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SWAZILAND HIGH COURT

Kokai Uche
Plaintiff

v

ATTORNEY GENERAL
Defendant

Civ. Case No. 2000/2000

Coram
For Plaintiff
For Defendant

Sapire, CJ
Mr. P.S. Dunseith
Mr. P. Msibi

JUDGMENT
(26/07/2000)

This is an application brought by an individual who is presently in detention. The matter comes before the court as a matter of urgency and the applicant seeks an order that the station commander Mbabane Police Station be ordered to release the applicant from custody forthwith. There is an alternative prayer that the station commander be ordered to bring the applicant before the Honourable Court when the matter is heard and that the respondent is ordered to pay the costs of this application in attorney and client scale.

In an affidavit attached to the notice of motion one Sabelo Benguni Gumedze informs the court that he is an adult male Swazi articulated clerk employed by an attorney of this court Mr. Dunseith. He says that on the 18th July 2000 he was instructed to visit the applicant, one Kokai Uche, at the Mbabane Police Station. He attended at the Station on the same date at 12.00 p.m. Upon his arrival he requested

the desk officer, whose name and rank is unknown to him, to see the Applicant. The desk officer referred him to the CID office where he made the same request to another police officer who informed him that he has no authority to release the applicant in order to consult with him. The deponent then further describes his frustrations at the police station and particularly he was refused permission to see the applicant. One of the officers there a certain Michael Dlamini informed him that the applicant was being kept in prison but could not produce any order or warrant authorising the police to keep the applicant in custody.

On the 19th July he saw the applicant and took instructions from him in the presence of a police officer. He recounts his difficulties in bringing this application. It is not necessary to deal with these matters because the real question before the court is whether the applicant is in lawful detention or not.

The respondent has sought to justify the continued detention of the applicant by referring to the terms of the Immigration Act No. 17 of 1982. The deponent to the replying affidavit one Nonhlanhla Sacolo states that the applicant was properly declared a prohibited immigrant under section 3 of the Immigration Act No. 17 of 1982 and he refers the court to annexure 2 being a copy of the declaration issued by the Minister of Home Affairs.

On the strength of this there is a submission that the applicant is in lawful custody and the annexure attached justifies such a continued detention.

I will not deal with the other aspects of the affidavit which deal with the difficulties experienced by the attorney in obtaining permission to consult and to obtain his client's signature.

The annexures on which the respondent relies are firstly a letter bearing the imprint of a stamp from the immigration department dated 13th July 2000, The letter is signed by Prince Sobandla who is the Minister of Home Affairs. This first annexure is a letter addressed to the officer in charge of Mbabane Correctional Serve and its heading is "*Detention of Prohibited Immigrants: Kokai Uche, a Nigerian and David Matumba, a Ugandan.*"

The letter reads *that*:

In terms of Section 3 of the Immigration Act No. 17 of 1982 I hereby direct that the abovenamed who has been declared a prohibited immigrant be kept in custody until such time that arrangements for their deportation from Swaziland are complete."

Also attached to the letter is a document headed "*General Notice No. 2000, Immigration Act 1982, Act No. 17 of 1982. Declaration of Prohibited Immigrants under section 3.*"

It reads as follows:-

"In exercise of powers conferred on me by Section 3 of the Immigration Act of 1982 and in consequence of information received from the source considered by me to be reliable I hereby declare Uche Kokai a Nigerian, and David Matumba a Ugandan: to be undesirable immigrant or person whose presence in Swaziland is contrary to the national interest within the meaning of the said sections."

It is signed by Prince Sobandla, Minister of Home Affairs and also bears a date stamp of the Immigration Department dated 15th July, 2000. It is assumed that both these documents were signed on the same day.

The applicant has pointed out that the procedure adopted and the warrant issue are not in accordance with the Act. In the first place the notice which has been produced does not appear to have been gazetted. No gazette has been produced, and a notice one presumes only takes effect on publication in the gazette. I see no reference here to any gazette: nor is there any attachment of a gazette: produced to show that publication indeed took place. This is a defect which should be borne in mind when reliance is placed on a Government Notice or any other document which requires to be published in order to take effect:

But: this is not the basis of the objection: One has to refer to the act to understand it and if one looks at the two sections involved one would immediately see

the section which defines a prohibited immigrant as a person or member of a class of persons who in consequence of information received from any Government or any other source considered by the Minister to be reliable, is considered by the Minister to be an undesirable immigrant, whose presence in Swaziland is declared by the Minister to be contrary to the national interest.

In the first annexure to the affidavit there is the notice to which I referred. The Minister has said in terms of Section 3 he has declared the applicant to be an undesirable immigrant or person whose presence in Swaziland is contrary to the national interest within the meaning of the said Section. That declaration in itself does not give anybody the right to arrest the applicant. He may be arrested in regard to criminal proceedings pending. In such a case the provisions of the Criminal Procedure & Evidence Act would have to be followed and the possibility of bail would arise. This does not amount to unrestricted power to imprison.

But the section on which the respondent relies is a further section which reads,

Section 8(1):—

"The Minister may, by order in writing, direct that any person whose presence in Swaziland was, immediately before the making of that order, unlawful under this act; shall be removed from and remain out of Swaziland either indefinitely for such period as may be specified in the order.

This section requires that a person who has been made a prohibited immigrant may be ordered to be moved from Swaziland and to stay out of Swaziland for any period which may be specified in the order. No order in those terms or any terms whatsoever requiring the removal of the applicant or his remaining out of Swaziland has been put in evidence. I assume that there is not one. This again becomes relevant in regard to sub-section 3 of the same section which reads:—

1. A person to whom an order made under this section relates shall:

(b) if the Minister so directs be kept in custody until departure from Swaziland and while so kept shall be deemed to be in lawful custody.

It is a pre-condition to the operation of Section 3(b) that the individual in whose custody it is sought to justify is a person to whom an order made under that section has been made. If no order has been made for his removal and for his remaining out of the country then the Minister may not direct him to be kept in custody until his departure from Swaziland because he does not have to leave Swaziland until the order is made.

Accordingly in the present case as I have said it is clear that the proper procedures have not been followed and Mr. Dunseith in arguing the matter referred me to a similar case which appeared before me in this court some years ago. The same point arose. I see no reason to depart from the decision made by me in that court. I therefore ordered that because of the invalidity of the warrant issued by the Minister, because it is not properly founded the detention is unlawful. The respondent is required to release the applicant from custody forthwith. The respondent will pay costs of this application.


SAPIRE, C.J.