SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 2010/1189

In the matter between:

KANYO ARUFORSE — Applicant

and

MINISTER OF HOME AFFAIRS — First Respondent

DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS — Second Respondent

BOSASA (PTY) LTD — Third Respondent

JUDGMENT

MEYER, J

[1] This is one of sixty-six urgent applications that were brought before me in the urgent motion court last week. This matter concerns the liberty of the applicant and is accordingly inherently urgent.

[2] The applicant, who is a Burundian national, seeks his immediate release from the Lindela Holding Facility in Krugersdorp ('Lindela'), which is a facility operated by the third respondent for the Department of Home Affairs where *inter alia* illegal foreigners are detained pending their deportation from the Republic of South Africa.

[3] The matter was argued on Wednesday, 20 January 2010. I permitted the respondents to file a supplementary answering affidavit and the applicant to file a replying affidavit. Once that was done the matter was further argued on Friday, 22 January 2010. A number of other urgent matters awaited hearing and I accordingly reserved judgment until this morning, which is Monday, 25 January 2010.

[4] In terms of his Notice of Motion, the applicant *inter alia* seeks that the first and second respondents ('the respondents') be ordered to immediately 're-issue' him with a temporary asylum seeker permit in accordance with the provisions of s 22 of the Refugees Act[1], and, as a temporary asylum seeker permit holder, his immediate release from Lindela and for the respondents to be interdicted from deporting him unless and until his status under the Refugees Act has been lawfully and finally determined. The respondents maintain that the provisions of the Refugees Act are not available to the applicant since the applicant is being

[1] Act No. 130 of 1998.

detained under the provisions of s 34 of the Immigration Act[2] as an 'illegal foreigner' pending his deportation.

[5] The applicant alleges that he was forced to flee persecution in Burundi and come to South Africa to apply for asylum. He arrived in South Africa during October 2006, and, pursuant to his application for asylum at the Marabastad Refugee Reception Centre, was issued a temporary asylum seeker permit in accordance with s 22(1) of the Refugees Act. He thereafter applied for its renewal from time to time in accordance with its conditions. The permit was renewed until it expired during September 2008 while he was staying at Acasia in Pretoria, which was a temporary protection site established during the time of the xenophobic attacks that occurred in South Africa from May 2008, where he sought shelter. The applicant states that he 'did not understand that [he] was required to renew [his] asylum permit because of the camp registration process at Acasia.' He also states that he cannot recall his permit number. On 25 December 2008, the applicant was arrested at Acasia on charges of rape and detained at the Pretoria Central Prison. On 15 July 2009, he was acquitted of the rape charges. He was then transported to Lindela where he has been detained since 15 July 2009 until the present. The applicant alleges that his asylum application is still pending and that the respondents have failed to allow him the opportunity of renewing his asylum seeker permit in terms of s 22(3) of the Refugees Act.

[2] Act No. 13 of 2002.

[6] The applicant contends that because he is an asylum seeker in the Republic of South Africa his status is governed by the provisions of the Refugees Act[3] and he may therefore not be lawfully detained under the provisions of the Immigration Act. He contends that s 21(4) of the Refugees Act prohibits his arrest and continued detention at Lindela and he accordingly claims his immediate release and the renewal of his temporary asylum seeker permit without delay.

[7] S 21(1) of the Refugees Act provides for the making of an application for asylum. Pending the outcome of such application for asylum, an asylum seeker permit must, in terms of s 22(1), be issued to the applicant 'allowing the applicant to sojourn in the Republic temporarily'[4] and the asylum seeker permit may be

[3] The provisions of the Refugees Act on which the applicant relies are essentially ss 21(1), 21(4), 22(1) and 22(3) of the Refugees Act. They read as follows:

> '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.
>
> 21(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-
>
> (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or
>
> (b) such person has been granted asylum.
>
> 22(1) The Refugee Reception Officer must, pending the outcome of anapplication 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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> 22(3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.'

[4]

issued subject to conditions. The period for which this asylum seeker permit was issued may, in terms of s 22(3), be extended from time to time.

[8] A precondition for the issue and subsequent extension of an asylum seeker permit is therefore the existence of an application for asylum. The applicant's allegations that he made application for asylum, of the issue to him of

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Counsel for the applicant, Adv N Mji, and for the respondents, Adv N Manaka, brought two unreported judgments that were delivered in this division to my attention, in which meaning of s 22(1) of the Refugees Act was considered, and particularly the meaning of the entitlement of an applicant 'to sojourn in the Republic temporarily' in terms of an asylum seeker permit issued to such applicant.

The first is a judgment of Motloung J in *Consortium for Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others* (WLD, 7 July 2008, Case No 6709/08). Mr. Budlender, who acted on behalf of the applicants in thie matter, contended 'that the way the two Acts must be applied, the Immigration Act as against the Refugees Act, is such that immediately an illegal immigrant applies for a refugee status irrespective of whether the illegal immigrant is already in detention or not, that the application of the relevant Section 22 of the Refugees Act is such that the applicants must then be released immediately from detention after the Section 22 permits have been issued to them.' Motloung J, disagreed with the submission and found that 'the Refugees Act does not anywhere provide that once a person has applied for refugees status and has been furnished with a Section permit, it means that person must be released from detention.' Motloung J *inter alia* said this: 'In other words I am saying the following, if a person is already in detention in terms of Section 34 of the Immigration Act, and that person subsequently then applies for the immigration status, for as long as the department complies with the requirements of the relevant Section regarding the initial 30 days detention and the maximum extension of 90 days, if a refugee applies for refugee status within the period, and with the department having complied with all other requirements it does not follow that that person must be released. The department can legitimately, and in fact should, refuse to release such a person from detention. The contention by Mr Budlender would lead to absurdity. It would mean that theoretically all illegal immigrants presently in custody at Londela, once they become aware of the order that was being sought by Mr Budlender could conceivably, all of them, tomorrow apply for refugee status and within the next few days, having been issued with the Section 22 permits which the department is enjoined or forced to issue to them if they apply for it, would be entitled to immediate release. That would be absurd especially if one looks at the objectives of the Act.'

The second is a judgment of Willis J in *Mustafa Aman Arse v Minister of Home Affairs and 2 Others* (WLD, 7 January 2009, Case No 52898/09), which matter is presently the subject of an urgent appeal to the Supreme Court of Appeal. Willis J interpreted the words 'allowing the applicant to sojourn in the Republic temporarily' appearing in s 22(1) of the Refugees Act as follows: 'The right to sojourn does not necessarily entail a right to move about freely in South Africa with any restrictions. The applicant is sojourning in South Africa, he is not going to be deported or send out of South Africa pending the outcome of his appeal relating to asylum status. He is sojourning in South Africa, albeit under restriction.' The 'restriction' referred to is the applicant's detention at Lindela.

an asylum seeker permit, of the extensions thereof, and of the failure by the respondents to afford him the opportunity to further extend the permit in terms of s 22(3) of the Refugees Act are disputed by the respondents.

[9] I consider the disputes of fact raised by the respondents to be *bona fide* and on reasonable grounds. The disputes of fact are not capable of resolution on the papers. The paucity of the applicant's allegations in this regard and the failure to provide the first respondent with the information requested to further investigate the applicant's claims, in my view, also adversely reflects on the credibility of his version on the disputed issues. This being an application for final relief such disputes of fact must accordingly be decided on the version of the respondents. It is trite that a final order can only be granted in motion proceedings if the facts stated by the respondents together with the admitted facts in the applicant's affidavits justify the order.[5] The relief which the applicant seeks under the provisions of the Refugees Act must accordingly fail.

[10] The matter does not end here, since the applicant contends that his continued detention, which the respondents allege is under the provisions of s 34

I need not consider the correctness or otherwise of the interpretation afforded to the wording of s 22(1) of the Refugees Act in the *Consortium for Refugees and Migrants in South Africa* and the *Mustafa* judgments in the light of my conclusion on the facts of the present matter.

[5] See: *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A), at pp 541J – 542A and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA), at p 491 para [4].

(1) of the Immigration Act,[6] is unlawful and his immediate release is accordingly sought.

[11] It is common cause that the applicant was arrested and detained at Lindela since 15 July 2009. He was, on the respondents' version, arrested as an illegal foreigner and he is being detained pending his deportation. From 15 July 2009 until 12 August 2009, the applicant was detained without in terms of s 34(1). On 12 August 2009, the Magistrate's Court, in terms of s 34(1)(d), extended the applicant's detention for a period of ninety calendar days. This period expired during November 2009 and was not extended again. It is to be noted that 'court', in terms of s 1, means a Magistrate's Court.

[12] The respondents, in their supplementary answering affidavit, have put forward reasons for the lengthy detention of the applicant, such as attempts

[6] S 34(1) of the Immigration Act reads:

> '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 god 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.'

made to have the Burundian Consulate identify its nationals who are detained at Lindela and issuing them with Emergency Travel Certificates and a vague suggestion of a failure by the applicant to co-operate in the process is made. It is stated that the Republic of South Africa has an understanding with countries having consular representation in South Africa that their Consulates are obliged to assist the respondents in facilitating the deportation process by *inter alia* identifying or confirming the relevant country's nationals who are being detained pending their deportation and by issuing them with 'one way passports'. I do not consider the reasons proffered in the respondents' supplementary answering affidavit as constituting a proper justification for his lengthy detention of now over six months.

[13] S. 34(1) of the Immigration Act authorises the detention of an illegal foreigner pending his or her deportation for an initial period without a warrant and for the extension of such initial period by a Magistrate's Court. The foreigner may, in terms of s 34(1)(d), not be held in detention for longer than 30 calender days without a warrant of a Magistrate's Court, but the foreigner may, in terms of s 34(1)(b), at any time request that his or her detention for the purpose of deportation be confirmed by warrant of a Magistrate's Court, which, if not issued within 48 hours of such request, ''*shall cause the immediate release of such foreigner*'. A foreigner may accordingly be initially detained without a warrant of a Magistrate's Court for no longer than 30 days, but this period may be reduced at the request of the foreigner that his detention be confirmed by warrant of a

Magistrate's Court. The 'detention' referred to in s 34(1)(d) which a Magistrate's Court on good and reasonable grounds may extend for an adequate period not exceeding 90 calendar days, is, in my view, clearly a reference to the initial period during which the foreigner was held in detention without a warrant.

[14] S 34(1) accordingly only permits an initial period of detention without a warrant that may not exceed 30 calendar days and which may at the instance of the foreigner concerned be reduced and s 34(1) only permits the extension of 'such' initial period by a Magistrate's Court for a period not exceeding 90 calendar days. The section does not permit the further extension of the detention once a Magistrate had extended the initial period of detention.[7]

[15] In *Consortium for Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others*,[8] Motloung J interpreted s 34(1) of the Immigration Act to mean 'that the maximum period for which any person can be detained in terms of the Immigration Act is a period of 120 days.' The reference to 'the Immigration Act' is clearly a reference to s 34(1) of that Act since other provisions of that Act also authorise detention. In interpreting s 34(1), Motloung J *inter alia* relied on the principle that a strict construction should be placed upon statutory provisions which interfere with an individual's rights, and particularly his or her right to liberty. I respectfully agree with this interpretation of s 34(1).

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[7] See the different wording of s 29(1) of the Refugees Act.

[8] The reference to this judgment is given in footnote 4 *supra*.

[16] Adv. Mji also referred me to the contrary conclusion which Preller J arrived at on the interpretation of s 34(1) in the unreported judgment of *Adela Mbalinga Akwen v The Minister of Home Affairs and Another*.[9] Preller J said this:

> 'In my view there is nothing in the wording of this subsection that suggests that after the detention has been extended for 90 days initially, it may not then be extended for a further 90 days.
> That seems to be in accordance with the thinking which appears from the judgment of the full bench of this division to which I have been referred, namely *Jeebhl v The Minister of Home Affairs* which was reported in July 2007. It fits in with the obvious intention of the statute, namely to deport illegal foreigners from this country in appropriate circumstances.
> It is a known fact that there are a vast number of known criminals in this country who are simply not prosecuted because the police cannot locate them. It must follow that a person who is here illegally and who is detained while facing the possibility of a deportation will likewise disappear and not be found by the immigration authorities. I think, therefore, that the purpose of the Act will be defeated if this Section is interpreted more strictly than is necessary.'

[17] I respectfully disagree with the construction placed on s 34(1) in the *Adela Mbalinga Akwen* judgment for the reasons stated in the preceding paragraphs. The intention of the statute undoubtedly includes an intention to deport illegal foreigners from this country. But the maximum period for which any person may be so detained in terms of the s 34(1) is a period of 120 days. I also respectfully fail to appreciate how this interpretation will defeat the said purpose of the Immigration Act. In terms of its preamble the Act aims at putting in place a new system of immigration control which *inter alia* ensures that: 'immigration laws are efficiently and effectively enforced, deploying to this end the significant administrative capacity of the Department of Home Affairs, thereby reducing the

[9] TPD, 8 February 2008 (Case No. 46875/07).

pull factors of illegal immigration;[10] immigration control is performed within the highest applicable standards of human rights protection;[11] a human rights based culture of enforcement is promoted;[12] and civil society is educated on the rights of foreigners and refugees.[13]

[18] The applicant's present purported detention in terms of s 34(1) of the Immigration Act is, in my view, accordingly unlawful. The respondents do not suggest that the applicant is being detained or that the first respondent or other immigration officials are entitled to detain him in terms of any other provision of the Immigration Act.[14] 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.[15] The applicant is accordingly entitled to his immediate release.

[19] In the result the following order is made:

1. The second respondent is ordered to cause the immediate release of the applicant from the Lindela Holding Facility in Krugersdorp.

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10 Para (g) of the Preamble.

11 Para (l) of the Preamble.

12 Para (n) of the Preamble.

13 Para (p) of the Preamble.

14 See for example s 34(5).

15 *Silva v Minister of Safety and Security* 1997 (4) SA 657 (W), at p 661 – H.

2. The first and second respondents are ordered to pay the applicant's costs of this application.

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P.A. MEYER
JUDGE OF THE HIGH COURT

25 January 2010.

Date of Hearing:	22nd January 2010
Date of Judgment:	25th January 2010
Counsel for Applicant:	Adv Nomzamo Mji
Instructed by:	Lawyers for Human Rights Johannesburg Law Clinic 2nd Floor Braamfontein Centre 23 Jorissen Street Johannesburg
Counsel for Respondent:	Adv Manaka