IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No: 2571/11

In the matter between:

Okwali Fidelis Emeka **Applicant**

and

Minister of Home Affairs **First Respondent**

Commissioner of Correctional Services **Second Respondent**

The Attorney General **Third Respondent**

Neutral citation: *Okwali Fidelis Emeka vs Minister of Home Affairs and 2 Others 2571/2011 [2012] SZ HC 3 ( )*

Coram: **Maphalala PJ**

Heard:

Delivered:

Summary: **Applicant filed an urgent Application seeking court to review and set aside Minister of Home Affairs' decision in declaring Applicant a prohibited immigrant in Swaziland and pending decision to deport Applicant – Application fails – Applicant ordered to pay cost of Application.**

[1] The Applicant one Okwoli Fidelis Emeka has filed an urgent application on the 6 December 2011 against the Ministry of Home Affairs for an order in the following terms:

> "1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the above Honourable Court and directing that the matter be heard as one of urgency.
>
> 2. Condoning the Applicant for non-compliance with the said Rules of the Court.
>
> 3. Reviewing and setting aside the 1st Respondent's decision declaring Applicant a prohibited immigrant.
>
> 4. Reviewing and setting aside the 1st Respondent decision detaining Applicant pending deportation.
>
> 5. Costs in the event the application is opposed.
>
> 6. Further and/or alternative relief."

[2] The founding affidavit of the Applicant is filed in support of this Application where xxxxxxx annexures are also filed thereto. These included annexures "OFE 3" and "OFE 4" cited in the following paragraphs at paragraphs [6] and [7] of this judgment.

[3] The Respondent has filed its opposition and has filed an answering affidavit one Phineas Dlamini who is the Chief Immigration officer in the Ministry of Home Affairs.

[4] The Applicant then filed his replying affidavit to the Respondent's answering affidavit. In the said affidavit the Applicant has raised four points *in limine* as follows:

> "3. The deponent to the Respondents' answering affidavit has no authority to oppose my application in that in terms of the Immigration Act (hereinafter referred to as the Act) such power to do what I am complaining about vests with the Minister (of Home Affairs) not with a public official in the position of the deponent, and the deponent himself has not alleged that he has been delegated such powers, if at all such powers may be delegated, by the Minister.
>
> 4. In terms of section 8 of the Act, being the section the Minister purported to be acting in terms of, it is only the Minister who may exercise the powers set out therein and there is no provision for delegation.
>
> 4.1 It should be noted that in terms of section 2 of the Act, the "Minister" is defined as the minister

responsible for immigration and there is no reference of any official acting on his instruction.

5. The affidavit deposed to by the deponent is inadmissible because it contains hearsay evidence as the deponent thereto is not the author nor has he alleged that he is the one who took the decision sought to be reviewed and set aside and neither has he alleged that he knows the reasons leading to the taking of the said decision.

[5] The historic background of the matter is that on the 6 December 2011 Applicant filed an urgent application for orders *inter alia* reviewing and setting aside the 1st Respondent's decision declaring Applicant a prohibited immigrant. I must say that in prayer 4 the same relief in prayer 3 is sought and therefore I shall only consider prayer 3 thereof.

[6] The Applicant Okwoli Fidelis Emeka is a Nigerian national and has been incarcerated at Matsapa Correctional since …… after being convicted and sentenced to a fine of E500.00 or five (5) months' imprisonment in the event of default.

[7] After being sentenced and transferred to Matsapa Correctional Centre to serve the sentence his wife paid the fine for him but 2nd Respondent could

not release him. He was advised that he was now detained on the strength of a written instruction issued by the 1st Respondent.

[8] The written instruction is in annexures "OFE 3" and "OFE 4" of the Applicant's founding affidavit.

[9] For purposes of the record I shall outline these annexures in full in the following paragraphs:

"Our Ref: DI/S/VOL.III

Your Ref: CP/52/3/VIII/336

P.O. Box 432
MBABANE
Tel: 2 404 2941
Fax: 2 552 4060

17TH NOVEMBER, 2011

OFFICE-IN-CHARGE MATSAPA CORRECTIONAL
STATION COMMANDER MATSAPA

<u>DETENTION AND DEPORTATION OF PROHIBITED IMMIGRANT</u>

1. OLUWASUYI KAREE
2. SALAKO KAREE
3. OKWOLI FIDELIS EMEKA

In terms of section 8, sub-section 3(b) of the Immigration Act No.17 of 1982 I hereby direct that the above-named who have been declared prohibited immigrants be kept in custody of Correctional Services Department until such time that arrangement for their deportation from Swaziland are complete.

PRINCE GCOKOMA

MINISTER OF HOME AFFAIRS"

[10] The second annexure "OFE 4" states the following:

"Our Ref: P.O. Box 432
MBABANE
Tel: 2 404 2941
Your Ref: Fax: 2 552 4060

GENERAL NOTICE NO…….2011

THE IMMIGRATION ACT, 1982

(ACT NO.17 OF 1982)

DECLARATION OF PROHIBITED IMMIGRANTS

(UNDER SECTION 3)

In exercise of the powers confirmed upon me by Section 3 of the Immigration Act, 1982 and in consequence of information received from a source considered by me to reliable. I hereby declare:

1. LLUWASUYI KAREE
2. SALAKO KAREE
3. OKWOLI FIDELIS EMEKA

To be an undesirable immigrant or person whose presence in Swaziland is contrary to the national interest within the meaning of the said section.

PRINCE GCOKOMA
MINISTER OF HOME AFFAIRS

17th November 2011"

[11] The Applicant averse in paragraph 12 of his founding affidavit that he actions of the 1st Respondent are unlawful and irregular in that not only did the 1st Respondent afford him an opportunity to make representation before taking such an adverse decision he also failed to explore the application of section 3 (2) of the Act.

[12] The Applicant avers in paragraph 13 thereof that had the 1st Respondent afforded him an opportunity to make representation. He would have presented the following facts:

"13.1 I entered Swaziland legally in the year 2005 and I had a visa to remain in Swaziland.

13.2 My visa expired and at the time of my arrest I was working on acquiring Swazi citizenship and/or permanent residence in Swaziland as I was not in the process of "kukhonta".

13.3 In the year 2010, I married Ntombifuthi Bulunga, who is a Swazi citizen by birth with whom I have one (1) minor child and who is about nine (9) months pregnant.

13.4 Every tie I came to Swaziland (and in my whole life) I have never been convicted of any offence save the current one.

13.5 Having regard to the foregoing, I would have motivated my being dealt with in terms of section 3(2) of the Act."

[13] The preliminary objection by the Applicant on the Respondent's answering affidavit is that the deponent did not have power to oppose the Application. I must say the Applicant does not say anywhere in his papers what should happen to this affidavit if the court finds that it has these objectionable features as averred by the Applicant.

[14] The Applicant first of all contends that the decision sought to be reviewed and set aside was done by the "Minister" (1st Respondent) purportedly on powers vested in him by section 8 of the Immigration Act No.17 of 1982 hereinafter referred to as the Act. That in terms of section 2 of the Act the Minister is defined as the Minister responsible of immigration. In the said section there is no reference to a person exercising the power for and/or on behalf of the Minister. In support of this argument the Applicant cited the case of *Swaziland Independent Publishers (Pty) Ltd t/a The Nation Magazine vs Minister of Public Service and Information, Civil Case No.1155/2001 (unreported)* to the following proposition:

> "Public authorities possess only so much power as is lawfully authorities and every Administrative Act must be justified by reference to some lawful authority."

[15] That in the present case the deponent has not made reference to the authority which empowers him to Act as he has done hence opposition cannot be sustained.

[16] The second leg of the Applicant's argument is that as already averred in the Applicant's replying affidavit the deponent has not proved that the allegations he has deposed to are within his personal knowledge a he ahs failed to allege that he participated in any way leading to the 1st Respondent making or taking the decision he took. In support of this argument cited the legal authority of *Herbstein and von Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 368 – 370, as a general rule, and subject to the provisions of the *Civil Evidence Act*, hearsay evidence is not permitted in affidavits.

[17] As I stated earlier on in paragraph [13] of this judgment that Applicant had not stated what prayers he seeks in the event I find in his favour on these points *in limine*. It is trite principle of law that prayers ought to be averred in such matters. Therefore I will decline to determine the points and will proceed without any further ado to the merits of the case.

[18] The nub of the case on the merits of the case is that before an adverse decision may be taken against a person such person must be afforded an opportunity to be heard before such decision is taken.

[19] The Applicant contends that *in casu* the Respondents have not alleged that the Applicant was granted any hearing before the decision to declare him a prohibited immigrant (and further directed that he must be kept in custody

pending deportation) was taken. That the lack of a hearing before the taking of a decision filed in the fact of section 21(1) of the *Constitution Act No.1 of 2005* and the dictates of natural justice.

[20] The Applicant in support of its argument in this regard has cited what was stated by *Mamba AJ* (as he then was) in the case of *John Bongwe vs The Secretary of the Civil Service Board, Civil Case No.482/2006* to the following proposition:

> "One of the facets or components of natural justice is that no man should be condemned before being an opportunity to defend himself or in whatever way plead his cause. This is the *audi alteram paterm* rule. What is required of the decision maker is that in order for him to arrive at a fair and balanced decision, especially where the decision affects the rights of an individual, he must give or afford both sides the opportunity to adequately present their side of the issue."

[21] Counsel for the Applicant further cited the legal authority of *Lawrence Baxter, Administrative Law* at page 534 – 544 to the following:

> "what is required, in essence, is that the administrative agency should act fairly in affording the affected individual the opportunity of a fair hearing …. There are two fundamental requirements to which an affected is entitled; notice of the intended action; and a proper opportunity to be heard ….an opportunity to be heard presupposes adequate notice of intended administrative action. Whether this is required by statute or not, an affected party must be

given adequate notice of the possibility that an administrative action may be taken against him."

[22] The attorney for the Applicant cited two of decided cases this Court including that of *Rex vs Valentine Oparaoch Review Case No.193/07,* that of *The Nation Magazine* case supra.

[23] The gravamen of the argument of the Applicant on the merits of the case is that for the Minister to exercise the powers he sought to exercise certain jurisdictional facts must exist and must be presented to the Applicant and in the absence of same it cannot be said that the Minister acted lawful.

[24] Lastly that he cannot be declared an illegal immigrant at the xxxxx of the Minister without the dictates of natural justice being followed. That the Minister does not have unfettered powers which operate outside the dictates of natural justice.

[25] Respondents' attorney Mr. Dlamini also advanced important arguments against the Applicant's contention. Mr. Dlamini stated in paragraph 2.1 and 2.2 of his arguments the pertinent legal issues for decision. Firstly, that the peg on which this review application stands is predicted on whether the Minister ought to have afforded the Applicant an opportunity to deal with the information he relied upon in coming to his decision in isolation of the principles of natural justice.

[26] Secondly, that in essence, the Applicant challenged the procedure by which the decision was reached and decision substantially. The Applicant does not stick to challenge the validity of legislation.

[27] In paragraph 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, and 3.7 Respondent lays down the Respondent's argument.

[28] Counsel for the Respondent has cited a decided case in Botswana that of *Good vs The Attorney General (2) [2005] 2 BLR 337* at 344 (Korsah JA concurring) the court remarking:

> "The Immigration Act is the embodiment in Botswana of what is a universally accepted principle of international law viz that every country has the sovereign right to decide who it will have as its inhabitants. Botswana accordingly, in terms of that principle, has the undisputed right to control who will come into its territory and the unquestionable right to expel those persons who are undesirable. These unassailable rights have been given judicial expression in a number of decisions both in the United Kingdom and in the United States and that they have equal validity in Botswana is beyond doubt."

[29] The Respondents contend that the above commends by the court apply wholesale in Swaziland and therefore Swaziland has a right to expel a person whose presence is deemed undesirable or whose presence in Swaziland is contrary to the natural interest.

[30] On the argument on the right to be heard (*audi alterim partem)* in paragraph 4.1, 4.2, 4.3, and 4.4 to the final submission that in view of the comments *good case supra* read in tandem with the constitutional provisions cited in paragraph 4.3 *supra*, article 13 of the ICCPR remains applicable. As such, the Applicant was not entitled to a hearing before the Minister acted in terms of the Act.

[31] The last argument advanced on behalf of the Respondent is that the Minister acted within the ambit of the law and that the Applicant has no form of legal recourse under the relief he seeks.

[32] That the Minister acted in accordance with law in invoking the provisions of the Immigration Act. The administrative power exercise in terms of section 3(1)(d) vests in the Minister of Home Affairs, and as stated in *Good (supra)* at page 360 citing with approval the words that fell from the lips of *Bernard JA* in *Attorney General vs KC Confectionery Ltd 1986 LRC 172* that:

> "I mean no disrespect in making the observation that in matters of this kind the courts must be careful not to appear to usurp the functions that are purely within the plentitude of the powers of mother organ of state."

[33] The court in the above case further made the following trenchant remarks, which apply with equal force in the present case:

> "In the present case Parliament has entrusted to the President the power to decide who is and who is not an undesirable inhabitant of or visitor to Botswana. It is an executive function. It is not only his right but indeed his duty to ensure that the national interest and the security of the country and its peace and stability are protected. He is the person best placed to decide whether in any particular case those elements are likely to be prejudiced by the continued presence of a non-citizen in the country. He acts on information and advice. He may have to act with expedition in the light of that information. As stated in the cases I have quoted it is not the function of the court to second-guess him in his decision. Moreover, the disclosure of the information and advice on which he acted may prove an unacceptable risk to national security."

[34] These are the arguments of the parties in this case. Firstly, I agree with the Respondents' identification of the issues for decision. The review application hands on the arguments whether the Minister ought to have afforded the Applicant an opportunity to deal with the information he relied upon in coming to his decision in isolation of the principles of natural justice. That in essence, the Applicant challenges the procedure by which the decision was reached and the decision substantially. The Applicant does not seek to challenge the validity of the legislation.

[35] It would appear to me that the crux of this case lies in the proper operation of section 3(1) (d) read with section 8(3)(b) of the Immigration Act of 1982, which states as follows:

"Prohibited immigrants.

3. (1) In this Act, a prohibited immigrant means a person who is not a citizen of Swaziland and who is –

(d) a person or a member of a class of persons who, in consequence of information received from any government or from any other source considered by the Minister to be reliable, is considered by the Minister to be an undesirable immigrant or whose presence in Swaziland is declared by the Minister to be contrary to the national interests;"

[36] Further, section 8(3) (b) reads as follows:

"Power to remove persons unlawfully in Swaziland.

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 or for such period as may be specified in the order.

(3) A person to whom an order made under this section relates shall -

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

[37] In my assessment of the parties' arguments regarding in interpretation of these two sections of the Immigration Act it would appear to me that Respondents' contentions are correct on accounts. I find that the *ratio* in the case of *Good vs Attorney General (supra)* apply to the facts of this case. The comments made in the above case as outlined above at paragraph [28] of this judgment apply in Swaziland and therefore Swaziland has the right to expel a person whose presence is deemed undesirable or whose presence in Swaziland is contrary to the national interest.

[38] Coming to the second point that of the right to be heard (*audi alterim partem*) Applicant does not mean where such right originates. In the sphere of international law this right is embedded in the international covenant on civil and political rights, 1966 in particular Article 13.

[39] In the case of *Good (supra)* at page 346 the following is stated:

> "What must be said at this juncture, however, is that it is trite and well recognized that signing such a treaty does not give it the power of law in Botswana and its provisions do not form part of the domestic law of this country until they are passed into law by Parliament. Until that occurs, those treaties do not confer enforceable rights on individuals within the state but they may be referred to as an aid to construction of enactments including the Construction…"

[40] I agree with the Respondents' contentions in this regard that the view expressed by the court in the above except applies with equal force in Swaziland when considering the provisions of section 238(2) as read with subsection 6 of the Constitution Act of 2008.

[41] I further agree with the Respondents that in view of the comments in view of the comments in the above case, read in tandem with the above constitutional provisions, Article 13 of the ICCPR remains inapplicable as such the Applicant was not entitled to a hearing before the Minister acted in terms of the Act.

[42] The last point for consideration is whether the Minister's decision was lawful in the circumstances. The words, "in accordance with the law" as found in the Convention (ICCPR) were interpreted in *Good (supra)* at 358 as follows:

> "I have cited Article 13 of the ICCPR treaty that an alien may only be expelled from a member state in pursuance reached in accordance with law. That law, as I have held, would in Botswana be its Immigration Act. His expulsion can take place on the basis of a decision by the President. That is an executive decision which may be made; *inter alia*, where the national security is at stake. The article goes on to recognize that where reasons of national security require it the alien may not submit reasons against his expulsion or have his right reviewed by the competent authority, which would no doubt include a court of competent jurisdiction."

[43] On the facts it appears to me that the Minister acted in accordance with the law in invoking the provisions of the Immigration Act. The administrative power exercised in terms of section 3(1)(d) vests in the Minister of Home Affairs, and as was stated in the case of *Good (supra)* 360 citing with approval the words of *Bernard JA* in *Attorney General vs KC Confectionery Ltd 1986 LRC 172* that:

> "In the present case Parliament has entrusted to the President the power to decide who is not an undesirable inhabitant or visitor to Botswana, in an executive function. It is not only his right but indeed his duty to ensure that the national interest and security of the country and its peace and stability are protected. He is the person best placed to decide whether in any particular case those elements are likely to be prejudiced but the continued presence of a non-citizen in the country. He acts on information and advice. He may have to act with expedition in the light of that information. As stated in the cases I have quoted it is not the function of the court to second-guess him in his decision. Moreover, the disclosure of the information and advice on which he acted may prove an unacceptable risk to national security."

[44] In the result, for the aforegoing reasons I find that the Minister acted within the ambit of the law and the Applicant has no form of legal recourse under the relief he seeks and therefore the Application is dismissed with costs.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

For the Applicant	**:**	**Miss S. Masuku**
For the Respondent	**:**	**Mr. T. Dlamini**