IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No: 470/14

In the matter between

KHAIRUL BASAR	**APPLICANT**
And	
THE NATIONAL COMMISSIONER OF POLICE	**1ST RESPONDENT**
THE COMMISSIONER OF CORRECTIONAL SERVICES	**2ND RESPONDENT**
THE SWAZILAND GOVERNMENT	**3RD RESPONDENT**
THE ATTORNEY GENERAL	**4TH RESPONDENT**

Neutral citation: ***Rhairul Basar v The National Commissioner of Police & 3 others (470/14*** **[2014] SZHC 89 (22 April 2014)**

Coram: **OTA J**

Heard: **14 April 2014**

Delivered: **22 April 2014**

Summary: **Civil procedure; writ of habeas corpus; principles thereof; Applicant declared a prohibited immigrant by the Minister**

of Home Affairs; Respondents failing to notify the Applicant of the Minster's order prior to his arrest and detention pending his deportation; arrest and detention set aside in the circumstances.

JUDGMENT

OTA J

[1] The Applicant a Bangladesh National who is resident in Swaziland, and has been so resident for the past five years, moved this application on the premises of urgency contending for the following substantive reliefs:-

> **"3. Granting an order that the 1st and 3rd Respondents should stay any process of deportation of Applicant with immediate and interim effect, pending finalization of this matter.**
>
> **4. Granting an order for the release of Applicant from the custody of the 2nd Respondent and from any detention with interim and immediate effect.**
>
> **5. Granting an order that the arrest and detention of Applicant is unlawful and must be set aside.**
>
> **6. Granting an order that the 1st Respondent surrenders the Applicant's passport and temporal permit that expired in February 2014 to the applicant forthwith.**
>
> **7. Granting an order that in the meantime the 3rd Respondent in processing Applicant's working permit must grant the Applicant a temporal permit valid for such time that the processes relating to Applicant's Application for permit shall have been exhausted.**
>
> **8. Granting an order against the 1st Respondent at the scale of Attorney own Client Scale.**
>
> **9. Granting further and or alternative relief".**

[2] The Respondents are described herein as follows:-

> **"(3) The First Respondent is the Commissioner Of Police of Police headquarters along Usuthu Link Road in Mbabane and is cited by virtue of my being illegally arrested, detained by Manzini special branch division without a charge and later taken to the remand facility at Zakhele in Manzini without any court hearing and committal and is represented by the 4th Respondent.**
>
> **(4) The Second Respondent is the office of the Commissioner Correctional Services of Correctional Headquarters and is cited by virtue of holding into its custody, the body of the Applicant without any order of court and is represented by the 4th Respondent in terms of the law.**
>
> **(5) The Third Respondent is the government of Swaziland cited by convenience in that it is in possession of a renewal application for a work permit of Applicant dating back in January 2013 that has not been finalized to date and is also represented by the 4th Respondent by law.**
>
> **(6) The Forth Respondent is the office of the Attorney General of 4th Floor Justice Building in Mbabane and is cited as a representative of all government agencies on civil litigations by law".**

[3] When this matter served before me on 2 April 2014, I granted interim reliefs in terms of prayer 3 of the application amongst others. I subsequently ordered the parties to file all relevant processes requisite for the decision of this matter. I heard oral arguments from the parties on 14 April 2014.

[4] The Applicant contends for the writ of *habeas corpus* to issue against the Respondents in terms of the application.

[5] In his founding papers the Applicant alleges that around January 2014 two Bangladesh Nationals were arrested at the Matsapha International Airport on the premises that they did not have authentic entry permits. The Applicant was

suspected to have helped them acquire the permits since he accompanied the person who was sent to fetch the Bangladesh Nationals to the airport.

[6] Applicant alleged that he was subsequently arraigned on several occasions at the Manzini Regional Police Headquaters and Matsapha police station and his cellphone and passport were taken away in February 2014 to date.

[7] The Applicant had made an application for a renewal permit, consequent thereto, the Immigration Department had given him a temporary pass which was valid until 28 February 2014. This temporary pass was also taken away by the police in early February 2014.

[8] Applicant alleged that sometime before 28 February 2014, he pursued the renewal of his permit by the Immigration Department who requested for his passport and expired pass, but the Manzini police refused to hand over these documents to him until date.

[9] The Applicant averred that about 3 March 2014, the Manzini police approached him to request for his permit, well knowing that his documents were still in their possession.

[10] Subsequently, the Applicant was arrested and charged to Court for not having a valid permit. He was found guilty, convicted and fined the sum of Five Hundred Emalangeni (E500-00). He paid the fine and was liberated.

[11] On Monday 31 March 2014, Applicant was re-arrested by the same Manzini special police branch. He was not charged for any offence but was taken to the Zakhele Remand Facility under the custody of the 2nd Respondent without any appearance in Court.

[12] Applicant and his attorney have since been advised by the prison authorities that the Manzini special police branch are preparing documents for his deportation, yet no Court heard such a matter and there is also no Court order directing his deportation.

[13] Applicant contended that in these circumstances, his arrest and detention is unlawful and warrant an order for his immediate release in terms of the doctrine of *habeas corpus.*

[14] The Respondents opposed this application with an answering affidavit sworn to by one Alfred Gule, who is described in that process as a Senior Immigration Officer, Head of the Entry Permit section and Secretary to the Immigration Appeals Board.

[15] In the answering affidavit, the Respondents allege that the Applicant was lawfully arrested on 3 March 2014, arraigned before the Manzini Magistrates' Court, found guilty and sentenced to a fine of Five Hundred Emalangeni as reflected in the committal warrant annexed as annexure AG1.

[16] Respondents contend that on 12 March 2014 and subsequent to Applicant's conviction by the Magistrates' Court, the Honourable Minister for Home Affairs declared Applicant as a prohibited immigrant in the Kingdom as reflected in annexure AG2. Applicant is therefore lawfully detained at the Manzini Remand Centre pending his deportation from Swaziland. A letter from the Hon. Minister directed to His Majesty's Correctional Services ordering Applicant's detention pending the said deportation is evidenced by annexure AG3.

[17] The Respondents further alleged that there is no pending renewal application for Applicant's work permit as Applicant's appeal to the Appeals Board was rejected on 11 February 2014. This was long before Applicant's arrest on 3 March 2014.

[18] Respondents further allege that the Applicant's renewal application, if any, would have been processed in the absence of the Applicant's passport and expired pass because there are other procedures available which are adopted in the event that these documents are missing. These include, but are not limited to, payment of half the required amount for an application, production of Applicant's photographs, covering letter and proof of Appeal.

[19] The Respondents allege that at this stage the special pass had expired and the application launched by the Applicant was not for a renewal of permit but an appeal. Since Applicant had already been rejected on appeal he did not qualify to apply for a new permit.

[20] Respondents further contended that Applicant's re-arrest and detention on 31 March 2014 was lawful and is meant to facilitate his deportation as provided by the Immigration Act which empowers the Minister of Home Affairs to cause the detention of a person who has been declared as a prohibited immigrant under the Act.

[21] The doctrine of *habeas corpus* does not apply and the application should be dismissed, further contended the Respondents.

[22] It is on record that the Applicant filed a replying affidavit, which content I will allude to if the need arises. Counsel for both sides also filed heads of argument which they amplified orally when this matter was heard.

[23] Now, the writ of *habeas corpus ad subjiciendum* generally referred to in the short form as *habeas corpus*, is one of the prerogative writs. By means of it the legality of the detention of a person by an executive authority may be challenged in the High Court. It is a prerogative process for securing the liberty for the subject by affording an effective means of immediate release from unlawful and unjustifiable detention whether in prison or in private custody.

[24] The purpose is to inquire into the cause for which a subject has been deprived of his liberty. By it the High Court at the instance of the subject aggrieved, command his production and inquire into the cause of his imprisonment or detention. If there is no legal justification for the detention, the party is ordered to be released.

[25] The writ is applicable as a remedy in all cases of wrongful deprivation of personal liberty. Even where the restraint is imposed on civil grounds under claim of authority, the legal validity of the claim may be investigated and determined.

[26] It is therefore of fundamental importance in that it is an instrument of protection of the fundamental right to personal liberty.

[27] It is not a discretionary remedy. It is granted *ex debito justiciae* but not as of course. In other words a Court should grant it once an Applicant has made out a case therefor. The grant is not a matter of the discretion of the Court. The Court may however refuse an application if there is another remedy whereby the validity of the restraint can be effectively questioned.

[28] It is important that I stress here, that *habeas corpus* is used as a means of review and not of an appeal. It challenges the legality of a detention order and not whether the order is correct on the merit. So, if an inferior Court acted within its jurisdiction but wrongly convicted a person, such conviction is not illegal and the remedy is an appeal and not an application for the writ of *habeas corpus.*

[29] The writ lies where the detention is *ultra vires* the authority or person that ordered it. The order may be *ultra vires* substantially or procedurally, for instance, were the statutory conditions which would justify the deportation of a person from a country were not met, *habeas corpus* would be granted for the release of that person.

[30] *In casu*, it is common cause that the Applicant was tried and convicted for the offence of contravening section 14 (2) (e) of the Immigration Act 17/1982. He was sentenced to a fine of E500-00 in default five months imprisonment. He paid the fine and was liberated,

[31] There is no doubt, as argued by Learned Counsel for the Respondents Mr Lukhele, that by virtue of the said conviction, the Minister of Home Affairs has the power in terms of Section 3 (1) (d) of the Immigration Act to declare the Applicant an undesirable immigrant whose presence in Swaziland is contrary to national interest, as the Minister proceeded to do in her declaration of prohibited immigrant as evidenced in annexure AG2.

[32] Furthermore, there is no doubt that in these circumstances, the Minister has the power, in terms of Section 8 (3) (b) of the Immigration Act to direct that the Applicant be kept in the custody of His Majesty's Correctional Services until such time that arrangements for his deportation from Swaziland are complete.

[33] Section 8 of the Immigration Act provides as follows:-

> **"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.**
>
> **(2) Before making an order under subsection (1), the Minister shall seek the advice of the Commission established under Section 9 but shall not be bound by any advice given to him by the committee.**
>
> **(3) A person to whom an order made under this section relates shall…….....**
>
> **(a) ……**
>
> **(b) <u>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</u>" (**underlining mine)

[34] It is by reason of the above provision that Mr Lukhele contends that the detention of the Applicant is lawful and the writ of habeas corpus is inapplicable thereto. In fact, the Court lacks the jurisdiction to grant the orders sought in the circumstances, so contended learned counsel.

[35] On the other hand Mr Dlamini who appeared for the Applicant, argued, *au contraire*, that the whole process leading up to the Applicant's trial and conviction for violation of the Immigration Laws, his consequent declaration as a prohibited immigrant by the Minister and the subsequent arrest and detention pending his deportation, is illegal.

[36] Mr Dlamini contended that this illegality is informed by the fact that the Applicant was not heard prior to the decision of the Minister to dismiss his appeal against the refusal of the Immigration Department to renew his permit. He was not notified or served with the decision of the Minister dismissing his appeal to enable him take subsequent actions to regularize his stay in the country.

[37] Furthermore, the Manzini police illegally seized the Applicants passport and the temporary permit issued to him during the pendence of his appeal and would not release these documents to him to enable him regularize his stay in the country. In the wake of the expiry of the Applicant's temporary permit on 28 February 2014, the police who were still in possession of his documents promply arrested him on 3 March 2014. He was charged and convicted for violating the Immigration Laws, this triggered off a chain reaction culminating in the Minister's orders as contained in AG2 and AG3 respectively.

[38] The illegality leading up to the Applicant's conviction should invoke the courts review power to issue a writ of *habeas corpus* quashing the Minister's orders as contained in AG2 and AG3 respectively, argued Mr Dlamini.

[39] Learned Counsel also argued that the Applicant ought to have been served with the Minister's order declaring him a prohibited immigrant. This would have afforded him the opportunity of exercising his rights in terms of section 3 (2) of the Immigration Act. This omission on the part of the Respondent rendered his subsequent detention pending his deportation illegal.

[40] Mr Lukhele for his part contended that the Minister's decision in an appeal is final and cannot be questioned by the court. For this proposition he urged Regulation 12 of the Immigration Regulations read together with section 5 (3) of the Immigration Act.

[41] Section 5 of the Immigration Act provides as follows:-

> **"(1) There shall be the classes of entry permits specified in the Schedule to this Act, and the Minister may, by notice in the Gazette, amend the Schedule.**

(2) Where a person, other than a prohibited immigrant has made application in the prescribed manner for an entry permit of a particular class, and has satisfied an immigration officer that he or the person whom he wishes to employ, as the case may be belongs to that class and that the conditions specified in the said Schedule in relation to the class are fulfilled, the immigration officer may, in his discretion, issue an entry permit of that class to that person.

(3) Any person who has applied for an entry permit of any class other than I or J and who is aggrieved by a decision refusing him such an entry permit may, in the manner and within the time prescribed, appeal against that decision to the Minister, whose decision shall be final and shall not be questioned in any court.

(4) Before making a decision under subsection (3), the Minister shall seek the advice of the Committee established under section 9 but shall not be bound by any advice given to him by the Committee.

(5) The Chief Immigration Officer may vary the terms and conditions of any entry permit issued under this Act and may with the written consent of the Minister cancel such permit".

[42] It is pertinent that I observe here, that the enquiry before the court is not the correctness or otherwise of the Minister's decision, but to interrogate the legality of the process leading up to that decision. It follows that the issue of the court having or not having the jurisdiction to question the decision of the Minister does not arise.

[43] Since the Applicant contends that the appeal process violated his right of fair hearing, I will take my compass from the tangent of the right of fair hearing as enshrined in sections 21 (1) and 33 of the Constitution Act 2005, which postulate as follows:-

"21 (1) In the determination of civil rights and obligations or any criminal charge a person shall be given a fair and speedy public hearing within a reasonable time by an independent and impartial court or adjudicating authority established by law.

33 (1) **A person appearing before any administrative authority has a right to be heard and to be treated justly and fairly in accordance with the requirements imposed by law including the requirements of fundamental justice or fairness and has a right to apply to a court of law in respect of any decision taken against that person with which the person is aggrieved.**

(2) **A person appearing before any administrative authority has a right to be given reasons of that authority".**

[44] The principle of fair hearing is one of the twin pillars of natural justice, expressed in the latin maxim *audi alteram partem*. It simply denotes that a party entitled to be heard before deciding was in fact given the opportunity to be heard. Once an appellate or reviewing court comes to the conclusion that a party was entitled to be heard before a decision was reached, but was not given the opportunity of a hearing, the order or judgment thus entered is bound to be set aside. This is because such an order offends the rule of fair hearing.

[45] Propounding on this principle in the case of **Swaziland Federation of Trade Unions v The President Of The Industrial Court and Another Civil Appeal No. 11/97** the Supreme Court of Swaziland stated as follows:-

> **"The audi alteram partem principle i.e, that the other party must be heard before an order can be granted against him, is one of the oldest and most universally applied principles enshrined in our Law. That no man is to be judged unheard was a precept known to the Greeks, was inscribed in ancient times upon images in places where justice was administered, is enshrined in the scriptures, was asserted by an 18th century English Judge to be a principle of divine justice and traced to the events in the Garden of Eden, and has been applied in cases from 1723 to the present time (see De smith: Judicial Review of Administrative Action p. 156; Chief Constable, Pietermaritzburg v Ishini (1908) 29 NLR 338 at 342). Embraced in the principle is also the rule that an interested party against whom an order may be made must be informed of any possibly prejudicial facts or considerations that may be raised against him in order to afford him the opportunity of responding to them or defending himself against them (see Wiechers: Administratiefreg 2nd edn .p. 237".**

[46] It is incontrovertible that the combined effect of sections 21 (1) and 33 (1) of the Constitution Act makes it imperative that the Applicant should be heard by the Respondents in the appeal process, before the Minister decided. The failure to give such a hearing is inconsistent with the Bill of Rights in the Constitution, particularly, section 33 thereof, which obliges an administrative authority to give a person appearing before it a hearing and to treat such a person justly and fairly including observing the requirements of natural justice and fairness.

[47] This is the gravamen of the dictum of the court in **Administrator Transvaal and Others v Traub and Others 1989 (4) SA, 731 (A) at 748 (G – H),** where the court stated as follows:-

> **"The maxim expresses a principle of natural justice which is part of our law. The classic formulation of the principle state that when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter) unless the statute expressly or by implication indicates to the contrary".**

[48] *In casu,* what stands out in its stark enormity is that the Applicant was not heard or requested to make any form of representation, before his appeal was rejected by the Appeals Board on 11 February 2014. The Respondents had alleged in para 7 of their answering affidavit that the Applicant's appeal was rejected on 11 February 2014. The fact that the Applicant was not heard prior to that decision remains uncontroverted and unchallenged by the Respondents. It is thus established. The failure of the Respondents to hear the Applicant before deciding violated his right of fair hearing in terms of sections 21 (1) and 33 (1) of the Constitution.

[49] The Respondents committed a further illegality by not giving the Applicant reasons in writing for rejecting his appeal. What the Respondents appear to have done was to reject the Applicant's appeal without affording him a hearing. Thereafter, they failed to notify the Applicant of reasons for their decision in writing to afford him the opportunity of exercising his right in terms of section 5 (5) of the Immigration Act, by applying to the Chief Immigration Officer for a variation of the terms and conditions of his permit.

[50] In the face of all this, the Respondents persisted in withholding the Applicant's passport and temporary permit which they seized in early February 2014, further preventing him from taking steps to regularize his stay in Swaziland before the expiration of the permit.

[51] The Respondents, in my view, appear to have waited for the temporary permit which was in their possession to expire on 28 February 2014, thereafter, they promptly pounced on the Applicant on 3 March 2014, arrested and charged him for violating the Immigration Laws by failing to comply with the conditions imposed by an entry permit or pass, in terms of section 14 (2) (e) of the Immigration Act. The subsequent conviction of the Applicant for this offence led to the Minister declaring him a prohibited immigrant and ordering for his arrest and detention pending his deportation.

[52] It appears to me that the whole process leading up to the declaration of the Applicant as a prohibited immigrant and his subsequent detention pending his deportation, is tainted with illegality. This renders the declaration of the Applicant by the Minister as a prohibited immigrant and his subsequent detention therefor, pending his deportation, a nullity.

[53] I should stress here that this conclusion does not impinge on the correctness of the Minister's order but the process leading up to it.

[54] Quite apart from the fact that the process leading up to the Minister's order was illegal, there is yet another worrying aspect of this case. This is the fact that the Respondents failed to notify the Applicant of the order of the Minister declaring him a prohibited immigrant before his arrest and detention on 31 March 2014. The Applicant only became aware of this fact via the Respondents' answering papers after he had launched the application instant.

[55] The Respondents were required by section 33 (2) of the Constitution to notify the Applicant of such an adverse decision. More so, because, the Minister's declaration of the Applicant as a prohibited immigrant was not the last bus stop for the Applicant. The Applicant still had an avenue of escape from immediate deportation by invoking the option afforded by section 3 (2) of the Immigration Act, which states:-

> **"(2) The Chief Immigration Officer may, with the approval of the Minister, issue a prohibited immigrant's pass to a prohibited immigrant, permitting him to enter and remain temporarily in Swaziland for such period and subject to such conditions as may be specified in that pass".**

[56] By not notifying him of the Minister's order declaring him a prohibited immigrant prior to his arrest on 31 March 2014, the Respondents foreclosed the Applicant's option of applying to the Chief Immigration Officer for a prohibited immigrant's pass in terms of section 3 (2) of the Immigration Act.

[57] The Applicant has made it categorically clear that he would have exercised his option in this regard, as it would have afforded him the opportunity to put his house in order in Swaziland before his departure. This is in consideration of the fact that the Applicant has been resident in Swaziland for 5 years and has both

business and personal concerns which he is desirous of tidying up before his departure from the country. It is for the Applicant to be given the opportunity to exercise this option and for the Chief Immigration Officer to exercise his discretion to grant or refuse it. It does not lie with the Respondents to foreclose this right by proceeding in the fashion that they did.

[58] This case exudes an unsavory highhanded and cavalier treatment of the Applicant by the Respondents which smarks of illegality. The Respondents, in my view, rode roughshods over the Applicant to secure his ultimate detention in custody pending his deportation.

[59] This is clearly unacceptable in a democratic society. Such a detention cannot stand. It should attract this court's immediate intervention by way of the writ of *habeas corpus*. As the court observed in **Chief Constable of the NorthWales Police v Evans, [1982] 3 ALL ER 141 at 143, (F – G)**

> **"this remedy, vastly increase in extent and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretion properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner".**

[60] Similarly, in **Administrative Law at 540** the **Learned Author Baxter** put the position succinctly as follows:-

> **"The principles of natural justice are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of the particular case in question. Being fundamental principles of good administration their enforcement serves as a lesson for future administrative action. But more than that, and whatever the merits of any particular case, it is denial of justice in itself for natural justice to be**

ignored. The policy of the courts was crisply stated by Lord Wright in 1943 -

> **'If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision'".**

[61] For the above stated reasons, this application has merits. It succeeds in part only to the extent of the unlawfulness of the arrest and detention of the Applicant in terms of prayers 4 to 6 of the notice of application.

[62] The Applicant is clearly not entitled to the relief sought in prayer 7 of the application. To grant such an order will tantamount to this court usurping the powers of the Immigration Department.

[63] <u>COSTS</u>

The Applicant seeks punitive costs against the 1st Respondent on the scale of attorney and own clients costs. Mr Dlamini made a passionate plea for this scale of costs on the grounds that, in seizing the Applicants documents and cellphone, the 1st Respondent was being malicious, vexatious and illicit in its activities. This conduct should attract an order of punitive cost, so argued counsel.

[64] I find myself unable to subscribe to the above proposition. This is because the Applicant admitted in his papers that the event leading up to the seizure of his documents was borne out of the suspicion of the police that he had assisted the Bangladesh National whom he had gone to collect at the airport, to enter into Swaziland with irregular papers. The Immigration Act does not preclude the seizure of the Applicant's documents and cellphone in these circumstances and in the face of investigations into the matter. All the law requires is that the

Immigration officers should issue a receipt to the immigrant in this event. This is in terms of section 13 (4) of the Immigration Act.

[65] I do not think that the obvious failure of the Respondents to issue the said receipt as required rendered their action in this regard malicious or vexatious. The punitive costs sought by the Applicant is not warranted in these circumstances.

[66] ORDER

I order as follows:-

1. The Applicant's arrest and detention on 31 March 2014, is declared unlawful and is hereby set aside.
2. The Applicant be and is hereby ordered to be released from the custody of the 2nd Respondent, forthwith.
3. The 1st Respondent be and is hereby ordered to surrender forthwith, the Applicant's passport and temporary permit that expired in February 2014 to the Applicant.
4. The 1st Respondent shall pay the costs of this application on the ordinary scale.

DELIVERED IN OPEN COURT IN MBABANE ON THIS

……DAY OF ……..….2014

OTA J

JUDGE OF THE HIGH COURT

For the Applicant:	**M.N. Dlamini**
For the Respondents	**M. Lukhele** **(Crown Counsel)**