REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12/05018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

OTSHUDI, FRANCIS KIMOTO Applicant

and

THE 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

Summary

Refugees Act no 130 of 1998 – illegal foreigner having exhausted internal remedies and no further proceedings pending - falls to be dealt with in terms of the provisions of the Immigration Act no 13 of 2002.
Contempt of court – minister and officials prevented from deporting illegal foreigner whilst proceedings pending as they may be guilty of contempt of court.
Immigration Act – detention pursuant to s 34 of Immigration Act – calculation of initial period of 30 days and extended period of 90 days to be cumulative.

Suspension of 120 day period allowed by Act for detention for purposes of deportation in the event of legal proceedings preventing Department from deporting illegal foreigner.

WEPENER, J:

[1] This is an urgent application in which the applicant seeks a declaration that his continued detention is unlawful and an order for his release. In addition he seeks that the respondents be directed to re-issue him with a temporary asylum seeker permit in accordance with s 22 of the Refugees Act No. 130 of 1998 ('*the Refugees Act'*).

[2] I deal with the applicant's prayer for a mandamus to re-issue an asylum seekers permit first. Only two affidavits, a founding affidavit and an answering affidavit were filed. There is a serious dispute of fact which cannot be resolved on the papers. Mr Dikolomela, appearing for the applicant requested me to find the version of the applicant to be supported by probabilities and to decide the matter on such probabilities. I decline the invitation. Since time immemorial and at least since the judgment in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), the approach to disputed facts in application proceedings is to have regard to the facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by the respondent.

[3] The applicant's version regarding his application for a temporary asylum seeker permit, is put into context by the respondents, who justify their

actions also with reference to objective evidence in the form of documents. From this version, it is clear that the applicant was less than frank in his founding affidavit. Once the applicant was found to be an illegal foreigner present in the Republic of South Africa, he was afforded to and did utilise the internal remedies provided for in the Refugees Act. The applicant submitted an application for asylum to a Refugee Status Determination Officer ('*RSDO*') in terms of s 21 of the Refugees Act and was issued with a temporary refugee permit as provided for in s 22 of the Refugees Act. He received an answer from the RSDO, (a copy of which is attached to the founding affidavit) in which he was advised that his application was rejected as unfounded pursuant to s 24(3)(c) of the Refugees Act. S 24(3) of the Refugees Act provides that the RSDO must, upon the application of a refugee, either grant asylum; or reject it as manifestly unfounded, abusive or fraudulent; or reject it as unfounded; or refer any question of law to the Standing Committee. The result is that the provisions of s 26 of the Refugees Act come into operation and an asylum seeker may then lodge an appeal to the Refugees Appeal Board ('*RAB*'). This, the applicant also did whilst his temporary refugee permit was extended but the RAB eventually dismissed the appeal, thus ending the applicant's reliance on the Refugees Act to obtain the status of an asylum seeker in the Republic.

[4] The applicant exhausted the internal remedies available to him under the Refugees Act. The RAB decision, which was handed to the applicant, advised him that henceforth, he will be dealt with in terms of the provisions of the Immigration Act No. 13 of 2002 ('*the Immigration Ac*'). That, in my view,

brought the applicant's entitlement to rely on the Refugees Act to an end and his application for an order to extend his asylum seeker permit is ill-advised and misplaced.

[5] The original temporary asylum seeker permit issued to the applicant provides that he had to leave the Republic on 15 June 2010 or such later date as was authorised by the RSDO. At a later date, and after a further extension of his temporary permit, the date upon which the applicant was obliged to leave the Republic, was extended to 17 October 2011. On 18 October 2011 the applicant was given the decision of the RAB and arrested and detained as an illegal foreigner pursuant to the provisions of the Immigration Act.

[6] Upon his arrest, the applicant was given a notification of his intended deportation pursuant to s 34(1)(a) of the immigration Act. The notice also advised the applicant that he has the right to appeal the decision to deport him to the Director General within 10 working days of receipt of the deportation notice as well as his right to request that his detention be confirmed by a warrant issued by a court. The detention of the applicant was by means of a warrant issued by an immigration officer authorising the station commander or head of the detention facility to detain the applicant. (See *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 SCA at para 26. There was, since 18 October 2011, an obligation upon the respondents to deport the applicant pursuant to s 32(2) of the Immigration Act. The applicant again had internal remedies which were available to him under the Immigration Act such

as an appeal to the Director General pursuant to s 8(4) of the Immigration Act. He did not avail himself of these remedies.

[7] I interpose to mention that the lawfulness of the decision of the immigration officer to detain the applicant pending his deportation was not raised in the affidavit or in argument before me.

[8] The basis upon which the applicant seeks relief in this court is, firstly, that s 29 of the Refugees Act provides that detention for a period longer than 30 days is unlawful unless sanctioned by a judge and because there was no such sanction, his continued detention should be declared unlawful. The Refugees Act, however, ceased to be of application since the arrest of the applicant on 19 October 2011 when his internal appeals, pursuant the Refugees Act, failed.

[9] The applicant also relies on the fact he has been detained at Lindela for more than 100 in support of his contention that his detention is unlawful. The answer to that is found under the Immigration Act. S 34(1)(d) of the Immigration Act provides that the initial period of detention of an illegal foreigner may be extended by a court for a period not exceeding 90 calendar days. It is common cause that a magistrate's court may do so. The applicant was arrested on 19 October 2011 and his first period of detention of 30 days expired on 17 November 2011. However, the respondents obtained an extension of 90 days from a magistrate. This additional period of 90 days would have expired on 17 February 2012 – a date after the institution of the

present application, which was served on the respondents on 10 February 2012. The expiry date of the 120 day period during which a foreigner may be held in detention was consequently not an issue canvassed in the affidavits before me. In any event Ms Manaka, appearing for the respondents, advised me that the respondents are of the view that once an application is served upon them by an illegal foreigner they are prevented from deporting such an applicant despite being within the 120 day period in fear of being found in contempt of court. This apprehension is well justified as a person who interferes with the administration of justice will be in contempt of court. If the respondents deported the applicant whilst these proceedings are pending, they could, in my view, depending on the circumstances, be guilty of contempt of court or of obstructing the course of justice as the deportation could influence the effectiveness of any order granted resulting from the application. See *Fein & Cohen v Colonial Government* 1906 (23) SC 750 and *Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki* 1964 (4) SA 618 at 627. In Herbstein and Van Winsen The Civil Practice of the High Court of South Africa 5th edition (Ed Cilliers Loots and Nel) Volume 2 page 1098 it is said:

> *'Contempt of court ex facie curiae, again broadly speaking, could be divided into two categories, firstly, contempt which solely relates to scandalising of the court such as 'words which tend, or are calculated, to bring the administration of justice into contempt' or a statement or document which tends to prejudice or interfere with the administration of justice in a pending proceeding.'*

The Supreme Court of Appeal held in *Midi Television t/a E-TV v Director of Public Prosecution* 2007 (5) SA 540 SCA at 547A that conduct should not 'tend' to bring the administration of justice into disrepute, but it should actually

hold a real risk that prejudice will occur. There seems to me to be no reason to limit contempt proceedings to statements or documents as stated by the learned authors. Any conduct which prejudices or interferes with the administration of justice in pending proceedings would, in my view, be in contempt of court. See *R v Gray* 1900 (2) QB 36 where it was said:

> *'It cannot be doubted... that the article does constitute a contempt of Court; but as these applications are, happily, of an unusual character, we have thought it right to explain a little more fully than is perhaps necessary what does constitute a contempt of Court, and what are the means which the law has placed at the disposal of the Judicature for checking and punishing contempt of Court. Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt.'* (Own underlining).

In the circumstances, any act performed by the respondents that could prejudice or defeat the possible future court order, may constitute contempt of court once the respondents have received notice of the application. In my view, there can be no doubt that the deportation of the applicant prior to the completion of these proceedings holds a real risk that prejudice for the applicant will follow. De Villiers JP said in *Yamomoto v Athersuch and Another* 1919 TPD 105 at 108:

'*But it would be interfering with the administration of justice when the same act is done with the object of defeating a possible order of court, for the due and effective administration of justice demands that acts with such an object should not be allowed*.'

Baker AJ (as he then was) said in *Consolidated Fish (Pty) Ltd v Zive and Others* 1968 (2) SA 517 C at 524G as follows:

'It seems logical to say that where a respondent is accused of having done something in order to prevent a possible future order from being granted or, if granted from having any effect, the applicant for his committal should have to prove mala fides...'

[10] I am of the view that the 120 day period during which the respondents are entitled to comply with their legal obligations cannot be thwarted by an application which precedes the completion of the 120 day period. It could not have been the intention of the legislature that an applicant through his actions by instituting proceedings could deprive the respondents of the right to detain the applicant for a period of 120 days in order to deport him. Indeed, in *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC) at para [50] it was said:

> *'The Immigration Act has as its objective the important task of regulating the admission of foreigner nationals to, their residence in, and their departure from South Africa.'*

The respondents are tasked to perform the functions under the Immigration Act. If the applicant is the cause that the respondents are prevented from deporting him lawfully within the period of 120 days, by launching an application prior to the expiration of the period of 120 days, during which a foreigner may be lawfully detained, one must regard the period during which the proceedings are brought by such a foreigner as having suspended the running of the period of 120 days. In this matter the application was launched and served 7 days prior to the expiration of the 120 day period. The respondents should have that period of time after the completion of these proceedings to take steps to deport the applicant if they so wish, as they were prevented from doing so during the time when this application was pending. This conclusion is based on the view that a party who is the cause of another's inability to exercise his or her rights, could not be heard to say that

the other party has lost that right. It is akin to the principle referred to in *MacDuff and Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 57 – a person who prevented the fulfilment of a condition, is deemed to have allowed such a condition to be fulfilled. In the instant matter that would mean that the condition (the 120 day period) will only be fulfilled after the expiry of 120 days excluding the period during which the respondents were prevented from performing their duties i.e. from the date of service of the application to its finalisation. It is also based on the same principle often applied when a party is prevented from taking steps, that the period during which it is so prevented from taking steps is excluded from the calculation of any period during which that party should have taken steps - the rule *lex cogit ad impossibilia* is applicable. See *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) at 635A-636E:

'Ek het tot die gevolgtrekking gekom dat wel so bevind kan word, en wel in die lig van die algemene oorwegings wat die spreuk lex non cogit ad impossibilia ten grondslag lê (D 50.17.185: impossibilium nulla obligatio est) en wat inhou dat iemand se versuim om 'n verpligting na te kom wanneer dit vir hom onmoontlik was om dit na te kom, hom nie tot sy nadeel toegereken word nie. Die toepassing van die beginsel is welbekend in die kontraktereg in die geval van kontrakte waar prestasie deur 'n party deur oormag onmoontlik gemaak word. Kyk bv Peters, Flamman and Co v Kokstad Municipality 1919 AD 427, waar hierdie Hof (per SOLOMON WN AR) onder meer gesê het (op B 435):

> *"... the authorities are clear that if a person is prevented from performing his contract by vis major or casus fortuitus... he is discharged from liability".*

Dieselfde beginsel geld in ons erfreg in die geval van onmoontlike voorwaardes in testamente: kyk bv D 35.1.6.1; Voet 28.7.9.16; Corbett ea The Law of Succession in South Africa op 115, 118; Lee en Honoré Family, Things and Succession 2de uitg op para 633. Wat die deliktereg betref, het mnr Mahomed ons verwys na Hay v The Divisional Council of King William's Town 1 EDC 97 waar - op grond van Engelse beslissings - beslis is dat die Afdelingsraad, wat 'n sekere pad nie herstel het nie, die verweer kon opwerp dat hy deur oorlogstoestande verhinder was om die nodige werk te doen, en dat dit 'n geval van lex non cogit ad impossibilia was. Die beginsel wat die

spreuk ten grondslag lê, word in ons reg ook in die strafreg erken en toegepas. Ek verwys in hierdie verband na die beslissing van hierdie Hof in R v Hargovan and Another 1948 (1) SA 764 (A). In hierdie geval is die beskuldigdes daaraan skuldig bevind dat hulle 'n opdrag wat kragtens 'n oorlogsregulasie aan hulle gegee is, nie nagekom het nie. Dit het geblyk dat hulle daardie opdrag nie kon uitgevoer het sonder om 'n vroeëre opdrag wat kragtens 'n ander regulasie aan hulle gegee is, te negeer nie. GREENBERG AR het onder meer gesê (op 769 - 770):

> *"If under reg 5 (1) (a) any person is required by the Controller to deliver to him a consignment of any commodity in regard to which the Controller has power under reg 5 to make such an order, then, in my opinion, the person to whom the order is directed would not be bound by a later order made by the Secretary as long as the Controller's order is still in force. I think that the maxim lex non cogit ad impossibilia would apply. (See Baily v De Crespigny LR 4 QB 180; Peters, Flamman & Co v Kokstad Municipality 1919 AD 427; MacDuff & Co Ltd v Johannesburg Consolidated Investment Co Ltd 1924 AD 573 at 600; Broom Legal Maxims 9th ed at 171 - 3.) The cases on the point, in the main at any rate, deal with civil and not criminal obligations but I see no difference in principle between the two cases, and in Halsbury (vol 31 2nd ed at s 753) it is stated generally that the performance of a statutory obligation is excused if it is rendered impossible by the operation of a subsequently enacted statute."*

(Kyk ook die bespreking van onmoontlikheid as 'n regverdigingsgrond in die strafreg in De Wet en Swanepoel Strafreg 3de uitg op 90 - 91; Snyman Strafreg op 102 - 104.)

Mnr Roos, namens die respondent, het betoog dat in die Romeins-Hollandse reg die beginsel wat in die spreuk lex non cogit ad impossibilia opgesluit is tot onmoontlikheid van prestasie in die geval van kontrakte beperk is en dat, wat die beslissing in die Hargovan- saak betref, GREENBERG AR se beroep op twee sake wat om die kontraktereg gaan (nl Peters, Flamman & Co v Kokstad Municipality (supra) en MacDuff & Co Ltd v Johannesburg Consolidated Investments Co Ltd 1924 AD 573 op 600) as regverdiging vir die toepassing van die spreuk in die strafreg, ongeregverdig was. Die beslissing toon dat GREENBERG AR deeglik daarvan bewus was dat die twee sake waarna hy verwys het met kontraktuele verpligtinge te doen gehad het, maar dat hy van mening was dat daar nie op grond van beginsel tussen verpligtinge in die siviele reg en verpligtinge in die strafreg onderskei kan word nie. Hy het ook gesê, soos uit die aanhaling uit sy uitspraak hierbo blyk, dat in die Engelse reg, volgens Halsbury,

"the performance of a statutory obligation is excused if it is rendered impossible by the operation of a subsequently enacted statute".

In die lig van wat hierbo gesê is, kan daar nie bevind word dat die spreuk lex non cogit ad impossibilia net tot die kontraktereg beperk is nie, en ek is verder van mening dat die toepassing van die spreuk op 'n geval soos die

onderhawige geregverdig sou wees. Dit sou die toepassing wees van 'n reël wat reeds in ander afdelings van ons reg erken word, en daar kan myns insiens nie gesê word dat dit op grond van beginsel nie in 'n geval soos die onderhawige moet geld nie.
Dit skyn duidelik te wees dat in die Engelse reg die spreuk lex non cogit ad impossibilia nie net tot sekere gebiede van die reg beperk is nie. In Craies On Statute Law 7de uitg op 268, word in die algemeen gesê:

> *"Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law lex non cogit ad impossibilia, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested E had no control, like an act of God or the King's enemies, these circumstances will be taken as a valid excuse."'*

[11] Having regard to the aforegoing, I am of the view that by virtue of the impossibility for the respondents of continuing with their duties to deport the applicant on pain of being found to be in contempt of court, the running of the 120 day period must be regarded as having been suspended from the date that the application was served on the respondents until the finalisation of these proceedings with the result that the applicant's continued detention was not unlawful at the time when the application was launched, nor would it be for a period of 7 days after finalisation of these proceedings.

[12] In order to overcome the 120 day detention period difficulty counsel for the applicant argued that the 90 day extension, which was granted by the magistrate, commenced on the date on which the extension was granted. Ms Manaka argued that the total period, which a foreigner may be detained is 120 days and that the respondents are obliged to apply for an extension of time prior to the initial 30 day period expiring and that the 90 days' extension only commences from the expiry of the initial 30 day period. I agree that the

application for the granting of an extension does not shorten the initial period of 30 days during which a foreigner may be detained. S 34(1)(d) of the Immigration Act reads as follows:

> *'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 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, …'*

S 34(1)(d) states that '*such detention'* i.e. the 30 days may be extended. The decision by the magistrate also makes it clear that the magistrate confirmed the '*application for the extended detention'*. The extended detention is a period of 90 days which follows upon the initial 30 day period. See the judgment of Meyer J in *Aruforse v Minister of Home Affairs* 2011 (SACR) 69 GSJ at paras [13] and [14] and the remarks of Malan J in Arse v Minister of Home Affairs 2010 [3] All SA 261 at para 9.

[13] Counsel for the applicant also argued that the extension granted by the magistrate was unlawful. The argument was based on the allegation that the magistrate did not have the necessary documentation before him when

granting the order. Counsel, however, conceded that for this issue to be properly raised it was necessary to join the magistrate whose conduct is being attacked. Nevertheless the magistrate recorded that '*after perusing the documentation referred to above …*'. The documents referred to are listed although not attached to the respondents' answering affidavit in this application. I cannot find that the documents were not attached to the application which served before him and that the magistrate acted unlawfully.

[14] Having come to the aforegoing conclusions the applicant has failed to show an entitlement to a temporary refugee permit or that his continued detention is unlawful and the application is consequently dismissed with costs.

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W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT	ADV DIKOLOMELA
INSTRUCTED BY	MZAMO ATTORNEYS
COUNSEL FOR THE RESPONDENTS	MS N MANAKA
INSTRUCTED BY	STATE ATTORNEY
DATE OF HEARING	16 FEBRUARY 2012
DATE OF JUDGMENT	23 FEBRUARY 2012