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IN THE HIGH COURT FOR ZAMBIA 2017/HP/0380
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	**The Immigration and Deportation Act of Zambia No. 18 of 2010 of the Laws of Zambia, Section 34, 35, 36, 37, 38 and 39**
IN THE MATTER OF:	**Order 53 of the Rules of the Supreme Court (RSC). White Book (1999 Edition) Volume 1 and Volume 2**
AND IN THE MATTER OF:	**An Application for Judicial Review**
AND IN THE MATTER OF:	**Deportation of Omar Dirie Hirsi**
AND IN THE MATTER OF:	**Residence Permit No. H-0182/10 H-270/03**

B E T W E E N :

OMAR DIRIE HIRSI **APPLICANT**

AND

THE ATTORNEY GENERAL **RESPONDENT**

Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 7th day of July, 2017

For the Applicant	:	*Mr. B. Gondwe, Messrs Buta Gondwe & Associates*
For the Respondent	:	*Mr. A. Mwansa, SC, Solicitor General assisted by Mr. C. Mulonda, State Advocate*

R U L I N G

Cases Referred To:

1. *Nyampala Safaris (Z) Limited, Baobab Safaris (Z) Limited, Nyumbu, Safaris (Z) Limited, Exclusive Safaris (Z) Limited, Busanga Trails (Z) Limited v Zambia Wildlife authority, Zambia National Tender Board, Attorney General, Luangwa Crodocdile and Safair Limited, Sofram and Safaris Limited, Leopard Ridge Safaris Limited, Swanepoel & Scandrol Safaris Limited (2004) Z.R 49 (S.C)*
2. *New Plast Industries v The Commissioner of Lands and The Attorney General (S.C.Z Judgment No. 8 of 2001)*

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999 Edition*
3. *Immigration and Deportation Act No. 18 of 2010*
4. *Constitution of Zambia, Chapter 1*

Other Works Referred To:

1. *Universal Declaration of Human Rights, 1948*
2. *International Covenant on Civil and Political Rights, 1966*

By this application, the Respondent seeks to set aside the Ex-parte Order dated 5th June 2017, in which the Applicant was granted a temporary permit to attend the hearing of this matter. The application is made pursuant to Order III Rule 2 and Order XXXV Rule 5 of the High Court Rules and is supported by an Affidavit and Skeleton Arguments.

Chibesa Mulonda swore an Affidavit on behalf of the Respondent where he deposes that the Minister of Home Affairs

signed the Applicant's warrant of deportation on 26th September 2016, as shown in the exhibit marked **"CM1."** Following an inter-partes hearing and subsequent Ruling delivered by this Court on 3rd May, 2017, the Applicant was granted leave to commence judicial review proceedings, which was not to operate as a stay of the Applicant's deportation.

The deponent states that the Applicant, through his Advocates, Messrs Buta Gondwe and Associates, obtained an Ex-parte Order, in which the Applicant was granted a temporary permit by this Court to attend the hearing of his matter and to remain in Zambia until its determination as shown in the exhibit marked **"CM2."** The deponent avers that this Court has no jurisdiction to grant any individual a temporary permit to enter the country.

The deponent also avers that once the Ex-parte Order is executed, the substantive judicial review matter will be defeated because the deportation of the Applicant, will be determined hence rendering these proceedings an academic exercise. He further avers that the Ex-parte Order is irregular given that the deportation Order was executed.

Learned Counsel for the Respondent filed Skeleton Arguments, where it was submitted that judicial review is concerned with the decision making process and not the merits of the decision. He made reference to Order 53/14/19 of the Rules of the Supreme Court which reiterates the purpose of judicial review as follows:

> **"The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. "It is important to remember in every case that the purpose of [the remedy of judicial review] is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question"**

Counsel cited the case of **Nyampala Safaris (Z) Limited and others v Zambia Wildlife Authority and others**[1], which reaffirms Order 53/14/19 of the Rules of the Supreme Court.

He further submitted that since the Court was only called upon to determine the validity of the decision of the Applicant's deportation, the matter could be heard in his absence. In support of his contention, he cited Section 39 (2) of the Immigration and Deportation Act (the Act), which profers that:

> **"If an immigration officer has reasonable grounds to believe that any person's presence in Zambia or conduct is likely to be a danger to peace and good order in Zambia, that person shall be deported from Zambia under a warrant signed by the Minister."**

Counsel submitted that once an Immigration Officer had reasonable grounds to believe that a person's presence in Zambia was likely to endanger peace and good order, such person could be deported under a warrant signed by the Minister of Home Affairs. Counsel repeated his contention that if the Ex-parte Order was executed, the substantive matter for judicial review would be defeated. He went on to cite Section 35 of the Act, which lists persons to be considered as prohibited immigrants and the second Schedule to the Act, which prescribes the classes of prohibited immigrants.

It was Counsel's submission that the Applicant, having been required to leave the country by the warrant of deportation, fell into the classification of prohibited immigrants and had to be removed from the country. Counsel submitted with respect to the Ex-parte Order dated 5th June 2017, that while Order III Rule 2 of the High Court Rules gives discretion to the Court to make any order, it did not conceive the type of Ex-parte Order granted. He further submitted that the Court had power, under Order XXXV Rule 5 of the High Court Rules, to set aside any judgment or decree obtained in the absence of a party. Counsel argued that since the Ex-parte

Order was granted in the absence of the Respondent, it was liable to be set aside.

In buttressing his contention that this Court has no jurisdiction to grant any individual a temporary permit, Counsel cited Section 27 of the Act which he argued vests the authority with immigration officers. Counsel concluded with a prayer to the Court beseeching it to set aside the Ex-parte Order for irregularity with costs to the Respondent.

On behalf of the Applicant, **Buta Gondwe** swore an Affidavit in Opposition. He deposes that the Respondent did not deny that the Ex-parte Order was properly served on it and received by the Director General of Immigration, but then disobeyed as shown in the exhibits marked **"BG1- BG4"**.

The deponent states that the Applicant procured the Ex-parte Order because the Respondent did not react to any of the Applicant's correspondence and the Order was primarily intended to ensure the Applicant's attendance at the hearing. The deponent avers that the warrant of deportation signed by the Minister of

Home Affairs was never issued or served on the Applicant except for the one produced as exhibit **"ODH8"** in the Affidavit in Support of Originating Notice of Motion for Judicial Review. The deponent also avers that the issues raised in this matter can only be resolved by an oral hearing or testimony, which requires the Applicant's personal attendance. He concluded with a prayer to the Court urging it to uphold the Ex-parte Order.

Learned Counsel filed submissions on behalf of the Applicant, where he contended that this Court was not obliged to hear the Respondent's application, because it was in breach of its Order. He submitted that by refusing to entertain this application, the Court would maintain its authority and dignity over its Orders and proceedings. Further, that by this action, the Court would ensure the due process of law in that the Applicant would be allowed to attend the hearing of his matter. Learned Counsel referred the Court to Order 52/1/33 of the Rules of the Supreme, Court which provides sanctions against persons who defy Court Orders.

Counsel submitted in terms of Order 52/1/33 of the Rules of the Supreme Court that this Court had jurisdiction to grant the

Applicant a temporary permit. The fact that the Applicant held a residence permit prior to his deportation placed him in good standing. Counsel further submitted that the reason now being advanced for the Appellant's deportation of disturbing the peace and order in the Somalian community, was never brought to his attention.

He went on to state that the Applicant is not a Somalian national but American and added that pursuant to Section 36 of the Act, the Applicant should have been granted forty-eight hours to make representations instead of forcibly being denied. Counsel asserted that it would be Wednesbury unreasonable to deny the Applicant a temporary permit because his case fell under Section 35 (2) of the Act, which provides that:

> **"Any person whose presence in Zambia is declared in writing by the Minister to be inimical to the public interest shall be a prohibited immigrant in relation to Zambia."**

Counsel also cited Section 35 (3) of the Act, which provides that:

> **"subject to section thirty six, the presence within Zambia of any prohibited immigrant shall be unlawful and such person shall be arrested without warrant, detained and deported from Zambia in accordance with this Act.**
>
> **Provided that if the prohibited immigrant has a pending case before any Court, the prohibited immigrant shall not be deported from**

Zambia until after the determination of the prohibited immigrant's case before the Court."

Counsel contended that even if the Respondent argued that the Applicant's deportation progressed from a residence permit to an outright deportation, he was still entitled to the due process of law. He reiterated his prayer to the Court urging it to uphold the Ex-parte Order and to find the Director General of Immigration liable for contempt of Court if he continued to disobey the Order.

The matter came up for haring on 28th June 2017, and both parties were in attendance. In the oral arguments, the Learned Solicitor General submitted that the leave to commence judicial review proceedings did not operate as a stay. He argued that the Ex-parte Order granting the Applicant a temporary permit to enter Zambia on the face of it pre-supposed that he was still within the Court's jurisdiction when he had already been deported pursuant to the warrant of deportation.

The Learned Solicitor General submitted that the only institution mandated to grant permits to foreign nationals to remain in the country, after taking into account diverse considerations, is the Department of Immigration, under the Ministry of Home Affairs. It was his contention that the Ex-parte Order granted by the Court had no basis and was not one envisaged under the provision of Order 53/4/43. It neither resembled an interlocutory order under Order 53/14/51 nor a bail application under Order 53/14/52 of the Rules of the Supreme Court.

The Learned Solicitor General went on to submit that judicial review was only concerned with the decision making process and not the merits or demerits of the decision made and for that reason, judicial review was mainly conducted in Chambers. It was rare that witnesses were called to testify. It was his further submission that since this Court did not direct that leave should operate as a stay, it should have not subsequently granted the Applicant the Ex-parte Order.

The Learned Solicitor General regurgitated that if the Applicant was granted re-entry into the country, then the

substantive judicial review hearing would be rendered an academic exercise. He concluded with a prayer to the Court urging it to vacate the Ex-parte Order granted to the Applicant on 5th June 2017.

In response, Learned Counsel for the Applicant contended that the Ex-parte Order was granted in the interest of justice and in line with Order III Rule 2 of the High Court Rules. He argued that this matter was one of those rare cases where there was need to hear viva voce evidence from the Applicant, granted that the Respondent's Affidavit in Opposition to the Notice of Motion for Judicial Review filed on 23rd June, 2017, had contentious issues, which could only be determined upon the hearing of witnesses.

Counsel argued that the Ex-parte Order was never intended to act as a stay and it was in the interest of justice that the Applicant be allowed to attend Court. Counsel reiterated that the Respondent's application was not to be entertained by the Court given that it had disobeyed its Order.

In rejoinder, the Learned Solicitor General submitted that as officers of the Court, they were duty bound to bring matters, where

the Court may have been misdirected to its attention. As a result, the Respondent was motivated not to execute the Ex-parte Order, maintaining that this Court had no jurisdiction to grant it in the first place. On Section 35 (3) of the Act, the Learned Solicitor General submitted that it did not apply to the Applicant who was not present in the country.

He added that the requirement for the Applicant to attend Court at the hearing of the substantive judicial review application was not envisaged under Order 53/14/47 of the Rules of the Supreme Court. However, the Order would have been applicable if the Respondent had made an application requiring the attendance of the Applicant for the purposes of cross-examination. He submitted that since the Respondent had not made any application the Court could vacate the Ex-parte Order dated 5th June 2017, and any subsequent orders made pursuant thereto.

I have anxiously considered the application before me and the contested arguments of the parties. The application raises the issue, whether this Court has jurisdiction to grant the applicant a

temporary permit to attend the hearing of his substantive judicial review proceedings.

As rightly submitted by the Learned Solicitor General, the remedy of judicial review is concerned with the decision making process of a public authority and not the merits of the decision. I agree with his submission as that is the position at law. Under Order III Rule 2 of the High Court Rules, this Court has jurisdiction to make any orders as stated hereunder:

> **"Subject to any particular rules, the court or a Judge may, in all causes and matter, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not."**

I also agree that under Order XXXV Rule 5 of the High Court Rules, this Court has jurisdiction to set aside any judgment obtained in the absence of a party. It is highly contestable if the Ex-parte Order granted in casu can be likened to a Judgment. This calls for another discourse, which is outside the issue at hand.

I understand the Respondent's contention to be that the Ex-parte Order granted by this Court seeks to usurp the power vested

in immigration officers to grant temporary permits under section 27 of the Immigration and Deportation Act. On the other hand, the Applicant argues that the Ex-parte Order is meant to ensure that the due process of law is guaranteed by enabling the Applicant the opportunity to be present and heard at his judicial review hearing. Further, the issues raised by the Respondent cannot be determined on the basis of affidavit evidence and this adds to the need for his personal attendance.

The Ex-parte Order assailed by the Respondent reads as follows:

> **"UPON HEARING Counsel for the Applicant and UPON READING the Affidavit in support of one BUTA GONDWE, IT IS HEREBY ORDERED that leave for judicial review having been granted that the Applicant BE AND IS HEREBY GRANTED a temporary permit to attend hearing of this matter and to remain in Zambia until determination of this matter.**
>
> **Costs for this application shall be in the cause."**

It is trite law that Order 53 of the Rules of the Supreme Court is couched in a manner that all contemplated applications and reliefs can arguably be sought therein. In fact, the Order provides for interlocutory orders to be made which include, discovery and

production of documents, interrogatories, orders requiring the deponent of an affidavit to attend for cross-examination, dismissal of proceedings by consent and for further and better particulars of any special damage claimed.

Under Order 53/14/48 of the Rules of the Supreme Court, the Court is empowered to grant interim relief in judicial review proceedings, and this can be done ex-parte. However, the type of interim relief that may be granted is not defined in that Order.

In my considered view, suffocating the contention of the Ex-parte Order to the realm of Order 53 of the Rules of the Supreme Court may be ignoring and narrowing the larger issue at hand and which affects the due process of law in which the Applicant is entitled to the right to a fair trial. The function of the Judiciary as provided in Article 118 (1) (2) (a) and (e) of the Constitution, is reproduced hereunder:

> **"118 (1) The judicial authority of the Republic derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability.**
>
> **(2) In exercising judicial authority, the Courts shall be guided by the following principles:**
>
> **(a) justice shall be done to all, without discrimination.**
> **(e) justice shall be administered without undue regard to procedural technicalities."**

The cited provisions of the Constitution in my considered view implore me to consider what is "*just*" in administering justice. By implication there is an inherent obligation on me as an adjudicator to respect human rights principles to the extent that any person who comes into the dependency of the Court should be afforded a fair, just and predictable hearing.

In the circumstances, I am fortified to assert that this Court may summon the appearance of any person before it, if this is what it entails to do justice, without undue regard to procedural technicalities. Thus, a clear distinction emerges in that there is need to separate the issuing of a temporal permit, which undoubtedly is the preserve of immigration officials and the judicatory responsibility that demands every matter that comes to Court to be heard in a just, fair and predictable process that guarantees and respects the rights of an individual.

In my considered view, this exposes Order 53 of the Rules of the Supreme Court to wider interpretation than what is provided in the Order, taking into account the fundamentals of human rights principles.

It is worth stating that Zambia has accepted and or ratified international human rights instruments such as Article 10 of the Universal Declaration of Human Rights which states that:

> **"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."**

Further, the International Covenant on Civil and Political Rights elaborates in Article 14 (1) as follows:

> **"All persons shall be equal before the Courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by Law."** (underlining my own)

These international instruments are also encapsulated in Article 18 (1) of the Constitution of Zambia which provides that:

> **"18 (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."**

While the Constitution notably adopts a criminal dimension, this does not derogate from the rights contained in the international instruments, which Zambia is party to. The point being canvassed is that be it a civil or criminal suit, a litigant is entitled to the right to a fair trial conducted by an independent and impartial tribunal.

In doing so, this Court finds it appropriate to state that the Ex-parte Order dated 5th June 2017, is meant to ensure the attendance of the Applicant at the hearing pursuant to Order III Rule 2 of the High Court Rules.

Section 27 of the Immigration and Deportation Act provides that:

> **"27. (1) An immigration officer may issue a temporary permit to a prohibited immigrant or to any person in respect of whom the Minister directs that such permit be issued.**
>
> **(2) An immigration officer may, as a condition precedent to the issuance of a temporary permit, require a prohibited immigrant or any other person to deposit such sum, not being more than a prescribed amount, for the purpose of securing compliance with the conditions specified in the permit and, if any such condition is not complied with, the Director-General of Immigration shall authorise that the money be used for purposes of deporting the person or that the money be forfeited to the State.**
>
> **(3) A temporary permit shall specify the prescribed conditions attaching to the permit and the period of the permit's validity, except that no period in excess of ninety days shall be specified without the approval of the Director-General of Immigration.**
>
> **(4) Except under a temporary permit, any person who belongs to class C specified in the Second Schedule and who returns to Zambia commits an offence and is liable, upon conviction, to a fine not exceeding two hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both."**

I have carefully analyzed Section 27 of the Act and find that immigration officers have the power to ***issue*** temporary permits to prohibited immigrants, if such persons meet the conditions

precedent. The conditions include the payment of a prescribed fee and other conditions that may be attached taking into account diverse considerations. Thus, the Director of Immigration may impose reasonable conditions in the issuance of a temporary permit.

It is worth stating that Section 27 of the Act does not proscribe a prohibited immigrant from returning to the country or being granted a temporary permit. It merely specifies the conditions under which a prohibited immigrant may enter the country. In this sense, the Ex-parte Order by no means impeaches the authority granted to immigration officers by that Act.

I therefore, find it difficult to accept the Respondent's preposition that the Ex-parte Order effectively removes the authority of immigration officer under Section 27 of the Act. Those officers needless to emphasize have a clear role to play in the issuance of permits.

As rightly canvassed by Learned Counsel for the Applicant, the effect of the Ex-parte Order is meant to do justice to the Applicant

whose presence this Court holds is important for the purposes of the substantive judicial review application. Contentious issues have been raised against the Applicant by the Respondent, which he can only respond to outside affidavit evidence. I am mindful that the Supreme Court in the case of **New Plast Industries v The Commissioner of Lands and The Attorney General**[2], had this to say on what amounts to a hearing:

> **"We wish to take advantage of the present appeal to make the point that the content of what amounts to the hearing of the parties in any proceedings can take either the form of oral or written evidence. This depends on the nature of the application. Where the evidence in support of an application is by way of affidavit, the deponent cannot be heard to say that he was denied the right to a hearing simply because he had not adduced oral evidence."**

I am also mindful that judicial review hearings are mostly conducted in Chambers. This does not however entail that such matters cannot be heard in Open Court. It is of utmost importance to guarantee the Applicant the right to a fair trial given that a deportation order affects his human rights. Therefore in distinguishing the principles in the **New Plast Industries**[2] case, I opine that this is a matter that cannot be said to been heard on the basis of affidavit evidence. The issues raised in casu are much wider and this is definitely an instance where the human rights of the Applicant must be respected.

Let me cast away the misconception that has been created by the Respondent that the temporary permit effectively determines the substantive application for judicial review. This is far from reality as this matter, in my considered view, should be heard on the merits where both parties are accorded an opportunity to widely canvass their positions. It is only then that this Court can move to render an informed judgment.

Both parties have touched on the Applicant's deportation. I will not delve into the issues surrounding the Applicant's deportation order because by doing so, I will be tempting myself to make a determination on the substantive application, which is highly inappropriate at this stage.

Before I conclude, I wish to address a very interesting issue that was raised by the Learned Solicitor General. He submitted that as officers of the Court, they were under an obligation to bring matters where the Court may have been misdirected to its attention. In my view, a Court Order, whether right or wrong, has to be respected regardless of a party's sentiments until it is set

aside. I totally accept the submission of Learned Counsel for the Applicant that:

> **"... the Court is not obliged to hear the application to set aside the Ex-parte Order when the Respondent is in breach of the Order by this Honourable Court. This we submit is the only way the Court can maintain its authority and dignity over its orders and its proceedings."**

I could not agree more. In consequence, I refuse to set aside the Ex-parte Order dated 5th June 2017, granted by this Court and which still remains in force. Should the Director General of Immigration continue to disobey the Order, the Applicant is at liberty to commence contempt of Court proceedings.

I award the Applicant costs to be taxed in default of agreement. Leave to appeal is granted, however this will not arrest the substantive judicial review hearing on the conditions set out by this Ruling.

Dated this 7th day of July, 2017

M. Mapani-Kawimbe
HIGH COURT JUDGE