

Palm Beach Inn Ltd and Another

v.

Commission for Tourism and Two Others¹

Following a series of harassment by government officials, a tourist hotel business of the 2nd applicant, Ms. Naila Majid Jiddawy situated at Bwejuu on the east coast of the island of Zanzibar operating under the name Palm Beach Inn Ltd was closed by the Revolutionary Government of Zanzibar and her business licences withdrawn. In addition she was ordered to leave and never to return to the areas of Bwejuu, Paje and Jambiani.

She applied to the High Court of Zanzibar challenging these high-handed actions of the government, both on her own behalf and on behalf of her business company. In support of the application, several grounds were presented. Firstly, it was argued that in revoking the licence of the applicants and closing of their hotel and guest house, the 2nd respondent (Walidi Fikirini) had exceeded his powers. In other words, his actions were *ultra vires*. Secondly, the attempt to deport the 2nd applicant from her place of abode and business and in so doing restricting her freedom, the 2nd respondent was in fact abusing his authority. Thirdly, by denying the applicants the opportunity to be heard and the chance of facing their accusers to hear their charges, the respondents had failed to observe the rules of natural justice. Fourthly, by refusing even to answer questions by the Applicants who wanted to know their wrongs warranting the punishment meted out, the respondents were behaving unreasonably. It was also claimed by the applicants that the 1st and 2nd respondents had usurped the statutory functions of the Tourist Board, and action which had been prompted by the failure of the 3rd respondent to establish the said Board.

Elaborating their case the applicants submitted that there was currently no law in Zanzibar providing for the revocation of a licence issued and closure of a hotel which operates under a valid licence save under the Promotion of Tourism Act, 1991. The Tourist Board, which is provided for under the Act and empowered to issue and revoke licence and generally to oversee administration of the tourism industry in Zanzibar had not been established by the relevant authorities as required under the Act. According to the Act, the power to appoint the Chairman of the Board is vested on the President of Zanzibar whereas the Minister

¹ High Court for Zanzibar at Zanzibar, Civil Application No. 30 of 1994 (Unreported). Ruling delivered at the High Court of Zanzibar at Vuga in Zanzibar on 25th October, 1994 by Kannonyele, J.

responsible for tourism retains the power to appoint the other members of the Board.² The Act also vests in the Minister the power to appoint, by Notice published in the official Gazette, a date when the Act is to come into force.

The applicants submitted further that the order that the 2nd applicant should immediately leave the areas of Bwejuu, Paje and Jambiani was unconstitutional. This is because it curtailed her freedom of movement as guaranteed under Article 16 (1) of the Constitution of Zanzibar of 1984.

In reply, the respondents exerted no real efforts to challenge the substance of the serious issues raised by the applicants. Their Counsel simply contended that the matter was not properly before the court. According to them, the applicants ought not to have rushed to the High Court because they still have an alternative remedy of appealing to the Minister responsible for tourism.

Indirectly, the respondents were indicating that an application for an order of *certiorari* was inappropriate as the applicants had not exhausted all other possibilities of achieving their goal.

It was held by the High Court that the actions of the respondents amounted to a flagrant breach of the rule of law generally established to the extent and in the manner deponed by the applicants; and that the 1st and 2nd respondents acted arbitrarily, unreasonably and in a summary manner to flout the laws of the land. The court also found that failure on the part of the respondents to act judicially, unreasonableness and usurpation of lawful authority were also deemed to have been patently established just as much as they were undisputed.

That left the court with no any other alternative but to grant the order of *certiorari* as prayed for by the applicants. The net effect of the order was to quash the decision of the 2nd respondent closing down the Palm Beach Hotel at Bwejuu, revoking the applicants' tourist business licence and banishing the 2nd applicant from the areas of Bwejuu, Paje and Jambiani in the Island of Zanzibar. In addition, the Judge granted the order of *prohibition*, prohibiting the 2nd respondent, Walid Fikirini, the Commissioners purporting to compose the Commission for Tourism and or their agents from harassing or interfering in the applicants' tourism business.

² Section 4 (1) (a) and (c).

Ruling

Kannyonyele, J.

Naila Majid Jiddawy on her own behalf and on behalf of the 1st applicant has applied for orders of *certiorari* and *mandamus* against the respondents. Leave was duly granted in that respect and this is an order issuing in respect of the substantive application therefor.

The 1st applicant is a limited corporation sole incorporated under the Companies Decree.³ A certificate of incorporation No. L. 459 issued on 26th December, 1991 under the Zanzibar Investment Promotion Act, 1986⁴ is appended to the affidavit of 2nd September, 1994 as EXH-NAILA 2. The 2nd applicant is, on the other hand, a business woman running a hotel for the 1st applicant acting as its Director. She had, in 1990, applied for and obtained from the Ministry of Finance an Interim Certificate of Incorporation vide EXH-NAILA 3. She also had a valid licence to run tourist related business purportedly issued under the Promotion of Tourism Act, 1991.⁵ There is also Licence No. 0774/94 vide EXH.NAILA 4 issued to manage a Guest House.

Turning to the respondents, the principal actor is the 2nd respondent, Mr. Walidi Fikirini who acted in the capacity of an Executive Secretary of what is purported to be a Commission for Tourism which is thus impleaded in that capacity as the 1st respondent. The 3rd Respondent is the Minister for Tourism under whose ministry is the tourism industry the promotion of which are matters giving rise to these proceedings.

The 2nd Applicant deponed in paragraph 6 of her affidavit suggesting that there has been, among Government officials in Zanzibar, politically motivated jealousy to her business. This has led to harassments towards the 2nd applicant on a number of occasions. These were capped up with the receipt of a letter EXH-NAILA 5 dated 17th August, 1994 from the 1st and 2nd respondents purporting to act on directives from the Government of Zanzibar. This letter revoked the applicants' business licence and ordered them to close the hotel. The letter also ordered the 2nd Applicant (Naila) to move out, and live away from the areas of Bwejuu, Paje and Jambiani. No reasons were given prompting revocation of the licence and closure of the hotel nor was the 2nd Applicant called to defend herself against the move. In an additional affidavit of 17th October, 1994 and an earlier certificate of urgency accompanying the application for leave to apply, Naila affirmed that consequent to the closure of the hotel

³ Chapter 153 of the Laws of Tanzania Zanzibar.

⁴ Act No. 2 of 1986.

⁵ Act No. 9 of 1991.

the applicants are suffering daily losses of revenue approximately at the rate of shs. 165,000/= per day. She also fears loss of perishables and damage of the refrigerators which contained the perishables.

The applicants are aggrieved. They therefore have, in their substantive statement, applied for an order of *certiorari* to remove into the court the decision of the 2nd respondent revoking the applicants' tourist business licence and the closure of the hotel and the order removing the 2nd applicant from her place of domicile so that the same may be quashed. For the 1st and 2nd respondents, an order of *mandamus* is prayed that they be directed to issue an appropriate licence and conduct their actions in accordance with the law. As regards the 3rd respondent it is prayed that an order of *mandamus* should issue to direct the Minister to establish a tourist Board as by law enjoined. The Minister is also required to honour the certificate of incorporation EXH-NAILA 2. It is further prayed to issue an order of prohibition against 1st the 2nd respondent and the Commission of Tourism, or their respective agents, to prohibit them from harassing or interfering in the tourism business of the applicants.

Six grounds have been averred in support of the application. These are *ultra vires* the 2nd respondent by his act to revoke the licence and close the hotel; abuse of authority by the 2nd respondent's purport to deport the 2nd applicant and restrict her freedom of movement; failure of the rules of natural justice and unjudicious conduct by denying the applicants the opportunity to be heard and of facing their accusers to hear their charges. There is a claim of unreasonability. It is alleged in that regard that the 2nd respondent refused even to answer questions by the 2nd applicant who wanted to know her wrongs warranting the punishment meted against her. Finally, it has been alleged that the 1st and second respondents usurped the statutory functions of the Tourist Board prompted so to do by the failure of the 3rd respondent to establish the Board.

Before the Court Mr. Kakoti of the Law Associates represented the applicants whereas the respondents were advocated by the Honourable Deputy Attorney General for Zanzibar, Mr. Othman Masoud.

In his submissions Mr. Kakoti emphasized that there is currently no law in Zanzibar providing for the revocation of a licence issued and closure of a hotel which operates under a valid licence save under the Promotion of Tourism Act, 1991.⁶ However, Mr Kakoti argued,

⁶ Act No. 9 of 1991.

the Board which is empowered under the Act to issue and or revoke licence and generally to oversee administration of the tourism industry has not been established by the authorities as provided under the Act. According to the Act, power to appoint Chairman of the Board is vested on the President whereas the Minister retains the power to appoint the other members (Section 4 (1) (a) (c) respectively). And Section 1 vests in the Minister the power to appoint, by Notice published in the *Gazette*, a date when the Act is to come into force.

Counsel for the applicants also cited Article 16 (1) of the Zanzibar Constitution to back the claim of curtailment of the right of freedom of movement. On the failure of the rules of natural justice, Mr. Kakoti pointed out that not only were the applicants denied of the opportunity to be heard but that they would not even get replies to their queries for information as to their charges and accusers, if any. Together with the failure to conduct a proper inquiry as to the affairs of the applicants' business these were also the basis of the complaints raised on unreasonableness. And as to usurpation of powers and functions, the 1st and 2nd respondents are accused of usurping powers and functions of the Board which has not been operatively established and themselves so appointed to act in accordance with the law.

Apart from an emphatic contention that the matter was not properly before the court, the learned Counsel for the respondents exerted no real effort to challenge the substance of the complaints raised by the applicants. Neither had the respondents themselves attempted to do so in their counter affidavits either. All along the respondents and their Counsel have always argued that the applicants still have an alternative remedy of appealing to the Minister. In answer to this Mr. Kakoti submitted firstly, that since the letter EXH-NAILA 5 implied that it was issued on the directives of superior government authorities, it is unreasonable to expect and insist that the appellants should again appeal to the Minister. Secondly, Mr. Kakoti emphasized that no Board has been appointed against whose decisions could be appealed to the Minister as provided under the law.

In the case of *Sinai Mrumbe and Another v. Muhere Chacha*,⁷ Ramadhani, J.A. held that:

An order of *certiorari* is one issued by the High Court to quash the proceedings and the decision of a subordinate court or a tribunal or a public authority where, among others, there is no right of appeal. The High Court is entitled to investigate the proceedings of a lower court or tribunal or a public authority on any of the following grounds apparent

⁷ Court of Appeal of Tanzania, Miscellaneous Civil Cause No. 17 of 1987 (Unreported).

on the record. One, that the subordinate court or tribunal or public authority has taken into account matters which it ought not to have taken into account. Two, that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account. Three, lack or excess of jurisdiction by the lower court. Four, that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it. Five, rules of natural justice have been violated. Six illegality of procedure of decision ... In the exercise of such investigation the High Court is not entertaining an appeal. *If any of the above six grounds has been offended the proper action of the High Court is to quash the decision and proceedings ...* (my own emphasis)

I have had very anxious moments considering whether or not there is any right of appeal open to the applicants against the vices complained of in this case. In that respect I understand the appeal as being one that lies not only to the High Court but to any other superior court, tribunal or public authority. In the instant case it is contended by the defence that the applicants have such right of appeal open to them before they could resort to the course taken. It is said they have a right of appeal to the Minister. The applicants however, hold the contrary view saying first, that an appeal to the Minister would lie only if there was a Board legally established in accordance with Promotion of Tourism Act, 1991. Secondly, an appeal to the Minister is challenged on account of unreasonableness where the decision complained of is implied to have come from the Minister himself.

In determining this issue, I take into account the fact that it was conceded by Counsel for the respondents that no Board has been established yet in accordance with the Promotion of Tourism Act, 1991. The Honourable Deputy Attorney-General did not however, tell the court under what other provision an appeal would lie to the Minister as contended. Nor had the respondents done so themselves in their counter-affidavits. All that the Deputy Attorney-General said is, and I quote him *verbatim* thus:

So far we have no Board for Tourism. The same has not actually been established. Only the Commission exists so far and it is this which exercises the power and functions of the Board. Should there be any omission or defect that will be only in the name of the institution which is not a patent defect in accordance with the law.

This is as clear as it is. Counsel representing the respondents is here conceding in quite clear terms that the Board as such has not been established yet. I was not informed why the Board

has not been so established. According to the Act, however, the Board is established under Section 3 which says:

There is hereby established a Board to be known as the Tourism Board.

Under Section 1, the act is to come into "operation on such date as the Minister may by Notice in the *Gazette* appoint". I am made to understand that the Minister signed an Article on the 25th of January, 1994 intimating that the Act shall be deemed to have come into force on the 1st day of April, 1992. However, I am not aware of any Notice being published in the *Gazette* yet. My efforts to find one were miserably frustrated. I am therefore obliged to believe in the circumstances and on information received from reliable sources including State Attorneys and or Parliamentary Draftsmen that in fact no such Notice has been published yet. I therefore take a judicial notice as to that effect. It follows, therefore, that legally, no Board has indeed been established because the law that is supposed to establish it has itself not come into operation due to lack of publication in the *Gazette* as by it stipulated. Consequently, there can be no appeal to the Minister lying under the Act yet. That is apart from and in addition to the fear which the applicants have in appealing to the Minister which also is not unreasonable in the circumstances.

My own efforts to find out under what other provision such an appeal is legally available did not succeed either. I checked the Investment Protection Act, 1986⁸ as amended by the Investment Protection (Amendment) Act, 1989.⁹ Under this Act, the Minister can under Section 4, cancel certificates issued under the Act. In this case such certificates would be either EXH-NAILA 3 or 2 respectively. The letter EXH-NAILA 5 does not purport to cancel any of these but the licence No. 074/94 EXH-NAILA 4. In any case, even if it was EXH-NAILA 2 or 3 that were cancelled or purported to be cancelled by the respondents' letter, no provision is made in that regard for an appeal to a Minister of whatever description. The only provision for an appeal under that Act is that one under Section 16 where it is provided that where an investor is not satisfied with an amount of compensation granted, he or she may appeal to a tribunal whose chairman is a Judge of the High Court. This is provision for an appeal against revocation or cancellation of a licence issued under the Act, let alone it being not provision for an appeal to a Minister of whatever description. And what of the order or purported order denying freedom of movement and banishment of the second applicant?

⁸ Act No. 2 of 1986.

⁹ Act No. 1 of 1989.

I was also constrained to have a look at the Hotel Accommodation (Imposition of Levy) Decree, 1967¹⁰ which preceded and is supposed to be repealed by the Promotion of Tourism Act, 1991.¹¹ Neither did this help either. No provision is made thereunder for an appeal to a Minister against cancellation or revocation of licence or the purport thereof.

It was submitted for the applicants that since their complaints are not substantially controverted apart from the contention that the matter was not properly before the court, it should be held that the respondents are conceding as to the existence of the vices complained of. I fully subscribe to that view. Indeed it is apparent on the record. Mention any of the six grounds relied on in this application and the same is glaringly established and uncontroverted. Not only were the allegations not controverted but also no explanation was offered at all either by their Counsel or the respondents themselves through their counter-affidavits. I am therefore satisfied that there is flagrant breach of the rule of law generally established to the extend and in the manner deponed by the applicants. The 1st and 2nd respondents acted arbitrarily, unreasonably and in a summary manner to flout the laws of the land. Counsel for the applicant submitted that "the 1st and 2nd Respondents behaved in most unreasonable and uncivilized manner not befitting the twentieth century". Probably he was right.

It has been held by the authorities (*Supra*) that if any of the six grounds has been offended and the complainant has no right of appeal available to him, the proper action of the High Court is to quash the decision and the proceedings. I have sufficiently demonstrated how the applicants cannot avail themselves with the remedy of appeal in the circumstances of this case. I also have held that since the complaints have not been substantially controverted, the vices complained of namely, *ultra vires*, abuse of authority and failure of natural justice have, therefore, been proven to the same extent as they remain uncontroverted. So also is failure to act judicially, unreasonableness and usurpation of lawful authority. All these have patently been established just as much as they stand undisputed. It follows therefore that the six grounds laid down by the authorities as a condition precedent for the issue of *certiorari* have all been established as offended and not only one of them. But only one would suffice for the issuance of the order of *certiorari*, so it has been held. In this case therefore I am bound by the principles as enunciated by the authorities. I cannot but to follow behind their feet. The order of *certiorari* (Relief 4.1) is therefore hereby granted as prayed. The letter EXH-NAILA 5 is hereby quashed and declared to null and void and, therefore, of no effect.

¹⁰ Decree No. 13 of 1967.

¹¹ Section 28 (1).

On *mandamus*, in *John Mwombeki Byombalirwa v. The Regional Commissioner, Kagera and Another*¹² the High Court of Tanzania (Mwalusanya, J.) gave five grounds which, if they exist, would justify the order of *mandamus* to issue. In brief, the five grounds are first, the applicant must have demanded performance and the respondent refused to perform. Two, that the respondent as a public officer must have a public duty imposed by law owed to the State and citizens individually. Three, that public duty imposed should be of an imperative nature. Four, that the applicant must have a *locus standi* or interest and five, that there is no other remedy available. I understand that this is the correct proposition in law. I would therefore hold a similar stand for my own in this case.

In this case, the applicants were not even informed of the wrongs, if any, which they had committed to warrant the harsh treatment to which they have been subjected. They demanded to know but they got no replies to their queries. On the other hand, as against the first and second respondents, it is an appropriate licence for hotel business which it is prayed that they (respondents) be enjoined to issue, and also to guide their actions all in accordance with the law. At all material times the respondents represented themselves as the proper authority for the issuance of licences for tourist related business including hotels. When the applicants as bona fide investors in the business approached them for the grant of hotel licences, the 1st and 2nd respondents issued them (applicants) with licence No. 0774/94 vide EXH-NAILA 4. Hitherto the applicants had no reason to suspect that the respondents were operating illegally in so far as the Promotion of Tourism Act, 1991 is concerned. As against themselves therefore, the respondents are estopped to deny that they do not have the power to issue licences under the Act. It is immaterial whether they honestly believed that they had the power to issue the licences in the name of a purported Commission or that they were privy to the illegality therewith connected provided that the applicants were thereby misled into acting to their own detriment. It therefore springs from this that the prayer for an order of *mandamus* against the 1st and 2nd respondents (Relief 4.2) is also hereby granted as prayed.

As against the 3rd respondent, it was sought in relief item No. 4-3 to direct the Minister to establish the Tourist Board in accordance with the Promotion of Tourism Act, 1991 and to respect the investment certificate granted under the Investment Protection Act. I refrain to order the Minister to establish the Board mainly for two reasons. In the first place, the responsibility to establish the Board does not lie squarely on the Minister alone. Apart from the declaration to establish the Board as provided under Section 3, the duty to appoint a

¹² High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No. 22 of 1986 (Unreported).

chairman of the Board is vested on the President whereas the post of Director of the Board is not indicated as by whom he will be appointed. Only appointment of the members of the Board is the reposit of the Minister.

On the other hand, it is not certain as to why the Minister the not yet published in the *Gazette* the date on which the Act is to come into operation as it is provided under Section 1 thereof. May be it is only some operational bottle-necks which have hindered him so to do. However, it is also possible that he has since developed a second thought prompting him to withhold from publication the Article which he signed on the 25th January, 1994, intimating his desire to appoint the date as required. Be what as it may, the fact remains that the Act is not yet operational for want of publication of the effective date. In other words, the Act which has been assented to by the President has, but for want of publication of Notice in the *Gazette*, not yet become a public document.¹³

Coming back to our issue. It is my view that it is not prudent in the circumstances of this case to order the Minister to establish the Board as prayed by the applicants. For that reason, I refrain from making the order as to that effect. All I can do in that regard is only but to advise the Minister at least to facilitate the smooth operation of the Promotion of Tourism Act, 1991 by publishing in the *Gazette* its effective date. However, the prayer to order the 3rd respondent to respect the investment certificate issued under the Investment Promotion Act is hereby granted.

Finally on prohibition (Relief 4.4). In my understanding, an order of prohibition is a twin order to that of *certiorari*. Once vices are proven which warrant the granting of the order of *certiorari*, there normally would follow prohibition to prohibit the subordinate court or tribunal or public authority or officer, as the case may be, from further perpetration of those vices. Likewise in this case, an order of prohibition is issued in the manner as prayed in paragraph 4 of the statement.

The foregoing notwithstanding, I make no order as to costs nor any other relief.

In the ultimate result therefore, this application is granted and or dismissed to the extent and in the following manner:

1. An order of *Certiorari* to quash the decision of Walidi Fikirini (2nd Respondent) for an on behalf of the Commission closing down the Palm Beach Hotel at Bwejuu, revoking the

¹³ See Section 19 of Act No. 7 of 1984; and also Section 23 (3) of Act 7 of 1984 itself also not yet published in the *Gazette* - and Section 6 Chapter 1 of the Laws of Zanzibar.

applicants' tourist business licence and banishing the 2nd applicant from the areas of Bwejuu, Paje and Jambiani in the Island of Zanzibar is hereby issued.

2.(1) An order of *Mandamus* to direct the First and 2nd Respondent to issue and or restore to the applicants a Hotel Business Licence and to guide their actions in accordance with the law currently in force is also hereby granted.

(2) The prayer for an order of *mandamus* to direct the 3rd respondents to establish a Tourism Board is rejected.

3. An Order of *Mandamus* to direct the 3rd Respondent to respect the investment certificate issued to the applicant under the Investment Protection Act, 1986 as amended by the Investment Protection (Amendment) Act, 1989 is granted.

4. An order of Prohibition of prohibit Walidi Fikirini (2nd Respondent), the Commissioners purporting to compose the Commission for Tourism and or their agents from harassing or interfering in the applicants' tourist business except as provided under the Constitution or any other law then in force is also granted.

5. No order as to costs nor any other relief save as above.