

CHIGOZIE KINGSLEY OBI

Versus

THE STATE

And

THE CHIEF IMMIGRATION OFFICER (BULAWAYO)

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 26 MAY AND 3 JUNE 2010

Ms N. Ncube, for applicant

T. Makoni, for 1st respondent

B. Lunga and T. C. Nyakuhwa, for 3rd respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:-

“Terms of the final order sought:

That you show cause to the honourable court why a final order should not be granted on the following terms:

1. That the continued detention of the applicant be and is hereby declared unlawful.
2. That the applicant be released forthwith from [*sic*]
3. That the 2nd respondent should pay for the costs of suit.

Interim relief granted

Pending the determination of this matter, the applicant is granted the following relief:-

1. The applicant be and is hereby released from custody.
2. That the 2nd respondent should pay for the costs of this application.”

The salient facts are the following. The applicant is a Nigerian national. On 8 May 2010 the Immigration Officers under the 2nd respondent embarked on an operation to arrest illegal immigrants. In the course of the operation the 2nd respondent's officers got to a house in Montrose, Bulawayo where the applicant and three other Nigerians were arrested on a suspicion that they were prohibited persons pursuant to the provisions of section 8(1) of the

Immigration Act [Chapter 4:02] "The Act". After the officers of the 2nd respondent conducted interviews with these Nigerian nationals, one had in his possession valid documents permitting him to remain in Zimbabwe and he was accordingly released. That was not the case with the applicant and the two others. They were informed that they were being arrested for being in the country without legal authority and they were to be deported from the country. The applicant was served with a "notice to a prohibited person" on 17th May 2010. Not amused by the turn of events, the applicant launched this application on 20 May 2010. The applicant was detained for three (3) days at Donnington Police cells. Thereafter he was removed and detained at Bulawayo Remand Prison. The 2nd respondent derives its authority to arrest and detain the applicant from section 8(1) *supra*. The 2nd respondent issued an order declaring applicant a prohibited person in terms of section 14(1)(i) of the Act in that applicant has remained in Zimbabwe in contravention of section 29(1)(a) of the Act. The latter provision prohibits the presence in Zimbabwe of any alien who is not in possession of a permit allowing him to remain here. *In casu*, the applicant was allowed to remain in Zimbabwe on the strength of a provisional restriction notice issued to him by 2nd respondent on 24 December 2008. In terms of section 43(1) Immigration Regulations of 1998 he was required to comply with conditions for a consideration of the issue of a residence permit to him. This provisional restriction notice has been extended at regular intervals by the 2nd respondent in terms of section 45(2) of the Immigration Regulations, *supra*.

The applicant, according to the 2nd respondent, failed to comply with the requirements for consideration for the issue of a residence permit and should, therefore, be removed from the country. In short, as the applicant was claiming consideration for issue of a residence permit on the basis of a marriage to a Zimbabwean wife, he was required to submit a certified copy of such marriage. Since 2008 he has failed to do so according to the 2nd respondent. In any event, the mere production of a marriage certificate by an alien who claims to be married to a Zimbabwe citizen does not by itself entitle applicant to have a right of residence in Zimbabwe. The applicant has to satisfy the Principal Director Immigration that his marriage to a Zimbabwe citizen is a genuine one before consideration can be given to granting him a residence permit. Be that as it may, no copy of a marriage certificate was filed in this application. No wife was found at applicant's residence at the time of his arrest. No wife has made representations to 2nd respondent following his arrest as one would naturally expect. Even in this application, the applicant did not file a supporting affidavit of a wife. None of his in-laws appeared before the 2nd respondent to make representations on his behalf. In his papers, the applicant does not even state the names of his wife. It is not surprising that the 2nd respondent opined that there is no such wife or marriage. Or if the applicant is married to a Zimbabwe citizen, the marriage is one of convenience as described in section 3 A (1)(a) and (b) of the Act.

Permanent residence can only be granted to persons who have been resident in Zimbabwe for a period of not less than five(5) years on a permit held by them as provided in section 17(1)(a) and (b) of the Immigration Regulations, *supra*. The exception being persons who apply for permanent residence as investors which is not the case with applicant. In his papers, the applicant could not be eligible for consideration for permanent residence. The 2nd respondent also found that a fraudulent stamp was used to extend the applicant's provisional and restriction notice to 27 May 2010. From the foregoing, the applicant has failed to establish one of the requirements of the interdict i.e. a clear right and show an infringement of such right or at least a well grounded apprehension of such infringement - *Mabhodo Irrigation Group v Kadye & Ors* HB-8-03; *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Zimbabwe Music Rights Association v Zimbabwe Broadcasting Corporation* HH-468-88. The applicant has failed to establish a clear or prima facie right.

Accordingly, the application is dismissed.

Webb, Low & Barry, applicant's legal practitioners

Civil Division, Attorney-General's Office, 1st respondent's legal practitioners