Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: **22369/11**

In the matter between:

MAVERICKS REVUE CC	First Applicant
DIANA GORGOS	Second Applicant
IRINA YATSENKO	Third Applicant
PATRIZIA MEYNET	Fourth Applicant

and

DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent

JUDGMENT: FRIDAY, 03 FEBRUARY 2012

DESAI ADJP

[1] This is an urgent application for certain interim relief pending the launch of a review application.

[2] The first applicant is Mavericks Revue CC ("Mavericks"). Its sole owner says that it is a "gentlemen's revue bar" and for this purpose it engages the services of a large number of foreign "exotic dancers". The respondents use similar language to describe the activities at Mavericks. In less polite language, Mavericks appears to be a "strip club". That categorisation is important for the comments which appear later in this judgment.

[3] The other applicants are some of the so-called foreign exotic dancers.

[4] Mavericks holds, or held, two corporate permits which were issued in its favour by the Department of Home Affairs ("the Department") on 30 July 2005 and 29 November 2006. Subject to the regulatory framework, these permits entitled Mavericks to employ a total of 200 foreign workers as exotic dancers.

[5] On 7 October 2011 the Director-General of the Department ("the DG"), acting in terms of Section 21(3) of the Immigration Act 13 of 2002 ("the Act"), took a decision that Mavericks' corporate permits should be withdrawn. Furthermore the DG furnished a directive that the replacement of certificates issued under the corporate permits should be refused. Comprehensive reasons for these decisions are set out in the letter dated 21 October 2011 which was forwarded by the DG to Mavericks.

[6] The applicants now seek an order suspending the aforementioned decisions until the final determination of an application for review, to be launched by them within 1 month of the date of the order made by this court. It is their case

that in making the said decisions the DG acted in flagrant breach of the law and its obligations.

[7] The respondents' opposition to the relief sought by the applicants is premised upon the following. They contend that the applicants are required to comply with the Act, the Immigration Regulations published under Government Notice no. R615 in Government Gazette no. 27725 of 27 June 2005 ("the Immigration Regulation") and, of course, the conditions of the corporate worker authorisation certificate. They argue that Mavericks failed to comply with the Act, the Immigration Regulations and the conditions of the authorisation certificate and as a result the DG withdrew the corporate permits in terms of Section 21(3) of the Act. Moreover, they contend, the applicants have failed to demonstrate that they have any prospects of success in their anticipated review procedures, especially in that they have failed to establish the existence of any *prima facie* right.

[8] The background to the current dispute has its origins in the attempt by Mavericks to obtain replacements for its corporate worker authorisation certificates. These certificates entitle a foreign national to approach a South African Mission or the Department with a contract of employment signed by the corporate worker and the corporate employer in order to obtain a work permit. Once a work permit is obtained, the certificates are left with the corporate employer for safekeeping with the corporate worker's employment records. In March 2010 Mavericks applied to the Department for the replacement of 143 out of 200 corporate worker authorisation certificates, which it claimed were lost,

mislaid or stolen over many years. In deciding whether or not Mavericks was entitled to the replacement certificates, the Department learnt that Mavericks had not complied with the Act, the Immigration Regulations and the conditions of the corporate worker authorisation certificates. There were 74 certificates which were not mislaid, lost or stolen and had been returned to the Department. Mavericks could also not explain what had happened to the remaining certificates.

[9] Mavericks was alerted to this situation in a letter dated 21 December 2010 and on 20 February 2011 they were asked to furnish written representations as to why their corporate permits should not be withdrawn as contemplated in Section 21(3) of the Act. Pursuant to their response the corporate permits were in fact withdrawn and reasons furnished for this decision.

[10] It was contended on behalf of Mavericks that it had *prima facie* prospects of success in the intended review, *inter alia* in that the respondents failed to follow the required procedure set out in the Act and in the Immigration Regulations for withdrawing the permits.

[11] The Act provides that any decision which materially affects the rights of others shall be communicated in the prescribed manner and shall be accompanied by reasons (see Section 8(3)). This is amplified in Regulation 5(2) as follows:

> "A decision contemplated in Section 8(3) of the Act shall be communicated to the relevant person in writing in a form substantially corresponding to form 2 contained in annexure A."

Form 2 was not used to inform the applicant of the withdrawal decision. According to Mr A Katz SC, who appeared with Mr D Simonsz on behalf of Mavericks, it is a procedural irregularity which renders the entirety of the withdrawal decision invalid and void.

[12] The argument advanced by Mr Katz in this regard is clearly without any merit. The relevant regulation does not state that a failure to issue a notice in the precise terms of form 2 would render the notice invalid or a nullity. In any event, what is required is a notice "in a form substantially corresponding to form 2"

[13] The DG's notice to Eisenberg and Associates – who incidentally are self-styled specialist immigration practitioners – sets out in clear terms the nature of the decision and, in some detail, the reasons for it. In this instance there is no right to make representations to the DG as the DG himself took the decision. Form 2 does not require notice of the right to make representations to the Minister and it is quite apparent that Mavericks had no intention of exercising its rights of review to the Minister as it, on 25 October 2011, indicated that it would be approaching this court for an interim interdict. The notice was not defective in any material respect and Mavericks will not be able to demonstrate any prejudice in this regard.

[14] Section 21(3) of the Act provides that the DG may withdraw or amend a corporate permit "for good and reasonable cause". Good and reasonable cause is accordingly a jurisdictional prerequisite to, *inter alia*, the withdrawal decision.

[15] Mr Katz argued that no such good and reasonable cause exists in this case, particularly not concerning the validity of the contracts between Mavericks and the exotic dancers.

[16] The DG advances several reasons for withdrawing the corporate permits. He expressly states that the permits were withdrawn for “one or more” of the reasons cited. These are the following:

16.1 In Mavericks’ own version, its corporate workers are not employees but independent contractors who are not paid a wage or salary. An employer-employee relationship governed by a contract of employment is contemplated in the provisions of the Act, the regulations made under it and the conditions of a corporate worker authorisation certificate.

16.2 Mavericks failed to ensure that the foreign workers employed in terms of its corporate permits departed from the Republic upon completion of their tour of duty.

16.3 Mavericks on numerous occasions failed to immediately notify the Department when a corporate worker left its employ.

16.4 Mavericks failed to take prescribed measures to ensure that its corporate workers complied at all times with the provisions of the Act and the corporate permits.

16.5 Mavericks failed to keep any proper records and furnished false and materially incorrect information to the Department.

[17] For the purposes of this judgment it is not entirely necessary to deal with each of the reasons cited by the DG. I shall, however, briefly refer to some of them.

[18] Mavericks does not conclude contracts of employment with the foreign nationals employed by it. In fact, the agreements concluded by them expressly state that it is not a contract of employment and that the foreign national will not be part of Mavericks' personnel structure or on its payroll. Nor will she be providing services supervised or controlled by Mavericks. All Mavericks does is provide a venue for a limited period for the corporate workers to model and dance. In return, she – the corporate worker – must pay Mavericks the sum of R2000 per week, ostensibly as a levy for modelling and dancing at Mavericks' premises.

[19] The Act clearly contemplates a contract of employment. Sections 21(1) and 21(2) refer in express terms to a foreign employee or a foreigner being employed.

[20] Similarly, the Immigration Regulations clearly contemplate an employment contract. Regulation 18(1) reads:

> "1. An applicant for a corporate permit shall submit:
>
> (a) ......;
>
> (b) proof of the need to employ the requested number of foreigners; and

(c) a job description and proposed remuneration in respect of each foreigner."

Reference is made in Regulation 18(6) to the submission of a valid employment contract.

[21] The corporate worker authorisation certificate also refers to a contract of employment and a work permit.

[22] Mr Katz contended that the exotic dancers, whatever the words used in their contracts, are in fact employees of the first applicant and are therefore in compliance with the Act and the Regulations. This submission is simply incapable of fair-minded support.

[23] Mr Katz also argued that the utilisation of the services of corporate workers has been Mavericks' "practice from the beginning" and that "it is far too late for the respondents to now claim that this practice is illegal".

[24] In accordance with the relevant statutory scheme a contract of employment must be entered into with a corporate worker. The fact that this may not have happened for a number of years does not render the unlawful non-compliance with these provisions valid.

[25] As Mr A Schippers SC, who appeared with Ms K Pillay on behalf of the respondents, correctly pointed out, the failure by a statutory body to comply with provisions which the legislature has prescribed for the validity of a transaction

cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore *ultra vires* (see in this regard City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008(3) SA 1(SCA) para 13).

[26] The fact that in other cases involving Mavericks the issue of the invalidity of the independent contracts was not raised, has no bearing upon this case. The question as to the nature of the contract entered into with foreign workers was not in issue in any of these cases. The other courts were not called upon to decide this issue.

[27] On this basis alone there appears to have been a good and sufficient cause to withdraw the permits and accordingly there is no prospect that Mavericks will be able to set aside the DG's decision in the intended review.

[28] A further reason furnished by the DG for his decision is the failure by Mavericks to inform the Department if a corporate worker is no longer in its employ. In terms of Section 21(2)(a)(i) of the Act Mavericks undertook to inform the Department of such a fact and accepted that its permit may be terminated in the event of it breaching that undertaking.

[29] The validity of a corporate worker authorisation certificate is subject to the condition that the employer undertakes to immediately notify the Department if the employer has reason to believe that the corporate worker is no longer in compliance with Section 21(2)(a)(i) or when the corporate worker has left its employ.

[30] Mavericks simply did not comply with their obligations. In its representations it did not deny that in about 30 out of some 44 cases, it did not immediately inform the Department of the fact that the foreign national was no longer working for it.

[31] In response it was contended on behalf of Mavericks that the obligation to notify the Department only kicked in when it had "reason to believe that the corporate worker has left its employ". With regard to the 30 cases where it did not carry out its obligations, Mavericks did not point to a single instance where it could not inform the Department immediately that the worker was no longer in its employ.

[32] The corporate permits were also withdrawn for this reason and reviewing the DG's decision on this ground is bound to fail.

[33] In his letter dated 21 October 2011 the DG made it clear that he took his decision for "one or more" of the five reasons identified by him. The applicants, in order to succeed herein, must show that they have reasonable prospects of success in respect of each and every one on the grounds upon which the DG took his decision.

[34] I have dealt, in some detail, with two of the reasons advanced by the DG for his decision. The other reasons are equally compelling. Each one of the five

reasons independently constitutes good and reasonable cause for the DG's decision. The application for interdictory relief must accordingly fail.

[35] With regard to irreparable harm, or rather a well-grounded apprehension of irreparable harm, the test is objective. Mavericks protests that it will "go broke" within a few months if the interdictory relief is not granted. If regard is had to its income statement, it appears that there is no merit to this submission. Moreover Mavericks has been without some 130 corporate worker authorisation certificates and currently has only 16 foreign nationals in terms of the corporate permits. This has not yet resulted in its bankruptcy.

[36] The balance of convenience weighs heavily against Mavericks. The reasons for the withdrawal of the corporate permits are essentially that Mavericks has failed to comply with the Act, the Immigration Regulations and the corporate worker authorisation certificates. It should not be allowed to continue operating as if the corporate permits have not been withdrawn. As Mr Schippers correctly pointed out, they have demonstrated ongoing unlawful conduct and currently employ several persons illegally.

[37] I deal briefly with the case of the second to fourth applicants. As Mr Schippers has also pointed out, it fails both on the level of the facts and the law.

[38] They were issued with temporary residence permits to remain in South Africa. On 1 November 2011 they were told by the HR manager of Mavericks or

some other person that the respondents had cancelled their residence permits. The uncontradicted evidence is that their permits have not been cancelled and no decision in this regard has been taken by the Department. They were told on 3 November 2011 by officials of the Department that the DG had withdrawn the corporate permits. They were further informed that Mavericks had brought an application in this court to obtain interim relief and that they would be informed of the Department's next step once the application was finalised. This explanation was not denied in reply.

[39] If and when the temporary residence permits of the second to fourth applicants are cancelled, the process described in Sections 10(9)(10) will be followed. They will then be given an opportunity to make representations to the DG as to why their temporary residence permits should not be cancelled.

[40] Quite patently, the second to fourth applicants have failed to demonstrate a *prima facie* right as their temporary residence permits have not been cancelled and they will be given *audi* in due course if that happens.

[41] They do not have, and have not established, a well-grounded apprehension of any irreparable harm. They do have an alternative remedy – in terms of Section 10(10) of the Act and a further right of appeal which is set out in Section 8(4) of the Act.

[42] There is one further aspect that gives rise to some concern in this matter.

[43] The so-called exotic dancers come to this country having concluded a flimsy one-sided contract. They are guaranteed nothing. They have to share a room for which they pay rent on a weekly basis. They are <u>not paid at all</u> and given no benefits whatsoever. More alarmingly they have to pay Mavericks R2000 per week. The contracts do not specify who pays for their plane ticket to South Africa and, if it is paid by Mavericks, when and how it is to be repaid. The contract does not specify what happens if they are unable to generate sufficient cash to pay the weekly R2000 and, if at all, they are entitled to keep certain basic sums – as a first payment – for food, shelter and clothing. Save to state vaguely that they are expected to model and dance on tables there is no job description. What do they model? Are they fully informed as to the exact nature of the work they are expected to do so that they can exercise some choice in the matter? Can they speak English? If not, are there people around with whom they can communicate?

[44] Though there have been several cases involving Mavericks and I assume that others have had sight of the contracts into which the dancers are obliged to enter, it appears that it has been blandly accepted that these are exotic dancers whatever that may mean. The conditions under which the foreign dancers are procured, housed and expected to work makes them susceptible to exploitation. They are in a vulnerable situation and the fact that the person in control of them demands or, at least, expects large sums of money on a weekly basis places him in possible contravention of Article 3 para(a) of the PROTOCOL TO PREVENT SUPPRESS AND PUNISH TRAFFICKING IN PERSONS.

[45] I have not afforded the applicants an opportunity to be heard on this matter and there is insufficient evidence with me to come to any firm conclusion on it.

[46] However, I shall refer this matter to the Human Rights Commission for it to investigate whether the human rights of the dancers are being infringed and, if so, what steps can be taken to alleviate their plight.

[47] The respondents should reconsider the grant of corporate permits to entities such as Mavericks because procuring women for its activities may be inconsistent with the foundational values of our constitution.

[48] The applicants have simply not made out a case for the grant of an interim interdict and the court, in any event, is unpersuaded that it should exercise its discretion in favour of the applicants.

[49] In the result:

1. The application is dismissed with costs;

2. such costs are to include costs of 2 counsel and are to be paid by the applicants jointly and severally, the one paying the other to be absolved;

3. the respondents are to forward a copy of this judgment together with the record to the Human Rights Commission.

DESAI ADJP