CASE N0. 24736/2010

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)
CAPE TOWN: Tuesday 14 December 2010
Before the Honourable Mr Justice Griesel

In the matter between:

AUTUMN SKIES TRADING 171 CC t/a ARABESQUE	**Applicant**
And	
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**First Respondent**
MINISTER OF HOME AFFAIRS	**Second Respondent**
DIRECTOR OF IMMIGRATION SERVICES: WESTERN CAPE	**Third Respondent**

Having heard the Legal Representative for the Applicant and having read the documents filed of record;

IT IS ORDERED:

a) That pending determination of an application for review of the decision to withdraw the applicant's corporate permit – whether by this court in terms of Part B of this application or by the second respondent in terms of s 8(4) of the Immigration Act 13 of 2002 – the first respondent is directed forthwith to issue to the applicant –

   (i) in terms of s 21(1) of the Immigration Act, a corporate permit incorporating the terms of Corporate Permit No A050863;

   (ii) in terms of Immigration regulation 18(2)(b) and the said corporate permit, 70 (seventy) corporate worker authorisation certificates.

b) That the costs of this application will be costs in the cause.

WESTERN CAPE HIGH COURT
FOURTH DIVISION
2010 -12- 23
CAPE TOWN/KAAPSTAD
WES-KAAP HOË HOF

BY ORDER OF THE COURT

COURT REGISTRAR

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/avz

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

Case No 24736/10

In the matter between:

AUTUMN SKIES TRADING 171 CC t/a *ARABESQUE*	Applicant
and	
DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	First Respondent
MINISTER OF HOME AFFAIRS	Second respondent
DIRECTOR OF IMMIGRATION SERVICES: WESTERN CAPE	Third Respondent

Court: GRIESEL J

Heard: 9 December 2010

Delivered: 14 December 2010

JUDGMENT

GRIESEL J:

[1] This is an application for urgent interim relief, brought by the applicant pending the outcome of a review of the decision of the third respondent, taken on 26 June 2010, to withdraw a corporate permit No A 050863 that had previously been issued to the applicant in terms of the provisions of s 21(1) of the Immigration Act 13 of 2002 by the Cape Town regional office of the Department of Home Affairs ('the Department'). The permit allowed the applicant to employ seventy foreigners, each of whom was issued with a corporate worker authorisation certificate in terms of Immigration regulation 18(2)(b).

[2] The applicant conducts the business of a revue bar and night club in the centre of Cape Town under the name and style of *Arabesque*. Part of its business consists of entertainment provided by so-called 'exotic dancers', who are mainly of East European origin. In order to employ such dancers, the applicant was required to obtain the necessary corporate permit referred to above.

[3] On 26 June 2010, however, the permit was summarily withdrawn in the course of a midnight raid launched against the applicant's business by a task force consisting of 83 officials from the Department, assisted by members of the SAPS and other law enforcement agencies. According to the respondents, the objectives of the raid were *inter alia* to verify the status of all employees; to arrest illegal foreigners; to ascertain whether persons who had reported human trafficking were working at *Arabesque*; and to retrieve the corporate permit and certificates that had been 'illegally' issued. The evidence presented on behalf of the applicant tends to show that the raid was executed without any prior warning and

in a harsh and heavy-handed manner. The denials by the respondents of the factual allegations made by the applicant's witnesses are singularly unpersuasive – even on paper. Be that as it may, it is not necessary for present purposes to consider the legality or propriety of the raid or the motives behind it, neither is it necessary to pronounce on the legality or propriety of the business conducted by the applicant. What is in issue in these proceedings is the legality or otherwise of the withdrawal of the applicant's corporate permit and the question whether or not the applicant is, in the circumstances, entitled to interim relief.

Urgency

[4] The respondents oppose the present application *inter alia* on the basis of lack of urgency, arguing that much of the urgency relied upon by the applicant is of its own making.

[5] While the respondents' argument on this aspect is not without merit, I am not inclined to strike the matter from the role for want of urgency, as suggested by the respondents. This would merely enable the applicants to set the matter down again in the ordinary course, on proper notice and compliance with the provisions of the rules.[1] Where both sides have already filed comprehensive affidavits *and* addressed full oral argument to the court, this would indeed be a senseless and wasteful exercise at this stage.

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[1] *CSARS v Hawker Air Services (Pty) Ltd; CSARS V Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) para 9.

Prima facie right

[6] In order to establish its entitlement to an interim interdict, the applicant *inter alia* has to satisfy the court that it has at least a *prima facie* right. On this leg of the case, the applicant relies on the facts (a) that the permit was lawfully issued; and (b) that it was unlawfully withdrawn by the third respondent.

[7] The respondents vehemently deny that the corporate permit was lawfully issued to the applicant. They contend that the permit was 'irregularly' issued by one of the former departmental officials, one Tshukudu, 'in flagrant disregard of the directives and departmental policy'.[2] Much time and attention was devoted by the respondents to this aspect in an attempt to show that the applicant knew about the irregularity. Bearing in mind the approach and onus to be applied at this stage of the proceedings, however, I am not persuaded that this has been established. In any event, as the SCA made clear in *Oudekraal Estates (Pty) Limited v City of Cape Town,*[3] until the permit is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked:

> 'No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

The same principle is applicable in this case and has to be applied at this stage.

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[2] Apparently Tshukudu has in the meantime been dismissed from the service of the Department.
[3] 2004 (6) SA 222 (SCA) para 26.

[8] With regard to the withdrawal of the permit, the respondents rely on the provisions of s 21(3) of the Act, which empowers the Director-General to 'withdraw or amend a corporate permit for good and reasonable cause'. The respondents went to great lengths in their answering affidavits to demonstrate that the Director-General did in fact have good and reasonable cause for withdrawing the permit. That may or may not be so. Even if they are correct, however, this cannot, in my view, justify the summary withdrawal of the permit. Everyone is entitled to administrative action that is 'lawful, reasonable and procedurally fair'.[4] In this regard, the applicant relies on quite a number of grounds for review. Given the fact that the respondents have not in their answering affidavits attempted to proffer any legal justification for the summary withdrawal of the permit, it is not necessary for present purposes to traverse the various grounds of review. Suffice to say that the applicant has succeeded in establishing the requisite *prima facie* right to have its permit returned.

[9] I wish to emphasise that this should not be seen as a finding by the court that the applicant is in fact entitled to a permit; only that the applicant has established that its existing permit had been irregularly withdrawn.

[4] Section 33(1) of the Constitution.

Irreparable harm / alternative remedy

[10] For purposes of an interim interdict, it is not necessary for an applicant to establish actual harm; it is sufficient to show that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted.

[11] In my view, the applicant has discharged the onus in this regard. The evidence adduced by the applicant in this regard is sufficient to persuade me that the success of its business is directly related to its ability to provide sufficient numbers of exotic dancers to attract a sustainable client base. The absence of a permit will directly and adversely impact on its ability to conduct business profitably.

[12] It is for this reason that I am not impressed by the respondents' argument that the applicant has an adequate alternative remedy available in the form of a claim for damages. Apart from the fact that such damages will be extremely difficult to quantify and to prove,[5] it must be clear to everyone that, by the time that the plaintiff's claim for damages has eventually wound its way through the tortuous legal process to the stage of a final judgment, many years would have passed. Most litigants in the applicant's position would not be in a position, even if this were financially prudent, to sustain a business and pay its overhead expenses throughout such a protracted period. As pointed out by the applicant, once it has been shut down, it cannot be resurrected. It is cold comfort to

[5] This in itself is a factor relevant to the determination of the question whether or not damages would be an adequate remedy. See *Nampesca (SA) Products (Pty) Limited v Zaderer* 1999 (1) SA 886 (C) at 901G–I.

the applicant to know that its liquidator may eventually succeed in a damages claim against the respondents.

[13] In these circumstances, it was rightly not disputed on behalf of the respondents that the balance of convenience also favours the applicant.

Interference in unterminated proceedings

[14] It is common cause that on 1 September 2010 the applicant has submitted an application in terms of s 8 of the Act to the Minister to review the decision withdrawing its corporate permit. More than three months later, that application has still not been finalised. There has been no explanation proffered by the Minister for the delay, nor any indication as to how much longer the applicant is required to wait for an answer. (As a matter of fact, no affidavit has been filed herein on behalf of the Minister, who is not even opposing this application.) In these circumstances, I find it disingenuous of the respondents to take the point that the applicant is impermissibly seeking to interfere in unterminated proceedings or to criticise the applicant for failing to exhaust its internal remedies. Moreover, this is a further reason why the respondents' 'defence' of lack of urgency cannot be sustained.

[15] The point is, in any event, devoid of merit. It overlooks the fact that the applicant is not seeking, at *this* stage, to interfere in unterminated proceedings; it is seeking interim relief, so as to restore the *status quo ante*. It might have been a different story, had the applicant at this stage sought an order reviewing and setting aside the decision to withdraw the permit.

Relief

[16] In its notice of motion the applicant seeks an order directing the first respondent to issue the necessary corporate permit to the applicant and directing that such order is to remain in effect until the final determination of a review of the earlier decision to withdraw its permit. I am not prepared to issue an order in these terms. It is clear from what has been said above that the withdrawal of the permit is assailable on procedural grounds. It has not been necessary, for present purposes, to consider the substantive grounds for withdrawal on which the respondents rely. It may well be, therefore, that the Department may yet be able lawfully to withdraw the permit long before the proposed review has been determined, in which event the applicant's success in this application will be nothing but a pyrrhic victory.

Conclusion

[17] For the reasons set out above, an order is issued in the following terms:

(a) Pending determination of an application for review of the decision to withdraw the applicant's corporate permit – whether by this court in terms of Part B of this application or by the second respondent in terms of s 8(4) of the Immigration Act 13 of 2002 – the first respondent is directed forthwith to issue to the applicant –

(i) in terms of s 21(1) of the Immigration Act, a corporate permit incorporating the terms of Corporate Permit No A050863;

(ii) in terms of Immigration regulation 18(2)(b) and the said corporate permit, 70 (seventy) corporate worker authorisation certificates.

(b) The costs of this application will be costs in the cause.

B M GRIESEL
Judge of the High Court