THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 8231/2014

In the matter between:

FUNEKA KHAN **APPLICANT**

And

THE MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS: WESTERN CAPE **SECOND RESPONDENT**

MR JACKSON: IMMIGRATION OFFICER, CAPE TOWN INTERNATIONAL AIRPORT **THIRD RESPONDENT**

Coram: ROGERS J

Heard: **19 JUNE 2014**

Delivered: **27 JUNE 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The applicant alleges that she is the wife of Murad Khan ('Khan'), a Pakistani national. On Friday 9 May 2014 she launched an urgent application for the issue of a rule nisi calling on the respondents (the Minister and various officials in the Department of Home Affairs) to show cause why they should not be interdicted from causing Khan's deportation and why they should not be directed to release him forthwith, with the rule nisi to operate as an interim interdict. At about noon Yekiso J granted the order.

[2] On the evening of the same day, 9 May 2014, the respondents sought to anticipate the return day. The matter came before Schippers J. By agreement the matter was postponed for hearing at 14h00 on Monday 12 May 2014. The rule nisi was extended on the basis that Khan would be released from the Department's custody subject to certain specified conditions. Among these was that he was to take up accommodation at a specified hotel at Cape Town International Airport, that he was to report three times daily to the office of the South African Police ('SAPS') at the airport, that he was to surrender his passport until the matter was finalised, and that he would not leave the premises of the airport without informing a named official.

[3] The duty judge was not able to hear the matter on 12 May 2014. The case rolled over day by day until Friday 16 May 2014 when Bozalek J postponed it for hearing on 5 June 2014 with a timetable for the filing of further papers, and extended the rule nisi. By this stage Khan had, with the agreement of the respondents, been allowed to leave the airport for the Eastern Cape, where he was to report to SAPS at Mthatha each Wednesday until finalisation of the case.

[4] The respondents filed their answering papers on 12 May 2014. The applicant filed a replying affidavit dated 17 May 2014. On 24 May 2014 the respondents delivered supplementary answering papers. When the matter came before me on 6

June 2014 (having been crowded out the previous day), there was no supplementary replying affidavit in the file. There was a duplicate of the initial replying affidavit at the place in the index where one might have expected to find supplementary replying papers. After some initial confusion, Mr Uijs SC, who appeared for the applicant, informed me that a supplementary replying affidavit existed but that the initial replying affidavit had mistakenly been filed instead of the supplementary replying affidavit. Since the respondents, represented by Messrs G Papier and C Simons, had not received the supplementary replying papers, the matter stood down. I was later informed in chambers that the respondents insisted on a substantive application for condonation. By agreement I made an order postponing the case to 19 June 2014 with a timetable for the filing of papers in the condonation application.

[5] In terms of my order of 6 June 2014, the applicant was required to file her condonation application by 9 June 2014. She delivered it on 17 June 2014. The respondents filed an affidavit in opposition on 18 June 2014. The matter served before me on 19 June 2014.

[6] The Immigration Act and the regulations promulgated thereunder were amended with effect from 26 May 2014. The present matter falls to be determined with reference to the law as it stood prior to these amendments.

Condonation

[7] The respondents were entitled to a postponement on 6 June 2014, given that they only received the supplementary replying affidavit (which ran to 34 pages) on that day. I consider, though, that it was unnecessarily formalistic for them to insist on a substantive condonation application. The postponement afforded them sufficient opportunity to consider the supplementary replying affidavit and adjust their arguments.

[8] Nevertheless, since the parties agreed on a procedure for a substantive application for condonation, the applicant should have observed the time limits laid down in my order of 5 June 2014. The applicant’s attorney, Ms Nöckler, who made

the affidavit in support of condonation, explained the error in the filing of the supplementary replying affidavit without offering any explanation for the delay in delivering the condonation application.

[9] Despite this non-compliance, it would not be just to refuse to receive the supplementary replying affidavit. Despite the respondents' counsel's written submissions to the contrary (not pressed in oral argument), it is clear that what occurred here was an honest mistake, nothing more sinister. The applicant's attorney was undoubtedly at fault in effecting service and indexing the court papers without properly checking that what she was serving and filing was the supplementary replying affidavit rather than a repeat of the initial replying affidavit. In the event, though, this error has led to no further delay in the hearing of the matter, which is the only prejudice which the respondents might otherwise suffer.

[10] I shall thus grant the condonation application but direct the applicant to pay the wasted costs of the postponement of 6 June 2014. The parties shall bear their own costs in respect of the condonation application. I shall deal later with the question whether Khan himself should be responsible for any costs.

Approach to disputes of fact

[11] I was not addressed on the approach to disputes of fact. In terms of the notice of motion, the applicant on the extended return day has sought final relief, namely a final interdict against deportation and a final order of unreserved release. The *Plascon-Evans* rule thus applies to factual disputes insofar as that relief is concerned.

[12] During the course of argument Mr Uijs asked that, if I was not prepared to grant relief in the form prayed because of the existence of an internal remedy (as to which, see below), I should grant an interdict against deportation pending the outcome of the internal remedy. That would probably amount to an interim interdict, because my decision would then not finally determine the rights of the parties (see *LAWSA* 2nd Ed Vol 11 *Interdicts* para 401), even though the final determination would be made not by the court but by the Minister (to whom the internal review

lies), subject of course to any judicial review of the Minister's decision.[1] Mr Uijs' fall-back position would in essence involve an extension of the existing interim interdict, except that it would now operate pending the Minister's decision rather than pending the court's final decision. In respect of such interim relief, the *Plascon-Evans* rule would not apply. The test would be whether the applicant has made out a *prima facie* case, though open to some doubt (*LAWSA op cit* para 404). The other requirements for an interim interdict would need to be met (irreparable harm, balance of convenience and the absence of another adequate remedy).

The facts

[13] Khan, as I have said, is a Pakistani national. He has a Pakistani passport valid until 17 October 2015. At a time prior to 2006 he married one Safia in Pakistan and the marriage subsists. In terms of the laws of Pakistan, Khan was entitled, subject to compliance with certain conditions, to contract further marriages. There are two children in Pakistan from his marriage with Safia.

[14] It appears that Khan first came to South Africa on a temporary asylum seeker's permit dated 25 November 2005 issued in terms of s 22 of the Refugees Act 130 of 1998.

[15] The applicant, who is a lady from the Eastern Cape, and Khan allege that during 2006 they got married in South Africa, first by Xhosa tradition (including the payment of lobola), then (after the applicant had converted to the Muslim faith) by Muslim rites and finally at a civil ceremony on 4 May 2006 at the Department of Home Affairs in Port Elizabeth. They have a marriage certificate dated 4 May 2006 in usual form purportedly issued by the Department of Home Affairs. There are no children from this marriage. They say they have tried to start their own family but that the applicant has suffered four miscarriages.

[1] See *Fedsure Life Assurance Co Ltd v Worldwide Africa Investment Holdings (Pty) Ltd & Others* 2003 (3) SA 268 (W) where an interim interdict was granted pending a final determination by an arbitrator.

[16] Khan has from time to time been the holder of a relative's permit issued to him in terms of s 18 of the Immigration Act 13 of 2002. The first such permit attached as part of the record was issued on 27 March 2009. On 14 April 2011, shortly before the expiry of the latter permit, a further such permit was issued to him. That permit expired on 13 April 2013. On 7 August 2013 a further relative's permit was issued to him with an expiry date of 27 April 2015. This permit, like the earlier ones, contained the following condition: 'To continue residing with SAC [South African citizen] spouse ID 791230 0639 084'. This is the applicant's South African ID number. The permit authorised multiple entries.

[17] Khan has a cellphone business in the Eastern Cape trading under the name of Khan's Cellular. He conducts this business jointly with the applicant.

[18] On 18 June 2009 Khan received a work permit in terms of s 19 of the Act. The work permit expired on 3 June 2011. The conditions of the permit were expressed thus: 'Take up a voluntary work permit at Khan cell market + reside with SAC 791230 0639 084.' It is probable that this was not Khan's first work permit but it does appear to have been his last.

[19] On 6 July 2011 Khan applied for permanent residence in terms of s 26(b) of the Act, based on the fact that he had by then been the spouse of a South African citizen for five years. In their initial answering papers the respondents denied knowledge of this application. However, in the supplementary answering papers the respondents produced various documents relating to the application and the interview conducted with Khan on that date. They allege that Khan made fraudulent misrepresentations to the Department in the application for permanent residence. In particular, he asserted in response to specific questions that he had no children and that his marriage to the applicant was his first marriage. In his 'Declaration of support regarding spousal relationship', he declared that he was married to the applicant and that 'I never married in my country' (he struck out the alternative wording 'I was married in my country to…'). In his disclosure of details of 'family members' remaining in his country of origin (which were to include 'spouse, children, parents, sisters, brothers'), he listed six brothers but did not mention Safia or his two children.

[20] Khan in the supplementary replying affidavit said that he assumed he was only being asked about civil marriages in South Africa, though I do not see how that could be a satisfactory explanation for his answer to the questions relating to whether he was married in his own country and whether he had a spouse or children remaining in his country of origin.

[21] For reasons which do not appear from the papers, a permanent residence permit was not issued to Khan. No decision at all seems to have been made on the application. Had such a permit been issued, he would have been entitled to work in South Africa.

[22] During February 2014 Khan went to Pakistan for about three months to visit Safia and his children. He returned to Cape Town International Airport on Emirates Airline flight EK-772 on 8 May 2014. He was examined by officials of the Department, including Mr Jack Goeieman, an Immigration Officer, and Mr Adrian Jackson, a Control Immigration Officer (see s 9(3)(e), which makes provision for an examination). Khan produced his marriage certificate and relative's permit. The officials ascertained from their examination of Khan that he had a wife and children in Pakistan and that he was conducting business in South Africa. He was refused entry. The notification issued to him in terms of ss 34(8) and 34(9) of the Immigration Act recorded that in terms of s 8(1) Khan was an illegal foreigner for the following reasons (corrected for typographical errors): 'In contravention of the condition of his permit. Marriage of convenience. Involved in bigamous marriage. Subject V-listed.'

[23] The alleged contravention of the condition was that Khan was conducting business in South Africa in violation of s 18(2), which was applicable to his relative's permit. Section 18(2) states that the holder of a relative's permit 'may not conduct work'. Regulation 6 sets out the prescribed form of examination contemplated in s 9(3)(e). In terms of regulation 6(3)(a)(iv), one of the things the immigration officer must do is satisfy himself or herself that the foreigner is not in contravention of the Act, which the officer is to do by requiring the foreigner to produce 'a permit commensurate with the activities to be undertaken by him or her in the Republic'.

[24] The alleged bigamy was Khan's marriage to the applicant at a time when he was already married to Safia. (The question of an alleged 'marriage of convenience' was not pursued as a distinct matter in the present proceedings.)

[25] The meaning of 'V-listed' is unexplained in the papers. The applicant did not advert to it.

[26] The Department's officials determined that Khan should be placed back onto the aircraft. They say they handed Khan to Emirates staff for this purpose. This was at about 12h30 on 8 May 2009. Emirates informed Goeieman at about 13h00 that there was no space on the flight. The respondents say that Khan was then kept in an Emirates facility in the pre-entry area of the airport until the next available flight. This was initially scheduled to leave at 11h00 on 9 May 2014, subsequently altered to 13h00.

[27] Jackson and Goeieman allege that Khan was duly informed of his right to ask the Minister to review the officials' decision in terms of s 8(1) of the Immigration Act ('the ministerial appeal') and that he chose not to lodge a ministerial appeal. Khan says that he was browbeaten into signing documents and that his grasp of English is not very good. He claims that he was not allowed to contact anyone and only succeeded in getting a message through to his family when a friendly security guard allowed him to use his mobile phone for a short while. Jackson alleges, by contrast, that he was present when Khan used his own mobile phone to inform the applicant that he had been refused entry. (The respondents alleged that Khan spoke English 'very well'. In his application of 6 July 2011 for permanent residence status, he stated that his proficiency in speaking English was 'good' and his proficiency in writing and reading it was 'fair'. In his supplementary replying affidavit Khan denied that he could speak English 'very well' but said he was 'sufficiently fluent in English to conduct a simple conversation'.)

[28] An attorney, Ms Nöckler, was contacted by Khan's cousin about the refusal of entry. Nöckler arrived at the airport at 07h00 on 9 May 2014. She says in her affidavit that Jackson refused to allow her to consult with Khan and told her that Khan was to be put on a flight to Pakistan that morning. Jackson says he told

Nöckler of Khan's right to a ministerial appeal in terms of s 8(1), a fact which Nöckler admits. (The way she puts it is that Jackson told her to make representations to the Minister in terms of s 8 if she wished to prevent Khan's deportation to Pakistan.) While she was talking with Jackson, the applicant, who had travelled down from the Eastern Cape overnight, arrived at the airport. Jackson took the applicant into a security area and interviewed her in Nöckler's absence. A little while later Goeieman came back with the applicant and confirmed that Khan was to be sent back to Pakistan on the first available Emirates flight.

[29] Nöckler prepared an urgent application and, as noted, an urgent order was granted by Yekiso J, effectively *ex parte*. This was at about noon. Nöckler managed to find a staff member of Emirates at the airport, to whom she communicated the order. Khan had already been placed on the aircraft and had to be brought back into the holding room as a result of the order.

[30] The respondents, upon learning of the order, wanted to anticipate the return day. Negotiations between the legal representatives, which carried on into the evening, resulted in the amended order made by Schippers J. The respondents were not, however, willing for the revised arrangement to extend beyond Monday 12 May 2014, which was thus the date to which the matter was postponed. I have already summarised the further procedural history.

[31] In the initial answering papers filed on 12 May 2014, the respondents provided further information relating to the grounds on which entry had been refused. They also said that Khan had failed to date to exercise his right, in terms of s 8(1) of the act, to ask the Minister to review or appeal the refusal of entry.

[32] In the supplementary answering papers filed on 24 May 2014, the respondents made allegations concerning the alleged misrepresentations made by Khan when applying for permanent residence on 6 July 2011. It was clear, they said, that Khan had obtained his current relative's permit (and presumably earlier ones) by fraudulently failing to disclose his marriage to Safia. The respondents also now challenged whether a civil marriage had ever occurred, alleging that the Department had no record on its database of the alleged marriage of 4 May 2006 and that the

official who had purported to issue the marriage certificate was based in Mpumalanga and was under investigation.

[33] The respondents also said, in their supplementary papers, that there was no proof that Khan had been permitted by Pakistani law to conclude a second marriage, having regard to the requirements of the applicable Pakistani legislation, the Muslim Family Laws Ordinance of 1961. Section 6 of the latter Ordinance allegedly requires a man who is party to an existing marriage to obtain permission from the Arbitration Council before contracting a second marriage. The respondents submitted that the applicant and Khan had failed to allege compliance with this requirement. It is doubtful, to my mind, whether the content of Pakistani law on the point was properly proved in the present proceedings and it is in any event doubtful whether a foreign restriction of that kind is an impediment to a civil marriage in South Africa.

[34] In the supplementary answering papers the respondents pointed out that Khan had still not exercised the remedy afforded to him by s 8(1) of the Immigration Act.

Khan's 'release' after 12 May 2014

[35] As noted, at some stage after 12 May 2014 the parties reached agreement that, instead of being detained at a facility at the airport, Khan could return to the Eastern Cape subject to certain conditions. Counsel were agreed that this interim arrangement did not affect the legal position. In other words, the applicant and Khan are legally in no better position than if Khan were still being detained in the pre-entry facility at the airport.

Exhausting internal remedy

[36] Sections 8(1) and (2) provide as follows:

'(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform the 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), that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision –

(a) in a case contemplated in subsection (1)(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(b) in a case contemplated in subsection (1)(b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.'

[37] I shall refer to the review contemplated in s 8(1) as the ministerial appeal.

[38] Initially Khan's case fell within s 8(1)(a), because he was refused entry at a time when the aircraft by which he had arrived was still at the airport and the officials intended that he should return to Pakistan on that same aircraft. Because there was no space for him on the aircraft, it seems to me that s 8(1)(b) became applicable; by the time it became apparent that Khan could not return on the same aircraft (about 13h00 on 8 May 2014), Khan had not yet made a ministerial appeal and the Minister had thus not yet considered any such appeal. I think Khan would thus have had three days from 8 May 2014 within which to make the appeal.

[39] The decision of the officials to refuse Khan entry and to find him to be an illegal foreigner constituted 'administrative action' as defined in s 1 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). In terms of s 7(2) of PAJA a court is not entitled to review administrative action 'unless any internal remedy provided for in any other law has first been exhausted'. If the court is not satisfied that an internal remedy has been exhausted, the court must direct the person concerned first to exhaust the remedy. These requirements are subject to the qualification that a court may 'in exceptional circumstances' and on application by the affected person exempt him from the obligation to exhaust an internal remedy if the court deems it 'in the interest of justice'.

[40] Section 8(1) of the Immigration Act is an internal remedy as contemplated in s 7(2) of PAJA. In *Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) the Constitutional Court emphasised the general principle that internal remedies should be exhausted (paras 34-49). With reference specifically to the internal remedies afforded by ss 8(1) and (4) of the Immigration Act (paras 50-55), the court said that the remedies 'illustrate the value and importance of a tailored remedial structure designed to cure a specific administrative irregularity' (para 54). On the one hand, a finding that a person is an illegal foreigner 'has a material and adversely effect on that person' and it is thus in his or her interest that the decision be reviewed speedily to ensure its correctness and fairness. The State, on the other hand, 'has a legitimate interest in the security of its borders and the integrity of its immigration systems' and must thus 'take reasonably speedy, yet constitutionally compliant steps, to resolve questions about the legality of the presence of foreign nationals in its territory'.

[41] In *Koyabe* the factual position was that the Director-General had withdrawn the permanent residence permits and status of the applicants. They were already in South Africa. They were thus not persons who had been refused entry but they had been declared illegal foreigners as contemplated in s 8(1). The Director-General's decision to withdraw the applicants' permits was taken on 9 January 2007 and by 7 February 2007 their attorneys had been provided with adequate reasons for the decision. Without pursuing a ministerial appeal, the applicants launched high court proceedings to review and set aside the Director-General's decision and also claimed interim relief. It appears from the unreported judgment in the court of first instance ([2008] ZAGPHC 9) that the applicants launched their application on 8 February 2007, that interim relief was granted on 16 February 2007 but that the application was dismissed on 18 December 2007. The basis of the dismissal was that the applicants had failed to exhaust their s 8(1) remedy. This decision was upheld by the Constitutional Court. Mokgoro J, who wrote the unanimous decision of the court, held that the applicants had shown no exceptional circumstances exempting them from the duty to exhaust the internal remedy (paras 72-74; see also *Road Accident Fund v Duma & Other Cases* 2013 (6) SA 9 (SCA) para 25).

[42] By the time the high court in *Koyabe* dismissed the application, the three-day limit for a ministerial appeal as laid down in s 8(1)(b) had long-since expired. It is clear from the confirmation of this decision by the Constitutional Court that the duty to exhaust an internal remedy does not disappear just because the time-limit for invoking the internal remedy has passed (see also Hoexter *Administrative Law in South Africa* 2nd Ed at 542). It nevertheless appears from the Constitutional Court's judgment that the three-day limit may not be immutable. In para 55 Mokgoro J observed that the constitutionality of s 8(1) and the time period stipulated therein were not before the court 'and this judgment remains silent on that issue'. Although the order of the Constitutional Court as recorded in para 88 of the judgment was simply to dismiss the appeal, para 82 contained the following direction:

'In the light of this provision [*s 7(2)(b) of PAJA*], the applicants are directed to proceed within seven days of this judgment with an application for a review of the decision withdrawing their permanent residence status [*ie in terms of s 8(1) of the Immigration Act*], before they embark on a judicial review, if necessary.'

[43] This direction did not, I assume, bind the Minister to consider the ministerial appeal on its merits. The Minister may perhaps have been entitled to refuse the ministerial appeal on the basis that it was out of time. Nevertheless, the direction given by the Constitutional Court appears to assume that the Minister would at least have been entitled to entertain the appeal on its merits and potentially to uphold it – this despite the fact that the judgment of the Constitutional Court was given on 25 August 2009, about two and a half years after the expiry of the three-day limit.

[44] A similar approach was adopted in *Havard & Another v Minister of Home Affairs & Others* [2011] ZAGPJHC 128. This was a case where the applicant had been refused entry at OR Tambo International Airport. The refusal of entry occurred on 26 September 2011. On the following day he launched an urgent application to prevent his deportation pending a review by the court of the decision declaring him to be an illegal foreigner. An interim order was granted the same day. The matter was then argued before Wepener J on the 30 September 2011 who dismissed the application with costs, principally on the basis that the applicant had failed to exhaust his internal remedy of a ministerial appeal. In para 46, however, he gave a similar direction to the one contained in para 82 of *Koyabe*.

[45] The importance of exhausting the internal remedy contained in s 8(1) was also emphasised by Murphy J in *Patel & Another v Chief Immigration Officer, OR Tambo International Airport & Others* [2009] 4 All SA 278 (GNP) (see para 42). In that case the affected person had already been deported to India. The learned judge did not deal with the question whether the applicant would still have been entitled to lodge a ministerial appeal.

[46] Although the respondents alleged that Khan had 'chosen' not to exercise his right of ministerial appeal, I reject any notion that he waived his right to do so. Khan clearly wished to be in South Africa. Indeed, I entertain considerable doubt that, at the time he was handed over to Emirates with a view to being placed on the same aircraft by which he had arrived, he had properly been informed of his right of appeal. The document annexed by the respondents as being the notification of the right of ministerial appeal[2] is not the document prescribed under s 8(1), which is Form 1 of Annexure A to the regulations. What the respondents annexed as the purported s 8(1) notification was the notification to Khan in terms of ss 34(8) and 35(8) of the Act, the prescribed form for which is Form 37 of Annexure A. As will appear, even the latter notification was not in the prescribed form.

[47] The document relied upon by the respondents as the notification to Khan contained the abbreviated grounds of refusal previously mentioned and concluded with the following:

'I *wish/do not wish to request a review of this decision. My written request *is attached/will be submitted within three days.'

Khan signed the form immediately beneath the quoted words. The form does not contain an election as envisaged by the use of the asterisk.

[48] This notification did not pertinently inform Khan that the review was an internal administrative one rather than a judicial review; it did not identify the statutory provision providing for the review; and it did not say to whom the review lay. The prescribed Form 1 requires that a person refused entry should be informed as follows:

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[2] Para 16 at record 16 read with the form at record 42-43.

'In terms of section 8(1) of the Act, you are hereby notified that you may request the Minister to review the decision. However, if the conveyance you arrived on is on the point of departing, you shall lodge a request for review immediately and depart and await the outcome thereof outside the Republic.

The conveyor responsible for your conveyance to the Republic, namely… is liable for the costs of your detention, maintenance and removal from the Republic.'

(The prescribed form may itself be criticised on the ground that it assumes that in all cases falling under s 8(1)(a) the affected person must depart and await the outcome of the review from abroad, whereas in terms of s 8(2)(b) that is the case only if the person has not received an answer to his review by the time the relevant conveyance departs, which admittedly is likely to be the most common situation.)

[49] The officials were required to furnish Khan not only with Form 1 but also with Form 37. Although a document purporting to be a Form 37 was handed to Khan and contained the concluding paragraph quoted earlier, the concluding part of the prescribed Form 37 reads thus:

'Should you have reason to submit that the refusal of your admission into the Republic was procedurally unfair, unreasonable or unlawful, you may, within three days from the date of this notice, request the Minister to review this decision. However, if the conveyance you arrived on is on the point of departing, your request for review must be lodged immediately and if the said request has not been finalised prior to the departure of the conveyance, you shall depart on such conveyance and await the outcome of the request outside the Republic.

In terms of section 35(8) of the Act, the conveyor responsible for your conveyance into the Republic, namely…, shall be responsible for the detention and removal of a person conveyed and any costs related to such detention and removal incurred by the Department.'

[50] Khan admitted that he received and signed the document annexed by the respondents as being the notification of his right to a ministerial appeal. He denied, however, that the document was explained to him, which may be supported by the fact that the form did not reflect an election. He alleges that he did not know he could request a review of the decision and says that, if he was told that, he did not understand it. At a factual level, I find it difficult to conceive that, if, when he was handed over to Emirates to be placed on the aircraft by which he had arrived, Khan

had been clearly informed that he had a right to ask the Minister urgently to review the officials' decision in terms of s 8(1)(a), Khan would not immediately have asserted that right. He wished to remain in South Africa. I do not accept that he would have declined to exercise a right which might have held out some hope of his being able to remain, at least as a temporary respite.

[51] Furthermore, by 13h00 on 8 May 2014 it had become apparent that Khan could not depart on the conveyance which had brought him to South Africa. Section 8(1)(b) thus became applicable. Once again, it is impossible to suppose that Khan, if he had been properly informed, would have not exercised the right to lodge an appeal within three days (with the concomitant protection against removal from the Republic until his ministerial appeal had been determined). Yet one finds that by late morning of the following day (9 May 2014) he had been placed on another flight to Pakistan. I reject as far-fetched the notion (if it is advanced by the respondents) that at that stage Khan was aware of his right in terms of s 8(1)(b) or that he had been given due notice of that right.

[52] I thus consider that, despite the existence of an internal remedy, the applicant was entitled to approach the court as a matter of urgency to prevent Khan's removal from the Republic. Had it not been for the order granted by Yekiso J, there may have been a grave violation of Khan's rights.

[53] This does not mean, however, that the form in which the applicant sought relief was appropriate. She applied for an interim interdict pending a final determination by the court itself as to whether Khan should be deported or unreservedly released. The appropriate relief, having regard to ss 8(1)(b) and 8(2)(b), would have been an interim interdict pending the determination of a ministerial appeal to be lodged within three days. If the applicant and Khan had sought that relief, they would have been correctly asserting Khan's right in terms of s 8(1)(b) to lodge a ministerial appeal and his right in terms of s 8(2)(b) not to be removed from the Republic pending the determination of the ministerial appeal.

[54] Since the applicant and Nöckler were faced with a pressing emergency on the morning of Friday 9 May 2014, it may be unfair to criticise the applicant for

having failed, in the papers issued on that date, to appreciate the correct legal position. However, by Monday 12 May 2014 the respondents had filed answering papers in which they squarely took the point that Khan had failed to exercise the s 8(1) remedy. By then the applicant was assisted not only by Nöckler but by counsel. Despite this fact, the applicant has persisted in claiming the final relief set out in the original notice of motion – this in the face of clear authority, most importantly *Koyabe*, regarding the need to exhaust the s 8(1) remedy.

[55] It was only during oral argument that Mr Uijs mentioned, as a fall-back position, the granting of an interim order pending a ministerial appeal. He told me from the bar, based on instructions from Nöckler, that a ministerial appeal had as a fact been sent electronically to the Minister on Sunday 15 June 2015. Mr Papier for the respondents said he knew nothing of that and urged me to adjudicate the case on the basis that no ministerial appeal has been lodged. He pointed out, correctly, that Nöckler had not mentioned in her affidavit of 17 June 2014, made in support of condonation, that a ministerial appeal had now been lodged (though I do not suggest that her instructions to Mr Uijs were factually incorrect).

[56] Mr Uijs submitted that, because the applicant had been entitled to come to court urgently, this court could and should deal with the matter on its merits. I reject that contention. From the outset, the correct remedy was an interim interdict pending the determination of a ministerial appeal. The applicant and Nöckler knew, when they approached the court during the morning of 9 May 2014, that Khan had been refused entry. The case was thus objectively one falling, from the outset, within s 8(1), even if this was not appreciated in the rush of that morning's events.

[57] Mr Uijs said that there could not have been a meaningful ministerial appeal as at 8/9 May 2014 because the grounds on which Khan was being sent back to Pakistan were not known. That is incorrect. The applicant said in her founding affidavit that she had been told that Khan was to be sent back to Pakistan because he had a wife and children there and because Khan and she were supposedly not really married given that they did not have any children. This was a sufficient basis to lodge a ministerial appeal. Khan himself knew the grounds on which he was to be deported. The applicant and Nöckler were not allowed to see Khan, and the

application to court was thus made without the benefit of consultation with him. However, if the respondents had continued to refuse Khan access to an attorney, appropriate relief in that regard could have been obtained. Khan would have been entitled to supplement his ministerial appeal if additional reasons for refusal of entry were supplied.

[58] I do not think that there are exceptional circumstances for exempting Khan from complying with his internal remedy. There are various disputed facts which are more appropriately, at least at this stage, a matter for assessment and possible investigation by the Minister. To the extent that the officials exercised a discretionary power, there may also be issues of policy which are more properly the province of the Minister than the court.

[59] However, it does not follow from this that the present application should be dismissed outright. If I were to give a direction of the kind made in *Koyabe* and *Havard*, it seems to me to be just to extend the interim relief pending the determination of the ministerial appeal. The granting of an interim interdict was not considered and does not seem to have been necessary in *Koyabe* because the applicants had already been permitted entry into South Africa when their permanent residence permits were withdrawn. The Department appears not to have threatened actual deportation until proceedings were finalised. The Constitutional Court must have taken it for granted, I think, that the Department would not proceed to deport the applicants pending the determination of their ministerial appeal, assuming such an appeal were made within the seven days mentioned in para 82 of the judgment.

[60] I think there is every reason in the present case to make a direction of the kind made in *Koyabe*. The notification to Khan of his right of appeal appears to have been deficient. The applicant was entitled to approach the court for urgent relief on his behalf, even though she and Nöckler should have tailored the relief sought with reference to s 8(1) of the Immigration Act. The initial failure to appreciate the correct position should not be too harshly criticised, given the urgency of the situation. The applicant and Khan, it can safely be assumed, were acting on legal advice in persisting with the form of relief initially claimed. It is now just over six weeks since Khan was refused entry. But for the unavailability of an urgent judge during the week

of 12-16 May 2014, this case would have been dealt with more promptly. The unavailability of a judge is not the fault of either of the parties. In *Koyabe* a direction to pursue a ministerial appeal was given several years after the decision declaring the affected persons to be illegal foreigners.

[61] Furthermore, I do not think that this is a case where Khan's position can be said to be completely hopeless so that they would be nothing for the Minister seriously to consider in a s 8(1) appeal. I do not intend to decide any of the issues which the Minister will need to consider but I shall, under a separate heading, briefly mention certain legal questions which might warrant the Minister's attention.

[62] Since an appeal in terms of s 8(1)(b) must be brought within three days of the relevant decision, I see no reason to give Khan more than three days from the date of my order. Indeed, according to the instructions given by Nöckler to Mr Uijs, the internal appeal has already been lodged. The timing of the determination of the appeal will then be in the Minister's hands. The direction I give will not compel the Minister to deal with the appeal on its merits. I prefer to express no opinion on the question whether he could properly refuse the appeal on the basis that Khan has left it too late.

[63] Insofar as the other requirements for an interim interdict are concerned (in particular, irreparable harm and balance of convenience), I think at this stage that the case tilts in favour of Khan and the applicant. In the ordinary course, and save in the circumstances contemplated in s 8(1)(a) of the Immigration Act, an aggrieved person who has been refused entry is entitled as of right not to be removed from the Republic pending a determination of a ministerial appeal (s 8(20(b)). If I am entitled (as *Koyabe* indicates) to give a direction that a ministerial appeal now be lodged, the balance of convenience is in favour of preserving that state of affairs. If Khan were immediately required to return to Pakistan to await a decision which might be made within a week or two (this is in the Minister's hands), he would not only be separated from his alleged South African wife and deprived of the advantages of direct consultation with his South African legal representatives; he would also be liable for the costs of travelling to Pakistan and then (if his ministerial appeal succeeds) flying back to South Africa.

[64] I was addressed on questions relating to whether technically Khan had been 'arrested' or 'detained' and whether at any given time he was in the custody of the Department's officials or of Emirates Airline. Counsel were unable to explain to me why the answers to those questions mattered to the relief now at stake. I may say, though, that, if Khan were currently being held at the pre-entry facility at the airport pending the determination of a ministerial appeal, he would not in my view be entitled to be released into South Africa pending the Minister's decision. In that regard, I agree with what Savage AJ said in *Mahlekwa v Minister of Home Affairs & Others* [2014] ZAWCHC 89 paras 18-24 (and see also *Ulde v Minister of Home Affairs & Another* 2008 (6) SA 483 (W) paras 30-35). As explained by Yacoob J, writing the majority judgment in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC), s 34(1) of the Immigration Act, which authorises an immigration officer to arrest an illegal foreigner without the need for a warrant but which incorporates safeguards for the arrested foreigner, is concerned with an illegal foreigner 'who has already entered the country in the sense of being beyond the restricted area at a port of entry' (para 8). 'Detention' prior to entry is governed by other provisions, including s 34(8)) and 35(8).[3] *Jeebhai v Minister of Home Affairs & Another* 2009 (5) SA 54 (SCA), to which I was referred, was a case of a s 34(1) arrest of a foreigner already in South Africa.

The validity of the alleged South African marriage

[65] Because of the conclusion I have reached, I do not intend to determine the questions which the Minister may be called upon to decide in the ministerial appeal. However, since I was addressed on the merits of the matter, I do not think it out of place to mention certain legal questions which might warrant the Minister's consideration in the ministerial appeal. These concern the effect of Khan's Pakistani marriage on the alleged marriage to the applicant.

[3] The Constitutional Court in *Lawyers for Human Rights* was dealing with the Immigration Act as it read prior to the amendments effected by the Immigration Amendment Act 19 of 2004. The latter Act, among other things, jettisoned the wide definition of 'ship' referred to by Yacoob J in para 11 (a definition which extended the ordinary meaning of the word so as to include aircraft and other prescribed conveyances) and introduced the term 'conveyance'. The word 'ship' nevertheless remains in s 34(8). The latter provision must thus now apply only to a 'ship' in the conventional sense. Section 35(8) now covers detention and removal in the case of illegal foreigners who arrive at ports of entry on conveyances in general.

[66] The respondents' contention is that the alleged marriage between Khan and the applicant is one which the Immigration Act does not recognise, having regard to the earlier marriage to Safia. The relevance of this is that in terms of s 18(1) a relative's permit, which is the kind of permit on which Khan relied for entry in terms of s 9(4)(b), can only be issued to a foreigner who is a member of the 'immediate family' of a South African citizen or permanent resident. It is common cause that the applicant is a South African citizen. The phrase 'immediate family' is defined in s 1(1) as meaning 'persons within the second step of kinship, where marriage or a spousal relationship is counted as one of such steps…'. So a person who is married to a South African citizen or in a spousal relationship with a South African citizen is part of the citizen's 'immediate family'.

[67] Section 1(1) defines the word 'spouse' as meaning a person who is a party to '(a) a marriage, or a customary union; or (b) a permanent homosexual or heterosexual relationship as prescribed'. 'Prescribed', which here applies only to para (b) of the definition of 'spouse', means 'prescribed by regulation'. The word 'marriage' is defined as meaning '(a) a marriage concluded in terms of the [Marriage Act 25 of 1961]; or (b) a legal marriage under the laws of a foreign country'. The phrase 'customary union' is defined as meaning 'a customary union recognised in terms of the [Recognition of Customary Marriages Act 120 of 1998]'.

[68] The Department's officials were of the view that, because Khan was already married to a woman in Pakistan, he could not lawfully have married the applicant in South Africa. As I understood Mr Papier, he ended up submitting in oral argument that this conclusion flowed not from our general law of marriage but from the definitions I have quoted from the Immigration Act. The argument was that Khan's marriage to Safia was a 'legal marriage under the laws of a foreign country' and thus a 'marriage' as defined in the Immigration Act. From this it followed, he contended, that, whatever our general law of marriage might be, Khan was already married to Safia when he purported to marry the applicant in South Africa and that the second marriage was thus invalid.

[69] Mr Papier also referred to regulation 3, which contains the regulations prescribing the form of 'permanent homosexual or heterosexual relationship' which

will qualify the parties to the relationship as ‘spouses’. It appears from regulation 3 that a foreigner seeking to be recognised as a ‘spouse’ on this basis must submit an affidavit signed by the foreigner and the South African partner attesting that their relationship is ‘to the exclusion of any other person’ and that neither of them is at the relevant time ‘a partner to a marriage’. In terms of the definitions in regulation 1, the word ‘marriage’ in the regulations has the meaning assigned to it in the Act. Because Khan’s marriage to Safia is a ‘marriage’ as defined in the Immigration Act, Khan could not, for as long as that foreign marriage subsists, satisfy the prescribed requirements for a ‘permanent homosexual or heterosexual relationship’ with a partner in South Africa.

[70] It appears to me that the officials’ view that Khan could in principle not qualify for a s 18 relative’s permit because of the pre-existing foreign marriage is unsound. The question whether a foreigner is married to a South African citizen within the meaning of para (a) of the definition of ‘marriage’ and para (a) of the definition of ‘spouse’ is determined by whether the marriage between the foreigner and the South African is a marriage concluded in terms of the Marriage Act. Whether the union is such a marriage is determined by the Marriage Act and the common law governing the validity of marriages. Likewise, the question whether a foreigner is the ‘spouse’ of a South African by virtue of being a party to a ‘customary union’ depends on whether the union is recognised as a customary union in terms of the Recognition of Customary Marriages Act. The answers to these questions are not found in the Immigration Act.

[71] Mr Papier’s reliance on para (b) of the definition of ‘marriage’ in the Immigration Act seems to me to be misplaced, because that part of the definition is only relevant if a foreigner claims to be the ‘spouse’ of a South African citizen or South African permanent resident by virtue of a legal foreign marriage between the foreigner and the South African. That is not the basis on which Khan claims to be the applicant’s ‘spouse’. Khan claims to be the applicant’s ‘spouse’ because he has concluded a marriage with her under the Marriage Act and because they are also party to a ‘customary union’ recognised in terms of the Recognition of Customary Marriages Act.

[72] Similarly, Mr Papier's reliance on para (b) of the definition of 'spouse' seems to me to be misconceived, because that part of the definition is only relevant if a foreigner claims to be the 'spouse' of a South African citizen or a South African permanent resident by virtue of being a party to a 'permanent homosexual or heterosexual relationship as prescribed'. That is not the basis on which Khan claims to be the applicant's 'spouse' (see the preceding paragraph). Regulation 15 sets out the requirements with which an applicant for a relative's permit must comply. In regard to proof of the relationship, regulation 15(1)(c) states that, where the applicant for the relative's permit is the 'spouse' of a citizen or permanent resident, such applicant must comply with regulation 9(3)(a) and (b). In regard to regulation 9(3)(a), it suffices, for a person who claims to be a 'spouse' by virtue of being civilly married to a South African citizen, to produce a marriage certificate. If the applicant, instead, relies on being party to a 'permanent homosexual or heterosexual relationship', regulation 9(3)(a) requires the applicant to produce proof of the relationship as contemplated in regulation 3. (The foreigner in *Mahlekwa v Minister of Home Affairs & Others supra* claimed to be a spouse on this latter basis.) Regulation 9(3)(b) requires an affidavit substantially in accordance with Form 12 to be submitted. Form 12 is framed on the premise that the foreigner will be attempting to establish that he or she is party to a 'permanent homosexual or heterosexual relationship'; it is inapposite in the case of persons to a civil marriage in South Africa.

[73] If these views are correct, one would need to consider whether, under our general law of marriage, a marriage under the Marriages Act is precluded where one of the parties is already married under the laws of a foreign country. The Marriages Act does not contain a definition of 'marriage' and does not determine whether one person may lawfully marry another. That is determined by the common law. A subsisting marriage constitutes an absolute impediment to a valid second marriage in South Africa (*LAWSA* 2nd Ed Vol 16 para 24). But what is a subsisting marriage for purposes of this rule? (Exactly the same question would now arise in relation to the conclusion of a valid South African civil union in terms of the Civil Union Act 17 of 2006 – see s 8(6) of that Act.)

[74] Since our law normally recognises, as valid in this country, foreign marriages which are valid under the foreign law, and since our law of marriage is conventionally based on monogamy, it is generally the case that a person who is validly married under the laws of a foreign country may not conclude a valid civil marriage in South Africa. However, in *Seedat's Executors v The Master (Natal)* 1917 AD 302 it was held that our law does not recognise a foreign polygamous union as a valid marriage, even though it might be recognised as a valid marriage under the foreign law. Innes CJ, who gave the judgment of the court, said that the marriage was polygamous if it was one 'the nature of which is consistent with the husband marrying another wife during its continuance' and that '[w]hether he exercises his privilege or not is beside the question' (308; see also *Ebrahim v Essop* 1905 TS 59 at 61; *R v Sukina* 1912 TS 1079 at 1083; *Esop v Union Government (Minister of the Interior)* 1913 CPD 133 at 135; *Ismail v Ismail* 1983 (1) SA 1006 (A) at 1025G-1026B).

[75] *Seedat* and the other cases mentioned in the preceding paragraph were concerned with the general question as to what is a 'marriage' for purposes of our law. They did not relate specifically to the question whether a person who was already party to a polygamous union, valid under the law of the country where it was concluded, could enter into a valid marriage in South Africa. Nevertheless, if the correct question, in determining the validity of the second marriage, is whether the first union constitutes one which our law would recognise as a marriage, it appears to me that *Seedat* and the other authorities I have mentioned would dispose of that question; Khan was not, when he allegedly married the applicant in South Africa, party to a union which our law would recognise as a 'marriage', and the earlier union was thus not an impediment to his marriage in South Africa.

[76] The cases cited in *LAWSA* where later marriages were invalidated by earlier marriages (para 24 footnote 2) appear all to have been cases of earlier civil marriages or marriages under foreign monogamous legal systems. In *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC) the court held that the word 'spouse' in the Intestate Succession Act 81 of 1987 included the widow of a polygamous but *de facto* monogamous Muslim marriage but the decision was not founded on a conclusion that the Muslim marriage was a valid marriage for purposes of South

African law. In *Ryland v Edros* 1997 (2) SA 690 (C) Farlam J, as he then was, held, basing himself on constitutional values, that it would not be contrary to public policy to enforce the proprietary aspects of a Muslim marriage agreement between parties to a *de facto* monogamous union. He did not decide that the Muslim union was a valid 'marriage' for purposes of our law.

[77] I simply add that there would be a deep irony in an argument that, in a more enlightened era, our law should recognise a polygamous marriage, valid under the foreign law, as a marriage in South Africa while simultaneously contending that, because of that very polygamous marriage, a civil marriage in South Africa is void on the grounds of our law's disapproval of polygamy.

[78] In regard to customary marriages, s 22 of the Black Administration Act 38 of 1927 was amended in 1988 by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. The effect of the amendment was that the existence of a customary marriage, like a civil marriage, became an impediment to the conclusion of a civil marriage to a third party. Prior to 1988 it appears that the existence of a customary marriage was not an impediment to a civil marriage with a third party (Sinclair *The Law of Marriage* Vol 1 1996 at 219)[4]. Since the coming into force of the Recognition of Customary Marriages Act, a customary marriage has been recognised as a marriage for all purposes (s 2(1)). This would not preclude a further customary marriage, given that customary marriage is polygamous. However, a customary marriage would, by virtue of its statutory recognition, preclude a civil marriage between one of the partners and a third party (see s 2(2); and see also s 10(1), which permits partners to a customary marriage to conclude a civil marriage only if neither of them is a spouse in another subsisting customary marriage).

[79] It may be, however, that the correct question is not whether the first union is recognised as a 'marriage' for purposes of our law but whether, where such a union subsists, the parties to the second marriage can truly be said to be undertaking the pact of marriage. It is conventionally said that 'marriage' in our law is the 'voluntary

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[4] The position may have been different in the former Southern Rhodesia (see *R v Tarasanwa* 1948 (2) SA 29 (SR) where Thomas J said that the conclusion of a civil marriage by a person who was already married to someone else by customary law constituted the crime of bigamy). I have found no similar authority in South Africa (and cf Snyman *Criminal Law* 5th Ed at 401-402).

union of one man and one woman to the exclusion of all others while it lasts' (*LAWSA op cit* para 12; *Minister of Home Affairs & Another v Fourie & Another (Doctors for Life International & Others, Amici Curiae); Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC) para 3). In the latter case, this common law definition and the resultant form of the marital affirmation specified in s 30 of the Marriage Act were found to be constitutionally invalid to the extent that they were confined to heterosexual unions. Sachs J observed (para 3 footnote 2) that in some formulations of the common law definition of 'marriage' it was said that the union also needed to be entered into 'for life'. He remarked that this would seem to be a misnomer, given the high degree of divorce.

[80] It will be seen that the conventional common law definition requires the union to be 'to the exclusion of all others while it lasts'. This aspect of the common law definition is not expressly reflected in the marriage formula specified in s 30(1) of the Marriage Act though, having regard to the common law, it may perhaps be said to be inherent in an affirmation that the one partner takes the other as his or her lawful 'wife'/'husband'/'spouse' (the last of these three is to be read into s 30(1) pursuant to the order in *Lesbian and Gay Equality Project* at 586G). It may thus be suggested that the true question to be answered is whether Khan and the applicant undertook to be 'husband' and 'wife' under our law, having regard to the fact that neither of them regarded their union as being to the exclusion of Khan's union with Safia. (The applicant said in her founding affidavit that it was a tenet of their religion and of their respective cultures that a man could have more than one wife.)

[81] I have not found any authority dealing with that question. Although in the *Lesbian and Gay Equality Project* case a conventional common law definition of marriage was given as a preface to the discussion, the only point under consideration was the heterosexual element of the definition. Sinclair points out that each of the components of the common law definition of marriage is open to debate (*op cit* pp 305-312; see also by the same author in ***Boberg's*** *The Law of Persons and the Family* 2nd Ed at 164-170), including the supposed requirement of exclusivity (at p 310). Her statement that prior to 1988 a customary marriage was no impediment to a subsequent civil marriage to another person by either of the parties

(219) appears to be against the notion that a requirement of exclusivity would operate to preclude a civil marriage.

[82] Since it was not argued, I prefer to express no opinion on the import and validity of the conventional phrase 'to the exclusion of all others' in the common law definition of marriage and whether a marriage is void where the partners have a common understanding that one or both of them may continue with or conduct liaisons with a third party; but they are questions on which the Minister may need to form an opinion in dealing with Khan's ministerial appeal.

[83] Whether Khan's alleged customary marriage to the applicant is valid (and thus a separate basis for the alleged spousal relationship between them) turns on the Recognition of Customary Marriages Act and customary law. The respondents' counsel, in their heads of argument, submitted that ss 10(1) and (4) of the latter Act means that, because of the marriage to Safia, there could not be a valid customary marriage. That submission, which I do not understand, seems to have been linked to the contention that there could not be a valid civil marriage between them. The content of customary law was not debated before me. All I would say is that there is nothing in the Recognition of Customary Marriages Act which appears to me to have the effect of precluding a customary union where one of the parties is already party to a foreign polygamous marriage nor have I found reference to such a prohibition in the commentary on customary marriage in *LAWSA* 2nd Ed Vol 32.

[84] I do not finally decide these questions. However, they may require consideration by the Minister in the course of the ministerial appeal.

Other matters

[85] The other questions which will or may arise in the ministerial appeal appear to me to be primary factual, for example (but non-exhaustively): (i) whether Khan made misrepresentations to the Department when applying for his relative's permit (the evidence in the present case concerns alleged misrepresentations when Khan applied for permanent residence status – different prescribed forms are used when seeking a relative's permit); (ii) whether, if Khan had disclosed his Pakistani

marriage when applying for his relative's permit (assuming he was obliged to disclose it and failed to do so), a relative's permit would and could permissibly have been refused; (iii) whether Khan as a fact concluded a marriage or customary union with the applicant, and whether the marriage certificate he produced was genuine or bogus; (iv) whether Khan was conducting work in South Africa in violation of s 18(2) and whether, assuming this were the only obstacle to his re-entry into South Africa, he should still have been refused entry (he may in good faith have believed he was still entitled to work[5]; and perhaps, if he had been told that his right to work had lapsed, he would have undertaken not to work until he had obtained the necessary permit).

Conclusion and costs

[86] For reasons I have explained, I intend to make a direction of the kind made in *Koyabe* and to incorporate it in my order. I must emphasise that Khan is being afforded an indulgence, since the ministerial appeal should have been brought shortly after 8/9 May 2014. Despite the circumstances of this case, the ministerial appeal retains its character as an expeditious review by the Minister of his officials' decision. It will be for the Minister to decide what process he follows.

[87] I intend to extend the interim arrangements reflected in the order of Bozalek J, pending the determination of the ministerial appeal. However, and because those arrangements were reached at a time when the respondents expected Kahn's fate to be determined one way or the other pursuant to a court hearing on 6 June 2014, I shall make provision for the respondents to apply, on the same papers supplemented as needs be and on notice to the applicant, for an amendment of the interim arrangements pending the determination of the ministerial appeal. The respondents might, for example, wish to persuade the court that Khan should await

[5] Khan says in the replying affidavit that he was told by a Home Affairs official that he did not need to renew his work permit because he qualified for permanent residence and would be receiving a permanent residence permit in due course. He named this official as 'M'Jacky'. In his supplementary replying affidavit he points out that it appears from the documents annexed by the respondents to their supplementary answering papers that the official who signed Khan's permanent residence documentation had the surname 'Majiki'. There may be merit in Khan's explanation that this was the person whose name he had earlier given to his lawyers and which they had rendered, phonetically, as 'M'Jacky'. As noted, it does not appear from the papers why no decision was apparently made on Khan's application for permanent residence status dated 6 July 2011.

the outcome of the ministerial appeal at the pre-entry facility at the airport or that he should be required to take up accommodation at an hotel at the airport (which was the temporary arrangement reflected in the order of Schippers J).

[88] As to costs, I think the applicant was entitled to seek urgent relief on 9 May 2014 but she misconceived the form of interdict to which she and Khan were entitled. The fact that the matter was not heard during the week of 12 May 2014 was due to the unavailability of an urgent judge. Neither side is to blame for that. I thus think that the fairest course is to require the parties to bear their own costs in respect of the appearances on 9 May 2014 and 12-16 May 2014.

[89] The application was intended to serve before me on 5 June 2014 as the duty urgent judge, but owing to more pressing matters I was unable to deal with the case until the following day. Again, therefore, the parties will need to bear their own costs in respect of 5 June 2014.

[90] In regard to the appearance on 6 June 2014, I have already said that the applicant should bear those costs, since the postponement was attributable to the applicant's failure to file the correct supplementary replying papers.

[91] In regard to the appearance on 19 June 2014, when the matter was finally argued, the respondents have been vindicated in their contention that Khan should have exhausted his s 8(1) remedy. I have decided, in the interests of justice, to afford Khan the opportunity now to exhaust that remedy, but in my view the applicant, who brought the application for Khan's benefit, must bear the costs of the hearing on 19 June 2014, including those associated with the preparation of heads of argument. She will also need to bear the costs of the application generally (ie those relating to the respondents' consideration of the application and the preparation of their answering and supplementary answering papers).

[92] Mr Papier submitted that the applicant was acting for the benefit of Khan and that Khan effectively made himself a party to the application when he made the replying affidavit and the supplementary replying affidavit. Mr Uijs did not oppose the submission that Khan could be held liable for any costs properly awarded against

the applicant. I thus intend to direct that the applicant and Khan shall be jointly and severally liable for the costs in question.

[93] Although the case was not without its difficulties, I do not think it was of sufficient complexity or importance as to warrant burdening the applicant and Khan with the costs of two counsel.

[94] I make the following order:

[a] Condonation is granted to the applicant for the late filing of the supplementary replying affidavit. The parties shall bear their own costs in respect of the condonation application.

[b] In terms of s 7(2)(b) of the Promotion of Administrative Justice Act 3 of 2000, Murad Khan (holder of Pakistani passport VY4117561) ('Khan') is directed to exhaust the remedy afforded to him by s 8(1) of the Immigration Act 13 of 2002, namely his right to request the first respondent (the Minister of Home Affairs) to review the decision taken on 8 May 2014 by one or more officials of the Department of Home Affairs to refuse him entry into South Africa.

[c] If the said request has not already been lodged with the first respondent, Khan shall, if he intends to avail himself of the said internal remedy, deliver the request to the first respondent within three calendar days from the date of this order.

[d] Pending the determination by the first respondent of Khan's request as aforesaid, the interim arrangements contained in the order of this court dated 16 May 2014 shall, subject to [e] below, continue to apply.

[e] The respondents are granted leave to apply on the same papers, duly supplemented as needs be and on notice to the applicant and Khan care of the applicant's attorneys of record, for an order to amend the said interim arrangements.

[f] The interim arrangements shall lapse if the first respondent dismisses Khan's request or if Khan (if he has not already filed a request) fails to deliver the request

within three calendar days from the date of this order. This direction is without prejudice to Khan's right to apply, in fresh proceedings, for interim relief if the first respondent should dismiss his request.

[g] Save as aforesaid, the application is dismissed.

[h] The applicant and Khan shall jointly and severally be liable for the respondents' costs of the application, including the costs of the appearances on 6 and 19 June 2014 but excluding the costs of any earlier appearances. Save as aforesaid, the parties shall bear their own costs.

ROGERS J

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