IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO. 1344/2006
REPORTABLE

In the matter between:

MOHAMED ABDELNASER HOUD
APPLICANT

and

MINISTER OF HOME AFFAIRS **1ST**
RESPONDENT

GIDEON CHRISTIANS **2ND**
RESPONDENT

THE STATION COMMANDER: S.A. POLICE SERVICES, RAVENSMEAD CHARGE OFFICE **3RD**
RESPONDENT

JUDGMENT DELIVERED ON 25 AUGUST 2006

DLODLO, J

(1) The Applicant was apprehended by the Second respondent at Cape Town airport when he attempted to board a flight to Cairo on 8th February 2006. He was questioned by the Second Respondent and after the Second Respondent had also questioned the Applicant's spouse and obtained a statement from her, the Second Respondent determined that the Applicant was an illegal foreigner and arrested him and set a date for his deportation. On 11 February 2006, the Applicant approached this Court on an urgent basis seeking *inter alia*, to prevent his deportation from the Republic of South Africa for as long as he remains lawfully married to Zaynap Cassiem ("*Cassiem*"). On

that day the Applicant obtained a *Rule Nisi* calling upon the Respondents to show cause why an order interdicting and restraining the First and Second Respondents from deporting him from the Republic of South Africa ("*the Republic*") pending the determination of an application for permanent residence in the Republic, should not be granted. On 3 April 2006, the applicant filed a Notice in terms of Rule 28 in which he substitutes the main relief sought in the Notice of Motion with the following relief:

(i) "*Interdicting and restraining the First and Second Respondents from deporting the Applicant from the Republic of South Africa pending the determination of his application for permanent residence in the Republic of South Africa; and*

(ii) *Declaring Second Respondent's purported cancellation of the Applicant's temporary residence permit to be null and void, and of no force and effect."*

This is therefore the return date and the confirmation of the provisional order is resisted by the First and Second Respondents.

(2) The Applicant's contentions for remaining in the Republic are four-fold:

i) firstly, that he is by virtue of his marriage to Ms Cassiem entitled to remain in the Republic of South Africa;

ii) secondly, that the asylum seeker temporary permit issued to him in terms of section 22 of the Refugees Act No. 130 of 1998 ("*the Refugees Act*") has been extended to 30 June 2006;

iii) thirdly, a temporary residence permit issued to him in terms of section 18 of the immigration Act, 13 of 2002 ("*the Act*")

permits him to remain in the Republic of South Africa until 2007; and

iv) fourthly, that he had submitted an application for permanent residence in the Republic, which had not yet been determined.

Mr. W. Fisher appeared for the Applicant whilst Mr. E.A. De Villiers-Jansen, assisted by Ms N. Mangcu appeared for the Respondents.

HISTORICAL BACKGROUND

(3) The Applicant is an Egyptian National. The First Respondent is the Minister of Home Affairs, sued in her capacity as the Ministry in charge of refugees and asylum seekers in terms of the laws of this country. The Second Respondent is employed as Senior Immigration Officer by the First Respondent and is cited herein by virtue of his employment. The Third Respondent is infact the Station Commissioner in the South African Police Services apparently sued in his/her capacity as the person in charge at the police station where the Applicant was detained upon being arrested at the airport. The Applicant applied for a business visa at the South African Embassy in Cairo and entered the Republic allegedly under the pretext of conducting business here. Upon his arrival on 19 February 2003, the Applicant was issued with a business permit valid until 18 May 2003. Once in the Republic, the Applicant applied for asylum on 5 March 2003 and was issued with an asylum seeker temporary permit. It is a requirement that an asylum seeker discloses to a refugee reception officer whether he is in possession of a passport. The reason for this is that a refugee reception officer must satisfy himself fully as to the reasons for the applicant’s entry into South Africa. The Applicant is alleged to have failed to disclose to the refugee reception officer that he was in possession of a passport.

Had he done so, it is contended in papers, the refugee reception officer would have seen that a business visa had been issued to the Applicant in Cairo.

(4) The Applicant approached Ms Cassiem and asked her to marry him so that he could stay in the Republic. On 19 April 2005, the Applicant married Ms Cassiem whereupon he applied for a change in his status, allowing him to stay in the Republic with Ms Cassiem as his spouse. Once married, the Applicant and Ms Cassiem, allegedly misrepresented to the Department of Home Affairs that they lived together as husband and wife. The Application to remain in the Republic and to reside with Ms Cassiem was approved on 19 May 2005 and in order to do so, the Applicant was issued with a relative's permit. The Applicant applied for permanent residence on 7 July 2005.

(5) On 8 February 2006, whilst on his way to Cairo, the applicant was stopped at Cape Town International Airport. It was apparent from his passport that the Applicant was a foreign national and that he had entered South Africa on a business visa. When questioned about his business dealings in South Africa, the Applicant was unable to give any explanation at all. Ms Cassiem, who accompanied the Applicant to the airport, willingly accompanied the Second Respondent, who explained to her that he would interview her about her marriage to the Applicant. During the interview, Ms Cassiem indicated to the Second Respondent that her marriage to the Applicant was not a genuine marriage and deposed to an affidavit to that effect. Pursuant to the affidavit made by Ms Cassiem, the Second Respondent determined that the Applicant is an illegal foreigner, informed him accordingly and issued the Applicant with notification of deportation and a

warrant for his detention. The Second Respondent explained to the Applicant the reasons for his deportation, read all the documents to the Applicant and informed the Applicant that he could appeal to the Director-General should he not agree with the Second Respondent's determination.

(6) The Applicant accepted the Second Respondent's determination and in fact indicated that he wanted to return to Cairo. The Applicant in any event had every intention of returning to Cairo. Accordingly, flight arrangements were made for the Applicant's return to Cairo on 11 February 2006. The Applicant did not inform the Second Respondent that he was issued with an asylum seeker temporary permit. On 9 February 2006, the Second Respondent informed the Applicant's attorney of record of the Applicant's detention and deportation and the reasons therefore. The Applicant's attorney informed the Second Respondent that the Applicant is not contesting his deportation, but that they wanted the cellular phones which the Second Respondent had found in the Applicant's possession and which the Second Respondent had handed to the South African Police, returned to the Applicant's attorney. The Applicant's attorney was satisfied that the Applicant was leaving the country. The applicant resided at 50 Olympic Avenue, Grassy Park prior to his arrest. According to the Applicant's application for permanent residence, his address is given as 2 Foxwold Avenue, Voorbrug, Delft. Ms Cassiem, in her affidavit given to the Second Respondent on 8 February 2006, states that she resides at 103 Angela Street, Valhalla Park. According to Ms Cassiem, she and the Applicant have at no stage lived together as husband and wife. Ms Cassiem's intention was to assist the Applicant, whom she says is her friend, to remain in the Republic. She is the

mother of three (3) children and is in a relationship with a South African citizen from Lenteguer, Mitchell's Plain. Moreover, Ms Cassiem and her South African companion have a daughter, Fatima.

THE FOUNDING AFFIDAVIT

(7) Mr. Mohamed Abdelnaser Houd, the Applicant deposed to this Affidavit. He stated that on his arrival in the republic during February 2003 he applied for asylum and was granted temporary asylum in terms of section 22 of the refugees Act, 130 of 1998. Mr. Houd averred further that whilst residing in the Republic by virtue of the aforementioned temporary asylum he met and fell in love with a South African National, Zaynap Cassiem. The two got married in March 2005. Mr. Houd also remarked that he verily believes that by virtue of his marriage to Ms Cassiem, he is entitled to remain in the Republic for as long as the marriage endures. On a Wednesday, 8 February 2006, Mr. Houd prepared for departure to "my motherland", as he stated, his plan being to visit his family.

(8) According to Mr. Houd, when he was about to board a flight at Cape Town International Airport to depart for Qatar from where he would fly to Cairo, he was, in his words, "accosted by members of the Department of Home Affairs", who, after perusing his documents, including the marriage certificate, asked where his wife was. The wife had escorted Mr. Houd to the Airport and was taken to a separate room and questioned by the said officials. The latter were under the auspices and command of the First Respondent. It is at this stage after Ms Cassiem had been interviewed, that Mr. Houd was accused of having entered into a sham marriage in order to remain in the Republic and he

was arrested. Mr. Houd claimed that he was sworn at by the officials and he, however, did not understand most of what was said to him because his English is extremely poor. He further explained that at some point he was asked by the Second Respondent to sign a document and in his understanding this document was either a declaration of his rights or was a confirmation of his rights.

(9) What he fully understood (which was made “plainly clear” to him) was that he would be deported to Egypt on Saturday, 11 February 2006 at 07h00. He understood the reasons for his deportation to be that he had entered into a marriage of convenience in order to merely stay in South Africa. His further understanding was that the Second Respondent had formed the view that the marriage was a sham and that the former violated immigration laws by entering into such a marriage.

(10) Mr. Houd averred that insofar as he knows, he is entitled to just administrative action in terms of section 33 of the Constitution of South Africa. He submitted that given the facts sketched in his Founding Affidavit, just administrative action has not been applied in his case. He categorically denied that his marriage is that of convenience and that he had transgressed the laws of the Republic, thereby deserving deportation. In Mr. Houd’s view, there were no basis for his incarceration which he labelled as an unfair limitation of his freedom and he called for his immediate release. Mr. Houd reserved his right to file supplementary affidavit setting out the reasons why.

SUPPLEMENTARY AFFIDAVIT

(11) In his Supplementary Affidavit Mr. Houd set out what he called "additional factors". The first such factor is that he had applied for permanent residence in South Africa. In respect to this factor he annexed a copy of the receipt of such application lodged with the First Respondent, marked "A". The second additional factor mentioned by Mr. Houd is that he applied for the extension of his asylum seeker temporary permit and that same had been extended to 30 June 2006. Annexure "B" evidences such extended asylum seeker temporary permit. Mr. Houd gave as a further additional factor that he was also granted two (2) years temporary residence in terms of the regulations promulgated under the Immigration Act 13 of 2002, which would have expired somewhere in 2007.

(12) Mr. Houd re-iterated that he believed and had been advised that the Second Respondent did not have the authority and/or power to cancel his temporary residence permit. In the alternative, averred Mr. Houd, should the Second Respondent be found to have been possessed of the power to cancel the temporary residence permit, then the cancellation was done without any just reason or grounds for doing so and that, in his view, the cancellation is without force and effect. In summary Mr. Houd averred that his right to remain in the Republic rested upon the three-fold foundation, namely, the temporary residence accorded to him in terms of section 18 of the Immigration Act, the right to apply for an extension of his asylum seeker temporary permit and the pending application for permanent residence.

THE ANSWERING AFFIDAVIT

(13) In opposition to the confirmation of the provisional order granted in favour of the Applicant, Mr. Gideon Christians deposed to the

aforementioned Affidavit. Mr. Christians dealt at length with the background of this matter. Most of what appeared under the background category of Mr. Christians constitutes common cause facts between the parties. The Applicant hardly denied any of such common cause facts. It would be a plentiful waste of time to deal with the common cause facts under this category. In any event such facts have been summarized in this judgment under the historical background.

(14) Importantly Mr. Christians averred that before issuing the Applicant with asylum seeker temporary permit, he would have had to disclose whether he was in possession of a passport. In this regard Mr. Christians referred the Court to annexure “GC2” in which it is clear that the Applicant declared to the refugee reception officer that he was not in possession of a passport. Mr. Christians elucidated that the reasons why an asylum seeker must disclose the existence of a passport is so that a refugee reception officer could satisfy himself fully as to the reasons for an Applicant’s entry into the Republic.

(15) In Mr. Christians’ averment, the Applicant did not indeed disclose that he was in possession of a passport. In his assertion, had the applicant disclosed that he was in possession of a passport, the refugee reception officer would have seen that a business visa had been issued to the Applicant. The refugee reception officer would have been able to make enquiries regarding the nature of the business or any meeting which the Applicant intended to attend. An enquiry of this nature would assist the refugee reception officer in determining whether the Applicant is in fact a genuine asylum seeker.

(16) Mr. Christians also annexed and marked annexure "**GC3**" a copy of the Applicant's application for a change in his status upon his marriage with Ms Cassiem. The application referred to in annexure "**GC3**" was approved on 19 May 2005. The Court is referred to annexure "**GC4**"; being the copy of the approval Mr. Christians has alluded to. On 27 May 2005, according to Mr. Christians and as it appears on annexure "**GC5**", the Applicant was issued with a relative's permit valid for two (2) years allowing him effectively to reside with Ms Cassiem as his spouse.

(17) Mr. Christians stipulated that as it can be seen in annexure "**GC6**" on 7 July 2005, the applicant applied to the Department of Home Affairs for permanent residence. Mr. Christians admitted that on 8 February 2006, during a routine inspection at Cape Town International Airport, he did stop the Applicant who was on his way to Cairo. The Applicant was questioned regarding his sojourn in this country and a substantial number of cellular phones were found in the Applicant's possession. It is here that Mr. Christians noticed that the Applicant's passport contained a business visa and a relative's permit. According to Mr. Christians, on being questioned about his business visa and his business dealings in South Africa, the applicant could not give any explanation at all. Mr. Christians became suspicious of the true reasons for the Applicant's entry into the Republic. When it was confirmed that the Applicant was married and that the spouse was present at the airport, Mr. Christians took her to the office for an interview. The Applicant's spouse indicated to Mr. Christians that she had continued long enough in pretending that theirs was a genuine marriage. Ms Cassiem, according to Mr. Christians, willingly made a statement in which she set out the reasons and the circumstances under which she and the

Applicant got married. The statement is annexed as annexure "**GC8**" to the Answering Affidavit.

(18) Mr. Christians then confiscated the cellular phones from the Applicant and had same handed over to the South African police Service. According to Mr. Christians, he thereafter informed the Applicant that he had determined that he is an illegal foreigner, and he issued him with a notification of deportation, explaining the reasons for his deportation and a warrant for his detention. Mr. Christians pointed out that he read all the documents to the Applicant to ensure that he understood what had happened and explained to him that he could appeal to the Director-General if he was dissatisfied with the determination.

(19) According to Mr. Christians the Applicant did not object to his determination and he in fact indicated that he wanted to return to Cairo. Arrangements were then made and the Applicant was booked on the next flight to Cairo on 11 February 2006. Mr. Christians emphasized that at no stage during his interview with the Applicant did the latter bring it to his attention that he was issued with an asylum seeker temporary permit. Mr. Christians mentioned that he saw this permit for the first time as an annexure to the Founding Affidavit given to him during the week of 13 February 2006.

(20) According to Mr. Christians, on 9 February 2006, he spoke to the Applicant's attorney, one Mr. Patel telephonically and he informed him of the applicant's detention and deportation and the reasons therefore. Mr. Patel allegedly informed Mr. Christians that the Applicant was not contesting his detention and deportation, but that they wanted the cellular phones found in

the possession of the applicant returned. Concluding on this aspect, Mr. Christians pointed out that Mr. Patel was satisfied that his client was leaving the country. Responding on the contents of the Founding Affidavit read together with the Supplementary Affidavit, Mr. Christians mentioned that the Applicant was no longer in detention and had been released pursuant to an order of this Court on 11 February 2006. Dealing with paragraph 6 of the Founding Affidavit, among other things, Mr. Christians admitted that the Applicant had a temporary asylum seeker permit but hastened to add that same was issued because of the Applicant's misrepresentation. He added that on the date of the Applicant's detention, the asylum seeker's permit had expired.

(21) Mr. Christians denied that the Applicant could not understand his explanation of the contents of the notification of deportation form as well as the warrant for his detention. Whilst Mr. Christians admitted that the Applicant would have been deported to Egypt on 11 February 2006, he added that this was not as a result of his determination that he was an illegal foreigner only, but the Applicant's own willingness to go back to Egypt as well. Mr. Christians also pointed out that the Applicant refused to avail himself of his right to appeal to the Director-General of the Department of Home Affairs. It will be helpful to set out the contents *infra* of the statement of Ms Cassiem made to the Second Respondent annexed to the Answering Affidavit as annexure "**GC8**".

ANNEXURE "GC8" – STATEMENT BY MS CASSIEM:

(22) *"Ek ZANAP CASSIEM, identiteits nommer 770219 0099 089 verklaar die volgende onder eed.*

Ek is ‘n volwasse Suid-Afrikaanse dame woonagtig te 103 Angela Straat, Valhalla Park. Gedurende December 2004 het ek Mnr. Mohamed Abdelnaser Mohamed Houd ontmoet. Hy het by my woning Rakams kom verkoop en ons het mekaar leer ken. Ons was bevriend vanaf December 2004 tot April maand 2005 to Mohammad na my toe kom en vra of ek nie vir hom kan uithelp om in Suid Afrika te bly nie. Hy het my gesê hy wou ‘n burger van Suid Afrika word en het gevra of ek nie saam met hom kan trou nie sodat hy die nodige dokumente kon kry by binnelandse sake. Ek het toe saam gestem om hom te help en hy het toe die nodige reeling getrek. Op 19 April 2005 het Mohamed en sy vriend vir my by my huis kom optel en ons is na ‘n woning in Mitchell’s Plain. Mohamed het ‘n huweliks bevester geken en ons is toe deur hierdie persoon, Rev. A.J.C. Daames getrou. Gedurende Mei 2005 het Mohamed my gevra om saam met hom Wynberg Home Affairs toe te gaan sodat hy die nodige dokumente kon kry om in Suid Afrika te bly. Ek het briewe en vorms uitgevul om te bevestig dat hy my man is en dat ons saam bly as man en vrou. Mohamed het my belowe dat hy my elke maand R150.00 so gee as ek hom help om in Suid Afrika te bly. Op 07 Februarie 2006 het hy en sy vriende my kom haal by my woning om saam met hom te gaan na Kaapstad Lughawe waar hy sou terug vlieg Egipteland toe. Op hierdie dag het die Polisie en Immigrasie beampte my ondervra oor ons verhouding en ek het uit my eie vryewil besluit om die waarheid te praat. Ek is ‘n moeder van 3 kinders en is in verhouding met ‘n Suid Afrikaner wat in Lenteguer, Mitchell’s Plain woonagtig is. Ons het ‘n babatjie en haar naam is Fatiema. Ek wou net vir Mohamed uithelp omdat ons vriende was. Ek het nooit saam met hom gebly nie en ons lewe nie soos man en vrou nie.”

THE REPLYING AFFIDAVIT

(23) In reply to the Answering Affidavit, Mr. Houd expressed that he had no idea why the Respondent contended that he should have had to disclose that he was in possession of a passport on applying for a temporary asylum seeker permit. According to Mr. Houd, he was simply never asked whether or not he had a passport, neither was he ever advised by any person that he needed to disclose the fact that he was in possession of a passport. If these are requirements whenever a person applies for a temporary asylum seeker permit, conclude Mr. Houd, then the officers concerned had not properly executed their duties.

(24) Responding to paragraph 11 of the founding Affidavit, Mr. Houd admitted that he had fourteen (14) cellular phones in his possession. These were intended as gifts for his family and friends in Egypt. In Mr. Houd's submission, the Second Respondent had no reason to be suspicious. Given all the circumstances of this case, in Mr. Houd's view, the Second Respondent is xenophobic, he enjoys the power he has over foreigners by virtue of his job and is over-zealous in applying this power. Mr. Houd denied that he could give the Second Respondent no answer at all but merely averred that for the most part he did not understand the Second Respondent because of his limited use of the English language. Mr. Houd stated that all that came to his mind was that he had committed some crime or other by merely being present in South Africa, and being ignorant of the law he thought that it would be better to leave the country than be jailed. In Mr. Houd's view, the statement allegedly given by his wife, Ms Cassiem, annexed to the Second Respondent's papers as Annexure "**GC8**" was extorted from her. According to Mr. Houd the contents of such a

statement are difficult to reconcile with the fact that she was present at the Airport in order to see him off.

(25) According to Mr. Houd, Ms Cassiem was not requested to go with the Second Respondent, but she was ordered. He and his wife were held under a state of siege at the Airport and were treated like criminals. Mr. Houd averred that the Second Respondent threatened Ms Cassiem that she would be jailed and that her children would be taken away from her. Mr. Houd opined that the Second Respondent had no basis for determining that he was an illegal foreigner as such determination was based on "facts" contained in Ms Cassiem's Affidavit which had been extorted from her and which facts were untrue. According to Mr. Houd it remains beyond his comprehension that it is alleged he was informed of the determination and his right to lodge an appeal. The right to appeal within ten (10) days viewed against the fact that he was due to be deported within three (3) days evidences inconsistence on the Second Respondent's version. Mr. Houd did admit that he did not tell the Second Respondent that he was the holder of an asylum seeker temporary permit and the reason was because he was unable to communicate with the Second respondent as a result of the language bar.

(26) According to Mr. Houd his attorney was never satisfied that he would be deported. He had merely decided not to fight the deportation because he did not have legal fees quoted for him in order to obtain an interdict preventing deportation. He also wanted the cellular phones returned. A Confirmatory Affidavit by Ms Cassiem was attached to this Replying Affidavit and she merely stated therein the following:

"I confirm that the contents of the aforesaid affidavit are true

and correct in all respects in which it refers to me. I confirm that the statement to the second Respondent was false and was induced by the threats made against me and my children."

SUBMISSIONS

(27) Mr. Fisher summarising the scenario in the instant case submitted that the Applicant is possessed of a relative's permit, his asylum seeker temporary permit having expired. In his view, the fact that the Second Respondent after interviewing the applicant's spouse came to the conclusion that the marriage between the Applicant and Ms Cassiem was a marriage of convenience, did not entitle the Second Respondent to effectively revoke the Relative's permit granted to the Applicant. In Mr. Fisher's submission the issues that fall to be determined by this court are in fact, three-fold, and can be expressed simply: Does the Immigration Officer (Second Respondent) in the given circumstances have the authority to:

i) revoke the Relative's Permit granted to the Applicant?

ii) determine that the Applicant is an illegal foreigner?

iii) deport the Applicant?

In Mr. Fisher's submission the answer to the above is negative. According to Mr. Fisher the "determination" made by the Second Respondent amounted to an effective revocation of the Relative's Permit granted to the Applicant. Mr. Fisher referred me to section 8(1) of the Act, prior to its amendment and concluded that on a proper construction of the said section 8(1) and (2) it is clear that the Act contemplated that prior to making a "determination" against a person, such a person must be informed of the contemplated decision and the reasons for the contemplated decision and must be afforded ten (10) days in

order to make representations before such decision is made and that after receiving notice of such decision (after having received the affected person's representations) that a person aggrieved by the relevant decision may appeal within twenty (20) calendar days.

(28) Mr. Fisher opined that within the framework of the facts in the instant matter, the Second Respondent could not make a "determination" based on a statement taken from the spouse given the circumstances under which the statement had been obtained. In Mr. Fisher's view, Section 33(1) of the Constitution Act 108 of 1996 read with section 33(2) find application in this matter. In Mr. Fisher's submission failure on the part of the Second Respondent to provide the applicant with a fair opportunity to respond to allegations contained in an affidavit made by Ms Cassiem regarding the parties' marriage, offended the rule of natural justice, namely, the *audi alteram partem* rule.

(29) Relying of ***Sidorov v Minister of Home Affairs*** 20014(4) SA 202 (T) at 209D-E, Mr. Fisher submitted that to be lawful administrative action has to be rational in respect of the reasons advanced for its execution as well as procedurally fair and objectively reasonable. I have no quarrel with this last submission and the authority on which it is founded. It suffices at this stage to mention that, in my view, the submission is misplaced. It cannot, in my view, be sustained on the facts and circumstances of this matter. I undertake to deal with Mr. Fisher's submissions fully *infra*. I have merely attempted to set them out *supra* without considering and subjecting them to reasoning. Maybe it is time that I set out both constitutional and statutory framework to which I must give consideration as I

travel through the "path" leading to the decision of this matter.

THE CONSTITUTIONAL PROVISIONS

(30) The starting point of the constitutional and statutory frameworks is section 1 of the constitution of the Republic of South Africa 108 of 1996 ("*the Constitution*"), which provides *inter alia* that the Republic of South Africa is one, sovereign, democratic State founded on the values of the supremacy of the Constitution and the Rule of Law. These founding values inform the interpretation of the Constitution and other law. See: ***United Democratic Movement v President of the Republic of South Africa and Others (and African Christian Democratic Party and Others*** **intervening;** ***Institute for Democracy in South Africa and Others*** **as** ***amici curiae*****) (No. 2)** 2003(1) SA 495 (CC) at 508 para (18-19). In keeping with the provisions of section 1 of the constitution, section 2 provides that the Constitution is the supreme law; that law or conduct inconsistent with it is invalid; and that the obligations imposed by it must be fulfilled. (See: ***Speaker of the National Assembly v De Lille and Another*** 1999(4) SA 863 (SCA) at 868-869 para (14); ***Pharmaceutical Manufacturers Association of SA and Another***; in re ***Ex Parte President of the Republic of South Africa and Others*** 2000(2) SA 674 (CC) at 687 para (19). Section 33 of the Constitution provides that:

"(1) Everyone has the right to administrative action that is lawful,

reasonable and procedurally fair.

2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

3) National legislation must be enacted to give effect to these

rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the State to give effect to the rights in ss (1) and (2); and

(c) promote an efficient administration."

(32) The transitional provisions of the constitution in schedule 6 required that the legislation referred to in section 33(3) be passed within three (3) years of the Constitution coming into force (See: item 23 to Schedule 6 of the Constitution). Promotion of Administrative Justice Act 3 of 2000 (PAJA) was assented to on 3 February 2000. The long title to PAJA states that it is:

> ***"To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto."***

(33) Section 1 of PAJA defines administrative action *inter alia* as any decision taken, or any failure to take a decision, by an organ of state exercising a public power or performing a public function in terms of any legislation. Section 6 of PAJA identifies the circumstances in which the review of administrative action may take place. (See: ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others*** 2004(4) SA 490 (CC) at 505 para (24). The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of

administrative action now ordinarily arises from PAJA, not from the common law as in the past. Moreover, the authority of PAJA to grant such causes of action rests squarely on the Constitution. As PAJA gives effect to section 33 of the Constitution, matters relating to the interpretation and application of PAJA will of course be constitutional matters (See: ***Bato Star Fishing (Pty) Ltd*** (*supra*) at 506 para (25); ***National Education Health and Allied Workers' Union v University of Cape Town and Others*** 2003(3) SA 1 (CC) at paras (14-15); ***National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another*** 2003(3) SA 513 (CC) at para (15); ***Alexkor Ltd and another v Richtersveld Community and Others*** 2004(5) SA 460 (CC) at para (23). Section 7 of PAJA provides *inter alia* that no court shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. Section 239 of the Constitution defines an organ of state as, *inter alia*, any department of state in the national sphere of government, or any other functionary exercising a public power or performing a public function in terms of any legislation.

THE STATUTORY PROVISIONS

(34) The Act has been amended by the Immigration Amendment Act, 19 of 2004 ("*the Amendment Act*") with effect from 1 July 2005 (See: Proc R30 in GG 27725 of 27 June 2005). Section 8 in the Amendment Act (See GG No. 26901 Vol 472 dated 18/10/2004) provides as follows:

"(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that 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) .....

3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

4) An applicant aggrieved by a decision of the Director-General contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.

5) The Director-General shall consider the application contemplated in subsection (4), where-after he or she shall either confirm, reverse or modify that decision.

6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.

7) The Minister shall consider the application contemplated in subsection (6), where-after he or she shall either confirm, reverse or modify that decision."

(35) Section 10(1) in the Amendment Act provides that 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. Section 10(2) provides that subject to the Act, upon application in the prescribed manner and on the prescribed form, one of the temporary residence permits contemplated in sections 11-23 of the Act may be issued to a foreigner. Section 18 in the Amendment Act provides, *inter alia*, that a relative's permit may be issued for the prescribed period by the Director-General to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance (See: In terms of Regulation 15(2) a relative's permit may be issued for a maximum period of two years. See **Regulation Gazette No. 8256 Vol. 480** dated 27 June 2005.)

(36) Section 25(3) in the Amendment Act provides that a permanent residence permit shall be issued on condition that the holder is

not a prohibited or an undesirable person, and subject to section 28. Section 26 in the Amendment Act provides as follows:

"26. Subject to section 25, the Director-General may issue a permanent residence permit to a foreigner who:

a) ……

b) Has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permit shall lapse if at any time within two years from the issuing of that permit the good faith spousal relationship no longer subsists, save for the case of death…"

(37) Section 32 of the Amendment Act provides that any illegal foreigner shall depart, unless authorized by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status. In terms of section 34 of the Amendment Act, an immigration officer may without the need for a warrant, arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General.

(38) Finally, section 41 in the Amendment Act provides that when so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such

immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary, detain him or her in terms of section 34.

APPLICATION OF THE ABOVE LEGAL PRINCIPLES TO THE FACTS OF THIS MATTER

(39) The Applicant contends that he is in terms of Section 33 of the Constitution entitled to fair administrative action, and submits that he has by virtue of the steps taken by the Second Respondent, not been afforded fair administrative action. As can be gathered from the above in terms of section 41 in the amendment Act, if an immigration officer, on reasonable grounds is not satisfied a foreigner is entitled to be in the Republic, such immigration officer may take such a foreigner into custody without a warrant and shall take reasonable steps to assist the person in verifying his status, and thereafter, if necessary, detain him in terms of section 34. In terms of section 34(1) in the Amendment Act, an immigration officer may arrest an illegal foreigner or cause him to be arrested, without the need for a warrant, and shall deport him or cause him to be deported and may, pending his deportation, detain him or cause him to be detained. In terms of section 34(1) (a) of the Act a foreigner shall be notified in writing of the decision to deport him and his right to appeal such decision in terms of the Act. Section 8 of the Amendment Act clearly sets out the procedures which a foreigner is entitled to follow once a decision has been taken to

deport him.

(40) The Applicant does not dispute the constitutional validity of any of the sections in the Act or the Amendment Act. Moreover, the applicant does not dispute that annexures **“GC 11”** and **“GC 12”** had been read and explained to him. In addition, the Applicant does not dispute that the Second Respondent informed him of his right of appeal to the Director-General should he be dissatisfied with the decision to deport him. In my view, the aforementioned provisions clearly furnish the Applicant with administrative action which is lawful, reasonable and procedurally fair. Moreover, the Applicant provides no explanation for his failure to exhaust the procedures contained in section 8 in the Amendment Act. Accordingly, I would think that as a result of the applicant’s failure to make use of the aforementioned procedure, he cannot complain of unfair administrative action. In my view, the Second Respondent simply complied with the provisions in the Act and the Amendment Act. On this aspect and in the circumstances of the instant matter this Court inescapably arrives at the conclusion that the Second Respondent’s action constituted lawful, reasonable and procedurally fair administrative action.

FAILURE TO COMPLY WITH SECTION 7 OF PAJA

(41) As can be seen above section 7 of PAJA precludes a court from reviewing administrative action unless any internal remedy provided for in any other law has first been exhausted. The Applicant seeks in terms of the Rule 28 Notice a declaration that the cancellation of his temporary residence permit is null and void and of no force and effect. What the Applicant in effect seeks, is a review of the Second Respondent’s determination

that he is an illegal foreigner. Inasmuch as the consequence of such determination is that the temporary residence permit which the applicant obtained fraudulently, cannot continue to exist. Accordingly, in my judgment, the Applicant is not entitled to a declaration of invalidity as this would clearly enable him and future litigants to avoid compliance with the procedure set out in Section 8 in the Amendment Act. In any event, the Applicant must be precluded from bringing a review application disguised in character. The application in the instant matter seeks to have an interim interdict granted in favour of the Applicant as a relief. In the nature of things, I must canvass the requirements for an interim interdict. I must do so in order to satisfy myself that such requirements have infact been met. It is trite law that even if the requirements have been met, I remain entrusted with a discretion whether or not to grant the relief sought. The discretion must at all times be exercised judiciously and not capriciously. I deal infra with these requirements.

THE REQUIREMENT FOR AN INTERIM INTERDICT

(42) These are infact four-fold, namely:

a) a *prima facie* right;

b) well-grounded apprehension of irreparable harm if the relief is not granted;

c) that the balance of convenience favours the grant of an interim interdict; and

d) that the Applicant has no other satisfactory remedy.

I have alluded *supra* that the grant of the remedy is discretionary. The Court therefore has a wide discretion in this regard. See: ***Hix Networking Technologies v System Publishers (Pty) Ltd and Another*** 1997(1) SA 391 (A) at 398I-399A; ***Ward v Cape Peninsula Ice Skating Club*** 1998(2)

SA 487 (C) at 497B-D.

(43) The approach to matters of this nature has been the subject of discussion in our courts and there are many decisions dealing with this aspect of our law. For purposes of this judgment I deem it necessary to quote from ***Webster v Mitchell*** 1947 WLD 1186 at 1189, where the following helpful exposition appears:

> **"In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect….. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant, he could not succeed in obtaining temporary relief, for his right, prima facie established may only be open to 'some doubt.'"**

I now proceed to consider the said requirements individually in the context of the instant case.

Prima Facie Right

(44) It is the Applicant's first contention that he is entitled to remain in the Republic for as long as he is married to Ms Cassiem. It is not disputed that Ms Cassiem gave the Second Respondent a statement in which she explains that her marriage to the

Applicant is not a genuine marriage. That the marriage is one of convenience and as such was entered into for the primary purpose of evading the immigration laws seems abundantly clear (See: ***Hambly v Chief Immigration Officer and Another*** 1999(9) BCLR (ZS) at 9681). It is also not disputed that prior to his arrest on 8 February 2006, the Applicant resided at 50 Olympic Avenue, grassy Park, whilst Ms Cassiem, at 8 February 2006, resided at 103 Angela Street, Valhalla Park. It is furthermore not disputed that the applicant and Ms Cassiem do not live together as husband and wife. The Constitutional Court in ***Dawood and Another v Minister of Home Affairs and Others Shalabi and another v Minister of Home Affairs and Others; Thomas and another v Minister of Home Affairs and Others*** 2000(3) SA 936 (CC) at p 963 para (37) held that the decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity.

(45) As stated above, the Applicant does not challenge the constitutional validity of any of the provisions of the Act. I hasten to mention that what the constitutional Court intended is a bona fide marriage and not the kind of marriage concluded by the Applicant and Ms Cassiem. See: ***Hambly v Chief Immigration Officer and Another*** (*supra*) at 9681; Answering Affidavit Annexure **“GC 8”**. The Applicant was, by virtue of the affidavit of

Ms Cassiem, determined to be an illegal foreigner. Accordingly, in my view, the Applicant has no entitlement to remain in the Republic, despite his marriage to Ms Cassiem.

(46) The second contention raised by the Applicant is that inasmuch as the asylum seeker temporary permit issued to him has been extended to 30 June 2006, he is entitled to remain in the Republic. It is clear that the Applicant is not a genuine asylum seeker. The Applicant arrived in South Africa on a business visa, under the pretext of doing business in the Republic. The business permit issued to the Applicant upon his arrival in the Republic on 19 February 2003 was valid for a very short period until 18 May 2003. On 5 March 2003, shortly after his arrival, the Applicant applied for asylum. He was issued with an asylum seeker temporary permit on 5 March 2003, which had been renewed from time to time. The Applicant's asylum seeker temporary permit was extended until 30 June 2006. Despite this extension, the Applicant sought to leave the Republic and return to Cairo. In any event, this matter was argued before me on 15 August 2006 long after the temporary permit had infact expired. To talk about it now is merely academic at this stage.

(47) Section 22(5) of the Refugees Act provides that an asylum seeker temporary permit shall lapse if the holder departs from the Republic without the consent of the Department of Home Affairs. The Applicant does not allege that he obtained the Department's consent to return to Cairo to ensure the continued validity of his asylum seeker temporary permit. In my view, the Applicant's reliance on his asylum seeker temporary permit is a mere afterthought. It is irrelevant for purposes of the relief sought by the Applicant.

(48) The Applicant's third contention is that the temporary residence permit, i.e. his relative's permit, has been extended to 2007, thereby entitling him to remain in the Republic. The Applicant obtained his relative's permit when he applied on 25 April 2005 for a change in his status after he married Ms Cassiem. It is abundantly clear that this application was approved on the basis of the representations made by the Applicant and Ms Cassiem. (See: **"GC 8"** annexed to the Answering Affidavit). In view of the affidavit deposed to by Ms Cassiem, the Applicant obtained the relative's permit through fraudulent means and as such was not entitled thereto. The relative's permit therefore terminated by operation of law. In the circumstances, in my view, the Applicant's reliance on this contention is similarly misplaced.

(49) The fourth contention raised by the Applicant is that he had submitted an application for permanent residence and as such is entitled to remain in the Republic. Section 26 in the Amendment Act provides *inter alia* that the Director-General may issue a permanent residence permit to a foreigner who has been the spouse of a citizen for five years and the Director-General is satisfied that a good faith spousal relationship exists. The Applicant and Ms Cassiem have been "married" for approximately one year. Furthermore, by virtue of Ms Cassiem's affidavit, no good faith spousal relationship exists between the Applicant and Ms Cassiem as contemplated in section 26 in the Amendment Act. In the circumstances, the Applicant does not, and cannot comply with the provisions of section 26 in the Amendment Act any time soon. As such, the Applicant does not qualify for a permanent residence permit.

Irreparable Harm

(50) The Applicant must demonstrate a well-grounded apprehension of irreparable harm if the relief sought is not granted. In view of the fact that the marriage between the Applicant and Ms Cassiem is not a bona fide marriage, but one entered into purely to evade the immigration laws of the Republic, the Applicant cannot suffer any harm should the relief not be granted. In any event, in my view, granting the relief sought will have the effect of the Applicant benefiting from his fraudulent actions.

Balance of Convenience

(51) The Applicant cannot in the circumstances complain of any prejudice he might suffer should the relief sought not be granted. The application for a permanent residence permit cannot succeed because the Applicant and Ms Cassiem have been married for approximately one year and the marriage is one of convenience. Moreover, it is not insignificant to note that the applicant wished to return to Egypt, the very country in respect of which he sought asylum from persecution. (See: ***Minister of Home Affairs and Others v Watchenuka and Another*** 2004(4) SA 326 (SCA) at 334 paras (1-2). Moreover, it is not disputed that the Applicant did not inform the Second Respondent on the day of his arrest that he was issued an asylum seeker temporary permit. It is also not disputed that the Applicant was willing to return to Cairo and that arrangements were made for his return on 11 February 2006. The application therefore lacks merits to the extreme and falls to be dismissed. I cannot, in the circumstances attendant to this matter, exercise my discretion in favour of the Applicant.

COSTS

(51) The general rule is that the successful party is entitled to its costs. There is no justification in the instant matter that the general rule should be departed from.

ORDER

The *Rule Nisi* granted on 11 February 2006 is hereby discharged. The application is dismissed with costs, including costs occasioned by employment of two (2) Counsels.

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DLODLO, J