Reportable:	Yes / No
Circulate to Judges:	Yes / No
Circulate to Magistrates:	Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no:	1226/2008
Date heard:	2008-09-12
Date delivered:	2008-09-19

In the matter of:

MUHAMMAD IMRAN KHAN **APPLICANT**

versus

THE IMMIGRATION OFFICER:
KIMBERLEY REGION,
DEPARTMENT OF HOME AFFAIRS **RESPONDENT**

Coram: **MAJIEDT J**

JUDGMENT

MAJIEDT J:

1. The Applicant, a Pakistani National, who is presently in detention in terms of s34(1) of the Immigration Act, 13 of 2002 ("*the Act*") as an illegal foreigner, seeks the following final relief on an urgent basis:

   1.1 "that the Applicant be released from detention and be allowed a proper

opportunity of at least 30 days to meet any legal requirements for his further stay in South Africa, inter alia by means of the procedure prescribed in s8 of Act 113 of 2002 (sic: it should be Act 13 of 2002);

alternatively the Applicant be allowed to depart voluntarily from South Africa, without any endorsement on his passport.

1.2 Further and alternative relief.

1.3 Costs."

2. The Respondent opposes the application and has raised a number of points *in limine*. Although, as will shortly appear, there is sufficient merit in the points *in limine* to uphold same and to dismiss the application on those grounds alone, I intend dealing fully with the application, including its merits, particularly since this matter involves the liberty of an individual.

3. Most of the facts are common cause in this application and I briefly set out the common cause facts, together with the Respondent's averments on the facts in issue (based on the approach in **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 620 (A)**) as follows:

3.1 The Applicant was arrested by immigration officers and members of the South African Police Services ("*SAPS*") on 5 August 2008. He was arrested outside the Transvaal Road Police Station in Kimberley, while he was enquiring about the arrest of certain of his relatives by the immigration

officers.

3.2 His papers were examined by an immigration officer, Mr. Mohamed, who is the deponent to the Respondent's opposing affidavit herein. Upon examining the Applicant's papers, Mr. Mohamed noticed that the Applicant was the holder of a temporary residence permit with the condition stipulated therein that he should continue residing with his South African citizen spouse.

3.3 Upon questioning the Applicant, Mr. Mohamed was informed that the Applicant's spouse resides in Cape Town, that he was *en route* from Cape Town to Johannesburg and that he would be visiting a friend in Kimberley for two days before continuing his journey to Cape Town.

3.4 In Mr. Mohamed's presence the Applicant telephoned his wife and handed the phone to Mr. Steenkamp, a colleague of Mr. Mohamed. Mr. Steenkamp thereafter informed Mr. Mohamed that the Applicant's spouse had informed him

that she was not aware of the fact that the Applicant was in Kimberley and that they had not been living together as husband and wife from December 2007 (i.e. for some eight months). Mr. Steenkamp confirmed this in a confirmatory affidavit attached to the Respondent's opposing affidavit.

3.5 As a consequence of the aforementioned information gleaned from the Applicant's spouse, the Applicant was arrested because he was *prima facie* in contravention of the conditions of his temporary residence permit.

3.6 Mr. Mohamed contacted the Applicant's spouse again on the following day (6 August 2008) and she confirmed the contents of her conversation which she had had the previous day with Mr. Steenkamp and which the latter had conveyed to Mr. Mohamed. She indicated her preparedness to depose to an affidavit in this regard, which she did. This affidavit of the Applicant's spouse confirmed that they had been separated since December 2007. She

also indicated that the Applicant had visited her some two or three weeks previously to ask for a letter for the extension of his temporary residence permit and that the Applicant had not supported her for the past eight to ten months.

3.7 On the 7th August 2008 the Applicant's spouse travelled from Cape Town to Kimberley to collect her computer laptop and she spoke to Mr. Mohamed. Mr. Mohamed explained to her the circumstances surrounding the Applicant's arrest and that he was going to be deported from the country. She was satisfied and left Mr. Mohamed's office.

3.8 On the 11th August 2008 Mr. Mohamed received a letter from the Applicant's spouse in which she explained that the first affidavit which she had sent to him had been a mistake and in which she recanted therefrom.

3.9 However, on the 14th August 2008, Mr. Mohamed received another letter from her stating that she was withdrawing

from the Applicant's case and that she felt that he had to be deported. A second letter received on the same day indicated that the Applicant's spouse is also withdrawing her application for an attorney from Legal Wise to represent the Applicant.

3.10 On 7th August 2008 the Applicant was served with a notification of deportation and a notification regarding his rights to request a review by the Minister. The Applicant refused to sign these forms as acknowledgement of receipt thereof. A member of the SAPS was then requested by Mr. Mohamed to sign as a witness that the forms had indeed been handed and explained to the Applicant and that he had refused to sign them.

3.11 As requested by the Applicant's attorneys, his detention was confirmed by a court warrant on 18th August 2008 and this detention was extended to 30th November 2008 by order of a Magistrate dated 1 September 2008.

4. It is the Applicant's contention that he is being detained unlawfully, that he has complied with the conditions of his temporary residence permit and that he should be released forthwith. The Respondent, on the other hand, apart from the points *in limine* raised, contends that the Applicant is in lawful detention in terms of the provisions of the Act, that he is an illegal foreigner and ought therefore to be deported, since he has failed to comply with the conditions of his temporary residence permit. I discuss firstly the points *in limine* before I deal with the merits of the matter.

5. The first point *in limine* raised by the Respondent is that the application is not urgent. From the facts set out above, it is plain that the Applicant has been in detention since 5th August 2008 and a notice of deportation has been served on him on 7th August 2008. A warrant of detention was issued on 18th August 2008 confirming his detention. There is considerable merit in the contention advanced by Ms Chabedi on behalf of the Respondent that, since the Applicant had been aware since at least 18th August 2008 that his detention is lawful and since he has failed to exercise his rights to either appeal or review (an aspect which I will refer to again later), the application can no longer be said to be urgent. Ms Chabedi is correct when she submits that the relief that the Applicant seeks now in this urgent application has already been afforded to him in terms of s8 of the Act and which had been explained to him at the time of his arrest and detention. Section 8(1) provides that a person who is found to be an illegal foreigner can in writing request the Minister to review that decision. Furthermore, s8(4) read with s8(3) makes provision for a review or appeal to the Director General if such a person is aggrieved by

any other decision taken against him or her. It is common cause that the Applicant was informed of this at the time of his arrest and detention, yet he has failed to exercise these rights which had been explained to him. He in fact refused to sign the relevant notifications when asked to do so by Mr. Mohamed. In the premises, I am of the view that the Applicant has been mostly the author of his own misfortune. Be that as it may, I was prepared to consider the matter on an urgent basis, given the fact that it involves the liberty of a person.

6. The next point *in limine* raised by the Respondent is that the decisions to find the Applicant to be an illegal foreigner and to detain him are administrative actions as defined in the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA"*), which are subject to review in terms of s8 of the Act, to which I have already alluded. Ms Chabedi contends that the Applicant's failure to have the decisions reviewed in terms of s8, has the effect that he has not exhausted his internal remedies. Section 7(2)(a) of PAJA provides that no court or tribunal shall review any administrative action in terms of PAJA, unless any internal remedies provided for has been exhausted. I agree with Ms Chabedi that the Applicant cannot approach this Court until he has exhausted these internal remedies. On this ground alone the application should be dismissed. The provisions contained in s8 will, for the reasons that follow later, also provide an insurmountable obstacle to the Applicant on the merits.

7. The third point *in limine* raised is that the Minister and the Director General, given the powers conferred upon them by the Act, *inter*

alia to consider appeals or reviews by an applicant who has been declared an illegal foreigner and who stands to be deported, have direct and substantial interest in the matter and should have been joined as co-respondents. In the same vein, Ms Chabedi also pointed out that the Respondent has been incorrectly cited. These points also have substantial merit and I am of the view that for this reason also the application should be dismissed. I now turn to consider the merits of the matter.

8. Section 11(6) of the Act provides as follows:

> *(6) "… a visitor's permit may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the permits contemplated in sections 13 to 22: Provided that-*
>
> *(a) such permit shall only be valid while the **good faith spousal relationship exists**;"*
>
> (emphasis supplied)

This provision must be read in conjunction with s10 of the Act which reads as follows:

> "*10 Temporary residence permits*
>
> *(1) Upon admission, a foreigner, who is not the holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a temporary residence permit issued by the Director-General.*
>
> *(2) Subject to this Act, upon application in the prescribed manner and on the prescribed form, one of the temporary residence permits contemplated in sections 11 to 23 may be issued to a foreigner.*
>
> *(3) …..*
>
> *(4 …..*
>
> *(5) The Director-General may for good cause attach reasonable individual terms and conditions as may be prescribed to a*

temporary residence permit."

In the present matter, the condition attached to the Applicant's temporary residence permit is of course that he must reside with his spouse and the permit only remains valid while the good faith spousal relationship exists.

9. Section 43, which deals with the obligations of foreigners, provides as follows:

"A foreigner shall-

(a) abide by the terms and conditions of his or her status, including any terms and conditions attached to the relevant permit by the Director-General upon its issuance, extension or renewal, and that status shall expire upon the violation of those conditions;

(b) depart upon expiry of his or her status.

10. The procedure adopted by the Respondent in the present case, in particular by Mr. Mohamed, complies fully with the procedures set forth in the Act. Firstly, Mr. Mohamed was in my view fully entitled to take the Applicant into custody without a warrant, once it appeared *prima facie,* according to the information gleaned from the Applicant's spouse, that the Applicant was not complying with the conditions of his temporary residence permit and that his status required further verification. Section 41 of the Act empowers an immigration officer, such as Mr. Mohamed, to detain a person without a warrant in such circumstances.

11. Likewise, once an affidavit was obtained from the Applicant's spouse, confirming what had been conveyed verbally to Mr. Steenkamp, Mr. Mohamed was entitled to detain the Applicant in terms of s34 of the Act. That section provides that an immigration

officer may arrest and detain without a warrant an illegal foreigner, pending his/her deportation. It provides further that:

a) such an illegal foreigner shall be notified in writing of the decision to deport him/her and of his/her right to appeal such a decision;

b) the illegal foreigner may at any time request from an immigration officer that his/her detention for the purpose of the deportation be confirmed by a warrant of a court and such warrant is to be issued within 48 hours of such a request, failing which the illegal foreigner must be released forthwith;

c) the illegal foreigner must be informed upon arrest or immediately thereafter of the rights set out in (a) and (b) above in a language that he/she understands as far as is practicable;

d) An illegal foreigner may not be held in detention for longer than 30 calendar days without a warrant of the court and such a warrant may on good and reasonable grounds extend the detention for a period not exceeding 90 calendar days; and

e) The illegal foreigner must be held in detention in compliance with minimum prescribed standards protecting his/her dignity and human rights.

All the aforementioned prescripts were complied with fully by Mr.

Mohamed and there is no *bona fide* dispute on this aspect (the Applicant's averments to the contrary can be summarily rejected as untenable, since it is controverted by the documents attached to the Applicant's and Respondent's affidavits).

12. On behalf of the Applicant, Mr. Schreuder has submitted, on the authority of the judgment in **Eveleth v Minister of Home Affairs 2004(3) All SA 322 (T)** at 331 e, that the Respondent has failed to comply with the procedures in terms of s8 of the Act. This submission is without substance. As indicated above, Mr. Mohamed had fully explained to the Applicant all his rights including the rights of appeal and review as contemplated in s8. There has in fact been full compliance with the provisions of s34, which are couched in peremptory terms. In the **Eveleth** matter, *supra*, there has been clear non-compliance with that particular section, which makes that case distinguishable on the facts and on the law from the present one.

13. The final nail in the coffin of this application is the fact that, as Ms Chabedi has correctly pointed out, the Applicant seeks the relief in his Notice of Motion which had been afforded to him in any event shortly after his arrest and detention, when Mr. Mohamed explained to him his rights. The Applicant failed to have the decisions reviewed and/or to appeal against them, as was explained to him. Consequently, he cannot now approach this Court and ask for the very same relief which he had earlier declined to take up. On the merits therefore, the Applicant cannot succeed in his application.

14. It seems to me that nothing precludes the Applicant, even at this late stage, from requesting in writing the Minister to review the decision that he is an illegal foreigner, as contemplated in s8(1) of the Act. In such a request, the Applicant could possibly explain the reasons for his failure to timeously lodge a request for a review. What is plain, however, is that the Applicant cannot be released as he is *prima facie* an illegal foreigner, subject to deportation in terms of the Act set out above.

15. In the premises therefore the application must fail for the following reasons:

    a) The Applicant failed to exhaust his internal remedies as set out in s8 of the Act and can therefore not approach this Court for relief (s7(2)(a) of PAJA);

    b) The Applicant's failure to join the Minister and the Director General is fatal, since both these parties have direct and substantial interest in the matter by virtue of the powers conferred upon them by the provisions of the Act;

    c) On the merits, the Respondent has made out a case for the lawful arrest, detention and deportation steps taken against the Applicant;

    d) The relief which the Applicant now seeks in his Notice of Motion, has already been offered to him but he has elected to decline same.

16. With regard to costs, I am of the view that, in the exercise of my discretion, it would be inequitable to mulct the Applicant in costs, given his present precarious situation. In the premises I take the view that, notwithstanding the fact that Ms Chabedi is probably correct in her submission that this application was ill-conceived and stillborn, I should make no order as to costs.

17. I issue the following order:

The application is dismissed.

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SA MAJIEDT

JUDGE

FOR THE APPLICANT : ADV J SCHREUDER
INSTRUCTED BY : JOOSTE ATTORNEYS

FOR THE RESPONDENT : ADV CHABEDI
INSTRUCTED BY : STATE ATTORNEY