

PLACIDE MASENGESHO
versus
MINISTER OF PUBLIC SERVICE, LABOUR
AND SOCIAL WELFARE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 26 January 2022 and 16 February 2023

Opposed Court Application

S Chako, for the applicant
T Tembo, for the respondent

CHITAPI J: The applicant is a male adult and a national of Rwanda. He came into Zimbabwe with his mother and siblings as a 12-year-old refugee in 2007. He alleged that the family fled from internecine violence which was rocking Rwanda at the time. He averred that his father and several of his relatives were shot at, maimed and some killed with machetes. The applicant and his family members were accorded refugee status as provided for under the Refugees Act [*Chapter 4:02*] and were subsequently granted refugee status. The applicant was registered on his mother's refugee status card and the family was settled at Tongogara Refugee Camp.

The applicant alleged that on an unspecified date in 2009, he came back from school to find that his mother and siblings had left the camp without trace. He was in consequence forced by that situation to apply for and was issued with a temporary permit in his name. He further averred that in 2015, he travelled to Harare. Specifically, he stated as follows in para. 13 of the founding affidavit:

“13. In 2015, I travelled to Harare, where I took residence still operating under immense fear of being killed or abducted. I was assisted by friends to acquire Zimbabwean documents under the name Charles Chikati.”

The applicant averred that he stayed peacefully in Harare albeit he was under surveillance by several men of Rwandese origin, one of whom was Giramata who later reported the applicant to the police in 2019 for a felony not disclosed in the papers. The applicant stated

that consequent on the arrest, he was convicted by the Harare Magistrates Court for contravening s 29 of the Immigration Act, [*Chapter 4:02*] under case reference CRB 8372/19. The details of the charge and conviction was that the applicant unlawfully obtained identity documents in the name of Charles Chikati which described him as a citizen of Zimbabwe and he used the document to be pass himself off as a person permitted to be in Zimbabwe as citizen when he was an alien. The applicant was on 17 June 2019 sentenced to pay a fine of \$500.00 in default 2 months imprisonment. The false identity document was ordered to be destroyed and a further order was made that the applicant be deported to his country of origin.

It is common cause that on review, the High Court by judgment No. HC 8736/19 set aside as incompetent part of the sentence which ordered the deportation of the applicant. In relation thereto, the High Court ordered that the applicant should be released to Tongogara Refugee Camp. The High Court order dated 18 December 2019 by FOROMA J was granted in default.

In the interim, the respondent on 18 October 2019 and acting in terms of s 13(1)(b) of the Zimbabwe Refugees Regulations as read with s 15(1) of the Refugees Act, [*Chapter 4:03*] issued a notice of expulsion of the applicant for the reason of:

“disturbing national security and public order through –

1. Harboursing undesirable Rwandan elements in Zimbabwe
2. Identity fraud
3. Possessing counterfeit national registration documents (birth certificate and identity card).”

The notice which the applicant signed for on 16 December 2019 gave the applicant the opportunity to make written representations to the respondent by himself or by his legal practitioner within 14 days from the date of service of the notice. The applicant did not make any representations within the period provided for. His explanation for not filing representations was that when his legal practitioners served the order of FOROMA J which set aside the deportation order in case No. HC 8736/19 it was then that they were advised by the Ministry of Home Affairs officials that the respondent had already issued the notice to expel the applicant.

The applicant then made a volte-face averred that then stated that he had in fact been served with “these papers” by Immigration Officers who came on a visit. He averred that he

signed the papers on 16 December 2019 but was not left with copies to keep. He averred as follows in para. 18 of the founding affidavit:

“18. Being a non-erudite man whose highest level of education is Grade 4, I did not understand their import.”

The applicant then stated that he believed that being served with legal notices required a party to be left with copies of papers that have been served. He averred that his legal practitioners were only furnished with a copy of the expulsion notice on 25 February 2020 by Ministry of Home Affairs officials whereafter the legal practitioners noted an appeal in terms of s 15(3) of the Refugees Act.

The applicant attached a copy of a letter addressed to the respondent dated 24 February 2020 and served upon the respondent on 26 February 2020. There was no explanation given by the applicant for the inconsistent averment in his founding affidavit that his legal practitioners were furnished with a copy of the notice of expulsion on 25 February 2020 yet the letter was written a day before that date. At the same time, in the letter from the legal practitioners they stated that they obtained the notice of expulsion on 6 February 2020. The legal practitioners in their letter indicated that because their client who is the applicant was not erudite and was semi-literate, had not been left with a copy of the notice of expulsion or the notice had been left with prison officers and the applicant’s legal practitioners only received the notice on 6 February 2020, that was the date on which the legal practitioners would reckon the *dies induciae* for purposes of appeal. To the legal practitioners’ letter to the respondent dated 24 February 2020, aforesaid was attached the applicants solemn declaration in which he made his representations responding to the grounds which had been listed in the notice of expulsion as justifying the respondent’s decision to expel the applicant. It is not necessary to deal with the representations at this stage for the simple reason that it is the respondent who should deal with them in the first instance with this court only intervening on review or appeal if such course is provided for. The respondent did not deal with them as she considered the appeal to be out of time. The applicant seeks in this application a declaration, specifically an order as set out in the draft order which reads as follows:

“IT IS HEREBY DECLARED THAT:

1. The expulsion notice issued by the respondent on the 18th October 2019 be and is hereby declared null and void and of no force or effect and set aside.
2. Any order expelling the applicant by the respondent be and is hereby declared null and void.
3. The respondent be and is hereby ordered to admit the applicant at Tongogara Camp.

4. No order as to costs if the application is unopposed.”

The respondent has opposed the application upon a preliminary point that the applicant’s appeal being out of time, being out of time, the applicant has lost his right to appeal and that therefore, there being no valid appeal which the applicant made to the respondent, the initial decision of the respondent stands on the merits. The respondent acknowledged that although the applicant had been convicted for breaching the Immigration Act and had the deportation order made by the Magistrates Court set aside, that did not take away the respondent’s powers of expulsion of the applicant in terms of s 15(1) of the Refugees Act, as read with s 13(1)(b) of the Zimbabwe Refugees Regulations, 1985. The respondent also averred that the applicant had not been candid with the court by not disclosing that on 17 February 2021, TAGU J by judgment No. HH 70/21 had dismissed the applicant’s contempt of court application wherein he had cited the respondent to be declared in contempt of the court order of FOROMA J in case No. HC 8736/19. TAGU J stated as follows in the last part of this judgment aforesaid:

“*In casu*, it is clear that the second part of FOROMA J’S order is a *brutum fulmen*. It cannot be enforced in the face of the Expulsion Order by the Minister of Public Service, Labour and Social Welfare which the applicant did not challenge and was not reversed. The applicant cannot be accepted back at Tongogara Refugee Camp. For these reasons the respondent’s actions cannot be said to be wilful and mala fide disregard of the court order. The application fails on this basis alone.”

It is apparent that TAGU J expressed the view which I find correct that the expulsion order had not been reversed and this is the current position.

I need to deal with the order sought by the applicant which is a declaratur. It is common cause that this court has power in its discretion to grant a declaration as provided for in s 14 of the High Court Act, [Chapter 7:06]. TAKUVA J in the case of *Zimbabwe Environmental Law Association and 4 Ors v Anjin Investments (Pvt) Ltd* HH 523/15 discussed the law on the exercise of the discretionary power of this court to grant a declaration when he stated as follows:

“..... Section 4 of the High Court Act [Chapter 7:06] provides as follows:

‘The High Court may, in its discretion at the instance of any interested party enquire into and determine any existing, future or contingent right or obligation notwithstanding that such person cannot claim any relief consequential upon such determination’

The requirements for issuing a declaratory order were discussed in *Munn Publishing (Pvt) Ltd v ZBC 1994(1) ZLR 337(S)* at 343-344 where GUBBAY CJ (as he then was) held that:

‘The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially effect by the judgment of the court’

United Notch & Diamond Co (Pty) Ltd & Ors v Aisa Hotels Ltd & Anor 1972 (4) SA 409C at 415. *Milamu & Anor v South African Medical and Dental Council & Anor 1990 (1) SA 899T* at 902G-H. The interest must relate to an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo-Transvaal Collieries Ltd v SA Mutual Life Assurance 50e 1997(3) SA 631(T)* at 635G-H. But the existence of an actual dispute between persons interested is not a statutory requirement to an exercise by the court of jurisdiction. See *Ex Parte Nal 1963(1) SA 754(A)* at 759H-760A nor does the availability of another remedy render the grant of a declaratory order incompetent. See *Gebon Investments v Adair Properties (Pvt) Ltd 1969(2) RLR 120(G)* at 128A-B; 1969(3) SA 142 at 144D-F.”

This then is the first stage in the determination by the court.

At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14. What constitutes a proper case was considered by WILLIAMSON J in *Ardbro Investments Co. Ltd v Minister of the Interior & Ors 196(3) SA 283(G)* at 285B-C, to be one which generally speaking showed that:

“..... dispute the fact that no consequential relief is being claimed or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by respondent. I think that a proper case for a purely declaratory order is not made out of the result is merely a decision on a matter which is really of more academic interest to the applicant. I feel that some tangible and justifiable advantage in relation to the applicant’s position with reference to an existing, future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought.”

The applicant undoubtedly is an interested party in the matter in relation to which a declaratur is sought. The issue that arises for determination is to determine whether this is a proper case to exercise a discretion to grant the declaratur sought. In this regard, the court must examine the nature and content of the declaratur sought. The applicant in the main seeks an order to declare the notice of expulsion issued by the respondent to be null and void and of no force or effect. The first enquiry in this regard is to consider whether or not the first respondent has legal authority to issue an expulsion notice. It is common cause that the respondent enjoys such legal power. Section 15 of the Refugees Act [*Chapter 4:03*] provides as follows:

“15 Expulsion of recognized refugees and protected persons

- (1) Subject to this section and section thirteen, the Minister after consultation with the Minister to whom the administration of the Immigration Act, [*Chapter 4:02*] has been assigned, may order the expulsion from Zimbabwe of any recognized refugee or protected person if he considers the expulsion to be necessary or desirable on the grounds of national security or public order.
- (2) Before making an order in terms of subsection (1) the Minister shall cause written notice to be served upon every recognized refugee or protected person whom he intends to expel; informing such recognized refugee or protected person –
 - (a) Of the Minister’s intention to expel him, the grounds for expelling him and the country to which it is proposed to expel him, and
 - (b) Of his right to make representations to the Minister in terms of subsection (3).
- (3) A recognized refugee or protected person upon whom notice has been served in terms of subsection (2) may either by himself or through a legal practitioner registered in terms of the Legal Practitioners Act, [*Chapter 27:07*] within a period of fourteen days from the date of such service, make written representations to the Minister in respect to either or both of the following matters –
 - (a) The necessity or desirability, on the grounds of national security or public order, of expelling him from Zimbabwe; or
 - (b) The possibility of his being persecuted or of his life being threatened in the country to which it is proposed to expel him on account of his race, nationality, membership of a particular social group or political opinion or an account of external aggression, occupation, foreign domination or events seriously disrupting public order in part or the whole of that country.
- (4) Before ordinary the expulsion from Zimbabwe of any recognized refugee or protected person in terms of subsection (1); the Minister shall give due consideration to any representatives made to him in terms of subsection (3).”

The provisions of s 15 as quoted are clear enough to any discerning person. The respondent acts in terms thereof after consulting the Minister who administers the Immigration Act. If the respondent is of the view that valid grounds for seeking the expulsion of a recognized refugee or protected person exist, the respondent is required to issue the expulsion notice which as shown thereon, advises the affected person of the respondent’s intention to expel the person concerned, setting out the grounds relied upon and advising the person concerned of his or her right to make written representations to the respondent within fourteen days of service of the notice. The Act does not require that the applicant is given a right of audience before a decision to issue the notice of expulsion is generated. The respondent does not make a definitive or final decision on the intended expulsion until the affected refugee or protected person has been granted fourteen (14) days from the date of service of the notice to make representations, failing which the respondent can then make a determination after taking into account the representations made by the recognized refugee or protected person as the case may be.

The applicant averred that his representations have not been responded to to-date. He further averred that a phone call made to the respondent elicited a response that the applicant's expulsion was ordered by the respondent and that this expulsion had been communicated to prison authorities. The applicant averred that he has not been served with an expulsion order as yet. The existence of the order is a matter of conjecture. The applicant's attack upon the respondent's issuance of the notice of expulsion are set out in para 23 of the founding affidavit. He averred that the respondent acted in a draconian and drastic manner without giving the applicant a chance to be heard. The applicant averred that he had a legitimate expectation that the respondent would act in a lawful, reasonable and fair manner.

The applicant is simply not being truthful. He was served with the notice of expulsion and he signed for it. In fact in the founding affidavits, he admits that he signed for service of the notice but then averred that he was not left with a copy. He then stated that he was not erudite. The simple position is that by his own admission the applicant was served with the notice. He did not make written representations within fourteen days of service. His right to make representations in terms of s 15(3) of the Refugees Act, lapsed. It was not up to him to hold as his legal practitioners asserted that the date of service of the notice was the date that the legal practitioners obtained a copy of the notice from the Ministry of Home Affairs. The submission was mischievous in my view because once service had been admitted, then there could not be two service acts. In fact, the legal practitioners are said to have obtained a copy. That is not service by the respondent. The notice was not generated by the Ministry of Home Affairs but by the respondent. Once they held service the view that there was no service, the applicant's legal practitioners ought to have on behalf of the applicant demanded proper service

I am not able to agree that this is a proper case for the declaration sought. The respondent acted within his statutory power to issue the expulsion notice as already discussed. It would not be a proper exercise of discretion by the court to declare invalid the notice concerned. What the applicant is attempting to do is to sneak a review application under the guise of an application for a declaratur. The applicant admitted as much in the heads of argument when he admitted that had the respondent served the decision on time, the applicant would have applied for a review. The applicant sought to rely on the decisions of this court has *Musara v Zimbabwe Traditional Healers Association* 1992 (1) ZLR 9 (H) and *Wilfield Muteweze & Another v Sheriff of Zimbabwe N.O & Ors* (no citation given) to argue that this

court this granted the relief of a declaratur where the applicant could have applied for review. The *dicta* in the *Musara Case* was that ROBINSON J postulated that it would be in the interests of justice to declare an invalid act a nullity by way of an application for a declaratur even though the matter could be brought on review. *In casu*, the respondent's issuance of the expulsion notice was not illegal and it would on the contrary be illegal to set it aside. See Estate late *Attwell Garande v Chipo Masati & 3 Ors* HH 51/2008. On the ground of the failure by the applicant to establish that the respondent acted outside of his powers to issue the expulsion notice. I would refuse to exercise a discretionary to issue the declaratur and consequential relief based upon such declaration. It is not the function of the courts to usurp the Ministerial power given by Statute. The applicant did not even pray that the matter is remitted to the Minister but that the court should make a declaratur setting aside the expulsion notice with the consequential relief of exercising further powers which are a function of the respondent.

The applicant is just being ingenious. He was served with the notice. His grounds of excuse for not acting on it cannot be dealt with by declaring the illegality of a lawful action. The applicant was out of time to make representations as envisaged in s 15(3) of the Refugees Act. Whether there could be condonation and an extension of time to make representations is not within the contemplation of this application. The same applies to arguments on the applicant not being abreast of the law or being a grade four educated person. That would be an argument for separate proceedings if any are available to the applicant.

This leaves the issue of costs. The respondent prayed in the last paragraph of the opposing affidavit that the "application be dismissed for lack of merit". The respondent did not pray for costs. It is not a surprise for the respondent not to pray for a costs order. It may turn out to be an order in name only whose execution is academic. The applicant is a refugee lodged in prison awaiting deportation. It would be too hopeful for the respondent to expect to recover costs from the applicant. The court has a discretion to award costs and the scale thereof. I am not persuaded that it makes any logical sense in the absence of proof otherwise of a refugee's financial situation being able to cater for costs to award costs when the Refugee is in fact a person looked after by the State. I would not grant a costs order under the circumstances of this case.

It is therefore ordered that:

- (i) The application be and it is hereby dismissed
- (ii) There be no order of costs

Mushangwe & Company, applicant's legal practitioners

Civil division of the Attorney General's Office, respondent's legal practitioners.