MUHAMMAD SHABBIR
and
REHANA SHABBIR
and
SHABBIR SALEH
and
MUMMAD SHAH ZAIB
versus
MR BUNYA N.O
and
CHIEF IMMIGRATION OFFICER
and
MINISTER OF HOME AFFAIRS N.O

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 6 & 12 October 2016

Urgent Chamber Application

S Kachere, for the applicants
S Musangwa, for the respondents

TSANGA J: Applicants brought an urgent chamber application essentially seeking an interim order suspending a notice of deportation to exit by the 1st of October 2016 and an order that they continue to be issued with temporary permits. The final order sought is that the notice issued be set aside and that the respondents refrain from deporting them until the 31st of December 2016 at least.

The founding affidavit revealed that on the 28th of July 2016, the Chief Immigration Officer, being the second respondent, declined to extend the residence permit of the first applicant, a Pakistani national who is the husband to the second applicant and the father of the second and third applicants. On the 28th of September 2016,the first applicant averred that he was told that the Minister of Home Affairs had rejected his appeal and pursuant to that he was then issued with a 'notice to visitor' to exit Zimbabwe by the 1st of October 2016. He argues that the decision to expel him and his family is highly unlawful, and unreasonable and unfair in that it did not consider the rights of his children or give him adequate time to wind

up his business. In particular, the time frame for departure is said to be unreasonable against the reality that one of the children, the third applicant, Shabbir Shaleh, is supposed to commence her "O" level examinations. Reliance is placed on s 81 (1) (a) of the Constitution in so for as it gives every child the right to equal treatment before the law. He argued that the children should have been consulted before the deportation. The gist of the application is that the children be allowed to write the examinations this term before the family is deported and that applicant be allowed to wind up his business.

It emerged at the hearing that the matter has been going on for some time and that the first applicant's permit expired some time in 2014 and that he has been in the country by virtue of his appeal. All the applicants have had audience with the Minister. There was an attempt by applicant's lawyer at the hearing to seek to give the fuller facts behind his client's quest for a permit which facts had been completely if not deliberately omitted from the founding affidavit. This was presumably because some of the background facts would not have lent to the urgency of the matter. An applicant must fully disclose to the court all material facts which have a bearing on the granting or refusal of the order sought. In an application, an affidavit should contain all necessary information and must not omit facts which would be necessary for the court to make a determination in the applicant's favour or indeed to arrive at a truly informed position on the urgency or otherwise of the matter.[1] I found that the attempt by applicants' counsel to try and give details which had been deliberately omitted from the affidavit for the purposes of getting a foot in the door highly improper. An order for deportation will inevitably have a context to it and it is improper in my view to omit background facts when bringing an application challenging such deportation

On the other hand, the respondent's main submissions were that due process was followed in informing the applicant of his departure date. They pointed out that the deportation information having been communicated to the first applicant, he did not exhaust internal remedies after having the received the notice and neither had he sought clarity from the 28th September 2016, when he received the letter as to why the permit was rejected. They stated that he would have been furnished with the reasons for his deportation if he had asked for them but equally stressed that the matter having been on-going for some time, he was also fully aware of these reasons which had to do with his fraudulent falsification of information

[1] As stated in *Westerhof* v *Zimbabwe Banking Corp & Anor* HH-105-03 an applicant who holds back any material facts, whether wilfully or negligently, and those facts have a bearing on the decision which the court must make, may fail to obtain the relief they seek.

and activities in relation to his investment permit and stay in Zimbabwe. The first applicant did not challenge this factual position.

The respondents also stated that rather than arrest him once his appeal had been denied, he was in fact given three days to go, in light of the fact that he lacked legal status. They added that it had not been brought to their attention that there is a child who is about to write their exams. They indicated the possibility of at least allowing the said minor child to write the examinations if approached with a request. However, they argued that the deportation being an administrative decision, this court should not attempt to substitute with its own decision since the discretion to issue a temporary permit is with the second respondent who have all the full information as opposed to the courts. Their counsel, Ms *Musangwa* further emphasised that the administrative authority's decision can only be set aside where the court concludes that it was arrived at unlawfully. Overall she prayed for the dismissal of this application.

Analysis

The nature of the application, filed as an urgent chamber application in terms of the High Court rules, is described as a quest for urgent relief against the decision of the respondents and is brought in terms of s4 (1) of the Administrative Justice Act [Chapter 10:28] on the basis that the decision to deport was not arrived at fairly or reasonably under the specific circumstances of the case. The relevant section provides as follows:

> **4 Relief against administrative authorities**
> (1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.
> (2) **Upon an application being** made to it in terms of subsection (1), the High Court may, as may be appropriate—
> (*a*) confirm or set aside the decision concerned;
> (*b*) refer the matter back to the administrative authority concerned for consideration or reconsideration;
> (*c*) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
> (*d*) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
> (*e*) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.

The key issue is that the provision allows the court to take appropriate action where an application has been made in which the allegation is that due process has not been followed.[2]

The law is clear on the circumstances under which it will set aside a decision of a public authority, regardless of whether such application is by way of review or other form of application. If an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. As regards s 4 (1) and section 4 in general of the Administrative Justice Act, it was held in *ANZ* v *Media & Information Commission and Anor*[3] that as a general principle the courts will not attempt to set aside their own decision for that of a public authority. It was held that it is settled law that a court will not interfere in the sphere of administrative actions or decisions except in very exceptional situations but it will normally interfere in the administrative sphere in the following circumstances:

a) *Where the end result is a foregone conclusion and a referral back will be a waste of time.*
b) *Where further delay would cause unjustified prejudice to the applicant. Where the statutory tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.*
c) *Where the court is in a good position to make the decision itself.*

There is no bias or incompetence that has been alleged in this case. This court is clearly not in a position to make a decision itself as it does not have the full facts before it. This is a point which I have already alluded to. In any event, what is crystal clear is that the first applicant and his dependants do not have a valid permit to remain in Zimbabwe. It is also clear from the correspondence attached in the application that as of 31 July 2014, the applicant was advised that the Minister of Home Affairs was still considering his appeal for a residence permit. It is this appeal which has since been refused. It is also clear that the investment licence attached, which the applicant relies on as having business to wind up, expired on the 11th of October 2011. What is therefore manifestly evident is that the applicants have no basis for remaining in Zimbabwe.

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[2] See in *U-Tow Trailers (Pvt) Ltd v City of Harare & Anor 2009(2) ZLR 259 (H).*
[3] *ANZ* v *Media & Information Commission and Anor* 2007 (1) ZLR 272 (H) at 273. See also *Affretair (Pvt) Ltd v MK Airlines (Pvt) Ltd 1996 (2) ZLR15 at 24 D*

However, in light of the interests of the child who is about to write her "O" Level examinations, I sought the views of the second respondent on the possibility of extending the departure date. This was against the backdrop that the respondents had indicated that the applicant can still approach them with his request that the child should write her examinations. Respondents' counsel agreed to put the issue to the second respondent in particular and to return with their position on an extension on Monday the 10th of October. This they did and put forward their final terms of settlement as follows:

1. 1st and 2nd applicants to be removed from Zimbabwe as prohibited immigrants in terms of the law.
2. 4th applicant to be removed from Zimbabwe as a prohibited immigrant together with his parents.
3. The 3rd applicant to remain in the country until finalisation of her examination and to depart the country by the 27th of November 2016. A temporary permit is to be specifically issued to the minor.

The conditions are in my view sufficiently accommodative of the request that the 3rd applicant writes her exams. The fourth applicant is only in grade four and his situation raises no special circumstances regarding examinations. The first applicant averred in his founding affidavit that his elder son, Zohaib Shabbir, whom he said he was in business with, is here in Zimbabwe. There is no reason why he cannot look after the third applicant up to the time of the completion of her exams.

Save for the second respondent's terms of final settlement which have been filed with this court as regards the third applicant's departure, this urgent chamber application with respect to the 1st, 2nd and 4th applicants, is accordingly dismissed with costs.

Kachere Legal Practitioners, Applicants legal practitioners
Civil Division of Attorney General's Office, for the respondents