C of A (CIV) No. 35/05

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

ADELAJA OTUBANJO	**Appellant**
and	
DIRECTOR OF IMMIGRATION	**First Respondent**
MINISTER OF HOME AFFAIRS	**Second Respondent**

CORAM:
Ramodibedi, JA
Grosskopf, JA
Gauntlett, JA

JUDGMENT

Administrative law – legitimate expectation – refusal of indefinite permit under Aliens Control Act, 16 of 1966 – expiry of temporary permit – delay of 26 months by judge in making order and continued failure(for 32 months at the time of the appeal hearing) to deliver judgment – these failures by judge deplored – referred to Chief Justice for his consideration.

4, 11 April 2006

GAUNTLETT, JA:

[1] The appellant is a Nigerian citizen, who in 2000 applied to the Teaching Service Commission ("TSC") of Lesotho to take up a teaching post. He was admitted to the Lesotho Teaching Service. On entry into Lesotho he applied for a permit for indefinite sojourn (or indefinite permit, as it is also termed) and a permit for temporary sojourn (or temporary permit). This was in terms of sections 6 and 7

respectively of the Aliens Control Act, 16 of 1966 ("the Act"). The application for a temporary permit was granted "pending permit 184/2001" (a reference to the application for an indefinite permit). This temporary permit was entered in his passport, together with the explicit endorsement "until 28-03-2002".

[2] On 27 March 2002 the appellant was notified in writing, on behalf of the second respondent ("the Minister"), that the latter had declined to grant the indefinite permit. He was also advised that his temporary permit would not be renewed on its expiry (the next day), and that he should arrange to leave Lesotho by then.

[3] No further communications between the parties ensued. On 14 May 2002 the appellant deposed to an affidavit seeking this relief as a matter of urgency:

> "2. (a) The decision of the second respondent dated 8th March 2002 refusing applicant's application for indefinite sojourn shall not be declared null and void, of no force and effect for failure to observe rules of natural justice.
>
> (b) [The] decision of the respondents not to renew applicant's temporary permit shall not be declared null and void, of no force and effect on account of failure to observe rules of natural justice.
>
> (c) Respondents shall not be restrained and interdicted from deporting the applicant pending finalization of the present application.
>
> 3. That prayer (2) (c) operate with immediate effect as temporary relief pending outcome of this application".

[4] The affidavit gives as the reason for the two-month delay in approaching the court a lack of funds. But even thereafter the appellant delayed a further three weeks before filing the application – seeking an order in the above terms on the same day (4 June 2002), and without serving it or giving any other form of notice to the respondents. The certificate of urgency signed by counsel is dated 20 May 2002. It asserts, that having

> "considered this matter …. [I] bona fide belief [sic] that it is one for urgent relief".

The reason given is the "risk of being deported forthwith".

[5] The High Court (Mofolo J) granted the order sought, returnable on 7 June 2002. The matter was ultimately heard in August 2003. Some 26 months later, on 19 October 2005, Monapathi J evidently discharged the interim order and dismissed the application in an oral ruling. No written order was thereafter signed by the learned judge. He also gave no reasons when he made the order. No judgment, we were advised, has been handed down by the learned judge, despite the elapse of nearly six months since the ruling (and some 32 months now since the hearing took place). A letter from the respondents' attorneys to the Registrar two months ago, pointing to the continued failure by the judge to furnish his reasons and requesting these, was handed up to us; we were told that it has elicited no response.

[6] I revert later to this state of affairs: the obtaining of the interim order without notice and as a matter of urgency; the passage of over two years during which the respondents stood interdicted; the lack of any recorded order and judgment. First however it is desirable that the merits of the matter be addressed.

[7] The appellant contends that the learned judge a quo was wrong to have dismissed the application, because he was entitled to a hearing "before the decisions under challenge were reached". These decisions are said to be the refusal of his application for an indefinite permit, and that his temporary permit would not be renewed on its expiry. The entitlement to a hearing is based on a claim of legitimate expectation, in turn founded on the fact that the appellant had successfully applied to the Government of Lesotho (through the TSC) to take up employment here.

[8] The respondents' answer is that the appellant, as an alien, had no right to be in Lesotho; "that the State has an absolute discretion as to the presence of an alien in its territory"; that as a consequence the appellant had no right to be heard, nor a legitimate expectation that he would be heard before the decision to decline his application for an indefinite permit was determined; that there was in any event no failure of natural justice, as contended, because in fact the appellant was heard (in

the requisite sense) before his application for permanent residence was refused; that once that happened, the temporary permit (granted "pending" the determination of the application for an indefinite postponement) fell away, with no need for a hearing in that regard.

[9] The rights of aliens in Lesotho are dealt with primarily by the Constitution and the Act. Section 4 of the Constitution grants the fundamental human rights and freedoms it records to "every person in Lesotho". One of these is freedom of movement, which in turn is specifically stated (section 7(1)) to include the right to enter Lesotho and to reside anywhere in the country. But this latter provision is qualified: laws may be made inter alia "for the imposition of restrictions on the freedom of movement of any person who is not a citizen of Lesotho" (s.7(3)(d)).

[10] That is the effect of the Act, the constitutionality of which was not disputed in this matter. The appellant did not claim a right to be heard on the basis of the audi alteram principle itself (as to which, see generally Matebesi v Director of Immigration LAC (1995-9) 616 at 621I – 626C; LLR (1997-8) 455 at 463-4), no doubt because he, as an alien, could not assert an existing right to reside in Lesotho prejudiced by the decision. Instead, as I have noted, he invoked a legitimate expectation.

[11] This was expressed both on the papers and in argument on behalf of the appellant in erratic terms – sometimes as an expectation that the appellant would receive an indefinite permit, and sometimes that he would be heard before any decision relating to his application was determined. It is unnecessary to determine in the present matter (especially since we have not had the benefit of full argument on the question) whether or in what circumstances legitimate expectation in the former (or substantive) sense is part of the law of Lesotho (cf. Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at para. [27]; SA Veterinary Council v Szymanski 2003 (4) SA 42 (SCA) at para. 15; see generally De Ville Judicial Review of Administrative Action in SA (2003) 123-6).

[12] This is because of the facts in this case. To make an expectation "legitimate", in the required sense, it is now clearly established that

(i) the representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification";

(ii) the expectation must be reasonable;

(iii) the representation must have been indeed by the decision-maker;

(iv) the representation must be one which was competent and lawful for the decision-maker to work without which the reliance cannot be legitimate

(SA Veterinary Council v Szymanski, supra para [19]).

In the present case, the TSC (which in any event was not of course the decision-maker under the Act) made no representation at all. In fact, its formal offer of employment drew the appellant's attention to the need for him to comply separately with immigration requirements. Nor did the Minister or his officials make any representation to the appellant. The suggestion that the conclusion of an employment contract with the appellant per se amounted to such a representation has no merit, particularly given the patent qualifications of the TSC's letter to which I have drawn attention.

[13] A yet more fundamental answer to the appellant's attack is that, whether or not the appellant had any claim to be heard in relation to the first respondent's decision to refuse an indefinite permit, in actual fact he was heard. True, this was not in the form of an oral hearing. But this is no sine qua non of a hearing compliant with the requirements of natural justice (Matebesi v Director of Immigration, supra at 625I – 626B; Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980 (3) SA 476 (T) at 486E; De Ville op cit 254). The written application process in the present case afforded the appellant both notice of the decision and the opportunity to advance what he wished in support of this application. At no stage did he seek in addition an interview or other opportunity to be heard in person.

[14] The appellant however contended that, inasmuch as the Minister relied on a policy to decrease the number of foreign nationals (from what is considered to be a currently inflated level) in the public interest, this should in fairness have been specifically disclosed to him and he should have been given an opportunity to address it. The answer is that his own application was made explicitly in terms of sections 6 and 7 of the Act, which in turn refer to the First Schedule. The latter identifies as a principle to be applied by the first Minister, in making his decision, exactly those aspects encompassed by the policy: inter alia, social and economic conditions of Lesotho; and the general interests of its existing population. Thus the appellant, through the application procedure, was alerted (or should have been alerted) to the broad considerations which could play a role in the determination of his application. This was not an instance (such as that in Foulds v Minister of Home Affairs 1996 (4) SA 137 (W), and the further decisions there canvassed) where either particular information prejudicial to an applicant is not disclosed to him, or unknown considerations are applied against him. In this regard, moreover, it is to be emphasized that the fairness of any procedure is to be assessed as a whole, and will vary from case to case (Administrator, Transvaal v Traub 1989 (4) SA 731 (A) at 758I; Foulds v Minister of Home Affairs supra 145J-146A). I am satisfied that, as a whole, the procedure here followed was a fair one. It is this which is the ultimate answer, not it may be noted – as was contended for the respondents – that the

Minister had "an absolute discretion". No such discretion exists in developed administrative law, as has long been observed (Ismail v Durban City Council 1973 (2) SA 362 (N) at 372 A-B). It is, in particular, a "contradiction in terms" (Schwartz and Wade Legal Control of Government (1972) 255) under a justiciable Constitution, such as Lesotho's, to contend for an "absolute" or "unfettered" discretion (Dawood, Shalabi and Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC) at paras [47] and [48]). I must confess to some surprise that such an argument should have been advanced, both on the papers and in written argument, for the respondents.

[15] I accordingly consider that the attack on the Minister's decision based on legitimate expectation must fail.

[16] This being so, the automatic effect of the failure of the application for permanent residence was that the temporary permit expired on the last day of the period for which it had been granted. It will be recalled that that application had been made by the appellant, and granted, pending the application for an indefinite permit. Once the procedure related to the latter had been accomplished, the temporary permit, in its terms, fell away. The appellant moreover had been accorded every opportunity to advance whatever he wished in support of his application(s) for a temporary permit. It was made clear to him from the outset that

his sojourn in Lesotho was dependent upon its continued existence. Again, apart from submitting the application in written form he sought no further opportunity to be heard on the matter, in any other way.

[17] For these reasons in my view the appeal must fail. It is however necessary to address in conclusion two matters.

[18] The first of these matters concerns the clear abuse of procedure by the appellant. There are two facets to this. The first is the inadequately unexplained delay between the deposition of the founding affidavit and the lodging of the application on the same day as it was served. The second is the complete lack of notice afforded to the respondents – not even by correspondence during the protracted gestation of the papers. How, in all these circumstances, Mofolo J could have thought it appropriate to issue the interim order ex parte as he did is not apparent.

[19] The second matter concerns the delay of 26 months before the interim order was set aside, the lack of any recorded order by Monapathi J in doing so, and his continuing failure – even now – to give reasons for his ruling. The papers in the application are brief and the legal issues very confined. If the learned judge felt

able to make an order, he must have reached a clear conclusion on the issues, such that this could be stated without yet further delay following the making of the order. If however he felt unable to formulate his reasons, despite the elapse of 26 months, he should of course not have made an order. Viewed either way, the conduct of Monapathi J in making a naked order more than two years after he heard argument on the matter cannot be justified.

[20] This is no mere cavil. Delay and a lack of accountability by judges is subversive of equal protection of the law, entrenched by sections 4(1)(o) and 19 of the Constitution, and of the principle of legality upon which it is founded. Nearly 800 years ago, article 40 of the Magna Carta provided, very simply,

> "**To none will we sell, to none deny or delay, right or justice".**

Or as Smalberger, JA has expressed the same principle:

> "**Justice delayed is justice denied, as the saying goes. It is incumbent upon courts and practitioners alike to strive conscientiously at all times to ensure that matters are disposed of as expeditiously as possible less litigants be prejudiced and the administration of justice consequently suffer in its reputation.**"

(in Malahe v Minister of Safety and Security 1999 (1) SA 528 (SCA) at 533. See too the observations (by Kriegler J) in Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC) at 57 and again in Ex parte Minister of Safety and Security: in

re S v Walters 2002 (4) SA 613 (SCA) at 647).

[21] Most recently it has been emphasized that judges, too, are accountable under a constitutional democracy for the diligent discharge of their duties:

> "**The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that judges are imperious …… it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public confidence in the judiciary. There rests an ethical duty on judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible**"

(in Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Ltd v Minister of Health 2005 (3) SA 328 (SCA) at para [39]).

[22] A similar approach has been adopted by the highest courts elsewhere in the Commonwealth. The Court of Appeal of England and Wales has criticized a High Court judge in these terms (such as obliged him to tender his resignation to the Lord Chancellor), when he had delayed - for a period less than that here - in delivering judgment:

> "**A judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of a decision when it is eventually delivered.**

> **Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again** "

(in Goose v Wilson Sandford & Co. v General Manion, Court of Appeal, The Times Law Reports 13.2.98, emphasis supplied). Similarly, in Boodhoo and Another v Attorney-General of Trinidad and Tobago [2004] 1 WLR 1689 (PC), Lord Carswell, giving the opinion of the Privy Council, in paragraph 12 recognized that "**delay in producing a judgment would be capable of depriving an individual of his right to protection of the law ... but only in circumstances where by reason thereof the judge could no longer produce a proper judgment or the parties were unable to obtain from the decision the benefit which they should".** Lord Carswell also said:

> "**The law's delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard**".

[23] I have set out these dicta at length because of their importance, and because serious delays in the finalization of legal proceedings in general and the delivery of

judgments in particular, continue unabated – despite the repeated strictures of this Court.

[24] The situation is compounded by the prejudicial effect on litigants and an appeal court alike by the failure of the court a quo to furnish reasons for the order it felt able to make some six months ago. As the Constitutional Court of South Africa has been constrained to observe,

> "**There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer**"

(in Mphahlele v First National Bank of SA Ltd 1999 (2) SA 667 (CC) at para [2], emphasis supplied).

[25] For these reasons, the failure by the learned judge a quo to ensure that his order was recorded, to provide reasons for that order expeditiously, to respond to the subsequent request for his reasons, and generally to ensure the conclusion of the litigation within an acceptable timeframe, is to be deplored. A copy of this judgment will be referred to the Chief Justice for his consideration.

[26] The appeal is dismissed with costs.

_____
J.J. Gauntlett
JUDGE OF APPEAL

I agree: _____
M.M. Ramodibedi
JUDGE OF APPEAL

I agree: _____
F.H. Grosskopf
JUDGE OF APPEAL

For the appellant : S. Ratau
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