IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION. PRETORIA)

CASE NO: 55580/2011

DATE: 23 SEPTEMBER 2014

IN THE MATTER BETWEEN

SINH FAYESSIN GOHIL SHAILENORA **APPLICANT**

AND

MINISTER OF HOME AFFAIRS **RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. In this application the following relief is sought by the applicant:

a) An order declaring that the applicant's Notice of Appeal to the Director-General of the Department of Home Affairs dated the 03rd of November 2008 constitutes compliance with sections 3(1) and (2) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ('the Act').

b) Alternatively to paragraph (a) above, an order condoning the applicant's failure to comply with the provisions of section 3(1) and/or Section 3(2) and/or section 5(2) and/or section 4(1) of the Act.

The respondent opposes the relief sought.

BACKGROUND

2. The applicant has issued summons against the respondent in which he claims the sum of R2 126 000-00 as damages following his arrest and detention during the period 27 October 2008 until 08 November 2008 by employees of the respondent.

3. He alleges that his arrest and detention was unlawful in that at the time of his arrest, he was lawfully in the country by virtue of a business permit issued at the behest of the respondent.

4. The applicant, together with other Indian nationals, was arrested by officials of the Department of Home affairs on the 27th of October 2008 at Tzaneen and was thereafter held in custody at various locations including the Tzaneen Police Station, the Polokwane Police Station and the Lebowakgomo Community Service Centre.

5. The reasons advanced for the arrest of the applicant was that he had failed to make written representations in terms of the Immigration Act 13 of 2002 following the delivery of a notice of intention to withdraw his work permit. A notice of deportation was served on the applicant on the 28th of October 2008.

6. The stance of the applicant was that he did not receive the notice of intention to withdraw a work permit and that in any event he was not in possession of a work permit but of a business permit. The respondent's view is that the reference to a 'work permit' was an error and that the business permit on which the applicant relies was fraudulently issued, and that as a failed asylum seeker, he could never have obtained a business permit.

7. On the 03rd of November 2008 and while the applicant was still in custody, Kraut Attorneys, acting on instructions given to them, wrote to the Director-General of the Department of Home Affairs appealing against the decision to deport the applicant. The letter was served on the Department of Home Affairs on the 05th of November 2008. In that letter the applicant asserts that his arrest and detention was wrongful, unlawful and illegal and concludes with a demand for the release of the applicant from detention and the withdrawal of the notice of deportation and other notices issued.

8. The applicant was released from detention on the 08th of November 2008 and continued with his efforts to prosecute the appeal referred to above, contained in the letter of Kraut Attorneys of the 03rd of November 2008.

9. It would appear that no decision on the appeal had been taken by August 2009 resulting in the applicant launching proceedings out of this Court for relief which included an order that the Minister of Home Affairs and the Director-General of Home Affairs grant the applicant an extension of his business permit as well as an order declaring the withdrawal of the applicant's work permit unlawful as well as declaring the decision to deport the applicant, invalid and of no force and effect.

10. Those proceedings were brought to finality on the 13th of September 2010 when the parties reached agreement on the dispute. The agreement was made an order of court and the order provided *inter alia* that:

> a) All withdrawal notices pertaining to the withdrawal of work and/or business permits were herewith withdrawn (This was done without an admission that the permits were lawfully issued);

b) All deportation notices were rescinded.

11. The settlement also provided a mechanism by which the applicant could apply for extensions of these work and/or business permits.

The agreement led to the withdrawal of the action on the basis that the respondent assumed liability for the costs of the application.

12. On the 23rd of August 2011, Kraut Attorneys wrote to the respondent giving notice in terms of the Act of the applicant's intention to institute legal proceedings against the respondent for damages arising out of the arrest and detention of the applicant during the period 27 October 2008 until 08 November 2008.

13. In the trial action which is pending and enrolled for hearing on the 20th of October 2014, the respondent has filed a special plea to the effect that the applicant has not complied with the provisions of the Act.

14. The relief which the applicant accordingly seeks in these proceedings is a declaration that the letter of the 03rd of November 2008 of Kraut Attorneys constituted compliance with section 3(1) and 3(2) of Act 40 of 2002, alternatively, an order condoning the applicant's failure to comply with the provisions of section 3(1) and/or section 3(2) and/or section 5(2) and/or section 4(1) of the Act.

15. No submissions were advanced by the applicant in support of the main relief it sought and in my view it could hardly be said that the letter of the 3rd of November 2008 constituted compliance with the provisions of the Act. While the letter did indeed allude to the applicant's view that his arrest and detention was unlawful, it did not allude to his intention to seek damages arising therefrom. It was no more than a Notice of Appeal in terms of the Immigration Act seeking the release of the applicant from detention.

16. The stance of the applicant relative to the alternate relief it seeks is that he was at all times unaware that his wrongful arrest and detention gave rise to an entitlement to claim damages from the respondent. He alleges that he became aware of the existence of such right for the first time during August 2011 when he consulted a health professional about hip discomfort which he believed was related to his incarceration.

17. He was advised by the health professional in question that he would possibly have a claim against the officials who were responsible for his arrest and detention.

18. He then consulted Kraut Attorneys who despatched the letter of the 23rd of August 2011 to which reference has been made. His stance is that in respect of the letter of the 23rd of August 2011, good cause exists for his failure to give timeous notice in that he only became aware of his right to claim damages during

August 2011, and that the prospects of success in the trial action are overwhelmingly in his favour, and that the respondent has not been prejudiced by the failure to give timeous notice.

19. In opposing the relief sought, the respondent takes the position that the applicant was a failed asylum seeker and was never lawfully in the country. Its stance is that the applicant had obtained a permit by way of fraudulent means. It warrants mention however that to date, that business permit has not been withdrawn.

20. With regard to the two letters which are the subject of this application, the respondent's stance is that the letter of the 03rd of November 2008 which was an appeal in terms of Section 8 of the Immigration Act could never constitute notice in terms of Act 40 of 2002. The intention of the section 8 notice was to submit an appeal. My view is that this argument is unassailable and the applicant, in any event, advanced no submissions in support of it. .

21. In opposing the grant of alternate relief it denies that the applicant has shown good cause as is required in terms of Section 3(4)(b)(ii). It also denies that it has not been prejudiced by the failure to give timeous notice but offers no reasons in support of such denial. Its stance is that:

a) There is no claim for hip discomfort contained in the letter of the 23rd of August 2011 which was despatched after he consulted a health professional for hip discomfort related to his detention;

b) On the probabilities, it is highly improbable that the applicant, who was represented by Kraut Attorneys from November 2008 up to September 2010, would not have been informed of his right to claim damages shortly after his release on the 08th of November 2008, especially in view of the fact that the applicant had already taken the position as far back as November 2008 that his arrest and detention was wrongful and unlawful.

THE LAW

22. In terms of Section 3 of the Act, no-one is entitled to recover a debt against an organ of State unless:

(1)(a) The creditor has given the organ of state notice in writing of his/her intention to institute legal proceedings in question; or

(1)(b) The organ of state has consented in writing to the institution of that legal proceeding(s) -

(i) without such notice; or

(ii) upon the receiptof a notice which does not comply with all the requirements set out in ss

(2)

In terms of Section 3(2) of the Act, the notice referred to above must:

> (2)(a) within six months from the date on which the date became due, be served on the organ of state in accordance with Section 4(1). . .

In terms of Section 3(4)(b) a creditor may apply for condonation for the failure to serve the notice timeously and the court may grant such an order if it is satisfied that:

> (i) the debt has not been extinguished by prescription
>
> (ii) good cause exists for the failure by the creditor; and
>
> (iii) the organ of state was not unreasonably prejudiced by the failure.

23. On what is before me there was no serious suggestion of prejudice and the respondent's answering affidavit, beyond denying the absence of prejudice, does not advance any reasons in support of its contention that the late notice operated to its prejudice. I am accordingly satisfied that the requirement that the respondent has not been unreasonably prejudiced has been met.

24. What remains in issue and requires determination is:

> a) Whether good cause exists?; and
>
> b) Whether the application for condonation was brought timeously?

25. In *MADINDA v MINISTER OF SAFETY AND SECURITY* 2008 (4) **SA** 312 **(SCA)** the Court held that:

> '*The phrase 'if [the court] is satisfied' in s 3(4) (b) has long been recognised as setting a standard which is not proof on a balance of probability. Rather it is the overall impression made on a court which brings a fair mind to the facts set up by the parties. See e g* Die Afrikaanse Pers Bpk v Neser *1948 (2) SA 295 (C) at 297. I see no reason to place a stricter construction on it in the present context. '* (at 316C)

In addition it was held that:

> '*Good cause' looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of*

success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefor. ' (at 316E-F)

26. When one has regard to those factors, which are not exhaustive, then it is my view that the applicant has good prospects of success. Despite the respondent's view that the business permit issued to the applicant was fraudulent, there are simply no grounds advanced in support of this view and while it is still open to the respondent to do that, it has not, to date, done so and this is a factor that I must consider in favour of the applicant in assessing the prospects. While I would not characterise the prospects as being as overwhelming as counsel for the applicant has urged me to, for present purposes I deem it sufficient to conclude that the applicant's prospects of success are good.

27. Moving to the reason for the delay, I have some difficulty in comprehending why if the applicant as far back as November 2008 took the firm view that his arrest and detention was illegal and unlawful, no steps were taken by him after his release early in November 2008 to pursue his claim for damages? He states that he was unaware that he had such a right and one must assume from that, that he was not advised of the existence of such a right by his attorneys, who continued to act for him at least until September 2010 in the litigation relating to the possible withdrawal of his business permit.

28. On the other hand, and in favour of the applicant, it is so that he diligently pursued his right to be released, and the matter of his business permit, and he succeeded with both. It is inconceivable that if he was aware of his right to claim damages, he would not have done so with similar diligence. Therefore in bringing a fair mind to the facts before me, I must conclude that the applicant's explanation for the delay is not so far-fetched that it falls to be rejected. There may be aspects of it that are worrisome, but overall, I am satisfied that from the overall impression of the facts, good cause has been shown to exist.

29. Finally there is the matter of the delay in bringing the application for condonation. It was some twelve months and no explanation has been advanced for it. Even where the Court is satisfied, as it is, that the requirements of Section 3(4)(b) have been satisfied, it retains a discretion in granting condonation. The absence of an explanation for the delay, while problematic, should not be fatal. If I have regard to all the circumstances in their totality, including the good prospects of success and the absence of prejudice to the respondent, the delay, in my view, should not displace the grant of relief that, in the ordinary course, the applicant has made out a case for.

COSTS

30. The court has a wide discretion with regard to the granting of costs and while the applicant has been

substantially successful, my view is that the respondent's opposition to the relief sought was not misplaced. Given that ultimately it is the applicant that seeks an indulgence for his failure to comply with the Act and that the main relief that was sought was misconceived and bad in law,it would be just, fair and equitable to direct that each part bear their own costs in relation to the application .

ORDER

31. In the circumstances I make the following order:

i. The applicant's failure to comply with the provisions of section 3(1) and/or Section 3(2) and/or Section 5(2) and/or Section 4(1) of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 is condoned.

ii. Each party is to bear their own costs.

55580/2011

HEARD ON: 05 AUGUST 2014

FOR THE APPLICANT: ADV A J KRAUT

INSTRUCTED BY: KRAUT ATTORNEYS (ref: Mr G Kraut/G073-11)

FOR THE RESPONDENT: ADV G BOFILATOS SC

INSTRUCTED BY: THE STATE ATTORNEY (ref: SJAS/KF 6155/2011/Z45)