REPORTABLE (6)

CLETUS CHIKWUKA ANUEYIANGU
v
(1) CHIEF IMMIGRATION OFFICER (2) THE CO-MINISTERS OF HOME AFFAIRS (3) THE ATTORNEY GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA, GARWE JA,
GOWORA JA, & OMERJEE AJA
HARARE, JULY 5, 2012

L Mazonde, for the appellant
M Chimombe, for the respondents

GARWE JA: After hearing argument from counsel, we dismissed this appeal and indicated that the reasons for this decision would follow in due course. These are the reasons.

The appellant, who is a Nigerian National, filed an urgent chamber application before the High Court seeking an order for his immediate release from detention at the instance of the respondents. After hearing the parties, the High Court dismissed the application with costs. Against that decision the appellant noted an appeal to this Court.

The background to this matter is as follows. The appellant, a Nigerian National residing in Zimbabwe, was arrested by immigration officials on 6 February 2012 in terms of s 8(1) of the Immigration Act [*Cap 4:02*] ("the Immigration Act") which allows an

immigration officer to arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of the Act and to detain such person for a period not exceeding fourteen days for purposes of making enquiries on the status of such person. Following such arrest the appellant filed an urgent chamber application with the High Court in which he challenged the legality of his arrest and sought an order for his immediate release from detention.

In his papers before the High Court, the appellant averred that he was in Zimbabwe on the basis of an investor permit and that he was a shareholder of Ideal Clothing Manufacturing (Pvt) Ltd, a company incorporated according to the laws of Zimbabwe. The appellant attached as an annexure a copy of an investor permit issued on 8 May 2007 by the Zimbabwe Investment Authority. In the circumstances he submitted that no reasonable suspicion for his arrest and detention had been shown and consequently an order for his immediate release was justified.

In his opposing papers in the court *a quo*, the first respondent opposed the application on the basis, firstly, that although the appellant had previously been issued with an investor permit this had expired in 2008 and had not been renewed and secondly, that the appellant had been staying in the country on the basis of a provisional restriction notice which had also since expired. Since the appellant had no valid residence permit allowing him to stay in the country he was therefore out of status. The first respondent further averred that it had also been discovered that the appellant had previously been deported twice from Zimbabwe in June 2005 and June 2009 and was therefore a prohibited immigrant. Given these circumstances it was the first respondent's submission that the appellant had been lawfully arrested and detained pending finalisation of further inquiries.

In his answering papers, the appellant accepted that his investor permit had indeed expired in 2008 and that he only renewed it on 14 February 2012 shortly after his arrest. He also admitted that the provisional restriction notice allowing him to stay in the country had expired on 20 January 2012 but stated that efforts to extend the same were frustrated by the respondents who insisted they wanted to know the outcome of his application for a permanent residence permit before any further extension. He denied having been deported either in 2005 or 2009.

What happened thereafter is pertinent as one of the grounds of appeal is predicated thereon. The appellant filed his heads of argument on or about 22 February 2012. The first respondent on the other hand filed his heads on 27 February 2012. In the heads the first respondent sought the leave of the court to file a supplementary affidavit in order to deal with some of the averments made by the appellant in the answering affidavit. The first respondent also filed with the court the supplementary affidavit in question and in his notice of filing indicated that the affidavit was in response to new issues raised which required clarification by him. In the main the first respondent sought to produce a record in the Immigration Deportation Book to confirm that the appellant had been deported in 2005 and that when he came back into the country he was allowed entry in error as it was not appreciated then that he was a prohibited person.

At the hearing of the application, the court *a quo* admitted the supplementary affidavit. Having done so the court then accepted that the appellant, having been deported from Zimbabwe on 15 June 2005, had become a prohibited person. The court also found that the appellant had not been in possession of any legal document such as would allow him to remain in the country. In the circumstances, the court found that the arrest of the

appellant and his subsequent detention had been lawful. Consequently the court dismissed the application with costs. It is against that order that the appellant appealed to this Court.

In his notice of appeal, the appellant attacked the decision of the court *a quo* on several grounds, some of which are not clear. The grounds are:

"1. The court *a quo* erred in allowing first respondent in filing supplementary affidavit (sic) which 1st respondent filed and issued on the 27th day of February 2012 before getting leave of the court to file the same on the 29th day of February 2012 which was the date of the hearing. This is contrary to the rules of the court *a quo*.

2. The court a quo further erred in allowing 1st respondent to file heads of argument which were mainly premised on supplementary affidavit which were improperly filed by 1st respondent.

3. The 1st respondent (sic) erred in condoning the improper filing of supplementary affidavit by 1st respondent which affidavit raised completely new grounds.

4. The court *a quo* erred in dismissing appellant's application despite the fact that 1st respondent lied to the court a quo that appellant was living on the strength of an expired investor permit which he never bothered to renew.

5. The court a quo in dismissing appellant's application despite the fact that 1st respondent further lied to the court that appellant was arrested and detained because his provisional restriction notice expired and was out of status when Annexure "c" to 1st respondent's notice of opposition shows that appellant was arrested on allegations of re-entering the country after having been deported. It therefore follows that 1st respondent never advised appellant of the charge of being out of status as required at law.

6. The court *a quo* erred in dismissing appellant's application despite the fact that 1st respondent's failed to produce evidence to substantiate the allegation that appellant was indeed interviewed and he admitted to the allegations of having once been deported.

7. The court *a quo* further erred in dismissing appellant's application despite the fact that 1st respondent lied to the court *a quo* that appellant was deported in June 2009 from Zimbabwe when there was overwhelming evidence that appellant was in Zimbabwe in 2009.

8. The court a quo erred in dismissing appellant's application despite the sudden change made by 1st respondent in the supplementary affidavit that he made a mistake in saying June 2009 instead he wanted to say 2005. (sic) With respect, a supplementary affidavit can not be allowed to raise new grounds at law.

9. The court a quo erred in dismissing appellant's application despite the fact that 1st respondent lied to the court a quo that appellant had no legal standing to apply

for a permanent residence permit despite the fact that 1st respondent made appellant to pay statutory fees for the same.

10. The court *a quo* erred in dismissing appellant's application despite the fact that 1st respondent acknowledge (sic) in his paragraph 8 of the Notice of Opposition that they forced appellant to append his thumb to notification papers against the will of appellant. In essence, evidence gathered illegally for purposes of lawful process (sic) is inadmissible.

11. The court *a quo* erred in making a finding that applicant lied under oath and stated or written (sic) that he had only entered Zimbabwe for the first time in 2006. This is a clear misdirection on the part of the court a quo given that applicant clearly stated in the affidavit that he first came to Zimbabwe in 2006 as an investor and not as an ordinary visitor. With respect, it is a matter of fact that applicant first came to Zimbabwe in 2006 as an investor.

12. The court *a quo* further erred both at law and facts (sic) when it relied on a photocopied immigration record that showed that applicant was deported twice from Zimbabwe in 2005 and 2009 without being shown an original copy of the same. In essence, the photocopied immigration record shows 2005 and 2009 but 1st respondent did not sufficiently explain to the court a quo what led to the inclusion of 2009 as the year that applicant was also deported. With respect, no reasonable court applying its mind could rely on a photocopied record without having to demand sight of the original one.

13. The court *a quo* further erred in making a finding that applicant's lawyer could not produce legal proof that applicant was never deported in 2005 when applicant's lawyer submitted that the passport used by the applicant had since been submitted to Nigerian authorities upon expiration and the same has since been retrieved from the same which clearly shows that applicant was never deported on 15 June 2005."

The above grounds of appeal are repetitive in some instances and vague in others. They have not been set forth clearly and concisely and generally are inelegantly worded. This notwithstanding, it seems to me that the issues raised are quite narrow and that this appeal can be disposed of on a consideration of just two issues. These are firstly whether the court *a quo* properly admitted the first respondent's supplementary affidavit which contained damning evidence against the appellant and secondly whether at the time of his arrest on 6 February 2012 the respondent had reasonable suspicion that the appellant was not lawfully in Zimbabwe. Put another way the second issue is whether as at the date of his arrest on 6 February 2012 the appellant was legally entitled to remain in Zimbabwe.

The first issue relates to the decision of the court *a quo* to admit the supplementary affidavit. In his heads of argument before this Court, the appellant submitted that the first respondent did not, as required by the Rules, seek the leave of the court first before filing the supplementary affidavit. He simply attached the supplementary affidavit to his heads of argument and then referred to the contents thereof in order to answer legal argument raised by the appellant in his heads of argument. He further submitted that by attaching a copy of the Immigration Deportation Record bearing the appellant's picture, the supplementary affidavit was raising new grounds justifying the detention of the appellant.

It is correct that in terms of r 235 of the Rules of the High Court of Zimbabwe, once an answering affidavit has been filed, no further affidavits may be filed without the leave of the court or a judge. Perusal of the supplementary affidavit in question reveals that both in the notice of filing and in para 2 thereof the first respondent requested the court to allow him to file the supplementary affidavit on the basis that the appellant had introduced a new matter in his answering affidavit and was persisting in his denial that he had previously been deported. He explained that the additional facts sought to be placed before the court had not been included in the opposing affidavit because the investigations had not been concluded and consolidated at the time. The affidavit also sought to clarify the position on the deportation of the appellant and to confirm that he had been deported only once in June 2005 and that the reference in the opposing affidavit to 2009 as well was an error occasioned by the fact that the figure '5' in the year 2005 reflected in the records appeared like a '9'. The first respondent also pointed out that the appellant was at liberty to also apply for leave of the court to file further supplementary papers to deal with the issues raised in the supplementary affidavit.

It is common cause the appellant did not request for an opportunity to file his own supplementary affidavit to clarify the situation. In particular he remained silent on the issue whether or not he had been deported in the year 2005.

In admitting the first respondent's supplementary affidavit the court *a quo* remarked at p 3-4 of the cyclostyled judgment:-

> "...Mr *Nyandoro* was at pains urging the court to disregard the first respondent's supplementary affidavit in opposition of the application. The first respondent's intention therein was to rectify an earlier statement that the applicant had been deported twice before and to state that the correct position was in fact that he had been deported only once in the past. The effect of acceding to Mr *Nyandoro's* submission would be for the first respondent's case to be that the applicant had returned to Zimbabwe after having previously been deported from Zimbabwe on two occasions and not once only. It was not stated what prejudice would be occasioned to the applicant by this correction of facts. It would appear that it could only occasion fairness, if at all, to the applicant, but certainly not prejudice. Either way, the applicant still faces the hurdle of the statutory onus placed on him to satisfy the first respondent that he is not a prohibited person."

One must be alive to the fact that the court had a discretion to admit the supplementary affidavit in question. The court in the exercise of its discretion admitted the supplementary affidavit. The fact that there was no strict compliance with r 235 was really not that important for the reason that in terms of r 4C a court or judge is allowed to condone any departure from any provision of the Rules.

The circumstances in which an appellate court can interfere with the exercise of a judicial discretion have been the subject of many a decision in this jurisdiction. Those circumstances are very narrow. As stated by GUBBAY CJ in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S), p 62G-63A:-

> "It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it does not take into account some relevant consideration, then its

> determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for doing so."

In the present matter, the court *a quo* is accused of "erring" in admitting the supplementary affidavit. Nowhere is the suggestion made that the court acted upon a wrong principle or that it has misdirected itself in any of the instances highlighted in the *Barros & Anor v Chimphonda* case (*supra*). No basis has been shown to justify interference by this Court with the exercise of discretion by the court *a quo.*

In any event, even on the facts, the court *a quo* cannot be criticized for admitting the supplementary affidavit. The court *a quo* was clearly alive to the need to balance the competing interests of justice on the one hand and the appellant on the other. The court was of the view that it was important that all the facts be placed before it so that it could make an informed decision. Despite the suggestion made by the first respondent that the appellant was at liberty to also apply for leave to file a further supplementary affidavit, the appellant did not request to do so. Clearly the appellant could have done so. Had the appellant made the request and such request been turned down then the appellant would have been on firmer ground in attacking the manner in which the court *a quo* exercised its discretion.

I am satisfied that the court *a quo* did not misdirect itself and that there is no basis upon which this Court can interfere with the decision by the court *a quo* to admit the supplementary affidavit filed by the first respondent. The appeal on this basis must therefore fail.

Turning to the second issue that arises from the papers, that is, whether the respondents had reasonable suspicion to arrest and detain the appellant, it is clear from the papers that at the time of his arrest, the appellant was not the holder of any permit such as would have allowed him to lawfully remain in the country. Although in his founding affidavit he stated that he had an investor permit and a provisional restriction notice, these had expired as at the date of his arrest. It is also clear that the appellant only acquired a new investor permit after his arrest on 14 February 2012. His provisional restriction notice had expired on 28 January 2012. His previous residence permit had expired on 26 June 2011.

Most importantly however, the respondents formed the impression that the appellant had previously been deported twice from Zimbabwe, although subsequent investigations revealed that he had been deported only once. The records from the Immigration Department clearly confirm, as found by the court *a quo*, that the appellant had been deported from Zimbabwe in June 2005. He had thereafter managed to make his way back into Zimbabwe and in his application for a residence permit indicated that he first came to Zimbabwe in 2006 as an investor. He did not disclose the fact that he had been deported in June 2005.

In his grounds of appeal the appellant attacked the court *a quo* for relying on the photocopies of Immigration and Prison records in coming to the conclusion that he had previously been deported. In my view, this submission is without merit. Section 12 (2) of the Civil Evidence Act [*Cap. 8:01*] allows the admission of public documents which are proved to be true copies or extracts or which purport to be signed and certified by a person who has custody of the originals. The Immigration Deportation Record Book was presented as a true copy of the original in the supplementary affidavit filed by Richard Tombandini, a

Principal Immigration Officer. The deportation register at the airport is also verified by Nyatwa Bunya, an Immigration Officer, in his affidavit. Further in terms of s 40 of the Immigration Act, any written statement under the hand of an Immigration Officer shall, in any proceedings under the Act or in any criminal proceedings arising from a contravention of the Act be *prima facie* evidence of the facts stated therein. The photocopies of the Immigration and Prison records that were produced were therefore admissible.

The appellant was out of status at the date of his arrest and clearly was a prohibited person as defined in s 14 (i) of the Act. In particular s 14 (i) provides that any person who has entered or remained in Zimbabwe in contravention of the Act is a prohibited person. As found by the court *a quo* his arrest and subsequent detention cannot, in these circumstances, be said to have been unlawful.

In the result, the court unanimously agreed that the appeal lacked merit and the appeal was therefore dismissed with costs.

Chidyausiku CJ: I agree

Ziyambi JA: I agree

Gowora JA: I agree

Omerjee AJA: I agree.

Hamunakwadi, Nyandoro & Nyambuya, appellant's legal practitioners

Attorney Generals Office, first respondent's legal practitioners