



Republic of South Africa

REPORTABLE JUDGMENT

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

Case No.: **22394/12**

In the matter between:

RASHID MAHMOOD

Applicant

and

**THE DIRECTOR-GENERAL
DEPARTMENT OF HOME AFFAIRS**

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

PRESIDING JUDGE : Y.S. MEER

Counsel for Applicant : Adv S Bruinders

**Instructed by : Ismail and Badrudeen Attorneys
(Zaheer Badrudeen)**

Counsel for Second Respondent : Adv A Albertus SC

**Instructed by : Office of the State Attorney
(Mr P Mhlana)**

Date of Hearing : 24 April 2013

Date of Judgment : 8 May 2013

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JUDGMENT delivered on 8 MAY 2013

MEER J.

Introduction

[1] The applicant, a Pakistani national, seeks an order to review and set aside the decision taken by the first respondent to revoke his permanent South African residence permit ("the permit"), and to direct that such permit be reinstated. He further seeks an order directing the respondents to issue him with citizenship, alternatively, decide on his citizenship within 30 days after the reinstatement of the permit. The review is brought under the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA").

[2] The permit was issued to the applicant on 2 March 2004 by virtue of the fact that he had married a South African citizen, Zoliswa Valencia Josephs ("Zoliswa"). The marriage took place on 24 December 2003 in Port Elizabeth.

[3] On 17 July 2012 the permit was withdrawn by Makomo Mafokoane, a Deputy-Director in the Department of Home Affairs, acting in terms of the provisions of Section 28 (b) of the Immigration Act No 13 of 2002 ("the Act"). The basis for the withdrawal and the reason provided therefor was that the permit had lapsed as provided for in Section 26 (b) (ii) of the Act, in that a good faith spousal relationship between the applicant and his wife no longer subsisted within three years of the date of his application for the permit. At the time of the withdrawal of the permit the applicant's application for South African citizenship was pending.

[4] In withdrawing the permit Mafokoane acted as the delegate of the first respondent by virtue of the provisions of Section 3 (2) of the Act.

[5] The review is brought on the basis that the permit was withdrawn for reasons that were neither reasonable nor rational, that the respondents drew illogical inferences and that they took into account irrelevant as opposed to relevant considerations in arriving at the decision.

[6] I am accordingly required to determine whether the decision to revoke the applicant's permanent residence stands to be set aside on the grounds as alleged by the applicant. This exercise requires me to consider whether the decision complies with the standards for just administrative action that is lawful, reasonable and procedurally fair as specified at Section 33 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") read with the relevant provisions of PAJA, in particular section 6 thereof.

The legislative framework regarding the granting and withdrawing of permanent residence permits.

[7] Section 26(b) of the Act, in terms of which the applicant was granted a permanent residence permit, provides as follows:

"26 Direct residence---- Subject to section 25, the Director - General shall issue a permanent residence permit to a foreigner who –

(a) . . . ;

(b) is the spouse of a citizen or resident, provided that –

(i) the Department is satisfied that a good faith spousal relationship exists; and

(ii) such permit is issued on condition that it shall lapse if at any time within three years from its application the good faith spousal relationship no longer subsists, save for the case of death; . . . "

[8] A good faith spousal relationship as referred to at Section 26(b)(ii) of the Act is defined at Regulation 33(4) of the regulations published in terms of Section 7 of the Act, which provides as follows:

"(4) A good faith spousal relationship shall be a relationship that was not entered into primarily for the purpose of gaining benefits under the Act and shall be confined to a relationship of two persons calling for cohabitation and intended to be permanent."

Regulation 33(5) allows for investigation by the Department of Home Affairs to verify if a good faith spousal relationship exists. It states:

"(5) The Department may at any time satisfy itself as envisaged in section 26(b)(i) of the Act whether a good faith spousal relationship exists by (a) interviewing the applicant and spouse separately; (b) contacting family members and verifying other references; (c) requesting proof of actual or intended cohabitation; and/or (d) inspection in loco of the applicant's place of residence."

Section 28(b) of the Act provides for the withdrawal of a permanent residence permit as follows:

"The Director-General may withdraw a permanent residence permit if its holder –

(a) ...;

(b) has failed to comply with the terms and conditions of his or her permit."

[9] Section 3(2) of the Act permits the powers enjoyed by the Director-General in terms of section 28(b) of the Act to devolve upon any person duly delegated to exercise such power. It was under such delegated power that the applicant's permit was withdrawn.

[12] Zoliswa gave birth on 22 November 2007 to a child born from a relationship with another man. According to the applicant even though he and his wife had a good faith spousal relationship during the period of her pregnancy in 2007, he had no knowledge of and did not become aware of her pregnancy during their visits together in April 2007 and June 2007, during which time she was pregnant.

[13] The answering affidavit of Mafokoane on behalf of the respondents states that during the course of 2009, the Department of Home Affairs discovered that the applicant's wife had given birth to a child out of wedlock on 22 November 2007. This emerged during the course of separate interviews conducted with the applicant and Zoliswa regarding the applicant's application for South African citizenship.

[14] According to Mafokoane the explanations given by the couple at their interviews for their living arrangements, were unconvincing and unsatisfactory. Consequently a letter was sent to the applicant dated 12 March 2010 from the Department of Home Affairs, informing him that his permanent residence had lapsed in terms of Section 26(b) of the Act. His attention was drawn to Section 26(b)(ii) to the effect that a residence permit is issued on condition that it shall lapse if at any time within 3 years from its application the good faith spousal relationship no longer

subsists. The applicant was afforded 30 days to make further representations.

[15] In response representations were made by Immigration Practitioners, Peninsula Immigration, acting for the applicant, in a letter addressed to Home Affairs, dated 8 July 2010, as follows:

".....Mrs Zoliswa Mahmood in March 2007 had an extra-marital affair i.e. "one night stand" while being intoxicated. This subsequently led to her falling pregnant and as such giving birth . . . on 22 November 2007".

..... Mr Mahmood's application for permanent residence is with no doubt still valid in that the time of the extra marital affair fell outside the prescribed period as outlined in the aforementioned act"

[16] It is convenient to pause here to note firstly that the above letter does not take cognisance of the fact that the conception of the child and hence the extra marital affair would have taken place within and not after three years of the application for the permit, and to note secondly that as of 8 July 2010 when these representations were made the applicant and his wife were no longer married. This is not disclosed in the letter. It is common cause that on 24 May 2010 the applicant and his wife were granted a decree of divorce in the Port Elizabeth High Court. Such fact was disclosed for the first time to this Court, and also it would seem to the respondents in the applicant's replying affidavit in this application, dated 6 March 2013. The divorce certificate was attached to the replying affidavit in response to Mafokoane raising in his answering affidavit the

strange feature that the supporting affidavit of Zoliswa's mother had referred to her as the applicant's ex-wife.

[17] Getting back to the chronology of events, there was no response from the Department of Home Affairs to the representations on behalf of the applicant of 8 July 2010. The applicant brought an application to compel and as a consequence on 18 May 2012 this Court ordered the respondents to decide on the representations within 30 days. The respondents failed to comply whereupon the applicant launched contempt proceedings. Ultimately in a letter dated 17 July 2012 from Mafokoane on behalf of the Director-General, a decision was conveyed to the applicant as follows:

"Ref. H15338/06

Mr R Mahmood

17 July 2012

Dear Mr Mahmood

LAPSE OF PERMANENT RESIDENCE: RASHID MAHMOOD (BORN 1976-08-08)

Our previous letter dated 12 March 2010 and your Founding Affidavit dated 28 September 2011 refers.

According to the information you and your wife separated in 2006. Cohabitation was a requirement for a good faith spousal relationship in terms of Regulation 33 paragraph 4 of the Regulations published on 21 February 2003 in terms of the Immigration Act (Act 13 of 2002 before amendments). Your wife had a relationship with somebody else in 2007 and child is not registered in your surname. This proof that the good faith spousal relationship

between you and your wife ceased to exist within 3 years since date of application, which was a condition of section 26(b) of the Immigration Act (Act 13 of 2002 before amendments).

Your permanent residence therefore lapsed in terms of the above mentioned section and you are illegal in SA. You must either legalise your stay in SA immediately or make the necessary arrangements to leave the country.

Yours sincerely

M MAFOKOANE

p.p. DIRECTOR-GENERAL"

[18] On 20 November 2012 the applicant commenced this application to review and set aside the first respondent's decision. His founding affidavit is replete with references to Zoliswa as his wife even though as of November 2012 he had been divorced for well over 2 years. Attached to his founding affidavit is his marriage certificate. Disconcertingly, also attached are affidavits by the applicant and Zoliswa date stamped 28 September 2011, wherein they purport to make out a case that they are still married even though, as aforementioned, they were divorced at the time. The applicant states in his affidavit:

"The first time I heard about the child was when I was called into Home Affairs. I asked her about this and she denied. ... she is very sorry about what she has done to me ...

She has made arrangements for us to go for counselling. I am hoping that there will be a way around this, as I do not wish for anything to happen to my marriage. I sincerely hope the mistake my wife made is not going to reflect negatively on my status."

Similarly Zoliswa's affidavit states:

"I, Zoliswa Mahmood

... am still married to Rashid Mahmood".

Her affidavit also states:

"The other day I was at a party so I meet a guy there I was drunk. It was one night stand. I fell pregnant in 2007 then in that period I did not meet with my husband because I was so scared to tell him. Maybe he was going to divorce me what I have done to him."

"I never told my husband that the baby is mine until Home Affairs mentioned it. He then told my mother who is still in a state of shock. I am very saddened by the situation because I love my husband and this mistake could cost me my marriage."

Finding

[19] It is clear from the letter of 17 July 2012 that in making his decision to withdraw the permit, Mafokoane relied firstly on the fact that the applicant and Zoliswa had not cohabited since 2006, which was less than three years after the applicant had applied for the permit in January 2004. Secondly he relied on the fact that Zoliswa had given birth to a child out of wedlock on 22 November 2007. He inferred and concluded from these facts that a good faith spousal relationship no longer subsisted between them within three years of the application for the permit.

[20] Mafokoane's reasoning emerges from his answering affidavit. In it he states that the applicant's attempts to suggest that he and his wife had a good faith spousal relationship during 2006 and 2007, is contrived and wholly inconsistent with his alleged absence of knowledge that she was pregnant during the period March to November 2007. Significantly he states and I quote:

"It defies belief, if, as he suggests, he was still cohabiting with her on his visits to Cape Town and had visited her . . . during June 2007, that he would not have noticed that she was pregnant. It also stretches credibility to the point of incredulity that his wife, if there was a good faith spousal relationship with him, would for the entire time of her pregnancy, keep this fact away from him and pretend that all was well."

And at paragraph 59:

" . . . even if the child was born of a once-off sexual encounter with another man during 2007, this strongly points to the fact that the applicant and his wife were not involved in a good faith spousal relationship."

[21] The above illustrates that Mafokoane had by way of inferential reasoning concluded that a good faith spousal relationship no longer subsisted within three years of the application for the permit. I am of the view that from the information before him Mafokoane was entitled to so reason and conclude. For, the investigation and interviews conducted by the authorities revealed that the hallmarks of the relationship were not those of a good faith spousal relationship as defined in the Act but one in which the spouses were not cohabiting and there was a child born out of wedlock. This justifiably gave rise to suspicion that this was not a genuine marriage but one of convenience entered into for an ulterior purpose. On the information, Mafakone, was entitled in the circumstances to conclude as he did, that this was not a good faith spousal relationship but a relationship entered into primarily for the applicant to gain benefits under the Act, a permanent residence permit and ultimately South African citizenship, in short a relationship not

intended to be permanent. The divorce not too long thereafter and the disingenuous subsequent non-disclosure thereof, further supports this theory. Mafakoane was also entitled given the circumstances to characterise the applicant's contrived explanations as incredulous.

[22] I am inclined to agree that the inference drawn by Mafokoane was on the facts the most readily apparent and acceptable inference. See *AA Onderling Assuransie Bpk v De Beer* 1982 (2) SA 603 (A); See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734 (C). ; *Cooper and Another NNO v Merchant Trade* 2000 (3) SA 1009 SCA at 1027 E – 1028 D

[23] I note that other factors which support Mafokoane's inferential reasoning are the uncharacteristic haste with which the marriage was concluded within a month of the applicant's arrival in the country (notwithstanding his religious beliefs), and the absence of a compelling reason for the applicant's wife to remain behind and work in Cape Town whilst he returned to Port Elizabeth. It is not stated that she could not work in Port Elizabeth nor is it stated what attempts were made for her to get a transfer to, or other work in Port Elizabeth. This is information one would have expected from spouses committed to a good faith spousal relationship and the attendant requirement of co habitation under the Act. It may well also be so, as alluded to by Mr Albertus for the

respondents, that the couple's separate living arrangements would not have accorded with the applicant's religious beliefs, beliefs which the applicant contends caused him to marry within such a short while of his arrival in South Africa. Then there is the question of the applicant's credibility in view of his unabashedly misleading this Court and the Department of Home Affairs that his marriage still subsisted when he was divorced. This lends unavoidably to speculation that, just as the applicant misled this Court that a *bona fide* marriage existed when it did not, so too did he mislead the Department of Home Affairs that a good faith spousal relationship existed for 3 years after he applied for the permit, when it did not. All of this supports the decision to withdraw the permit and the reasoning leading thereto.

[24] Mr Bruinders for the applicant submitted that the respondents' failure to resort to any independent investigation, was a further ground for attacking the decision to withdraw the permit. But an investigation was conducted. The couple was interviewed and in the light of the information gathered a reasoned decision was taken. The information which emerged was in my view sufficient to justify a decision to cancel the permit without more. Nor do the Act and Regulations specify that further or independent investigations are mandatory, as is evident from Regulation 33(5) read with Section 26 (b) (i) quoted above.

[25] In view of the above Mafokoane was entitled to arrive at the conclusion which he did and on the strength thereof to withdraw the applicant's permanent residence permit in terms of the provisions of Section 28(b) of the Act.

[26] Mafakone's decision and the reasons therefor were in accordance with substantive and procedural fairness as contemplated at Section 33 of the Constitution and Section 6 of PAJA. The decision, as explained above, was substantively fair, rationally connected to the purpose for which it was taken, to the purpose of the empowering provisions, to the information before him and to the reasons given for it. See Section 6 (2) (f) (ii) of PAJA. Relevant considerations were taken into account, the decision was taken neither arbitrarily, capriciously, nor in bad faith. See section 6 (e) of PAJA. The decision was also reasonable.

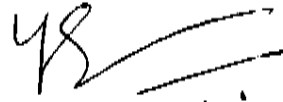
[27] The applicant does not challenge the decision on the basis of procedural fairness. Indeed the applicant was given an opportunity to make representations which he did.

[28] In view of my finding above that the decision to withdraw the applicant's permanent residence permit was in accordance with Section 33 of the Constitution and the provisions of Section 6 of PAJA, I find also that such decision was lawful, reasonable and procedurally fair.

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[29] I accordingly grant the following order:

The application is dismissed with costs.



Y S MEER

Judge of the High Court