 108 applicants for permanent residence. The second and third applicants are foreign nationals who had lodged applications for permanent residence but whose applications had been determined by date of the court order. The respondents, who are responsible for the determination of permanent resident applications, are the Director-General, the Department of Home Affairs ("the department') and the Western Cape Director of Immigration Services.

[3] The order of Van Staden AJ, taken by consent between the parties, concerned 75 applications for permanent residence permits brought in terms of the Immigration Act 13 of 2002. In terms of the order, the Director-General was required to determine and deliver certain listed applications to the first or fourth applicants within two (2) months of the order; and to determine and deliver other applications within three (3) months of the date of the order. Where applications had been misplaced, the Director-General was entitled to copy the misplaced applications from the offices of the first or fourth applicants.

[4] The main application in this matter was launched in May 2011 to review the respondents' failure to determine 110 permanent residence applications, including those of the second and third applicants, of which 35 had been

resolved by the time that the order of Van Staden AJ was made. What underlies such application is the complaint that the determination of applications for permanent residence by the Department of Home Affairs ("the department") is inefficient and burdened by undue delay.

[5] Similar complaints concerning the determination of immigration applications have resulted in orders of the High Court requiring the department and its officials to determine such applications within a specified time period.[1] The effect of such orders has been to compel performance by the department of its statutory function to determine immigration applications as provided in the Immigration Act 13 of 2002.

[6] By 18 May 2012, when the order of Van Staden AJ was made, 75 of the original 110 permanent residence applications remained undetermined. At the time that the current application was launched, 47 of these 75 applications had not been determined. This number was whittled down until when the matter was argued, the respondents accepted that 3 of the 75 applications remained undetermined, while the applicants persisted that 11 applications had not been determined.

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[1] A recent example being the matter of *Eisenberg & Associates and Others v Director General of Department of Home Affairs and Others* 2012 (3) SA 508 (WCC)

In limine

[7] Three issues were raised *in limine* by the parties. The first was disposed of at the hearing and related to the late filing of the Director-General's answering affidavit. This affidavit was due to have been filed by 21 September 2012 but was filed extensively out of time on 16 October 2012 following the applicant's refusal to grant an extension to the respondents. The delay in filing this affidavit was condoned.

[8] The second preliminary issue relates to whether the applicants are entitled to bring this application under the current case number or whether a separate application under a new case number was required. I am satisfied that it would be unnecessarily formalistic to require a new application to be launched under a new case number and that it is permissible to bring this application in terms of rule 6 under the current case number.

[9] The third issue is that of urgency. A lack of urgency will entitle this court in the exercise of its discretion to refuse to enroll a matter[2] or to strike it off the roll. Mr Papier for the respondents submitted that the applicants did not stand to suffer prejudice given that temporary permits were in place and that the

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[2] *Commissioner, SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA) per Cameron JA

matter was not urgent. Little is to be made of this point now given that the matter has been enrolled on the semi-urgent roll, pleadings exchanged and the issues fully ventilated between the parties. Furthermore, the Director-General was required to comply with specific dates in the court order, which dates have now passed. Furthermore, the relief sought in this application relates to this lack of compliance with the order and the matter is for this reason alone urgent.

Contempt of court

[10] It is a crime unlawfully and intentionally to disobey a court order, thereby violating the dignity, repute or authority of the court.[3] In *Fakie NO v CCII Systems (Pty) Ltd*[4] Cameron JA held that a private litigant who has obtained a court order requiring an opponent to do or not do something (*ad factum praestandum*) is entitled to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction.[5] This is a civil proceeding that invokes a criminal sanction or its threat and the court grants enforcement '*because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law*'.[6] The test for

[3] *S v Beyers* 1968(3) SA 70(A) per Steyn CJ
[4] 2006 (4) SA 326 (SCA)
[5] At para 7
[6] At para 8

when disobedience of a civil order constitutes contempt is whether the breach was committed deliberately and *mala fide* which must be proved beyond reasonable doubt.[7]

[11] In *Frankel Max Pollak Vinderine v Menell Jack Hyman Rosenberg*[8] Corbett CJ put it this way -

> '*Once the applicant for relief based upon this form of contempt of court has established that the order of the court has been brought to the knowledge of the respondent and that the respondent has failed to comply with it, wilfulness and mala fides on the part of the respondent will normally be inferred and the onus will be on the respondent to rebut this inference. . .*'

[12] Cameron JA reiterated in *Fakie NO* (*supra*) that a declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.[9]

[13] The application before this court seeks a declaration of contempt of court coupled with an order directing the Director-General to comply with the court

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[7] At para 33
[8] 1996 (3) SA 355 (A) at 367I-J
[9] At para 42

order and determine the applications required in terms of the order within a period of two weeks.

[14] This court may grant declaratory relief in accordance with the provisions of section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 –

> '*in its discretion, and at the instance of any interested person, [to] enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*".

[15] Two requirements must be met for a declaration to be made under section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959. First, a court must be satisfied that the applicant is a person interested in '*an existing, future or contingent right or obligation*'. If this is shown, the court must decide whether the case is a proper one for the exercise of the discretion conferred on it.[10]

[16] Declaratory relief is essentially remedial and corrective and is most appropriate where '*it would serve a useful purpose in clarifying and settling the legal relations in issue*'.[11] In itself it creates no direct legal consequences although it can provide a useful mechanism allowing the court to maintain its

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[10] *Durban City Council v Association of Building Societies* 1942 AD 27 at 32
[11] Edward Borchard Declaratory Judgments (2nd ed) at 299 quoted in *MEC, Department of Welfare Eastern Cape v Kate* at 492A

own institutional role and to reinforce the duties and obligations of other branches of government.[12] While nothing bars an applicant as an interested person in seeking a declaration of contempt if only to reinforce the duties and obligations of government, the efficacy of this approach has been brought into question in *MEC for the Department of Welfare v Kate.*[13] The Supreme Court of Appeal found in *Kate* that the Eastern Cape provincial government's continued failure to comply with court orders compelling it to provide social welfare was sufficient reason to reject the possibility of declaratory relief.

[17] In the current matter, the applicants are interested persons who possess certain rights in terms of the court order of Van Staden AJ. I am satisfied therefore that the first leg of the requirement for declaratory relief is met.

[18] The order of the court has been brought to the knowledge of the Director-General. This is not in dispute. The order required the Director-General to determine and deliver the listed applications to the first or fourth applicants within two (2) months of the date of the order; and to determine and deliver other listed applications within three (3) months of the date of the order. On the facts before the court, when the order was made, 75 of the original 110 permanent residence applications remained undetermined. At the time that the current application was launched, 47 applications had not been

[12] Bishop on Remedies Constitutional Law of South Africa (2nd ed) at 9-176
[13] *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) at 28-29

determined. This number was whittled down until when the matter was argued, a handful of the original 110 applications remained undetermined. All of the applications in respect of which the order applied were not determined within the time periods provided.

[19] In his affidavit the Director-General states that there has not been non-compliance with the order in that *'the cut-off dates were not cast in stone"* and that "*...this much is clear from a reading of paragraph 4 of the [order].'* This contention is without merit. The terms of the order and the time periods within which the applications were to be determined and delivered is patently clear from a reading of the order. The fact that the order permitted in paragraph 4 the respondents to obtain copies of applications mislaid did not alter the time periods within which the applications were to be determined and delivered. It is clear that any entitlement to copies of applications was to be exercised within the time periods required for determination of the applications in terms of the order. The attempt by the Director-General to explain away his obligations in terms of the order on the basis that time periods were not compulsory was ill-advised and does little to display the appropriate regard for an order of court, more so in the context of an order taken by consent between the parties in which, had it not been intended that time periods be framed in compulsory language the respondents were at liberty not to seek an order in such terms.

[20] The Director-General has failed to comply with the terms of the order, as much is clear from the fact that applications had not been determined within the time periods provided in the order. On the reasoning of Corbett CJ in *Frankel* (supra), wilfulness and *mala fides* on the part of the Director-General where the order has not been complied with will 'normally be inferred and the onus will be on the respondent to rebut this inference'. The Director-General is accordingly obliged to establish a reasonable doubt that his failure to comply with the order was not wilful and *mala fide*, failing which contempt will have been established beyond reasonable doubt.

[21] The Director-General denies wilfulness or *mala fides* on his part in his affidavit and suggests that serious departmental capacity and resource problems underlie his non-compliance. He states that permanent residence applications are determined by nine permanent residence adjudicators dealing daily with no less than eighteen applications. Despite 'strained resources' the department has introduced overtime and a special team to determine applications. Difficulties persist in locating files following the department's office move in December 2011 and the department has faced three different court applications, including the current one, involving a total of 1136 applicants.

[22] The applicants seek a finding that the first respondent held the requisite *dolus eventualis* in that he foresaw that his conduct, and the conduct of the

persons in his department to whom he delegated his authority, was leading to a situation where the terms of the order would not be fulfilled but did nothing to address this real risk, reconciling himself to the possibility that his conduct would lead to a violation of the order. In the circumstances, the applicants submit that the Director-General has acted willfully and *mala fide* in his failure to comply with the order and that he is therefore in contempt of court.

[23] The Director-General of a national government department such as the second respondent is responsible for the administration of the department and for oversight of the performance of departmental functions by his subordinates in accordance with the law. The responsibilities of the Director-General include ensuring as a critical task that the department adheres to court orders, including those taken against the Director-General in his capacity as such.

[24] What was lacking from the Director-General's explanation regarding his failure to comply with the terms of the order in full was any expression of an unequivocal resolve to comply and an understanding and acceptance of the importance of doing so in a constitutional democracy. An order of court is not to be complied with by government as and when a governmental official chooses to do on a piecemeal basis. The determination of the applications that were the subject of the order warranted an intervention by the Director-

General that was characterised by a sense of urgency and an appreciation of the adverse consequences that would follow if this was not done, all of which were lacking in the case at hand. Yet, at best, what the main application, the order and the current application achieved was a slow determination of applications in response, in the shadow of the compulsion of court process and order.

[25] The importance of ensuring compliance to court orders was emphasised by Froneman J in *Magidimisi v Premier of the Eastern Cape and Others*[14] -

> '*In a constitutional democracy based on the rule of law final and definitive court orders must be complied with by private citizen and the state alike. Without that fundamental commitment constitutional democracy and the rule of law cannot survive in the long run. The reality is as stark as that.*'

[26] The compulsion contained in section 165(5) of the Constitution that court orders are binding lies at the heart of the judicial authority of the Republic and the state holds a constitutional duty to ensure that court orders are adhered to and enforced.[15] Yet in *Nyathi v MEC for Department of Health, Gauteng and Another*[16] it was noted with concern that –

> '*...courts have been inundated with situations where court orders have*

[14] [2006] ZAECHC 20 (25 April 2006)
[15] Woolman et al Constitutional Law of South Africa Vol 1 (2nd edition) at 3-31
[16] 2008 (5) SA 94 (CC) at para 60

been flouted by State functionaries, who, on being handed such court orders, have given very flimsy excuses which in the end only point to their dilatoriness. The public officials seem not to understand the integral role that they play in our constitutional State, as the right of access to courts entails a duty not only on the courts to ensure access but on the State to bring about the enforceability of court orders".

[27] That the Director-General should have done more to ensure compliance with the order is not in doubt. It is clear that in failing to do so, the Director-General acted contrary to the law. However, for this court to find that the conduct of the Director-General was wilful and *mala fide* requires a conclusion that the Director-General intentionally failed to comply with the order and that he did so in bad faith. I accept that such intention may take the form of *dolus eventualis* in that in failing to comply with the court order the Director-General subjectively foresees the possibility that the order may not be complied with but recklessly reconciles himself to the possibility.[17]

[28] I am not persuaded however that intention on the part of the Director-General has been proved, or that his conduct has been proved to be *mala fide*. Goldin J in *Haddow v Haddow*[18] stated that '*(n)ot every breach of an order of Court justifies committal for contempt.*' This is such a case. The conduct of the

[17] CR Snyman Criminal Law (5th ed) at 184
[18] 1974 (2) SA 181 (R) at 182H-183D

Director-General has not been shown to be *mala fide* or willful although he has acted in breach of the order of this court. A finding of contempt can in these circumstances not follow.

[29] Kollapen J stated in *Section 27 and Others v Minister of Education and Another*[19] that -

> *'Conduct that would constitute a violation of a right does not have to be mala fide and equally the existence of bona fides cannot have the effect of rendering conduct which would ordinarily constitute the violation of a right, somehow immune from attack, simply because it was accompanied by bona fides.'*

[30] Although the Director-General has not been proved to have acted in a manner which is wilful and *mala fide* in failing to comply with an order of court he has acted in a manner which may well be unlawful. The seriousness of such conduct on the part of a senior government official brings to mind the stern warning of Justice Brandeis in the 1928 case of *Olmstead v United States*[20] that –

> *'If the government becomes a law breaker, it breeds contempt for the law.'*

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[19] [2012] 3 All SA 579 (GNP) at 27

[20] 277 U.S. 438 (1928)

[31] This court holds a discretion as to whether to make a declaration in terms of section 19 concerning the non-compliance with the court order by the Director-General. As much was expressly stated by Cameron JA in *Fakie N.O* (supra).[21] In doing so, I am cognisant of the fact that a court will not engage in the futile exercise of making an order that cannot be carried out.[22]

[32] In *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape*[23] Froneman J stated that all courts are enjoined by the Constitution to grant appropriate relief and make just and equitable orders taking into account the interests of justice -

> '*...In doing so the courts have to keep in mind not only that the new executive and administration carries a greater burden than the old to provide for these rights... The courts, in fashioning new remedies and in the enforcement of those remedies, must thus take account of the practical difficulties experienced by the new administration, and must also be extremely wary not to move into areas that, by virtue of the constitutional separation of powers, fall outside their domain.*'

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[21] At 42

[22] *Administrator, Cape and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) 720D and G

[23] [2005] 1 All SA 745 (SE) at para 16

[33] I am persuaded that it is appropriate that an order be made declaring that the Director-General has failed to comply with the order of this court and directing the Director-General to comply with such order within a period of two weeks.

[34] This order should stand as a stark reminder to the Director-General and the respondents that orders of this court are not advisory, to be complied with as and when it proves possible, but that adherence to their terms is critical in displaying a fundamental commitment to our constitutional democracy, without which the rule of law stands to be severely prejudiced. This is more so for the respondents who as part of the public administration are required to act in accordance with the law and the values and principles enshrined in section 195 of the Constitution.

[35] Immigration applications are determined by the department in terms of the Immigration Act 13 of 2002 which –

> '*...aims at setting in place a new system of immigration control which ensures that –*
>
> *(a) temporary and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objective, predictable and reasonable*

requirements and criteria, and without consuming excessive administrative capacity...'

[36] The failure by the respondents to respond to the needs of people by determining applications as expeditiously as possible and without undue delay conflicts with the law and requires that court orders be obtained against the respondents so as to drive the respondents to comply with the law.

Conduct inconsistent with Constitution

[37] The applicants seek in the alternative to a declaration of contempt of court that this court declare that the Director-General's failure to comply with the terms of the order of Van Staden AJ is inconsistent with the Constitution and unlawful in terms of section 172(1)(a) and (b) of the Constitution.

[38] Section 172 provides that –

(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) *an order limiting the retrospective effect of the declaration of invalidity; and*

(ii) *an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*

[39] In *Hlophe v Constitutional Court of South Africa and others*[24] it was argued that in the event that the court found that the applicant's rights had been violated, they were obliged under section 172(1)(a) to declare as such. All three judgments of the court rejected this proposition on the basis that what was sought was not invalidity but a declaration of rights. Marais J stated –

> *..we would...have to make an order 'that the publication of a media statement by the Constitutional Court judges was invalid'. What exactly would this mean? The act complained of was done; it cannot be undone. In what sense was it 'invalid'? Are we declaring it to have not force and effect? The applicant's very complaint is that it has a most detrimental force and effect and invades his right. That cannot be undone by a declaration of invalidity.*[25]

[40] While a 'pure' declaration of rights may not suffer from this same absurdity because it would merely state that rights had been violated,[26] in the current

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[24] [2008] ZAGPHC 289
[25] At para 9
[26] Bishop on 'Remedies' in Constitutional Law of South Africa (2nd edition) at 9-165

circumstances I am not persuaded that this court is seized with a '*constitutional matter within its power*' such as is contemplated in section 172. In the circumstances I am unable to conclude that section 172 can find application in this matter. While the Director-General's failure to comply with the court order does not accord with the provisions of section 165(4) and (5), or section 195 of the Constitution, it does not follow therefore that his conduct is inconsistent with the Constitution within the meaning and in the circumstances contemplated in section 172.

[41] Even if section 172 were to find application in this matter however, I am not satisfied that it would be logical to conclude that the Director-General's lack of compliance with an order of court and consequently provisions of the Constitution justifies a declaration that such conduct is invalid to the extent of its inconsistency.

[42] For these reasons the application made in the alternative for a declaration of conduct inconsistent with the Constitution fails.

Internal appeal applications

[43] The applicants seek an additional order in this matter directing that internal appeal applications in terms of section 8 of the Immigration Act may be filed

with the respondents within one week and that these appeal applications be determined within one month by the respondents. The applicants base their prayer in this regard on the fact that applications must be decided lawfully and reasonably and not arbitrarily. They contend that the proper recourse for applicants whose applications have been arbitrarily rejected is to utilise the internal appeal procedures contained in section 8 of the Immigration Act. Section 8 requires that applications for review or appeal may be made to the Director-General within 10 working days of receipt of notice of the decision. Application for appeal or review of the decision of the Director-General may be made within a further 10 days of that decision. However, 'a real risk' exists that the department may 'take many months or years to decide these internal appeals' and that this would be unlawful and unfair to the applicants and could not have been intended by the order of Van Staden AJ.

[44] The applicants hold a right to file appeal and/or review applications in accordance with section 8 of the Immigration Act. It is not appropriate for this court to make an order that simply echoes the statutory provision which already exists in terms of which the applicants are permitted by law to file such applications. The effect of this would be to order that the applicants hold a right to adopt a course of action of the applicants to exercise a right that they already hold.

[45] Furthermore, without the appeal applications having been filed, I am not persuaded that it is appropriate to order the respondents to determine future applications in circumstances in which such applications have not as yet been made. Whilst the applicants perceive that a real risk of delay in determining such appeals or reviews exists, I am not persuaded that this risk of delay is imminent in the absence of live appeal or review applications. Accordingly, I can find there to exist no basis on which to justify the granting of the relief sought in this regard.

Costs

[46] The applicants seek an order as to costs on the attorney and client scale against the respondents. This court may award attorney and client costs against an unsuccessful litigant where conduct has been 'unworthy', reprehensible or 'blameworthy'.[27] I am satisfied that the failure to comply with the terms of an order of this court that had been taken by consent between the parties constitutes blameworthy conduct that justifies a punitive costs order against the respondents. This is more so given that this application was capable of being avoided had there been compliance with the terms of the order of this court by the respondents.

[27] *Hamsa v Bailen* 1949 (1) SA 993 (C)

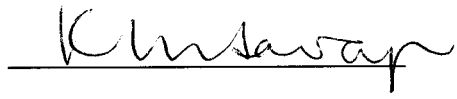
Conclusion

[47] In the result, I make the following order:

1. It is declared that the first respondent has failed to comply fully with the order of Van Staden AJ dated 18 May 2012.

2. The first respondent is directed to comply fully with the order of Van Staden AJ within a period of two weeks from the date of this order, failing which he is to appear before this court on 14 December 2012 and provide reasons why he should not be held in contempt of court.

3. The respondents are to pay the costs of this application on the scale between attorney and client.



K M Savage

Acting Judge of the High Court

Appearances

Applicants: D Simonsz
Instructed by Eisenberg & Associates

Respondents: G Papier
Instructed by State Attorney