

REPORTABLE (23)

(1) SISTER BERRY (NEE NCUBE) (2) JESSE AARON BERRY
vs
(1) THE CHIEF IMMIGRATION OFFICER (2) THE MINISTER
OF HOME AFFAIRS

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GOWORA JCC, HLATSHWAYO JCC,
PATEL JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE FEBRUARY 18, 2015 & JUNE 15, 2016**

L. Madhuku, for the applicants

O Zvedi, for the respondents

GWAUNZA JCC. This is an application in terms of ss 85 (1) (a) and 85 (1) (b) of the Constitution of Zimbabwe Amendment (No.20/2013) (“the Constitution”). The first applicant is acting in both her own interest and that of her husband who is the second applicant.

In their heads of argument, the applicants submit that they have abandoned paragraphs 2, 3 and 4 of the relief originally sought in their draft order. They indicate that the application is now ‘fundamentally focused’ on an infringement of the first applicant’s constitutional right to freedom of movement, which is protected under s 66 of the Constitution.

The applicants accordingly seek the following relief:

1. A *declaratur* to the effect that the first applicant's fundamental right to freedom of movement and residence, guaranteed under the Constitution, has been violated by virtue of the respondents' refusal to grant the second applicant entry into and residence in Zimbabwe, and
2. An order compelling the respondents to:
 - i) permit the second applicant entry into Zimbabwe, and
 - ii) grant the second applicant a 'spousal' residence permit.

The background to the matter is as follows. The first applicant is a Zimbabwean citizen by birth whereas the second applicant holds the citizenship of the United States of America. The latter sometime in August 2011 entered into Zimbabwe without any impediments. He was issued with a temporary employment permit for the period of 28 September 2012 to 27 July 2013. The application was made on his behalf by a religious group called Cornerstone Fellowship International. During the second applicant's stay in Zimbabwe, he met and fell in love with the first applicant. After the expiry of his employment permit the second applicant returned to his home country for a short period. He then returned to Zimbabwe on a holiday visa to spend time with the first applicant. During this period, the two applicants solemnized their marriage in terms of the Marriage Act (*Chapter 5:11*) and made a decision to settle, and start their own family, in Zimbabwe. This decision prompted the second applicant to take the necessary legal steps to attain the status of a lawful resident of Zimbabwe. He applied for a residence permit on the basis of his marriage to a Zimbabwean citizen. He was granted a thirty day extension on his holiday visa whilst his application for a residence permit was being considered.

On or about 2 June 2014, the second applicant was invited for a meeting with immigration officers under the control of the respondents. He was told to leave the country as he was deemed to be a "prohibited" person in terms of s 14(1)(e)(i) of the Immigration Act

[*Chapter 4:02*] (“the Act”). He was then given two options, that is, to leave the country immediately or to be deported. This was pursuant to s 17 of the Act.

The second applicant chose the former option and on 2 June 2014 left for South Africa together with his wife. Before leaving Zimbabwe, the applicants instructed their legal practitioners to appeal against the prohibition notice, which appeal was duly noted in the Magistrates Court, in terms of s 8 of the Act. The Court on 20 June 2014 ruled in favour of the second applicant and set aside the prohibition notice in question. The applicants were informed by their legal practitioners of this development and on 30 June, 2014, left South Africa for Zimbabwe, believing that they would finally settle down in Zimbabwe. Their joy was however short lived as the second applicant was denied entrance into Zimbabwe at the Beitbridge Border Post by the first respondent’s officers, on the basis that he was still a prohibited person despite the setting aside of the prohibition order. The first applicant proceeded with the journey without her husband who was left in the hands of the first respondent’s officers. She proceeded on 18 July 2014 to file an application before this Court, challenging the respondent’s decision to declare the second applicant a prohibited person, and denying him entry into this country. Before the matter was heard on 18 February 2015, the first applicant successfully applied for interim relief, in chambers before the Chief Justice, allowing the second applicant entry into the country pending the determination of this application.

I consider it pertinent at this juncture to address the parties’ submissions regarding the effect of the order of the Magistrates’ Court setting aside the first prohibition notice issued against the second applicant.

As already stated, the second applicant chose the option to leave the country, and did so, on the basis of the prohibition notice dated 2 June 2014. A look at this notice, which cites two provisions falling under s 14 of the Act, shows that the first respondent's officers were required to delete whichever of the two provisions did not apply in any particular case. This was not done. While clearly the second provision cited would not have been applicable to the circumstances of the second applicant, the first provision is not fully legible and seems to refer to a paragraph (i.e. paragraph (1) of subs (1) of s 4 of the Act) that simply does not exist as part of the various paragraphs and subsections of s 14. The applicants challenged the notice primarily on this point, stating as follows in their grounds of appeal in the lower court:

“The order of prohibition is invalid at law as it is not supported by the cited provisions of the Immigration Act (*Chapter 4:02*).”

The applicants accordingly sought an order setting aside the prohibition notice. This ground of appeal had merit in view of s 8 (4) (a) of the Act which reads as follows:

“When—

- (a) leave to enter Zimbabwe is refused or any person is informed for the first time that he is a prohibited person in terms of this Act, notice in writing specifying the provision of this Act under which leave to enter Zimbabwe is refused or the person is a prohibited person, as the case may be, shall be given to the person concerned:

Provided that..... “(*my emphasis*)

The Magistrate's full reasons for the order he made setting aside the impugned notice were not part of the record before this Court. Only the actual order of the Court has been provided, and it simply reads,

“The Immigration appeal is upheld and the prohibition be and is hereby set aside”

Despite the lack of reasons for this order, its correctness cannot be doubted. This is because the notice in question, as already mentioned, did not correctly cite the section of the Act by virtue of which the second applicant was a prohibited person. The notice therefore, did not comply with s 8(4)(a) of the Act.

As indicated above, the applicants understood the order setting aside the prohibition notice to mean that there were no longer any legal impediments to the second applicant’s return to Zimbabwe. The respondents took a different view of the matter. They contend that the Magistrate’s Court’s decision was based on a technicality rather than on the merits. This in their view meant that the lower Court did not make a determination to the effect that the second applicant was not a prohibited person, nor that such status be set aside. The respondents attached to their opposing papers another prohibition notice dated the same day, 30 June 2014, declaring that the second applicant was a prohibited person in terms of s 14 (1)(e)(i) of the Act. This notice fully complied with s 8(4)(a) of the Act.

I find the respondents’ submissions on the import of the Magistrates’ Court’s order setting aside the prohibition order, to have merit. The applicants challenged the prohibition notice of 2 June 2014, largely on technical grounds. There can be no disputing the fact that the notice in question was fatally defective, that is, a nullity. However, it appears that the applicants laboured under the misconception that the setting aside of the prohibition notice had the effect of opening the way to the second applicant to re-enter Zimbabwe. Sec 8(4)(a) of the Act makes it clear that the notice does not confer the status of prohibited person on the recipient. All that it does is formerly inform the person of the section of the Act under

which he was a prohibited person, that is, a person not eligible to enter Zimbabwe¹. The second applicant's prohibited person status derived from the law, that is, s14(1)(e)(i) of the Act, which I have cited below.

The respondents are therefore correct in the assertion that the second applicant maintained the status of prohibited person despite the setting aside of the prohibition notice. That being the case, the respondents were properly within their rights to issue another notice clearly setting out the basis for such a status.

The applicants, *albeit* challenging it *in casu*, did not appeal to the Magistrates' Court² against the allegation in the second notice, that he was a prohibited person. As indicated above, the second applicant has however been allowed to re-enter and stay in Zimbabwe pending the determination of this matter.

In my view there are basically three issues before this Court, namely:

- i) whether or not the second applicant's status of being a prohibited person was negated by his subsequent marriage to the first applicant;
- ii) whether or not there has been any infringement of the applicants' fundamental right to freedom of movement as alleged?; and
- iii) whether the applicants are entitled to the relief sought.

(i) Was the second applicant's status of being a prohibited person negated by his marriage to the first applicant?

¹ This is to be contrasted with the situation referred to in s 14 (2) of the Immigration Act which reads as follows; " A person shall be declared to be a prohibited person in terms of subparagraph (iii) of paragraph (e) of subsection (1) by notice in writing served on him or, if his whereabouts are unknown or he has departed from Zimbabwe, by notice in the Gazette".

² This would be in terms of s 21(1) of the Immigration Act

In this respect, it is pertinent to note that the second applicant was convicted by a court in the United States of America after being found in possession of dangerous drugs, and sentenced to pay a fine. Therefore, by operation of law, (that law being s 14(1)(e)(i) of the Immigration Act), he automatically became a prohibited person, a status that the Minister would simply be required to confirm through the issuance of a notice to that effect.

This is clear from a reading of that section, which defines a prohibited person, *inter alia*, as follows:

- “(e) any person who, not having received a free pardon, has been convicted in Zimbabwe or elsewhere of—
 - (i) any offence specified in Part I of the Schedule; or
 - (ii) ...
 - (iii) ...

Paragraph 12 of Part 1 of the Schedule specifies the offence relevant to the second applicant as follows:

- “12. Dealing in or being in possession of dangerous or habit-forming drugs or being in possession of any pipe or other utensils used in connection with the smoking of such drugs in contravention of any enactment.”

The second applicant became a prohibited person by law, after he disclosed that he was once convicted in the United States of America of being found in possession of dagga and sentenced to pay a fine of USD\$1 000. It is not in dispute that dagga is classified as a dangerous or habit forming drug in terms of the Dangerous Drugs Act (*Chapter 15:02*). The second applicant was, therefore, already a prohibited person when he first entered the borders of Zimbabwe, notwithstanding the fact that the Minister did not then issue a notice to that effect. It hardly needs mentioning that the Minister can only issue such notice if his

attention is drawn to the applicant's conviction for any of the offences specified in s 14(e) of the Immigration Act.

Significantly, the second applicant was already a prohibited person at the time he married the first applicant.

The first respondent readily accepts that the initial admission of the second applicant into Zimbabwe was allowed in error, and seems to suggest that he was allowed entry into this country because his conviction was deliberately not disclosed at that stage. Be that as it may, the second applicant, as already indicated was, by operation of law, a prohibited person.

This then raises the question of whether, by marrying a Zimbabwean woman, the second applicant was divested of his prohibited person status? Not having challenged the constitutionality or otherwise of ss 14(1)(e)(i) and 17 of the Immigration Act the applicants therefore, do not dispute that the second applicant became a prohibited person by operation of law. Indeed, and as already pointed out, the second applicant has not appealed against the declaration of his prohibited person status, that is contained in the second prohibition notice of 30 June, 2014. His argument is basically that because of his marriage to the first applicant, he should be spared, or be exempted from, the consequences that flow from one's status as a prohibited person, and be allowed to stay with her in Zimbabwe.

This is a matter that the Supreme Court has decisively determined in a number of cases.

In the case of *Nomsa Jonasi-Ogundipe vs Chief Immigration officer and 3*

Others SC 13/05 the learned judge had this to say in relation to facts similar to those *in casu*:

“... one does not need to be formally declared a prohibited person for him to be one. He becomes one by the mere fact of being in Zimbabwe in contravention of the Act. *In casu*, the applicant’s husband was a prohibited person from before his marriage to the applicant. He remained a prohibited immigrant until the day he was deported. The endorsement of his passport merely confirmed this reality. His marriage to the applicant did not convert his status from prohibited to non-prohibited person. To attain the latter status, he would still need the requisite permit. This point was stressed by this Court in *Edwards v Chief Immigration Officer* 2000(1) ZLR 485(S) at 487 E-F where GUBBAY CJ quoted, with approval, the following passage in the High Court case involving the same parties (HB 107/96):

In the absence of authority to the contrary, I find that marriage, *per se*, does not entitle an alien wife of a Zimbabwean citizen to reside in the country without the relevant permit issued in terms of the provisions of the Immigration Act and Regulations.”

The wife in the *Edwards* case was, like the applicant’s husband *in casu*, a prohibited persons in terms of s 14 of the Act. In that judgment, the learned Chief Justice addressed the same argument being advanced by the applicant, that as a spouse, her husband was protected from being declared a prohibited person by virtue of s 15(2) of the Immigration Act. The learned Chief Justice stated as follows at page 489 E- F:

“It is implicit that s 15(2) classifies persons or classes of persons who are not regarded as prohibited persons under s 14. Thus the actuality of being a prohibited person at the date of her marriage to a citizen of Zimbabwe effectively disqualified the appellant from becoming a non-prohibited person under para (d) to s 15 (2) of the Act. A contrary interpretation would give rise to the ability of a prohibited person to evade the restriction against entry or removal from Zimbabwe by marriage to a Zimbabwean citizen.” (my emphasis)³

Thus the issue of whether or not the parties’ marriage had the effect of negating the prohibited person status of the second applicant is one that is answered in the negative. This point is accordingly decided against the applicants.

³³ See also *Kenderjian v Chief immigration officer* 2000(1)ZLR 697 (S)

(ii) **Has the applicant's fundamental right to freedom of movement been violated, as alleged?**

I will now turn to the second issue for determination, which is whether or not the respondents' refusal to grant the second applicant – a prohibited person - entry into Zimbabwe, violated the first applicant's fundamental right to freedom of movement and residence.

Numerous authorities have determined that this right includes the right of a Zimbabwean citizen married to an alien spouse, to reside with him or her in Zimbabwe⁴. However, where the alien spouse is, like the second applicant *in casu*, a prohibited person, different considerations apply. The second applicant was a prohibited person at the time of his marriage to the first applicant. Accordingly, the issue of whether or not the first applicant's right to freedom of movement has been violated in the manner alleged, cannot be determined independently of the fact that her alien spouse was a prohibited person at the time that the two contracted their marriage.

According to the applicants, 'there is no doubt' that the first applicant's constitutional right to freedom of movement and residence has been infringed by the refusal of the respondents to grant her alien husband a residence permit. While conceding that the right to freedom of movement is not absolute, the applicants contend that in this case the infringement of the right was not reasonably justifiable in a democratic society, as envisaged under s 86 of the Constitution. They concede that the Immigration Act 'qualifies' as a law of general application but contend that the real issue is whether, and I quote from their heads of argument:

⁴ See among others, *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S); *Hambly v Chief Immigration Officer* 1998 (2) ZLR 285 (S)

“the conduct of the respondents, purportedly carried out in terms of the Immigration Act (*Chapter 4:02*), was fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity and freedom?”

I find the reasoning of the applicants to be somewhat confusing. The conduct complained of was done, (and not ‘purportedly’ so), in terms of a law of general application. Specifically the conduct amounted to enforcement of s 17 of the Act which stipulates as follows:

“Subject to this Act-

- a) a prohibited person shall not enter or remain in Zimbabwe;
- b) an immigration officer shall refuse a prohibited person leave to enter Zimbabwe, and if he has entered Zimbabwe, such person shall forthwith depart Zimbabwe.” (my emphasis)

As is abundantly evident, this provision is not only clear in its meaning, it is expressed in peremptory terms. The provision allows no discretion on the part of the respondents in terms of whether or not to enforce it against any particular prohibited person. In other words the provision does not exempt from its operation any class of prohibited persons. The strict application of this provision by the respondents is what the applicants refer to as ‘conduct’ that violated the first applicant’s fundamental right to freedom of movement.

Significantly, the applicants do not challenge the constitutional validity of s 17 of the Immigration Act. They simply contend, without providing a legal basis for it, that the respondents should have used some type of discretion, and allowed the second applicant entry into Zimbabwe. Nor do the applicants allege that in applying the law in question, the respondents employed means or a *modus* that went beyond what the provision mandates, to violate the first applicant’s fundamental rights. The applicants, therefore, take issue with the

mere fact of the respondents doing their job, in other words, the respondents' actions in properly applying an unchallenged law that falls under their direct responsibility.

On these grounds, the applicants seek a *declaratur* to the effect that the first applicant's fundamental right to freedom of movement has been violated. To support their case, they proffer detailed arguments that would, in my view, have been more appropriate to a challenge of the constitutional validity of the provision in question. Or, perhaps, the respondents' conduct based on a perceived misinterpretation thereof.

I am not persuaded that the applicants in the circumstances of this case, can properly impugn the strict application of s 17 of the Act, more so, in a constitutional case that alleges the infringement of a fundamental right of the prohibited person's Zimbabwean spouse. In this respect, I find the following excerpt from the book "Constitutional Litigation"⁵ by the learned authors **Max du Plessis**, **Glenn Penfold** and **Jason Brickhill**, to be eminently apposite:

"The quintessential example of a constitutional matter is one that involves the direct application of the Bill of Rights, that is, a constitutional challenge to law or conduct based on an unjustified infringement of a fundamental right. This includes challenges to the constitutionality of:

- (i) An Act of Parliament, a local government by law or conduct of a State functionary; and;
- ii) a rule of the common law or customary law." (my emphasis)

In my view, one cannot impugn, on a constitutional basis, "conduct" that constitutes a proper, lawful application of the law, without challenging the constitutional validity of the same law, or actions premised on a misinterpretation of it.

⁵ First Ed. at p 19

That being the case, I hold that the *declaratur* that the applicants seek lacks a proper constitutional basis. Such a *declaratur* would, in any case, have had the undesirable effect of introducing chaos and confusion in the application of the provision in question. This is because the respondents would be faced with the dilemma of not knowing when and on what basis to exempt any particular prohibited person from the operation of what clearly is a peremptory, (and unchallenged), provision of the Immigration Act.

(iii) Whether the applicants are entitled to the relief sought

I turn now to deal with the last issue for determination which is whether or not the applicants are entitled to the relief sought. In addition to the *declaratur* referred to, which I have determined has been improperly sought before this Court, the applicants also seek an order compelling the respondents to allow the second applicant entry into Zimbabwe, and, in addition, grant him a spousal visa.

The order relating to the granting of leave to enter Zimbabwe would be a consequence of the *declaratur* that the applicants have unsuccessfully sought. It therefore suffers the same fate. I should mention in this connection that the second applicant seems to have eschewed the procedure laid down in the Immigration Act and regulations (Statutory Instrument 195/1998) for challenging, through an appeal to the Magistrates' Court, the issuance of the second notice that declared him to be a prohibited person. The immigration regulations set out in detail the procedures for such an appeal, including the referral by the magistrate concerned, of any point of law, to the Supreme Court for determination (see ss 55-59). Instead, the applicants chose to mount this constitutional challenge, which I have determined to be ill-conceived.

As for a spousal residence permit, the papers before the court allude to the fact that the second applicant properly filed an application before the Chief Immigration Officer, for a residence permit as a spouse of a Zimbabwean citizen. This would have been in terms of ss 15 and 16 (1)(a) of SI 195/1998. The respondents submit that the application is still pending determination although it has been ‘stalled’ by the second applicant’s refusal to ‘observe due process.’ There is nothing on record to suggest that the applicants dispute this assertion.

The provisions of the Act and regulations make it clear that the process of applying for and being issued with, a spousal residence permit, is involved and requires the consideration, by the Chief Immigration officer, of numerous issues. The applicants in effect seek an order that would result in this Court interrupting a statutory process commenced by the appropriate immigration authorities to receive and determine an application for a residence permit by an alien spouse. Such order would in addition, compel the respondents to grant the permit sought without fully assessing the second applicant’s suitability for it, based on the requirements mandated by the Immigration Act. The impropriety of such an order hardly needs any emphasis. Due process needs to, and must be, followed.

In both the issue of the second applicant’s failure to appeal against the notice of prohibition, and his request for an order compelling the respondents to grant him a spousal permit I find that alternative remedies were not exhausted. This is a circumstance that brings to mind the doctrines of “ripeness” and constitutional “avoidance.” The former concept is said to encompass the latter and has been described in these terms:

“... the concept of ripeness also embraces the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course that should be followed⁶.”

I find this to be a doctrine that could properly be invoked against the applicants in respect of this aspect of the application.

In all respects therefore, I find that the application lacks merit and ought to be dismissed. As is the usual norm in constitutional applications, where no strong case has been made for it, no order as to costs will ensue.

It is accordingly ordered as follows:

The application be and is hereby dismissed.

CHIDYAUSIKU CJ I agree

MALABA DCJ I agree

ZIYAMBI JCC I agree

GOWORA JCC I agree

HLATSHWAYO JCC I agree

⁶ See the South African case *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC)

PATEL JCC I agree

GUVAVA JCC I agree

MAVANGIRA AJCC I agree

Mundia and Mudhara, applicants' legal practitioners

Attorney-General's office, respondent's legal practitioners