REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 08174/12

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

18 May 2012
DATE

SIGNATURE

In the matter between:

IDOWU LATEEF SIKUOLA	**APPLICANT**
AND	
THE MINISTER OF HOME AFFAIRS	**FIRST RESPONDENT**
THE DIRECTOR GENERAL: HOME AFFAIRS	**SECOND RESPONDENT**
BOSASA (PTY) LTD	**THIRD RESPONDENT**

J U D G M E N T

KATHREE-SETILOANE, J:

[1] The applicant, a foreign national, sought urgent relief for his release from Lindela Repatriation Centre ("Lindela") on the basis of having been detained unlawfully, in excess of 30 days, and without a warrant having been obtained from a court for the extension of his detention in terms of s34(1)(d) of the Immigration Act No 13 of 2002 ("the Immigration Act").

[2] The approach of our law to deprivation of liberty is well established. Once it is established that a detention has occurred, the onus falls on the person responsible for the detention to justify it (*Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) at para 25.

[3] The applicant alleges that he was arrested, on 23 November 2011, in King William's Town, and detained. On 1 December 2011 he was moved to Lindela, where he remained in detention until his release by order of this Court, on 15 March 2012. In view of the inherent urgency of the matter, which concerned the liberty of the applicant (*Abdi v Minister of Home Affairs* 2010 (3) SA 37 (SCA); *Aruforse v Minister of Home Affairs* 2010 (6) SA 579 (SGJ), I ordered the immediate release of the applicant, and indicated that I will provide reasons for my decision later. These are my reasons.

[4] The application was set down for hearing on an urgent basis on 13 March 2012. The legal representative for the respondents sought a postponement of the matter, on the grounds that he had not had an opportunity to consult with the respondents, on the matter, despite having been in receipt of the application for almost a week. I indicated to the legal representative of the respondents that I was only prepared to grant the respondents a postponement if they could demonstrate to me, by 14h00 that afternoon, that a warrant for the applicant's continued detention beyond 30 days had been obtained from a court. Promptly at 14h00 that afternoon, I was presented with a document, dated 1 December 2011, which purported to be a warrant, issued by a magistrate in terms of s 34(1)(d) of the Immigration Act, for the applicant's continued detention for a further 90 days from 1 December 2011. The place at which the warrant had been issued did not appear from the face of the document, which was presented to me. The warrant also had no documents attached to it, despite a statement indicating that:

"The following documents are attached:

(a) *certified copy of the warrant of detention of IDIDOULAR LATEVYSIKHOULA ...*

(b) *notification to the detainee contemplated in regulation 28(4)(a)*

(c) *affidavit of the immigration officer; and*

(d) *representation by the said detainee (if any).*"

[5] I stood the matter down to Thursday, 15 March 2012, to provide the respondents with an opportunity to file and serve their answering affidavit/s, which they did by 16h00 the next day. The applicant filed and served his replying affidavit at 9h00 on Thursday. I heard argument that afternoon at 12h00.

[6] Attached to the respondent's answering affidavit, marked annexure "SVM1", was a warrant, dated 21 December 2011, extending the applicant's detention for a further 90 days from 1 December 2011. This warrant was identical to the warrant which was presented to me in court on 13 March 2012, save for one important difference. The letters (a), (b) and (c) under the words "*The following documents are attached:*" were each circled in manuscript. The documents referred to were, however, not attached.

[7] Ms De Vos, appearing for the applicant, pointed out this discrepancy, contending that annexure "SVM1" appeared to have been tampered with, in order to create the impression that the second respondent had given the applicant notification, as contemplated in regulation 28(4)(a) of the Immigration Regulations ("the Regulations"), prior to making application in terms of s 34(1)(d) of the Immigration Act, for a warrant for his continued detention beyond 30 days from 1 December 2011.

[8] This was significant as the applicant had asserted, in his founding affidavit, that he had not been given any notification, in terms of regulation 28(4)(a) of the Regulations, by an immigration officer indicating his or her intention to apply for the extension of his detention beyond 30 days, and nor was he afforded the right to make representations in terms of regulation 28(4)(b) of the Regulations.

[9] Regulation 28(4) provides that an officer intending to apply for the extension of the detention period in terms of s 34(1)(d) of the Immigration Act shall:

(a) within 20 days following the arrest of the detainee, serve on that detainee a notification of his or her intention on a form substantially corresponding to Form 31 contained in Annexure A;

(b) afford the detainee the opportunity to make representations in this regard within 3 days of the notification contemplated in paragraph (a) having been served on him or her; and

(c) within 25 days following the arrest of the detainee, submit with the clerk of the court an application for the extension of the period of detention on a form substantially corresponding to Form 32 contained in Annexure A.

Form 31 is the form used to notify a detainee of his or her rights in terms of regulation 28(4)(a) of the Regulations, whilst Form 32 is used as both the application for the extension of the detention period, and the warrant authorising the extension of the detention period, when signed by the magistrate.

[10] Ms Liphoto, appearing for the respondents, denied that annexure "SVM1" was tampered with in order to give the impression that the applicant had been notified, in terms of regulations 28(4)(a) and (b) of the Regulations of their intention to apply for the extension of the applicant's detention beyond 30 days from the date of his original detention. Mr Sakhamuzi Vusimusi Dhlamini, a senior immigration officer based at Lindela, and the deponent to the respondents' answering affidavit, gave *viva voce* evidence on why annexure "SVM1" was different from the warrant which had been presented to me in Court on 13 March 2012. He explained that he had inserted circles, in manuscript, around the letters (a), (b) and (c) of annexure "SVM1", while explaining to Counsel for the respondents, during the consultation with her on 13 March 2012, that those documents had been annexed to the application

for the extension of the applicant's detention in terms of s 34(1)(d) of the Immigration Act. The document on which he had inserted the circles was then unwittingly attached to the answering affidavit. He denied tampering with annexure "SVM1". I find no reason to disbelieve Mr Dhlamini, as he came across as a credible and honest witness. I, accordingly, accept his testimony that the document on which he had inserted the circles, in manuscript, was inadvertently attached to the respondents' answering affidavit as annexure "SVM1".

[11] It is clear that the second respondent had obtained a warrant, in terms of s 34(1)(d) of the Immigration Act, extending the applicant's detention by a further 90 days from the date of his original detention. It, however, remains questionable whether the second respondent had complied with regulations 28(4)(a) and (b) of the Regulations prior to making application for the extension of the applicant's detention for a further 90 days, from the date of his original detention. I asked Mr Dhlamini where the documents, which the respondents alleged to be attached to the warrant, were. He said that they were at the Magistrates' Court, Krugersdorp — the court which issued the warrant. He could not, however, explain why they were not attached to the warrant.

[12] As indicated earlier in the judgment, the applicant had pertinently raised the failure of the second respondent to serve the notice (corresponding to Form 31), in terms of regulation 28(4)(a) of the Regulations on him. This notwithstanding, the respondents had failed to attach the notice (corresponding to Form 31) to their answering affidavit, or to make any allegation that an immigration official had served such notice upon the applicant. The only allegation made, by the respondents, in relation to the notice, in terms of regulation 28(4)(a) of the Regulations, is that:

"[T]*he Applicant's detention was extended by a Magistrate at Krugersdorp, from the face of the said warrant it becomes apparent that the Applicant was notified that an extension for his detention is to be sought from the Magistrate's Court.*

*The Applicant was notified that an extension of his detention was to be sought from the Magistrate...reference is made to the notification of deportation form attached hereto as "**SVM2**""*

[13] Regulation 28(4)(a) requires that notice of the intention to extend the detention period of a detainee be served on him or her in a form substantially corresponding with Form 31. It is apparent from a perusal of the notice of detention, which is attached to the respondents' answering affidavit that it does not substantially correspond with Form 31 as contemplated in regulation 28(4)(a) of the Regulations. Most notably, Form 31 states that "*you are entitled to submit in writing whatever representations you wish to be considered by the magistrate of the court who will rule on your extended detention.*" This statement is, glaringly, absent from the notice of deportation. It cannot, therefore, be said that the notice of deportation satisfies the requirements of regulation 28(4)(a) of the Regulations.

[14] In *Bula and Others v Minister of Home Affairs and Others* 2012 (2) All SA 1 (SCA) at para *15*, the deponent to the affidavit in support of the respondents' case, alleged that he *"personally had advised the appellants ... that there was a need for him to apply for an extension of their detention"* and, thereafter, the Director General applied for the extension of the appellants' detention, which was granted by the Magistrates' Court. The High Court held that this allegation was sufficient and that there had been substantial compliance with regulation 28(4) of the Regulations. On appeal, the Supreme Court of Appeal held that regulation 28(4) of the Regulations is couched in peremptory terms and that 'substantial compliance' is insufficient. Navsa JA stated thus (at paras 83-84):

"One further aspect calls for brief attention, namely, the conclusion by the court below that there was 'substantial compliance' with the requirement in regulation 28(4)of the Regulations under the IA [Immigration Act] *that the notification of intention to apply for extension of detention be served on the detainee concerned. Once again the principle of legality is implicated.*

...

The subregulation is couched in peremptory terms. It involves the liberty of an individual and must be strictly construed. In Arse, *Malan JA in para 10, dealing with the fundamental rights to liberty, said the following:*

'The importance of this right "can never be overstated". Section 12(1)(b) of the Constitution of the Republic of South Africa, 1996 guarantees the right to freedom, including the right not to be detained without trial. This right belongs to both citizens and foreigners. The safeguards and limitations contained in section 34(1) of the Immigration Act justify its limitation of the right to freedom and the right not to be detained without trial. Enactments interfering with elementary rights should be construed restrictively.'

There is no room for the 'substantial compliance' approach of the court below."

[15] Having regard to, the assertion of the applicant that he was not given notification, in terms of regulation 28(4)(a) of the Regulations, that the second respondent intended to make application in terms of s 34(1)(d) of the Immigration Act for the extension his detention beyond 30 days and, the absence of an allegation, by the second respondent, that regulations 28(4)(a) and (b) of the Regulations were complied with, I find that regulations 28(4)(a) and (b) of the Regulations were not complied with. The applicant's detention is accordingly unlawful.

[16] A further fundamental problem which, in my view, strikes at the core of the legality of the applicant's detention, is that he was arrested and detained whilst in possession of a valid residence permit, as well as a valid quota work permit which permitted him to take up employment until 13 February 2014.

[17] The applicant entered South Africa, through Oliver Tambo International Airport on 16 January 2008, on a one month single stay visitor's permit. He immediately proceeded to King William's Town to visit a friend. The applicant was 37 years old at the time, and had by then obtained, in Nigeria, a Bachelor of Science Degree, a Diploma in Computers and a Teaching Certificate. After hearing about a possible work opportunity in King William's Town, he applied for a temporary residence permit which was issued to him, and subsequently extended twice. He was employed as a Computer Business Analyst by Mayowa Trading Enterprise ("Mayowa Trading") from 2008 to around 2010.

He was entitled, in terms of this permit (B/275/080), to work for Mayowa Trading until 31 December 2011.

[18] However, in June 2010, he became aware of a teaching opportunity and, on 6 July 2010, took up temporary employment as a level 1 educator at Vulingqondo Lower Primary School ("Vulingqondo School") in King William's Town. The term of his employment at Vulingqondo School was between 1 July 2010 and 31 December 2010. On 11 January 2011 he was told not to return to work as the services of temporary teachers were no longer required. He was reinstated for the period 14 March 2011 to 11 April 2011. The Principal of Vulingqondo School, Mr WJ Bata, writes in a letter dated 24 November 2011, which is annexed to the respondents' answering affidavit, that "*[d]ue to his invalid work permit he left the school on 11 April 2011*". The applicant, no doubt, is of the view that he was unfairly dismissed, and has referred his dispute to the Education Labour Relations Council ("ELRC"). His matter is soon to be set down for hearing in the Eastern Cape High Court (Port Elizabeth).

[19] On 24 February 2011, at Pretoria, the applicant was issued with a further quota work permit by the second respondent. A condition of the permit is *"to take up employment as a teacher of Mathematics and Technology"*. A further condition of the permit is that he must *"report at the DHA (the Department of Home Affairs) every twelve months"*. The permit expiry date is 13 February 2014. This notwithstanding, the applicant was arrested on 24 November 2011, and held in detention at Lindela pending his deportation to Nigeria. The respondents have provided the following explanation in justification of the detention and imminent deportation of the applicant:

"There is a warrant extending the Applicant's detention, therefore the Applicant's detention is lawful, The Applicant has to be deported to his country of origin because he is an illegal immigrant in that according to his work permit, one of the conditions of the work permit is that he should be working for Vulinqondo Junior Secondary School. The Applicant employment contract with the school has been terminated, he

is an illegal immigrant and has to be deported to his country of his birth in terms of the law, as his work permit is no longer valid."

[20] On closer scrutiny of the quota work permit it is clear that a condition of the permit is that the applicant take up employment as a teacher, and not that he should be working at Vulingqondo School specifically. Section 19(1) of the Immigration Act makes provision for the issuing of a quota work permit (a quota work permit is different to a general work permit, which is provided for in s 19(2) of the Immigration Act). Section 19(1) provides:

"(1) A quota work permit may be issued by the Director-General, as prescribed, to a foreigner if the foreigner falls within a specific professional category or within a specific occupational class determined by the Minister at least annually by notice in the Gazette *after consultation with the Minster of Labour and Trade and Industry, and as long as the number of work permits so issued for such category or class does not exceed the quota determined in the notice."*

[21] Although s 19 of the Immigration Act makes provision for the circumstances in which a general work permit may lapse, it does not make provision for the circumstances in which a quota work permit may lapse or be cancelled. Regulation 16(3) of the Regulations maybe of some assistance in this regard. It provides:

" Within 90 days of admission, the holder of a quota permit shall submit to the Director-General confirmation of having secured employment within the category or class contemplated in section 19(1) of the Act and, within every 12 months thereafter, confirmation of continued employment within that category or class."

[22] It would follow that if a holder of a quota work permit fails to submit confirmation, to the Director General: Home Affairs (the second respondent), of having secured employment within the specific category or class contemplated in s 19(1) of the Act, within 90 days of admission into the country, then his or her quota work permit may, for that reason, be revoked or cancelled by the Director-General. By the same token, if the holder of the quota permit fails, within every twelve months thereafter, to submit

confirmation of continued employment within that category or class, to the Director-General, his or her permit may also be revoked or cancelled.

[23] The issuance and cancellation of a quota work permit, by the second respondent, constitutes administrative action as defined in s1 of the Promotion of Administrative Justice Act 3 of 2000 (" the PAJA"). The definition of "decision" in the PAJA means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to, amongst others, the issuing, suspending, revoking or refusing to issue a licence, authority or other instrument. The issuance, revocation or cancellation of a quota work permit clearly falls within the definition of "decision" in the PAJA. The second respondent is therefore required to make these decisions in a manner that is consistent with the PAJA (*Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) at para 101; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) at paras 8 -10).

[24] The Immigration Act is silent on the procedure that should be followed by the second respondent prior to cancelling the quota work permit. Section 3(2)(b) of the PAJA will therefore apply. It provides:

"in order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4) must give a person referred to in subsection (1) –

- *(i) adequate notice of the nature and purpose of the proposed administrative action;*
- *(ii) a reasonable opportunity to make representations;*
- *(iii) a clear statement of the administrative action;*
- *(iv) adequate notice of any right of review or internal appeal, where applicable; and*
- *(v) adequate notice of the right to request reasons in terms of section 5.*

[25] I am of the view that a quota work permit, which is issued under s 19(1) of the Immigration Act, may only be cancelled or revoked after the second respondent has, at a minimum, followed the procedure provided for in s 3(2)(b)(i) and (ii) of the PAJA. If the second respondent proposes or intends to cancel a quota work permit for failure of the holder to comply with regulation 16(3) of the Regulations then he must provide notice of his intention to do so, and a reasonable opportunity to make representations on why the permit should not be cancelled. The quota work permit will, however, remain valid until revoked or cancelled by the second respondent (*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (2004) (6) SA 222 at paras 26-27).

[26] The applicant was issued with a quota work permit on 24 February 2011. He was reinstated and worked as a teacher for the period 10 March to 14 April 2011 in terms of this permit. It is not clear from the papers whether he had informed the second respondent that he had secured employment at Vulingqondo School. We do know, however, that when the applicant was arrested and detained, the respondents were aware that the applicant had been employed for the period 10 March 2011 to 14 April 2011 at Vulingqondo School.

[27] A condition of the quota work permit, which was issued to the applicant on 24 February 2011, was that he take up employment as a teacher in mathematics and technology, and that he report to the Department of Home Affairs every 12 months to confirm his continued employment as a teacher in the subjects specified. Hence, once his employment at Vulingqondo School had been terminated, he was entitled to secure employment as a teacher of mathematics and technology at another school, and to provide confirmation of his employment to the Director-General on or before 24 February 2012. The applicant was, however, arrested and detained on 24 November 2011, on the strength of a letter, of the same date, from the Principal of Vulingqondo School stating that the applicant had left his employ at the school on 11 April 2011, due to an invalid work permit, despite having been in possession of a valid quota work permit which entitled him to secure employment as a teacher

of mathematics and technology, and inform the Director-General thereof on or before 24 February 2012.

[28] The applicant's quota work permit had not been cancelled or revoked, by the second respondent, in accordance with s 3(2)(b) of the PAJA, prior to his arrest and detention, pending deportation. It thus remains valid. For these reasons also, I find that the applicant's detention, pending deportation, is unlawful.

[29] At the time of his arrest, on 24 November 2011, the applicant was also in possession of a temporary residence permit, with an expiry date of 31 December 2011. Section 10 of the Immigration Act deals with the issuing and cancelling of temporary residence permits. Section 10(9) empowers the second respondent to cancel a temporary permit. It provides:

"the Director-General may at an time in writing notify the holder of a temporary residence permit issued in terms of this section that, subject to subsection (10), the permit shall be cancelled for the reasons disclosed in the notice and that the holder is thereby ordered to leave the Republic within a period stated in that notice, and upon the expiration of that period the permit shall become null and void."

Section 10(10) provides the holder of the quota permit with the right to make representations to the Director-General before the expiration of the period stated in the notice. It provides:

"The holder of a temporary residence permit who receives a notice contemplated in subsection (9) may, before the expiration of the period stated in that notice, make representations to the Director-General which he or she shall consider before making his or her decision.

[30] The applicant was never notified by the second respondent in writing that:

(i) the second respondent was intending to cancel his temporary residence permit, for the reasons set out in such notice;

(ii) he was ordered to leave the Republic within a specified period; and

(iii) that he had a right to make representations to the second respondent before the expiration of the period specified in the notice, which the second respondent would consider before making his or her decision to cancel the permit.

[31] The applicant's temporary residence permit was never cancelled by the second respondent in terms of s 10(9) and (10) of the Immigration Act. It accordingly remained valid prior to its expiry on 31 December 2011. The applicant was, however, arrested and detained on 24 November 2011. For these reasons also, I find that the applicant's detention, pending deportation, is unlawful.

[32] In *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) at para 25, Cachalia JA emphasised that:

"...s 34(1) confers on an officer a discretion whether or not to effect an arrest or detention of an illegal foreigner. There is no obligation to do so. If the officer exercises his discretion to arrest and detain a foreigner and it then transpires that the foreigner concerned is in fact not illegally in the country, the arrest and detention would have been unlawful — as it would have been if the officer had failed to exercise his discretion properly or at all."

In *Ulde v Minister of Home Affairs and Another* 2009 (4) SA 522 (SCA), Cachalia JA stated thus (at para 7) in regard to the exercise of an immigration officer's discretion to arrest and detain a person under s 34 of the Immigration Act:

"...bearing in mind that we are dealing with the deprivation of a person's liberty (albeit of an illegal foreigner), the immigration officer must still construe the exercise of his discretion in favorem libertatis when deciding whether or not to arrest or detain a

person under s 34(1) — and be guided by certain minimum standards in making the decision. Our courts have over the years stated these standards as imposing an obligation on the repository of a discretionary power to demonstrate that he 'has applied his mind to the matter' — in the celebrated formulation of Colman J in Northwest Townships (Pty) Ltd v The Administrator, Transvaal and Another [1975 (4) SA 1 (T) at 8F-G]:

> *'A failure by the person vested with the discretion to apply his mind to the matter (includes) capriciousness, a failure on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and the application of wrong principles.'"*

[33] In the present matter, the respondents have failed to allege how the discretion of the immigration officer, who was responsible for arresting and detaining the applicant, was exercised. In the absence of any such allegations, I find that the respondents have failed to discharge the onus to prove that the discretion was exercised *in favorem libertas*. For these reasons also, I find that the applicant's detention, pending deportation, is unlawful.

[34] Accordingly, for all of these reasons, I made the following order:

> *"1. The detention of the applicant at Lindela Repatriation Centre is declared to be unlawful.*
> *2. The respondents are directed to release the Applicant forthwith.*
> *3. The first and second respondents are ordered to pay the costs of this application."*

F. KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT: MS I DE VOS

ATTORNEYS FOR THE APPLICANT: THE LEGAL RESOURCES CENTRE

COUNSEL FOR THE RESPONDENTS: MS L LIPHOTO

ATTORNEYS FOR THE RESPONDENTS: THE STATE ATTORNEY

DATE OF HEARING: 15 MARCH 2012

DATE OF JUDGMENT: 18 MAY 2012