SHAHID MUHAMMAD

versus

PRINCIPAL DIRECTOR IMMIGRATION

and

CO-MINISTERS OF HOME AFFAIRS

and

ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 30 June 2010

Mr *A. Mambosasa*, for the applicant

Ms *C.J. Chawafambira* with Mr *E. Siziba*, for the 1st to 3rd respondents

CHIWESHE JP: I dismissed this urgent chamber application with costs and indicated that my reasons for doing so would follow. These are they.

The applicant is a Pakistan national who has been resident in Zimbabwe under the cover of a temporary employment issued by the first respondent on 7 June 2008. He has since been involved by way of employment in the purification and bottling of drinking water. He has done so in partnership with others. In May 2010 he and his partners obtained an investment licence in terms of the Zimbabwe Investment Authority Act [*Cap 14:30*]. Thereafter he sought to submit an application for a residence permit as an investor. He was advised that his file was missing and that he must wait whilst the authorities searched for it. He was advised that in the event the file would not be located then a temporary file would be opened for purposes of receiving his application and making the necessary endorsement in his passport.

The applicant’s temporary employment permit then expired on 17 June 2010. He was assured by the authorities that the temporary file would be opened the following week. On 21 June 2010 his legal practitioner was similarly advised that searches for his file were still in progress. His legal practitioner then formalised the applicant’s complaint by putting it in writing. This letter is filed of record as annexure “D”. On 22 June 2010 the first respondent opened a temporary file, accepted the application for a residence permit and the statutory fee. Instead of extending the applicant’s temporary employment permit as promised, first respondent arrested and incarcerated the applicant on the grounds that his temporary employment permit had expired and as a result he was now a prohibited immigrant.

On 23 June 2010 applicant’s legal practitioner made representations to the first respondent wherein he pleaded for the renewal of the temporary employment permit. The first respondent would not oblige stating that a genuine investor would have applied for such renewal six months before expiry and that he should have seen senior management regarding his missing file.

On the basis of these facts, the applicant has approached this court, on an urgent basis, seeking an order to compel first respondent to renew his temporary employment permit or, alternatively, to issue a temporary permit forthwith. He also seeks costs on an attorney-client scale.

In his heads of argument the applicant has argued that the stance taken by the first respondent is tainted with *mala fides*. He states that he is a *bona fide* investor and that he poses no threat to the security of Zimbabwe. The first respondent, he argues, should be bound by his earlier undertaking that his application for residence would be accepted and processed. In any event, argues the applicant, the respondent’s reading of s 16 (1) (d) (ii) of the Immigration Regulations is wrong. In terms of the Regulations applicant is required to apply for renewal of his permit within six months of the expiry of his permit and not six months before such expiry.

In their opposing affidavit sworn to by Evans Siziba, the Assistant Regional Immigration Officer in charge of the Investigations Section at Immigration Headquarters in Harare, the first and second respondents aver that the application should not be heard on an urgent basis as the applicant knew that his stay in Zimbabwe was illegal. He had been advised of his prohibition status by way of annexure “A” filed of record dated 22 June 2011. Annexure A is a “Notice To Prohibited Person”. This notice served to advise the applicant that he was now a prohibited person and that if he was aggrieved with that decision he could appeal to the nearest Magistrates Court, in Form 1.F.21 which may be obtained from any immigration officer. The applicant did not appeal as advised within the three day period. The issues the applicant now seeks to put before this court should have been canvased in an appeal before the magistrate, argue the respondents. The respondents also aver that the applications for temporary employment and investors’ residence permits were only lodged on 23 and 24 June respectively, well after the expiry of the initial permit. Further the applicant had not paid the statutory fee rendering the applications incomplete and incapable of consideration. The respondents further aver that it is their practice to receive applications even if the relevant file may be missing as such applications could still be processed once the file was located. It is submitted that the applicant’s story is an after thought as he is unable to identify the officer he dealt with nor did he seek to engage higher ranking officers to complain about his predicament. After all applications for his partners were received, processed and declined in the usual manner, so say the respondents. The respondents also aver that the applicant cannot say on the one hand he was asked to produce documents of proof of funds and then on the other hand that his application would not be received, because the two documents come together with the former supporting the latter. As the respondents had not been furnished with an application to renew the temporary residence permit nor an application for an investor’s permit, they could not have issued either, argue the respondents.

In his answering affidavit the applicant insisted on the urgency of the application and persisted with the argument that

* the respondents negligently misplaced the applicant’s file and rendered it impossible for him to submit his application as did his partners.
* he was assured that when his file is found or a temporary file opened, his application would be processed and his permit extended.
* the applicant’s legal practitioners had formalised this complaint and when a temporary file was opened the applicant lodged his application plus the statutory $500.00 on 23 June 2010 as reflected on annexure E to the founding affidavit.
* respondent’s interpretation of s 16 (1) (d) (ii) of the regulations is wrong.

There are three issues that the applicant must satisfy to succeed in this matter. Firstly is the matter urgent? The urgency depends on whether one believes the respondents or the applicants as to what transpired before and after the expiration of the permit. Was the applicant unduly denied the right to lodge a timeous application on account of the missing file? This fact is difficult of resolution on the papers as they stand.

The second hurdle is whether the applicant, having been issued with a prohibition order, followed the requirements for redress. I do not think so. The applicant should have appealed to the nearest Magistrate Court within three days in terms of the Immigration Regulations, a fact he was advised of in writing. He did not. Instead he sought to write to the first respondent asking him to rescind a decision he had already taken. It would still have been appropriate to lodge an appeal with the Magistrate Court be it out of time and tender an explanation as to why he was out of time. His decision not to do so has not been explained.

Thirdly, the applicant has lodged an appeal with the Co-Ministers of Home Affairs. In acknowledging receipt of this appeal, the Co-Ministers wrote to the applicant in the following terms:

“We acknowledge receipt of your appeal against the Principal Director of Immigration’s decision to refuse you an extension for a Temporary employment Permit. Please be advised that the Co-Ministers of Home Affairs are still considering your appeal.

For further assistance please approach the department of Immigration with a copy of this letter.” (See Annexure G 1 to the founding affidavit).

In other words, the applicant’s appeal to the Co-Ministers is yet to be disposed of. And yet the applicant seeks similar relief in this court! He should pursue that appeal first. The Co-Ministers have directed that in the interim he should be assisted by the first respondent to whom he should present their letter. It is common cause that the first respondent works under the oversight and direction of the second respondents, that is the Co-Ministers. Second respondents have directed that he be assisted by the first respondent pending the outcome of his appeal to them. Why has that not happened? Why does the applicant not report the first respondent to the second respondents for insubordination? In my view, as long as the Co-Ministers are seized with this appeal and have provided for the applicant’s stay pending the outcome of that appeal, this court has no business anticipating the outcome of that appeal.

It was for these reasons that I dismissed this urgent chamber application with costs.

*Messrs Mambosasa*, applicant’s legal practitioners

*Civil Division of the Attorney General’s Office*, respondents’ legal practitioners