IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION)

GRAHAMSTOWN

CASE NO.: 41/2009 **DATE: 12 FEBRUARY 2009**

In the matter between:

Z NCUBE **APPLICANT**

and

DEPARTMENT OF HOME AFFAIRS &

5 OTHERS **RESPONDENTS**

JUDGMENT

PICKERING J:

This is an application brought in terms of Rule of Court 49(11). On 18 December 2008 the first to fourth respondents were ordered by Pakade J *inter alia* to issue applicant with a work permit as provided for by section 19 of the Immigration Act, no. 13 of 2002 within 30 days from the date of that judgment as set out in paragraph 1.1 of the Court Order. Pakade J also dismissed, together with a punitive costs order, a so-called supplementary or second review application which was filed by applicant after argument had been heard on the main application and judgment thereon reserved, but before the delivery of that judgment.

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Applicant in due course filed a notice of intention to apply for leave to appeal against this decision as well as the costs order. Respondents in turn filed a notice of intention to apply for leave to appeal against the judgment of Pakade J on the main application. The noting of these appeals had the effect obviously of suspending execution of the judgment and order of Pakade J, hence the present application in which applicant seeks leave only to execute paragraph 1.1 of the Court Order. The present application is opposed by the respondents.

The details of the matter which led up to the judgment of Pakade J are fully canvassed in his judgment and it is not necessary to set them out here again. Suffice it to say that the matter has a long history. Applicant, a Zimbabwe High School English teacher, applied as far back as January 2008 for a requisite work permit enabling him to take up a post as English teacher at Molteno High School. It is not in dispute that the position was offered to him then and that the post is still currently open for him subject only at him being granted a work permit. It can also not be seriously disputed that applicant's application for a work permit was dealt with in an extremely dilatory fashion by the relevant respondents and their officials. It took just short of 7 months for second respondent to come to a decision refusing the initial application. The same lack of

urgency characterised the first respondent's approach to applicant's internal appeal against this decision and eventually applicant launched an urgent application for review of the first respondent's failure to take a decision. It appears from the judgment of Pakade J that there had been an unreasonable delay in the processing of applicant's internal appeal and that in his view and in view of the inordinate delay suffered by applicant, applicant would suffer further prejudice unless the court intervened.

As stated by the learned judge applicant was sent from pillar to post by the respondents' officials without actually ever being assisted. There were countless unanswered letters as well as unanswered telephone calls. Apart from categorising the delays as being unreasonable, Pakade J also chastised respondents and their officials for what he called "**their delaying tactics coupled with unjustified arrogance**."

It is fortunately not necessary in the view that I take of the matter to deal with the further progress of the matter including the dismissal by Pakade J of the so-called supplementary application or second review application. In **SOUTH CAPE CORPORATION (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD** 1977(3) SA 534 (AD) Corbet JA dealt with the principles applicable to an application such as the

present. At 545C-G he stated as follows:

"**The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised. [See VOET 49.7.3 RUBY'S CASH STORE (PTY) LTD v ESTATE MARKS AND ANOTHER (supra) at p.127]. This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf FISMER v THORNTON 1929 AD 17 at p. 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances and, in so doing so, would normally have regard, *inter alia,* to the following factors:**

(1) **The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal, (respondent in the application) if leave to execute were to be granted;**

(2) **the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal, (applicant in the application) if leave to execute were to be refused;**

(3) **the prospects of success on appeal including more particularly the question as to whether the appeal is frivolous or vexatious, or has been noted not with the *bona fide* intention of seeking to reverse the judgment, but for some indirect purpose eg. to gain time or harass the other party, and**

(4) **where there is the potentiality of irreparable harm or**

> **prejudice to both appellant and respondent, the balance of hardship or convenience as the case may be.**"

Applicant has submitted that he will indeed suffer irreparable harm and prejudice if leave to execute is not granted. So too, he submits, will the Molteno High School and those learners in Grade 7, 10, 11 and 12 who, it is common cause, were without proper English instruction for a large part of the 2008 academic year. It is not in dispute that this school wishes to employ applicant as he was the best candidate for the post. Should applicant not receive a work permit the school will in all probability be obliged to cut its losses and to employ a less qualified English teacher in his stead, if indeed such less qualified teacher is available.

That applicant too will be prejudiced is in my view, as was submitted by Mr Budlender who appeared for the applicant, manifest. Until such time as any appeal is finally disposed of or the matter otherwise finally determined applicant will be unable to be employed. If the application for leave to appeal is only heard during the last week of this term, as apparently was indicated to counsel by Pakade J, and if leave to appeal is in due course granted it is extremely unlikely that any such appeal would be disposed of before September or October at

the earliest. In effect therefore applicant will remain unemployed for the remainder of the school year. As pointed out by Mr Budlender, in terms of section 19(2) of the Immigration Act a work permit is job specific. Thus, if the order remains suspended, and respondent's appeal is eventually dismissed, applicant's victory will be a mere *brutum fulmen* or a pyrrhic victory . He would be entitled to a work permit which he could not use as his contemplated post would by then in all probability have been filled. As was submitted by Mr Budlender this would render the entire review application meaningless, a mere exercise in futility for applicant.

On the other hand, were applicant to be granted a work permit in the interim, he would be able to support both himself and his family whilst performing a useful service to the community. It is somewhat difficult to understand in these circumstances what prejudice the respondents would suffer should the work permit be granted. In this regard respondents allege in their reply that it would be prejudicial to allow a contractual relationship to come into being while the appeal is pending and that it would "**send out a signal**" to persons in a similar position to applicant that they can circumvent the Immigration Act and its regulations. Quite why it should be so undesirable for applicant to enter into a contractual relationship with the school pending the final determination of the appeal escapes

me. The school is desirous of having applicant's services. It is prepared to live with the consequences of employing him pending the final determination of the matter. It is also relevant that the 5th respondent, the Minister of Education, chose not to oppose the relief sought by applicant in the main application. In my view, had the Minister had any principled objection to applicant's appointment she surely would have said so.

As regards the alleged circumvention of the Act this submission is in my view devoid of merit. Applicant has a judgment in his favour which he seeks by legal means to enforce pending the respondents' appeal. Whatever the respondents' view of the correctness or otherwise of Pakade J's judgment may be there can in these circumstances in my view be no question of a circumvention by applicant of the Act. Applicant has throughout pursued his legal remedies, both internally and in court. The fact that respondents may disagree with Pakade J's finding as to the unreasonableness of their delays is in the circumstances quite irrelevant in my view to the issue of prejudice.

I should mention that respondents initially sought to rely in the context of prejudice on applicant's alleged illegal presence in South Africa. It is surprising that they should have done so.

Applicant had been granted permission to remain in South Africa in terms of a document known as Form 20. When that expired early in January 2009 applicant's attorneys wrote to respondents requesting that it be renewed. Applicant was given an undertaking that the form would be renewed. Indeed in the answering affidavit in this application attested to by Mr Lackay an assistant director of the Department of Home Affairs he undertook to attend thereto as a matter of urgency. As of today applicant had still not been advised of any such extension despite this undertaking. At the commencement of his argument, however, Mr Brooks for the respondents stated that he had in the meantime managed to ascertain that all that applicant had to do was to contact a Home Affairs Office and the form would be extended. In these circumstances the initial reliance by respondents on applicant's alleged illegal presence in South Africa was cynical in the extreme and would appear to have been advanced merely in an attempt to defeat his application.

Respondents have, in my view, failed utterly to show the existence of any prejudice to them should applicant be granted a work permit pending the finalisation of the appeal. Should leave to appeal eventually be granted by Pakade J and should such appeal eventually succeed then the work permit would obviously lapse.

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This brings me to the issue of respondents' prospects of success on appeal. Much was made by Mr Brooks of what he said was the failure by applicant to deal properly with this issue in his founding affidavit. Mr Brooks stressed that this submission was not aimed at applicant's appeal but at respondents' intended appeal. He submitted that the allegations contained in applicant's founding affidavit were deficient. Paragraph 15 of that affidavit reads as follows:

> "**The application for leave to appeal will be adjudicated in due course, it will be argued by my legal representatives that there is no merit in respondents' application for leave to appeal in that there is no reasonable prospect that another court would differ from the conclusion reached by this court.**"

In my view applicant needed to say no more than he did. The issue of reasonable prospects of success in the circumstances of this case is a legal one, and it would not in my view have been appropriate nor was it necessary to burden the affidavit with legal argument in that regard.

I turn then to the issue of respondents' prospects of success on appeal, it being common cause that applicant's prospects in respect of his appeal are irrelevant for present purposes. Because the application for leave to appeal has not yet been dealt with by Pakade J it appeared to me that I was in

somewhat of an invidious position. Whether I am of the view that respondents have no prospects of success on appeal or vice versa Pakade J may well be of a different view. This seems to me to illustrate the desirability of the judge who granted the order dealing also with any Rule 49(11) application. This is all the more so when the application for leave to appeal has not yet been heard. Be that as it may Mr Brooks submitted in effect that the judgment of Pakade J was so clearly wrong that applicant had no reasonable prospects whatsoever of resisting respondents' appeal against it. Although I obviously have not had the benefit of full argument such as would have been addressed to me were I sitting as a court of appeal I am constrained to disagree with his submissions. Indeed Mr Budlender put forward compelling arguments in support of the judgment. Fortunately, however, this is not an issue upon which I am called upon to make any definitive finding. In the matter of **SORIC PROPERTIES HILLBROW (PTY) LTD AND ANOTHER v VAN ROOYEN** 1981(3) SA 650 (W) referred to by Mr Budlender, McEwan J stated as follows at 657H-658B:

> "**Coupled with that argument, however, was a further argument that the respondent has no reasonable prospects of success on appeal. It was urged that on the respondent's own version she breached the lease and the first applicant was entitled to cancel it. At first blush that argument sounds convincing. However, Mr**

Suzman pointed out that on the authorities it is not a true test to determine whether or not there is a reasonable prospect of success in the appeal. The court in proceedings of this nature is not called upon to enquire into the whole case, or to attempt to evaluate the prospects of success on appeal. Only if the court is satisfied that the appeal has minimal prospects of success or is hopeless, then the court will take that factor into account and may draw an inference from it that the appeal was noted *mala fide* or for the purposes of delay. That principle is to be found set out in more detail in two cases referred to by Mr Suzman, namely BYRON v ANDERSON & COHEN 1955(3) SA 590 (D) at 596, especially the quotation from BAM v BHADHA (2) 1947(1) SA 399 (N) and WOOD NO v EDWARDS AND ANOTHER 1966(3) SA 443 (R) at 446."

I am not persuaded by anything that Mr Brooks has submitted that the judgment of McEwan J in this respect is wrong. Nothing said therein by the learned judge is in conflict with the dictum of Corbett JA in the **SOUTH CAPE** case *supra* to which I have referred above. It is noteworthy in this regard that far from referring to the necessity for reasonable prospects of success Corbett JA makes reference only to the prospects of success and stresses in particular the issue as to whether the intended appeal is frivolous, vexatious or *mala fide*.

Having heard Mr Brooks' submissions on the merits I cannot

say that the respondents' intended appeal is frivolous or vexatious. I am prepared to accept for present purposes that the appeal is arguable and that the noting thereof cannot be said to have been done *mala fide* for the purposes of delay. The issue of the prospects of success on appeal is, however, only one of the issues which I must consider in the exercise of my discretion. I must decide, having regard to all the factors set out in the **SOUTH CAPE** case *supra* whether it is just and equitable that leave to execute be granted. In the peculiar circumstances of this case the issue of prejudice and the balance of convenience looms large. In my view even assuming a degree of prejudice on the part of respondents, the balance of convenience is overwhelmingly weighted in favour of applicant. He has shown manifest prejudice should his application be dismissed whereas respondents in my view have shown little or none at all, should it be granted. On the face of it applicant has thus far been ill served by respondents' officials who entangled him in a bureaucratic web from which he must have despaired of ever freeing himself. He is entitled in my view to the order which he seeks, suitably amended however to make it clear that the work permit given to him will lapse should the issues between himself and respondents be determined in respondents' favour.

That leaves the issue of costs. The general principle in

applications of this nature is that in the event of the application succeeding the costs should be made costs in the appeal. I am of the view, however, that the circumstances of this case are such as to justify a departure from the general rule. In my view the respondents' opposition to the application was baseless. Their opposition has led to entirely unnecessary litigation. A realistic and objective view of the matter would and should in my view have led to their consenting to the relief sought. As I have said no prejudice whatsoever would have been occasioned to them thereby. Mr Budlender has submitted further that in view of certain irresponsible allegations made by the respondents concerning the honesty of applicant as well as having regard to their conduct with regard to the extension of Form 20 such costs should be awarded on the scale as between attorney and client. Although this submission is not without some degree of merit and although I have given it considerable thought I am not persuaded that such an order would in fact be justified.

In the result the following order will issue:

1. Notwithstanding any application for leave to appeal and/or appeal by any of the first to fifth respondents against the order granted by this court on 18 December 2008 and pending the final determination of the issues between the parties the second respondent is directed to

give effect to paragraph 1.1 of the order granted by this Court on 18 December 2008.

2. The second respondent is directed to issue the applicant with a work permit as provided for by section 19 of the Immigration Act no. 13 of 2002 within 6 days of this order.

3. Such work permit shall lapse immediately should the issues between the parties be finally determined in favour of the respondents.

4. The first to fourth respondents are ordered to pay the costs of this application jointly and severally the one paying the others to be absolved.

JD PICKERING

JUDGE OF THE HIGH COURT