IN THE HIGH COURT OF SWAZILAND

JUDGMENT

HELD AT MBABANE **CASE NO. 1954/17**

In the matter between

MONIRUZZAMAN SARKAR **Applicant**

And

THE NATIONAL COMMISSIONER OF POLICE **1st Respondent**

THE COMMISSIONER OF CORRECTIONAL SERVICES **2nd Respondent**

MAGISTRATE B. MAVUSO N.O. **3rd Respondent**

THE MINISTER OF HOME AFFAIRS **4th Respondent**

THE ATTORNEY GENERAL **5th Respondent**

Neutral citation: Moniruzzaman Sarkar v The National Commissioner of Police and 4 Others (1954/17 [2018] SZHC 01 January 2018)

Coram: Maphanga J

Heard: 9th January 2018

Delivered: 18th January 2018

Summary: Civil Procedure; review application to set aside a detention order; determination of immigration status; Applicant convicted of illegal entry and sentenced whilst an application for an entry permit pending; whether receipt issued by immigration authorities subject to validity of 30 days constitutes a valid permit; whether Magistrate's order for the detention of the Applicant in terms of Section 8 (8) of the Immigration Act irregular and liable to be set aside;Appication dismissed.

JUDGMENT

MAPHANGA J

[1] The Applicant one Moniruzzaman Sarkar is a Bangladeshi national. The circumstances of his arrival and entry into the Kingdom are unclear. His is a tale of misadventure as outlined in the account he gives in his founding affidavit. The exact date of his entry remains obscure as does the details of how he landed into the country.

[2] It is common cause that he was arrested in Siteki by officers of the Royal Swaziland Police on the 6th of December 2017 and was taken into police custody at the Police Station. He was subsequently arraigned before the Magistrate Court in Siteki on the 7th December

2017 where he was charged with contravention of Section 14 (2) I of the Immigration Act No. 17 of 1982 for illegally entering and remaining in the country without a valid immigration permit.

[3] He pleaded guilty to the charge and on the 7th December 2017 he was duly convicted and sentence to a fine of E500.00 or a sentence of 60 days imprisonment. Upon his conviction the Crown made an application in terms of Section 8 (8) of the Immigration Act for an order enabling the detention of the Applicant pending certain proceedings for his deportation by the Minister of Home Affairs as contemplated at the time. After a hearing of the application and evidence the Magistrate granted the sought detention order. The applicant is currently held at the Big Bend Correctional centre.

[4] At the hearing the position was that on the facts there was no evidence before the court that the applicant had exercised the option of paying the fine however in any case such payment even if tendered it might have been futile in light of the order warranting the Applicants detention and incarceration for purposes of his deportation. Since then he has prior to the handing down of judgment in the proceedings filed into court evidence that on the 10th of January 2018 whilst this application was pending, he paid the prescribed fine of E500 to which he was sentenced.

[5] The Applicant has cited the Commissioners of Police and Correctional Services as well as the Magistrate as 1st to 3rd Respondents in the proceedings. He has also joined the Minster of Home Affairs as the 4th Respondent whilst also citing the Attorney General as attorney of state in the matter, cited as he is as the 5th Respondent.

[6] Applicant moves this application on grounds of urgency and seeks the various heads of relief set out in his Notice of Motion in the following specific prayers:

"1. Dispensing with the normal provisions and rules of this Honourable Court as relating to form, service and time limits and enrolling the matter to be heard as one of urgency;

2. Condoning Applicant's non-compliance with the said Rules of this Honourable Court.

3. Granting an order that the 2nd and 4th Respondents should stay any process of deportation of Applicant with immediate and interim effect, pending finalization of this matter.

4. Granting an order reviewing, correcting and setting aside the order for the Applicant's detention pending Application for his deportation the 3rd Respondent (sic).

5. Declaring that the Applicant's detention is unlawful and must be set aside.

6. That the Applicant be forthwith released from detention at the Big Bend Correctional Institution.

7. Granting an order that the 1st Respondent surrenders Applicant's passport to him;

8. Declaring that the Applicant has a right to enjoy the 30 days that he was duly afforded by the 4th Respondent.

9. Directing that prayers 3, 4,5,6,7 and 8 operate as interim orders pending finalization of this application.

10. That a *Rule Nisi* do hereby issue calling upon the Respondent to show cause on a date to be determined by

this Honourable Court why the orders 3,4,5,6 and 7 should not be made final.

11. Granting the Applicant costs of this Application only in the event of unsuccessful opposition.

12. Further and alternative relief."

[7] This application first came before His Lordship Justice Hlophe on the 29th December, 2017 although launched on the 20th ultimo and on that day the Court eschewed the granting of the interlocutory orders and rule nisi as sought but instead gave specific orders as to the filing of the parties full set of affidavits and their respective written submissions. The matter was enrolled for hearing on the 5th of January and would have probably been disposed of sooner on that date but for the public holiday, which fell on the date, fixed for the hearing. Thus it comes before me.

[8] When the matter served before me, the Applicant's attorney Mr. S Gumedze did not pursue the interim relief and seemed to content himself with having the matter enrolled at the earliest date that availed the court for argument on the final remedy to the dealt with in fullness.

[10] In his founding affidavit the Applicant has narrated a brief background of the circumstances of how he came into the Kingdom. He states that he arrived in Swaziland having travelled by air from Bangladesh via Dubai (in the United Emirates) and landed in Johannesburg International Airport in the Republic of South Africa.

[11] No dates are furnished as to the relative dates of departure and arrival

in South Africa but he tells that his destination was Swaziland. Again no details as to the means by which he came to Swaziland or details of exact date, circumstances and port of entry he used in arriving in the country. He states that he entered the Kingdom with a passport bearing the immigration stamps of the various ports of departure and transit.

[12] He states however that his passport was lost in a robbery incident, which he says occurred at a place called Machala Shopping centre in Matsapha when he was robbed of his personal belongings and documents including the passport.

[13] He would subsequently make an application to the Bangladesh Ministry of Immigration for the issuing of a new passport, which he says, was dispatched to him in Swaziland through a courier. He says the used this new passport in the submission of documents in support of an application for an entry permit with the 3RD Respondent. He alleges that the Royal Swaziland Police in whose custody it remains seized this passport.

[14] The applicant claims to have had a valid visa on the basis of which he gained entry into the Kingdom and that this visa was affixed to the lost passport. He further alleges that he had also been granted a visa to enter the Republic of South Africa by that country's consulate in Sri Lanka. Apart from these bare averments the Applicant has placed no other evidence of the existence of the visas or permits he refers to in his averments in corroboration of his assertions.

[15] This application is opposed by the Respondents and in that regard the 4th respondent has filed an answering affidavit deposed to by the Acting Chief Immigration Officer one Makhosi G. Simelane who largely refutes the material allegations made by the applicant. In particular he denies the existence of any record of a visa having been issued to the applicant permitting his entry into the Kingdom.

[16] In his evidence Simelane states that citizens of Bangladesh require a visa to enter Swaziland and that the applicant was never issued with a visa to enter the Kingdom. This is premised on the fact that there is no record of the applicant's application for a visa; which record could have been traceable in the electronic records of the Immigration Department.

[17] A material circumstance that is common cause that at the time the applicant was arrested he had neither a valid entry nor residence permit entitling him to be in the country. He was not lawfully in the country. His status as an illegal immigrant has since been confirmed upon his conviction for the offence of unlawfully entering and remaining in the country. His protestation in his founding affidavit that prior to his arrival he had been granted a visa by the Swaziland Immigration authorities is therefore incredulous. His attorney conceded the Applicant's illegal residence status during the hearing of arguments.

[18] The only thing that the applicant has adverted to as favouring his stay in the country are a series of documents that he has placed before the court as annexures to his founding affidavit, bearing the title "ACKNOWLEDGEMENT OF APPLICATION AND DOCUMENTS". Two of these documents appear as Annexures C1 and C2 bearing the dates of issue of the 6th December 2017 and 23rd of August 2017. The court was also advised of the existence of a third and similar 'acknowledgement' slip or document issued in June 2017.

[19] The applicant's contends that these notices or receipts constituted a form of permit sanctioning the presence of the applicant in the Kingdom for the duration of the period or such series of 30-day periods of 'validity' of the said notices.

[20] The crux of the application has to be that the applicant contends that the Magistrates order warranting the detention of the applicant of the

15th December, 2017 ought to be reviewed and set aside on grounds that the said order was attended with certain irregularities.

[21] The legal premises on which the Applicant grounds his application for the reliefs he seeks may be summarized as follows:

21.1 That by virtue of the acknowledgement slips, notes or receipts issued to him by the Immigration Department on the several dates and instances, this in effect conferred on him rights or a permit to remain in the country pending the determination of his application for a class F entry permit;

21.2 that the learned Magistrate's order authorizing his detention in terms of Section 8(8) of the Immigration Act was erroneous and in regular in the following aspects:

(a) in holding that the so-called acknowledgement slips for his 'Class F' application did not constitute a permit enabling the applicant to legally maintain his presence in the country; and

(b) in issuing an order for the applicant's detention without placing a time-limit or duration to qualify its validity, was itself an irregularity and was tantamount to a detention order for an indeterminate duration in perpetuity and thus ultra vires the Act. To this end applicant also contends that such an indeterminate detention order constituted an unlawful usurpation of the Ministers Section 8 powers to deport the applicant by the Magistrate;

Acknowledgement of Application for Permit ***Documents***

[22] At the heart of the application is the issue as to what the status of the acknowledgment receipt the thdepartment on divers occasion and most importantly on the 6th December 2017. The issue is whether such document constituted valid entry or residence permit pass for any of the purposes specified or contemplated in the Act.

[23] It is the applicant's case that the issuing of the document described as an acknowledgment of application by the Immigration department entitled him to enter and remain in the kingdom pending the determination of his application for an entry permit in the Class F as sought for the duration of the receipts validity period as appears on its face. The circumstances purport and particulars of this document warrant closer examination

[24] The receipt in question was issued on the 6th December 2017 and bears the post- script at the bottom thereof:

"N.B. This document is valid for One Month only".

The applicant construes the document and in particular the post-script note to confer on him the right or pass to stay in the country denote that in terms of the validity period or any other extended periods that subsequent notices or receipts may stipulate.

[25] The document in its feature bears a caption that is further amplified after citing a reference No. T2954/2017, the address of the issuing agency as the Ministry of Home affairs and the date of issue, that proclaims it to be an ACKNOWLEDGEMENT OF Application FOR

PERMIT TYPE: 'ENTRY PERMIT: F.

[26] It further provides that certain information was received which it lists under the title, "PERSONAL INFORMATION the following particulars:

SURNAME:…….SARKAR

FORENAMES…….MONIRUZZAMAN

NATIONALITY……020 BANGLADESHI

SWAZI REGION……..02 MANZINI REGION

Below this field of information then appears the following note followed by what appears to be an official signature and stamp:

"**NB. PLEASE ENSURE THAT ALL THE INFORMATION ON THIS ACKNOWLEDGEMENT SLIP IS CORRECT.**

Finally the document bears the infamous words **"N.B. THIS DOCUMENT IS VALID FOR ONE MONTH ONLY".** This being the note that the applicant makes capital of in this application as bearing on his legal status.

[25] From the record it is quite clear that front-of-mind for the learned magistrate was the determination of the status of the very document the applicant purports to be a pass and that the Applicant relying on the said acknowledgment made the very assertions and contentions he makes presently. In determining the issue the Magistrate had regard to the above features contents of the notices in question.

[27] This was necessary given that the applicant had tendered the acknowledgement of the application in support of the assertion that it was a special permit allowing the applicant to remain in the country for 30 days or the duration of its validity.

[28] It is also a matter of record that in considering the question of the acknowledgement slip the learned magistrate went beyond consideration of its contents *ex facie* the notice and *ex sua motu* in his discretion (correctly in my respectful view) called for evidence to be led to provide clarity on the nature and circumstances of the document. In that regard Mr. Simelane who has deposed to the Answering Affidavit, was called before the Magistrates Court a quo and was led in evidence to explain the purpose and circumstances of the issuing of the said Acknowledgment slip.

[29] The Acting Chief Immigration Officer firstly acknowledged the signature and stamp affixed to the document to be his and thus that he was the author thereof. In his evidence he explained that the purpose of the acknowledgement slip to be an official confirmation of receipt of an entry permit application of the type specified and in regard to the particulars of the concerned applicant. He further explained that the document was a standard document issued for administrative and monitoring purposes to manage and track pending applications and to serve as a record of receipt of an application for the benefit of any applicant in following up on such matters.

[30] He further gave evidence that a typical acknowledgment slip as did the particular acknowledgement note borne and relied on by the Applicant had no legal or statutory purpose, was not a permit or pass.

[31] It is noted that during the hearing of the application for the

detention order the Acting Chief Immigration Officer was specifically questioned in cross examination on behalf of the applicant as to the import of the words "N.B. THIS DOCUMENT IS VALID FOR ONE MONTH ONLY".

[32] His very clear and consistent response was that this was intended to serve as an administrative guide and window period for consideration and enquiry purposes as to progress in the application process but had no other significance.

[33] Another issue that received the attention of the court and was canvassed by Mr. Simelane in his evidence is the reference and use of the phrase 'entry permit' in regard to an application for a permit to remain in the country. He explained that this was a term of art used in the legislation but did not invariable denote a pass literally to enter the country than a special permit to designate the nature and purpose of a persons residence in the Kingdom. He explained that an entry permit could be obtained by a person either prior arriving in the Kingdom or after arrival and should be distinguished from a permit or pass merely entering the Kingdom.

[34] Section 2 of the Act defines both an 'entry permit' and a 'pass' as follows:

"Entry permit" means an entry permit issued under section 5 of this Act, or a provisional entry permit issued under Section 21 of this Act, and where the context so requires, includes a residence permit or temporary residence permit issued under the repealed law; (and)

"Pass" means a pass to enter and remain temporarily in, or to

re-enter Swaziland issued under regulations made under this Act, and includes any class or description or pass which may be so prescribed.

[35] Section 5 of the Act makes provision for the issuing and variation of entry permits. Perhaps better insight into the form content of a valid entry permit as well as types or classes of entry permits and passes may be gained with reference to the regulations and schedule to the Act.

[36] As to the form the Act in terms of the said section envisages various specified classes of permits that may be issued in terms of a schedule to the Act.

[37] In the Schedule listing the classes of entry permits Class F designates a permit intended for persons wishing to carry out a prospective professional, trade or business undertaking.

[38] Section 21 of the Act envisages the issuing of a provisional entry permit in any of the various classes of permits set out in the schedule.

[39] It is clear from the regulations that a person may seek to gain entry and residence in Swaziland either by way of either a pass on a temporary basis or an entry permit for a specific purpose or mission which includes a transitory permit under section 21 of the Act. It must be stated that the Act (as read with the regulations) also envisages that a person having entered in the Kingdom either on a pass, or from outside the country, may apply for an entry permit in a prescribed form and if successful would on the payment of a fee be issued with an entry permit in a form as prescribed in the Regulations upon payment of a fee.

It appears that it is not necessary for a person to be physically in

Swaziland in order to make an application for an entry permit. This is so as Section 7 of the Act envisages the issuing of a permit to a person not present in Swaziland at the time. It is also therefore conceivable that a person in the country either on a provisional permit or a temporary pass may seek to attain an entry permit for whatever of the specified purposes or missions provided for in the Act.

[40] For purposes presently it may be observed that an entry permit or pass in terms of the Act enabling entry or residence in the Kingdom takes a specific prescribed form. To be specific a valid permit issued in terms of the Act has to be in the form or format prescribed being Form 4 of the First Schedule to the Act. Regarding 'passes' again Regulation 24 (3) makes it mandatory for a special pass to be issued in the prescribed FORM 13 of the Schedule.

[41] In sum, other than a prohibited immigrant pass or a transit permit, the Act and regulations permits only of either entry permits or passes in the ordinary course of person seeking either entry or to take up residence in the Kingdom. It is common cause that the Applicant presently, holds neither of these forms of permits or passes or any other type of document conferring any rights to remain in the Kingdom. That is a pertinent fact in the matter. It is but the first point on which the matter turns.

[42] The Respondents in opposing the application have contended that the Applicant in seeking to rely on the 'acknowledgement of application or document issued by the Immigration Department seeks to invent a type of permit not contemplated or provided for in the Act. I am inclined to agree that the Applicant's assertion is misconceived and therefore has no legal foundation or statutory basis.

[43] One notable point raised by the Respondents is that Section 24(1) of the Immigration Act makes provision enabling a person who seeks to remain in Swaziland for a transitionary duration pending an application for an entry permit (or variation of an existing permit) to apply for a Special Pass to the Chief Immigration Officer in a prescribed form[1]; whereupon the Chief Immigration Officer may under Section 24(2) of the Act my exercise his discretion to issue such a pass to the applicant for a period not exceeding three months. The Applicant did not pursue this option and at the time of arrest he was not a holder of a Section 24 special pass either.

[44] The only issue which a contention he made and argued before the Magistrate is whether by reason only of the note of receipt of his entry permit application he became entitled to or enjoyed some form of 'allowance' as he asserts to remain in the Kingdom pending the determination of his application for the Class F permit he applied for. By extension this is linked to the central issue whether the learned Magistrate erred in conclusion to the contrary in dismissing the point.

[45] In my view nothing short of a valid permit or pass or some other special document conferring rights to either enter or remain in the Kingdom in the prescribed and designated types under the Act and regulation stands muster. A so-called right to apply as urged by the Applicant cannot be equated to right to remain in the Kingdom. After all the Applicant may still pursue or await his outstanding application for the entry permit he seeks whilst outside the country. In light of these clear provisions I find no merit in the contention that the Magistrate erred in law in either construction of the provisions of the Act or in dismissing the applicants own misconceived construction of the legislation. Nor am I persuaded that the Magistrate erred in

[1] Form 10 in the 1st Schedule.

allowing the Section 8 (8) application for a detention order of the applicant.

[46] Finally I turn to the Applicant's second contention in his

application for review; this is premised on the point he makes that the Magistrate acted ultra vires and therefore committed a gross irregularity in so far as, so says the Applicant, he failed to delimit the warrant or order for his detention to the prescribed 15 day period stipulated in the Section 8 of the Immigration Act. I fail to see how that can be considered an irregularity warranting interference by this court with the Magistrates discretion or powers.

The fact of the matter is that no sooner had the Magistrate court granted the order for the applicant to be held, than he hastily launched the present application for the setting aside of the order- some six days after the grant of the order in question.

[47] I am inclined to agree with the Respondents contention that the applicant's protestation that the Magistrate granted an indeterminate term detention order is an afterthought raised only for the first time in his replying affidavit to pad his application; albeit without seeking to amend the cause in his founding affidavit. The general rule is that an applicant's case stands or falls on the assertions as framed in his founding papers and may only be amended or supplemented by leave of the Court on good cause.

That position is so well established in our law of civil procedure as to be trite. In conclusion I find the Applicant's case in this regard equally falls short on the onus that rest on him to set out a case for review and therefore his application must fail.

[48] Then in considering the whole application and the grounds for the review in the light of the circumstances of the case I am of the firm view that the Applicant's approach for review is ill advised given the nature of the contentions on which he relies. It is a classic case of the confusion of what constitutes grounds for review as opposed to appeal.

[49] That distinction has been alluded to time and again before our courts but appears to still elude litigants. I can do no more that refer to the dictum of his Lordship Maphalala P J as he then was in the case of ***Sitselo Mahlalela v Chief Mahlalela (214/15) [SZHC*** when he firstly deals with the issue of what the province of judicial review entails as follows;

"In this regard the court has referred the legal by text book by Herbstein and Van Winsen, in Civil Practice on the High Court of South Africa Vol 2 at page 1254 on the question of the exercise of discretion by a High Court to the following:

"Traditionally, it was accepted that where a lower court has given a decision on a matter within its discretion, the Supreme Court of Appeal would interfere only if the comes to the conclusion that the Court a quo had not exercised a judicial discretion, i.e exercised its discretion capriciously or upon a wrong principle, has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons." (underlining my emphasis)

[**50]** Further the learned Judge draws the distinction between procedural remedies of appeal and review by reference to judicial opinion as follows:

" Booysen J in Anchor Publishing Co. (Pty) v Publications Appeal Board 1987 (4) S.A. 708 at 728 D – F defining the distinction between an appeal and a review pointed out as follows:

> **"It is important, when considering a matter such as this, to hear in mind the main distinction between an appeal an da review and that is that the court will on appeal set aside a decision when it is satisfied that it was wrong on the facts or**

the law, whilst judicial review is in essence concerned not with the decision but with the decision-making process. ----- upon review, the court is thus in general terms concerned with the legality of the decision and not its merits."

[51] It is clear to me that the Applicant further misconceives the procedure that ought to have been followed regard being had to the grounds of review being in essence grounds for appeal. These do not evince grounds of procedural irregularities but in essence perceived errors of law which are in essence grounds of appeal.

In the event the application is dismissed with costs.

MAPHANGA J

Appearances:

For the Applicant: Mr S Gumedze

For the Respondents: Ms Z. Nsimbini