REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 33431/2011

DATE:30/09/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

XAIOMEI HAVARD	First Applicant
HAILIN CAI	Second Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE IMMIGRATION OFFICER IN CHARGE OF OR TAMBO INTERNATIONAL AIRPORT DEPORTATION CELLS	Second Respondent
THE MINISTER OF TRANSPORT	Third Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Fourth Respondent
THE AIRPORT COMPANY OF SOUTH AFRICA	Fifth Respondent

EMIRATE AIRLINES Sixth Respondent

ANALYTICAL RISK MANAGEMENT INTERNATIONAL Seventh Respondent

J U D G M E N T

Summary: Illegal foreigner – Judicial review of decision to declare applicant illegal foreigner – such not permissible prior to applicant exhausting internal remedy contained in s 8(2)(a) of Immigration Act 13 of 2002

WEPENER, J:

[1] The second applicant (referred to as the applicant) launched an application on an urgent basis to prevent his deportation from the Republic of South Africa (the Republic) pending a review by this Court of the "*decision of the respondents*" declaring the applicant to be an illegal immigrant.

[2] The first respondent is the Minister of Home Affairs. The second respondent is the "*Immigration Officer in charge of the OR Tambo International Airport Deportation Cells*". The third respondent is the Minister of Transport. The fourth respondent is the Director General, Department of Home Affairs. The fifth respondent is the Airport Company of South Africa. The sixth respondent is Emirate Airlines, the conveyor referred to below, and the seventh respondent is Analytical Risk Management International.

[3] When by brother Meyer J called the matter on 27 September 2011, only the founding affidavit was before him and in the light of the allegations

contained therein, he ordered that the applicant not be deported pending the outcome of this application. As a result of the uncertainty as to in whose custody the applicant was, Meyer J also ordered the joinder of additional respondents who, it was thought, could be parties in charge of the applicant where he is held in custody. He further ordered that the applicant be given access to his legal representatives.

[4] When the matter came before me on 28 September 2011 the applicant's legal representatives had still not been allowed access to him and on the strength of the affidavit filed by the first and fourth respondents I ordered the joinder of the seventh respondent, being the entity which keeps the applicant in custody pending the further development of the matter. The further assistance to the legal representatives to gain access to the applicant are not relevant for purposes of this judgment as they consulted him and filed a "*replying affidavit*" made by him. Although the affidavit is not attested, Ms Manaka agree that I should have regard to the matters therein contained as if it were contained in an affidavit.

[5] Pursuant to the above the applicant filed a replying affidavit and the matter proceeded before me on 30 September 2011.

[6] It was common cause that, upon the applicant's arrival at the OR Tambo International Airport, the officials in the employ of the first and fourth respondents (the Department of Home Affairs) issued a notice of refusal of

entry into the Republic to the applicant. The applicant's refusal to sign receipt of the document when it was presented to him is of little moment.

[7] The document was issued pursuant to s 34(8) of the Immigration Act 13 of 2002 (the Immigration Act) and informs the applicant that he is, *inter alia*, an illegal foreigner and the conveyer responsible for his conveyance to the Republic will be responsible for his removal from the Republic. He was also informed that he may appeal to the fourth respondent against the decision to refuse him entry into the Republic. It appears that when such notice of refusal of entry is issued a foreigner, he is then handed to the fifth respondent who utilises the services of the seventh respondent, the latter who keeps the foreigner in custody pending further developments.

[8] OR Tambo International Airport is a place designed as such by the first respondent for all persons to report before they may enter, sojourn or remain within, or depart from the Republic.

[9] The role of immigration officers stationed at OR Tambo International Airport is to efficiently facilitate, administer and manage entry and departure of all persons at that port of entry.

[10] The second applicant is held pending removal in an Inadmissible Facility situated inside OR Tambo International Airport but before a port of entry facilitated, administered and managed by immigration officers.

[11] The Inadmissible Facility is a Facility established in terms of Annexure 9 of the International Civil Aviation Organization ("*ICAO*"). It embodies, *inter alia*, the Standards and Recommended Practices ("*SARP's*") and guidance material pertaining specifically to facilitation of landside formalities for clearance of aircraft and passengers. Annexure 9 provides a frame of reference for planners and managers of international airports operations, describing the obligations of industry as well as minimum facilities to be provided by governments.

[12] ICAO is established in terms of article 43 of the Convention on International Civil Aviation drawn up in Chicago on 7 December 1944, as set out in Schedule 3, and includes any amendments and additions ratified and proclaimed in accordance with section 3(1)(b) ("*the Convention*" commonly known as "*the Chicago Convention*"). The Convention has been given effect by Chapter 2 of the Civil Aviation Act 13 of 2009 which came into operation on 31 March 2010.

[13] This facility is established in terms of the international law and it is a transit facility utilised by airlines to accommodate passengers who are supposed to be removed from the Republic for various reasons, including instances such as the present.

[14] OR Tambo International Airport is a public premises owned by the fifth respondent. The facility, which is situated at OR Tambo International Airport is administered by the fifth respondent and operated or managed on a day to

day basis by the sixth respondent, a private company contracted by the fifth respondent. The applicant's reliance on *Abdi and another v Minister of Home Affairs and other* 2011 (3) SA 37 (SCA) at par 30, is misplaced as the facts set out in this matter fully disclose the role of each of the respondents whilst the factual issue was not properly canvassed in *Abdi*. Be that as it may, all parties who may possibly be involved in the detention of the applicant have been joined in these proceedings.

[15] Ms Manaka, appearing on behalf of the first and fourth respondents, argued, *in limine*, that pursuant to the provisions of the Immigration Act the applicant was prohibited from obtaining the relief sought herein. There are four sections that are relevant.

[16] Section 34(8) provides:

> "*A person at a port of entry who had been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such a person is an illegal foreigner shall be detained by the master on that ship and, unless such master is informed by the immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.*"

[17] Section 34(9) provides:

"*The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in that subsection, be deemed to be in the custody of the master of such ship and not of the immigration officer or the Director-General, and such master shall be liable to pay the costs of the detention and maintenance of such person while so detained if the master knew or should reasonably have known that such person was an illegal foreigner, provided …*"

[18] Section 8(1)(a) provides:

"*An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and if he or she arrived by mean of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister.*"

[19] Section 8(2)(a) of the Immigration Act provides:

"*A person who was refused entry or was found to be an illegal foreigner and who was requested a review of such a decision in a case contemplated in subsection (1)(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic.*"

[20] On 26 September 2011 the applicant was conveyed to the Republic by the sixth respondent. He presented a passport bearing number G40372807 to the immigration officer. According to the passport there was only one endorsement indicating a departure stamp from OR Tambo International

Airport dated 31 July 2011 with comment "*Refer to AK upon arrival*". There was no permit or a visa in the passport.

[21] For this reason, and further reasons dealt with below, the second applicant was refused entry and issued with a notice in that regard. He refused to sign an acknowledgement of receipt of this notice.

[22] The immigration officer also issued a declaration to the representative of sixth respondent informing it that the second applicant has been refused entry into the Republic on the grounds that he is an illegal foreigner.

[23] In addition, the second applicant was issued with a notification regarding his rights to request the first respondent to review the decision of the immigration officer. The immigration officer explained to him that should he wish to lodge a review, he should do so immediately and depart to await the outcome outside the Republic. The second applicant, once again, refused to sign the acknowledgement of receipt thereof. The tasks performed by the immigration officials are part of the wider regulation of foreigners' visits to the Republic." *The Immigration Act has as its objective the important task of regulating the admission of foreign nationals to, the residents in, and their departure from South Africa.*" See *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC) at par 50.

[24] The applicant did not avail himself of the review procedure. Having regard to the provisions of s 7(2)(a) of the Promotion of Administrative Justice

Act No. 3 of 2000 (PAJA), the applicant is obliged to exhaust his internal remedies (the review to the Minister) prior to asking a court to review the decision to declare him an illegal foreigner. In this regard *Koyabe* said at paras 35, 36 and 54 as follows:

> "*35. Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities, first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.*
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> *36. First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action. In Bato Star, O Regan J held that:*
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> > *"a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branched of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."*
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> . . .

> *54. The internal remedies under section 8 of the Act illustrate the value and importance of a tailored remedial structure designed to cure a specific administrative irregularity. On the one hand, a finding that a person who has entered a country to stay for specific purposes is an illegal foreigner has a material and adverse effect on that person. It is therefore in his or her interest that the decision be reviewed speedily to ensure its correctness and fairness. The state, on the other hand, has a legitimate interest in the security of its borders and the integrity of its immigration system and must take reasonably speedy yet constitutionally compliant steps to resolve questions about the legality of the presence of foreign nationals in its territory.*"

[25] As a result of the operation of law, a judicial review of the decision to declare him an illegal foreigner is not competent prior to the completion of the administrative task of the Minister, who may be in a better position to determine the disputed facts.

> "*Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same holds true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.*" *(Koyabe,* para 37)

[26] Because of the fact that the "*duty to exhaust defers access to courts, …*" (*Koyabe* at par 47), the applicant's remedy is not a judicial review prior to a review being submitted to the first respondent.

[27] A judicial review is only competent if reliance can be placed on s 7(2)(c) of PAJA, which allows a court to exempt a person from exhausting an internal remedy in exceptional circumstances and if the court deems it in the

interests of justice. "*It is sufficient to emphasise that where the legislature has tailored a statutory remedy to address a specific administrative harm that remedy must be exhausted before resort is had to judicial review, under PAJA, unless exceptional circumstances exist*." (*Koyabe* para 55). No facts were placed before me to bring the matter within the ambit of s 7(2)(c) of PAJA and no argument was advanced that I can deal with the matter pursuant to the latter provisions. Indeed the provisions of s 8(2)(a) of the Immigration Act make it quite clear that the review can be pursued but that the applicant "*shall await the outcome of the review outside the Republic*". In *R v Secretary of State for Home Department, Ex Parte Swati* [1986] 1 All ER 717 (CA) at 724a-b it was held:

> "*[E]xceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.*"

This test was not satisfied by the applicant in the matter under consideration. The prohibition against a court considering the matter at this stage is generally referred to as deferring a complainant's access to court-based remedies. See Hoexter: *Administrative Law in South Africa* and the authorities referred to at p 478.

[28] There are indeed no exceptional circumstances favouring the applicant. On the contrary there are factual disputes on the papers regarding the status of the applicant and these disputes will be more efficiently dealt

with by the Minister in the event of the applicant launching a review of the decision to declare him an illegal foreigner. (*Koyabe* para 37).

[29] I summarise the respondents' case, which, in my view, is clearly indicative of the fact that the applicant's version is open to some serious doubt, if not wholly untenable. Upon the applicant's arrival he presented a Chinese passport (the new passport) to the employers of the first respondent and this passport had no permit endorsed in it which would allow him lawful entry into the Republic. When the immigration official advised the applicant that he needs a South African visa or permit to be admitted into the Republic the applicant produced another passport (the old passport). The following observations were made from the old passport. There is a transit stamp from OR Tambo International Airport dated 7 May 2010 (the applicant was never admitted into the Republic). There are no records of the applicant entering or departing from the Republic prior to 31 July 2011 in the old or new passport. The only inference from this is that if the applicant had entered the Republic in the past, such entry was illegal. This also refutes an allegation supported by a copy of a letter attached to the founding affidavit that the applicant commenced working for a company in the Republic during February 2010. I will return to the letter.

[30] On the same day i.e. 7 May 2010 there is a visa and an entry stamp from Mozambique.

[31] There is also an extension of a temporary residence permit issued on 22 February 2010 at Germiston, entitling the applicant to take up employment with Viterbo Trading CC. This permit suggests that the applicant was once issued with a similar permit prior to 22 February 2010, hence an extension in February 2010. There is an omission on the part of the applicant in his affidavit when dealing with the page of the passport in which the original permit was endorsed. The permit does not appear to be from the Movement Control System the latter which is used by the first respondent for control purposes. The relevance of the reference to the alleged extension of the temporary residence permit lies in the contradictory fact relied upon by the applicant i.e. that he "*acquired*" a residence permit.

[32] The old passport contains an endorsement purporting to be a South African visa issued on 3 August 2010 and the expiry date appears to be 3 March 2010. *Ex facie* the endorsement the visa expired before it was issued. In addition, according to the government printers, the control number A13876821 was issued to Harare/Zimbabwe and not Shanghai as is reflected on the endorsement in the applicant's passport.

[33] An entry stamp dated 12 August 2010 is also observed in the old passport. This endorsement suggests that the applicant entered the Republic for the first time on 12 August 2010 via Mahamba, a port of entry situated in Swaziland. The problem though, is that the word passport on the stamp is misspelt. It appears to be "*Pasport*" and the font is lighter than the norm. These discrepancies suggested to the employees of the first and fourth

respondents that the stamp itself is not genuine. There are no records in his old and new passports accounting for the applicant's movement from Mozambique to Swaziland.

[34] Nevertheless, the purported South African visa expired on 3 March 2010 or 3 August 2010. If it is accepted that the applicant indeed entered the Republic on 12 August 2010 as indicated in his passport, then he still entered and remained in the Republic in contravention of the Immigration Act and thus he was an illegal foreigner liable to deportation.

[35] Attached to the applicant's founding affidavit is a copy of a letter dated 30 July 2011 purportedly written by a company that he worked for. It purports to confirm that the applicant had been working at the company since February 2010 and refers to the fact that the applicant had applied for a "*replacement passport*". But, the replacement passport was only applied for two months after the date of the letter and reference to such replacement passport therein cannot be true.

[36] There is sufficient evidence suggesting that, what purports to be a permit entitling the applicant to enter and sojourn in the Republic, is a fraudulent document.

[37] The applicant filed a replying affidavit, which in my view exacerbates his problems. It raises a large number of disputes and also shows an inability by the applicant to explain certain discrepancies, which I am not able to

resolve without evidence and cross-examination. Applying the well-known principles of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623A, I am required to have regard to the version of the respondents and not to the disputed the version of the applicant,

[38] Indeed, counsel for the applicant conceded, correctly in my view, that the absence of explanations by the applicant regarding the validity of the number of his passport and the entry stamp in the passport purportedly obtained when entering the Republic from Swaziland, remain obstacles which the applicant has not overcome.

[39] Two further examples suffice. According to the applicant he obtained a visa on 3 August 2010, which visa was valid for 90 days. This makes no sense as, according to the applicant, he already obtained a temporary residence permit in February 2010, which renders the application for a visa unnecessary. In addition, the applicant alleges that he entered the Republic on 12 August 2010 from Swaziland. But the temporary residence permit was allegedly extended on 12 February 2010, which is the date prior to his alleged entry into the country. The visa which he relies on for this entry was issued in Shanghai and not in Swaziland.

[40] Against this background the applicant was declared an illegal foreigner and refused entry as referred to hereinbefore.

[41] Sixth respondent having been the conveyer responsible to convey the applicant to the Republic took custody of the applicant for purposes of removing him from the Republic. The sixth respondent placed the applicant in what is referred to the Inadmissible Facility at OR Tambo International Airport pending his removal from the Republic.

[42] On 27 September 2011 at 13h00 and 20h00 respectively, the applicant pretended to be unconscious at the time that he was supposed to board an aircraft of the sixth respondent to convey him. These latter actions of the applicant are rather suspicious and appears to be another ploy to enter the Republic illegally. I am of the view that the Minister would be in a better position to determine the facts after thorough investigation, should the applicant decide to review the decision to refuse him entry into the Republic. Indeed, if the allegations made on behalf of the first and fourth respondents are correct, there may be a well planned scheme afoot to forge documents in order to bring foreigners illegally into the Republic.

[43] In all the circumstances and, in addition to the point *in limine*, which I have held to be a bar to the applicant's approach to court for relief, the case made out by the applicant is so inadequate, vague and, on the face of it, deceitful that he would not be entitled to any relief even if I had to find that there are exceptional circumstances to hear a review despite the applicant not having exhausted his internal remedy.

[44] As a last resort the applicant's counsel, in replying argument, relied on *Lan v O R Tambo Airport Department of Home Affairs* 2011 (3) SA 641 (GNP) at par 41-55 where it was held at par 55 that the detention and the refusal to admit the applicant were unlawful and *ultra vires*. However, not a single fact was shown by applicant's counsel why the actions of the officials of the Department of Home Affairs were allegedly unlawful and, on the version of the first and fourth respondents, no such facts are apparent to me. *Lan* consequently finds no application in this matter.

[45] In all the circumstances the applicant has not shown that exceptional circumstances exist for him to proceed directly with judicial review. The applicant has not yet exhausted the available internal remedy under s 8(1) of the Immigration Act and ought not to have instituted judicial proceedings in this Court. Section 7(2)(b) of PAJA provides:

> "*Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.*"

[46] In the light thereof, I direct that the applicant must first exhaust his internal remedy of review to the first respondent before proceedings may be instituted in a court.

[47] Having regard to all the circumstances the application is dismissed with costs.

W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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INSTRUCTED BY	State Attorney
DATE OF HEARING	27, 28, 29 and 30 September 2011
DATE OF JUDGMENT	30 September 2011