IN GAUTENG SOUTH HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

REPORTABLE

CASE NO: 49231/10

DATE: 10/12/2010

In the matter between

LUCKY SHABANGU	Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL,	
DEPARTMENT OF HOME AFFAIRS	Second Respondent
BOSASA (PTY) LTD	
t/a LEADING PROSPECTS TRADING	Third Respondent

J U D G M E N T

EPSTEIN A J:

[1] The applicant applies by way of urgency for an order declaring his detention by the first respondent to be unlawful and interdicting his

deportation. He also seeks an order directing his release on certain conditions. The application is opposed by the first and second respondents. The third respondent is responsible for the day to day running of Lindela Holding Facility ("Lindela"). No relief is sought against the third respondent which has not opposed this application.

[2] The application relates to the deprivation of the Applicant's liberty and the urgency is not contested. In *Mustafa Aman Arse v Minister of Home Affairs and Others*[1] the Supreme Court of Appeal endorsed the principle referred to in *Silvo v Minister of Safety and Security*[2] that a "detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention, and that this right belongs to both citizens and foreigners".[3]

[3] The starting point is The Immigration Act, 13 of 2002, as amended, ("the Immigration Act") which provides in section 32(2) that any illegal foreigner shall be deported.

[4] It is common cause that the applicant has no documentation entitling him to remain in the Republic of South Africa. He is therefore an illegal foreigner and liable to be deported.

[5] The applicant states in his founding affidavit that he is from Zimbabwe but was forced to flee as a result of ongoing persecution. He states that he fled Zimbabwe in order to seek political asylum in South Africa where he arrived clandestinely in around 2006. According to his

[1] 2010 (7) BCLR 640 (SCA) para 10.
[2] 1997 (4) SA 657 (W) at 661 H - I
[3] Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2004 (4) SA 125 (CC) para 27.

affidavit, shortly after his arrival in this country, he reported to the Pretoria Refugee Reception Office in order to apply for asylum. He claims that he was unable to access the office in order to lodge his asylum claim due to the very large number of people with similar intentions. Thereafter, because he was unemployed and indigent, he did not have the money he needed to continue going to the Refugee Reception Office.

[6] Subsequently, in 2008, the applicant was arrested on charges of fraud. He was released on bail but later convicted and sentenced on 6 November 2009 to 12 months imprisonment. He served his sentence at Boksburg Correctional Services and was released on 4 November 2010.

[7] The deponent to the answering affidavit is Joseph Swartland ("Swartland"). He is an Assistant Director: Directorate Deportation Department of Home Affairs and stationed at Lindela. Swartland states that upon the applicant's release he was to be deported to Zimbabwe because he has no valid documentation entitling him to remain in South Africa and he is an illegal foreigner. Section 1 of the Immigration Act defines "*illegal foreigner*" as a foreigner who is in the Republic in contravention of the Act.

[8] On the day of his release, the applicant was taken to Lindela where he was detained pending deportation. The respondent has produced a copy of the notification of deportation.[4] The notification is signed by the applicant and date-stamped 4 November 2010.

[9] It is common cause that two days after his detention, an official from the Zimbabwean Consulate visited Lindela. The applicant states that

[4] This is a notification issued in terms of Section 7(1)(g) read with Section 34(1)(a) of the Immigration Act, and Regulation 28(2).

he was told to sign a document for his deportation. He believed that he had no choice because he had been informed that he could not apply for asylum. He therefore signed the document but now fears that his deportation may be imminent for that reason. Swartland states that the applicant was amongst those nationals of Zimbabwe identified by the Consulate official and then issued with an Emergency Travel Certificate (ETC).

[10] Deportation of certain Zimbabwean nationals, including the applicant, was scheduled to take place on 10 November 2010 from Lindela. Swartland however states that the private buses which were procured to transport them did not arrive as scheduled. Consequently the deportation was postponed. Swartland states that the buses were procured from a private company and the respondents were not directly responsible for the buses not arriving on 10 November 2010. The Zimbabwean nationals were deported on 8 December 2010, excluding the applicant who had by then brought this application to court.

[11] The applicant contends that his detention is unlawful, both in terms of the Immigration Act and the Refugees Act 130 of 1998 ("the Refugees Act").

[12] I will deal firstly with the contentions in respect of the Immigration Act and thereafter with the Refugees Act.

[13] The relevant sections of the Immigration Act upon which the applicant relies are sections 34(1) and 34(2) which read as follows:-

> "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) ...

(b) ...

(c) ...

(d) may not be held in detention for longer than 30 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) ...

(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation 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".[5]

[14] Thus, in terms of Section 34(1)(d) of the Immigration Act, an illegal foreigner may only be held in detention for 30 days. This period can only be extended by a warrant of a court for a period not exceeding

[5] "court" is defined as a magistrate's court.

90 calendar days.

[15] It is common cause that no warrant was sought nor obtained. As stated by Swartland, the deportation was to take place on 10 November 2010 which was well within the 30 day period. However, as also stated, the buses contracted to transport the foreigners to Zimbabwe did not arrive and the deportation had to be re-scheduled. The applicant was detained on 4 November 2010 and the 30 day period accordingly expired on 4 December 2010. From 5 December 2010 the applicant's detention was unlawful in that no warrant extending the detention had been obtained.

[16] It is irrelevant as to who was to blame for the non-arrival of the buses or that the officials at Lindela themselves were blameless. The fact remains that it was incumbent upon those responsible for the applicant's detention to ensure that any period of detention exceeding 30 days was authorised by a warrant issued in terms of section 34(1)(d) of the Immigration Act. It matters not that the buses arrived within four days after the 30 day period relating to the applicant had expired. It is a matter of illegality and not the degree of the illegality.

[17] It is for the first respondent to establish that the detention of the applicant is justified.[6]

[18] In the absence of a warrant, the continued detention of the applicant beyond 30 days became unjustified. In *Zeeland v Minister of Justice and Constitutional Development*[7], citing *Ingram v Minister of*

[6] Arse, *supra*, at para 5.
[7] 2008 (4) SA 458 (CC) at para 25

Justice[8] the following is stated:

> "It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing the interference to establish a ground of justification."

[19] On this basis, the applicant is entitled to his immediate release.

[20] I turn now to the Refugees Act. The applicant claims that he is an asylum seeker. He states that upon his admission to Lindela he attempted to inform the officials of the first respondent of this and that he has continued to inform them of his wish to apply for asylum. He however states that he was told that because he came from prison, he could not apply for asylum. On 13 November 210 the applicant's legal representatives advised in a letter of his intention to apply for asylum.

[21] In terms of section 1 of the Refugees Act "*asylum*" means refugee status recognised in terms of the Refugees Act; "*asylum seeker*" means a person who is seeking recognition as a refugee in the Republic; "*refugee*" means any person who has been granted asylum in terms of the Refugees Act.

[22] Pertinent to this application are the following provisions of the Refugees Act:

Section 8(1) - The Director-General may establish as many Refugee Reception Officers in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the

[8] 1962 (3) SA 225 (W) at 227

purposes of this Act.

Section 8(2) - Each Refugee Reception Office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer.

Section 21(1) - An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.

[23] It is clear, therefore, that an application for asylum can only be made to a Refugee Reception Officer at a Refugee Reception Office.

[24] Lindela is not a Refugee Reception Office - it is a place determined by the Director-General as provided for in section 34(1) of the Immigration Act as a holding facility.

[25] In terms of Section 21(2) of the Refugees Act, it is the Refugee Reception Officer who –

(a) must accept the application form from the applicant;

(b) must see to it that the application form is properly completed and, where necessary, must assist the applicant in this regard;

(c) may conduct such inquiry as he or she deems necessary in order to verify the information furnished in the application; and

(d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24.

[26] I emphasize that the Refugee Reception Officer is to be found at a Refugee Reception Office and not at a holding facility such as Lindela. It

is to be noted that in terms of regulation 2 of the Refugee Regulations, an application for asylum in terms of section 21 of the Refugees Act must be lodged by the applicant in person at a designated Refugee Reception Office without delay.

[27] An asylum seeker permit is dealt with in Section 22(1).

> 22(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.
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> The permit provided for in subsection (1) may be extended by a Refugee Reception Officer in terms of Section 22(3).

[28] I turn to the relief sought in the notice of motion. The applicant seeks the following orders:

1. Interdicting respondents from deporting the applicant unless and until his status under the Refugees Act has been lawfully and finally determined (paragraph 4 of the notice of motion).
2. Directing the respondents to forthwith release the applicant in possession of an asylum transit permit issued in accordance with section 23 of the Immigration Act read with regulation 2(2) of the Refugee Regulation (Forms and Procedure) 2000, valid for 14

days allowing him to report to a Refugee Reception Office in order to lodge an asylum application in terms of the Refugees Act (paragraph 6 of the notice of motion).

3. Directing the first and second respondents to accept the applicant's asylum application and to issue him with a temporary asylum seeker permit in accordance with Section 22 of the Refugees Act pending the finalisation of his claim, including the exhaustion of his rights of review or appeal in terms of chapter 4 of the Refugees Act and the Promotion of Administrative Justice Act 3, of 2000 (paragraph 7 of the notice of motion).

[29] Relevant therefore are the following:

(a) Section 23(1) of the Immigration Act which provides:

> The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only.

(b) Regulation 2(2) of the Refugee Regulations which provides:

> Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application.

[30] In my view, what the applicant seeks in this application is not competent for the following reasons: -

(a) An asylum transit permit in terms of Section 23 of the Immigration

Act can only be issued to a person at a port of entry. This does not apply to the applicant who is in detention at Lindela which is not a port of entry.

(b) The officials at Lindela cannot accept an application for asylum. I have already stated that it is not a Refugee Reception Office; nor are the officials Refugee Reception Officers as required by section 21 of the Refugees Act.

(c) The applicant cannot be issued with an asylum seeker permit. This can only be issued by a Refugee Reception Officer.

[31] The applicant also sought to rely on regulation 2(2) and contends that he is entitled to be issued with an appropriate permit because he has indicated his intention to apply for asylum. However, regulation 2(2) applies to a person encountered in violation of the Aliens Control Act who has not submitted an application pursuant to sub regulation 2(1) but has indicated an intention to apply for asylum. The applicant was not "*encountered*". "*Encounter"* means unexpectedly meet or be faced with (South African Concise Oxford Dictionary). This does not apply to the applicant. He had been in prison and was transferred after serving his sentence directly from the prison to Lindela.

[32] In the premises I find that the applicant is not entitled to the relief sought in paragraphs 6 and 7 of the notice of motion.

[33] Concern has been expressed on behalf of the applicant that once he is released from detention he will immediately be re-detained and deported. However, should this happen, he will then be a person who has entered the Republic and encountered in violation of the Immigration Act

and who has not submitted an application pursuant to sub-regulation 2(1). Upon indication of his intention to apply for asylum, he shall then be issued with the appropriate permit valid for 14 days, as provided for in regulation 2(2).

[34] Insofar as costs are concerned, the applicant was unlawfully detained after the 30 day period provided for in section 34(1)(d) expired without a warrant extending such period. The applicant was therefore entitled to bring this application and there is no reason why he should not be entitled to his costs.

[35] In the circumstances I make the following order.

1. The applicant's detention is declared to be unlawful.
2. The applicant is to be released forthwith.
3. The first and second respondents are directed to pay the costs of the application.

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EPSTEIN AJ

Applicant's counsel : Adv Nicole Lewis

Applicant's Attorney : Lawyers for Human Rights

Respondents counsel : Adv Naome Manaka

Respondents Attorney : The State Attorneys Office Johannesburg