

**NOT REPORTABLE**

**N THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION, EAST LONDON**

**Case no: EL 464/2012  
ECD1164/2012**

**Date heard: 24.11.2015  
Date delivered: 1.12.2015**

**In the matter between:**

**EMEKA CHRISTIAN OKONKWO**

**Plaintiff**

**vs**

**MINISTER OF HOME AFFAIRS**

**First Defendant**

**THE DIRECTOR GENERAL FOR THE  
DEPARTMENT OF HOME AFFAIRS**

**Second Defendant**

---

**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

---

**TSHIKI J:**

[1] In this application for leave to appeal, I will refer to the parties as plaintiff and defendants respectively. The plaintiff in this action sued the defendants for damages which he suffered as a consequence of wrongful and unlawful detention which occurred in an East London prison from the 3<sup>rd</sup> August 2012 for a period of seventy five days. For all the 75 days the plaintiff was kept in Fort Glamogan Prison in East London. His detention in prison was at the instance and instructions of the defendants which continued from the 3<sup>rd</sup> August 2012 to the 19<sup>th</sup> October 2009 and which he endured for seventy five (75) days. During his detention the plaintiff was never taken to court the reasons given by the respondents being that the plaintiff

was detained in terms of section 34 (1) read with section 41 (1) of the Immigration Act no 13 of 2002 (the Act).

[2] It should be noted that when the defendants dealt with the plaintiff in terms of section 34 of the Act they failed to strictly comply with sections 34 (1)(4) of the Act. The plaintiff was detained in custody for the whole period of 75 days contrary to the provisions of section 34 (1)(d) of the Act which provides:

**“34 Deportation and detention of illegal foreigners**

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned-

**(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;**

**(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;**

**(c)** shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

**(d)** may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

**(e)** shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.”

[3] The Act also makes provision that the deportation of the illegal foreigner shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non Court day it shall be extended to four p.m. of the first following court day. None of the provisions of the Act were applied to the plaintiff herein. Instead what, in my view, had happened to him he was met with degrading and cruel treatment at the hands of the defendants' officials

[4] After the release of the plaintiff he sued the defendants jointly and severally the one paying the other to be absolved. Having sued the defendants who conceded the merits of the claim and consequently this Court made a global award of R750 000.00 in favour of the plaintiff. The defendants did not give evidence to egainsay what the plaintiff told the Court, which, *inter alia*, is that he was detained in custody from the 3<sup>rd</sup> August to the 19<sup>th</sup> October 2009 without having been taken to Court and contrary to the provisions of section 34 of the Act.

[5] The defendants have now filed an application for leave to appeal against the plaintiff's award on the grounds that when the Court awarded a globular amount of R750 000.00 this amounted to lack on the part of the Court to properly exercise its discretion. In other words, the amount granted to the plaintiff is not reasonable in the circumstances.

[6] On the date of the argument of the application for leave to appeal, *Mrs Mqobi* appeared for the defendants and *Ms Da Silva* represented the plaintiff.

[7] *Ms Mqobi* has argued that the Court awarded an all inclusive globular amount and does not specify which amount is for *contumelia*. According to her even if *contumelia* is included in the damages it would be too much and excessive in the circumstances. She argued further that the award of damages should not be viewed as a deterrent factor.

[8] *Ms Da Silva's* argument is based on the fact that the conduct of the defendants against the plaintiff was cruel and malicious. Had one of the prison warders not showed concern about the plight of the plaintiff, the latter would have taken a longer time to be released from custody. According to her when the Court awarded the amount of R750 000.00 it did not commit an irregularity or misdirection.

[9] When I considered the plaintiff's plight I was of the view that he should never have been treated in the manner he was treated by the defendants. The provisions of section 34 of the Act speak for themselves. The defendants failed to treat the plaintiff as a detained illegal foreigner in terms of section 34 of the Act. They treated the plaintiff as if he was not protected by the laws of this country and that there is no existing bill of rights provided by a constitution in our country.

[10] When I granted the award, I made a globular amount notwithstanding that the plaintiff had made separate claims for each of the following:

[10.1] Contumelia	-	R400 000.00
[10.2] Deprivation of liberty	-	R600 000.00
[10.3] Legal expenses	-	R 15 000.00
[10.4] Loss of business income	-	R 75 000.00

[11] I agree with counsel for the defendant that a realistic approach was to separate the plaintiff's respective claims.

[12] I am also of the view that in respect of the *quantum* another Court may arrive to a different conclusion.

[13] Both counsels also agreed that I should make an order that the costs occasioned by the postponement of this case in Port Elizabeth on the 7<sup>th</sup> September 2015 should be paid by the defendants.

[14] In the result, I make the following order:

**[14.1] The application for leave to appeal is hereby granted to the Full Court of the Eastern Cape Division.**

**[14.2] The costs of the appeal shall be in the cause of the appeal.**

**[14.3] The costs occasioned by the postponement of this matter in Port Elizabeth on the 7<sup>th</sup> September 2015 are to be paid by the defendants jointly and severally the one paying the other to be absolved.**

---

**P.W. TSHIKI**  
**JUDGE OF THE HIGH COURT**

For the plaintiff / respondent : Adv Da Silva  
Instructed by : Msesiwe Vapi Inc  
EAST LONDON  
Ref: MV/M25/10

For the defendants / applicants : Adv Mqobi  
Instructed by : State Attorney  
EAST LONDON  
Ref: 481/12-P10