REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41571/12

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

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DATE SIGNATURE

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION AND 40 OTHERS First Applicant

and

MINISTER OF HOME AFFAIRS: NALEDI PANDOR AND 4 OTHERS First Respondent

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J U D G M E N T

TSOKA, J:

[1] In this application, the first applicant, South African Human Rights Commission ("*SAHRC*") the second applicant, People Against Suffering, Suppression, Oppression and Poverty ("*PASSOP*") and 19 other applicants

seek a declaratory order against the first respondent, the Minister of Home Affairs ("*the Minister*"), the second respondent, the Director-General, Home Affairs ("*the Director-General*"), the third respondent, Acting Head of Linedela Repatriation Centre ("*the Acting Head*"), the fourth respondent, Bosasa (Pty) Ltd ("*Bosasa*") and the fifth respondent, Chief Magistrate for the Krugersdorp Magisterial District, ("*Chief Magistrate*") that the respondents' practices regarding detention of the 19 applicants and other detainees, are unconstitutional and in contravention of the Immigration Act 13 of 2002 ("*the Act*").

[2] The applicants further seek a systemic order requiring the first to fourth respondents to provide regular reports to SAHRC about the number and status of detainees at Lindela and to permit SAHRC regular access to Lindela.

[3] Initially, there were forty-one applicants who sought the order as stated in para [1] above. Subsequent to the signing of confirmatory affidavits by the 19 applicants, applicants 27th, Aba Maleku and 35th Herre Mulomba, have since instructed a different firm of attorneys. Twenty of the applicants have not filed confirmatory affidavits with the result that these applicants are no longer represented by SAHRC and PASSOP in these proceedings.

[4] For convenience, second applicant to forty-fourth applicant shall be referred to as individual applicants unless the context suggests that anyone of them be referred to by their numerical number. The first and second applicants shall be referred to by their acronym SAHRC and PASSOP

respectively. Whenever the context otherwise suggests the first and second applicants will be referred to as such.

[5] Although there are five respondents in this matter, only the first to fourth respondents are opposing the application. The fifth respondent was cited as an interested party in these proceedings though no order is sought against it. In the application, the first to fourth respondents shall be referred to as the respondents unless the context otherwise suggests.

[6] PASSOP is a community-based, non-profit organization and grassroots movement that works to protect and promote the rights of all refugees, asylum seekers and immigrants in South Africa. PASSOP believes in and advocates for equality and justice for people across all societies, irrespective of nationality, age, gender, race, creed, disability or sexual orientation. PASSOP has since become a leading advocate for refugees and immigrants in their demands for human rights in South Africa.

[7] The second applicant and the individual applicants bring this application in terms of section 38(c), (d) and (e) of the Constitution, acting in the interest of a group and/or class of people, in the public interest and on behalf of its members who are detained without a lawful and valid warrant in terms of the Immigration Act 13 of 2002 and its regulations.

[8] The application was first launched on 2 November 2012 on an urgent basis to release all the 39 applicants detained at Lindela, a repatriation facility

in terms of the Act operated by the fourth respondent on behalf of the first respondent. Originally, the applicants sought the immediate release of the third to thirty-ninth applicants on the basis that the said applicants were either detained at Lindela for longer than 120 days or detained beyond 30 days without a warrant being issued for their continued detention in terms of the Act. Furthermore, the individual applicants complained that they were detained in circumstances where the warrant authorizing their detention was issued without the individual applicants being given the notice mandated by Regulation 28(4) of the Act. The vast majority of the individual applicants were detained for more than 48 hours before being transferred to Lindela for the purposes of repatriation. Since the launch of the application, all the individual applicants have since been released from detention. It is on this basis, that the first to fourth respondents oppose the application as moot.

[9] The applicants, although they concede that the issue of release is moot, contend that the detention of the individual applicants remain alive and therefore not moot as their detention by the first and fourth respondents was unlawful and contrary to the provisions of the Act.

[10] It is instructive to recall what Nkabinde J said in *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) dealing with the issue of mootness where the applicants, in that matter, were seeking an interdict against their eviction and even though the interdict sought against their eviction was moot as they had already been evicted from their houses.

The Constitutional Court still proceeded to consider the lawfulness of their eviction. In para [32] the court said the following –

> "*It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot. It is also alive because if we find that the removal of the applicants was unlawful, it would be necessary to consider their claim for restitutionary relief.*"

[11] Similarly, if the court finds that the individual applicants' detention was unlawful and thus inimical to the rule of law and to the development of a society such as ours, based on dignity, equality and freedom, the consideration of the issue of unlawful detention of the individual applicants presents a live issue worthy of consideration. The interests of justice dictate that the lawfulness or otherwise of the individual applicants must still be considered.

[12] The detention of the individual applicants is governed by the Act and its Regulations. Of particular importance is section 34(1) of the Act which provides as follows –

> "*(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 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 detained

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

(b) may at any time request any officer attending him or her that his or her detention for 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 court which on good and reasonable grounds may extent 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."

[13] The reading of section 34(1) of the Act reveals that an illegal foreigner may be arrested for the purposes of detention and may only be detained at a place so designated by the Director-General, in this matter, Lindela. Such foreigner shall be informed of the intention to deport him or her and that he or she has right to appeal such deportation. Furthermore, such foreigner may request that his or her detention be confirmed by a warrant issued by court within 48 hours of his or her detention, failing such warrant such foreigner shall be entitled to an immediate release.

[14] The illegal foreigner detained for purposes of deportation shall whenever possible and practicable be informed of his or her pending deportation; his or her right to appeal such deportation and that he or she may request his or her detention be confirmed by a warrant issued by court, in a language he or she understands.

[15] Such foreigner so detained, shall not be detained for longer than 30 calendar days which on good and reasonable grounds may be extended for a period not exceeding 90 calendar days. The immigration officer shall ensure that such illegal foreigner's right to dignity, and all the human rights guaranteed in the Bill of Rights are protected.

[16] The relevant regulation that deals with deportation and detention of illegal foreigners is Regulation 28. In terms of this regulation detention under section 34(1) of the Act must be confirmed by a warrant issued by an immigration officer. The regulation reiterates the right of such illegal immigrant to be informed of the decision to deport him and that he has a right to appeal such decision. In terms of subregulation (4), the 30 calendar days referred to in section 34(1) may be extended but such extension must be conveyed to the detainee to make representations if he or she so wishes.

[17] The procedural safeguards created by section 34(1) and Regulation 28 allow a detainee to ensure that a court has all the necessary information before it when it decides whether to extend the detention. These procedural safeguards are necessary and vital in our constitutional democracy to guard

against abuse and arbitrary deprivation of liberty which the Constitutional Court in *Pheko and Others* described as being inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Furthermore, these vital safeguards are a reminder that no-one should be detained without trial; guarantee the right to leave the Republic and the fair and just administrative justice enforced through the courts in terms of section 33 of the Constitution; ensure the right to access to courts and the rights of arrested persons to challenge the lawfulness of their arrest before courts.

[18] It is against these background safeguards that the individual detainees in the present matter aver that their detention beyond 30 calendar days without a valid and lawful warrant in terms of section 34(1)(d) of the Act should be declared unlawful and unconstitutional. In the present matter, it is undisputed that most, if not all the detainees, have been detained at Lindela beyond the 30 calendar days without a valid and lawful warrant. According to the applicants, which version is undisputed, it is standard practice by the first to fourth respondents that illegal foreigners such as the present applicants are detained beyond the 30 calendar days without a valid and lawful warrant. The applicants' attorney of record in fact states that the practice is so rife that more often than not, the warrant referred to in section 34(1)(d) of the Act appears for the first time at court when the detainees challenge their unlawful detention. Quite often such warrants do not contain the necessary documentation prescribed in terms of Regulation 28.

[19] In the present matter, the first to fourth respondents only attached a single warrant in spite of the fact that there are presently 19 detainees involved. The warrant is in respect of the twelfth applicant, Issako Mohammed. It purports to have been issued by the fifth respondent on 2 May 2012 with the view to extend the detention of the said Mohammed.

[20] On closer examination the said warrant reveals the following. Although it was signed by an immigration officer on 25 May 2012, it bears two Lindela Holding Facility stamps dated "*2012-05-25* and "*2012-~~06~~05-25*". It is also purported to have been signed by the Chief Magistrate. Though this may be so, as the signature is illegible, the designation of the person who signed the warrant is left blank. The purported extension states that Mohammed was detained on 8 May 2012. Although it must be accompanied by a notification as contemplated in terms of Regulation 28(4)(a) and an affidavit by the immigration officer who detained Mohammed and the representation made by Mohammed, none of these documents are attached. The Chief Magistrate authorised the extension of the detention on 2 May 2012 which is incongruent to the date of the request being 25 May 2012, which means the Chief Magistrate extended the detention of Mohammed even before the request was made by first to fourth respondents.

[21] That the purported warrant of extension is a botched job, admits no doubt. The applicants had been unlawfully detained, contrary to section 34(1)(d) of the Act. Their right to liberty and such other rights such as the right to dignity, have been violated by the first to the fourth respondents. In the

circumstances of this matter, in spite of the fact that the individual applicants have since been released, the interests of justice and the judgment of the Constitutional Court demand that their detention by first to fourth respondents should be pronounced upon.

[22] The court does not lose sight of the fact that this being an application, it must be decided on the respondents' version. The respondents' version will only be rejected if it does not raise genuine dispute of fact but a fictitious one which can merely be rejected on the papers. In the present matter, respondents' version with regard to the warrant does not raise a real, genuine and *bona fide* dispute of fact. In any event, the Supreme Court of Appeal in *Wightman* t/a *J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para [13], said the following –

> "*A real, genuine and bona fide dispute of fact exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed … When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court will generally have difficulty in finding that the test is satisfied.*"

[23] The respondents' ambiguous denials, in my view, does not raise '*a real, genuine and bona fide dispute of fact*'. The glaringly self-created dispute of fact is far-fetched and untenable. It is accordingly rejected as such.

[24] The other hotly contested issue is the commencement of the 30 calendar day period envisaged in section 34(1)(d) of the Act. The applicants

contend that the period should commence from the date that a person is detained including the period prior to such person's arrival at Lindela. The respondents, on the other hand, contend that the 30 day period should be calculated from the time the person is issued with a deportation notice under Regulation 28(2).

[25] In terms of section 41 of the Act a police officer or immigration officer may, without a warrant, detain a person who is suspected to be an illegal foreigner in order for such person's status in the country to be verified while section 34(1) allows immigration officer to arrest an illegal foreigner and to detain such illegal foreigner at Lindela for the purposes of deportation. If the arrested and detained person in terms of section 41 of the Act verifies his status, he or she will immediately be released. If not, such person would be detained in terms of section 34 of the Act. In terms of subsection (2) of section 34, such a person, including the person arrested and detained to verify his or her status in terms of section 41 shall not be detained for more than 48 hours.

[26] In my view, the respondents, whether effecting the arrest and detention under section 41 or 34 of the Act are granted a leeway of 48 hours to detain such a person without a warrant. This being the case, and in accordance with the limitations of rights in terms of section 36 of the Constitution, which limitation is, in my view, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, the 30 calendar days should commence only after the expiry of the 48 hour period and not when

such arrested and detained person is issued with a deportation notice under Regulation 28(2).

[27] The above interpretation does justice to the language of both sections 41 and 34 of the Act. It also accords with the provisions of section 35(1)(d) of the Constitution in terms whereof a person arrested on allegations of having committed an offence must be brought to a court as soon as reasonably possible, but not later than 48 hours after arrest or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day. Courts have, over the years, preferred interpretation of legislation that favours personal liberty of individuals. See *Jaga v Dönges NO and Another* 1950 (4) SA 653 (A) at 657, 661 and 668.

[28] In the result, the applicants are entitled to the relief sought, that the calculation of the commencement of the 30 calendar days commences only after the expiry of 48 hours permitted by section 34(2), and includes the period of detention prior to the person arriving at Lindela.

[29] The applicants further contend that the procedure followed by the respondents in detaining the individual applicants at Lindela beyond the 30 calendar days is contrary to Regulation 28(4) which provides that –

> "*28(4) An immigration officer intending to apply for the extension of the detention period in terms of section 34(1)(d) of the 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 three 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.*"

[30] It is the individual applicants' contention that the procedure prescribed by the regulation was neither followed nor an opportunity afforded to them to make representations prior to the 30 day period being extended.

[31] In *Bula v Minister of Home Affairs* 2012 (4) SA 560 (SCA) at para [84], rejecting any notion of substantial compliance with the regulation, the Court said the following –

> "*[84] 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 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 …*"

[32] Similarly, in *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) at para [63] the court said the following –

> "*[63] Given that the deprivation of Mr Rashid's liberty was prima facie unlawful, it was for the respondents to justify such deprivation. In this instance one would have thought that as a bare minimum the respondents would have sought to show compliance with reg 28. It would to my mind have been a relatively simple matter to have adduced duly completed forms 28 and 35 as proof of compliance with reg 28. That the respondents failed to do. After all, it seems to me that the reg 28 safeguards exist, not just for the benefit of the illegal foreigner, but also to protect the respondents against unjustified and unwarranted claims flowing from detention or deportation, or both … It follows that Mr Rashid's detention and subsequent deportation were unlawful.*"

[33] The respondents' attempt to rely on Mr Issako Mohammed's warrant being in compliance with Regulation 28(4) is of no consequence. As pointed above, no reliance can be placed on what appears to be a fictitious extension of the detention. The individual applicants' detention contrary to Regulation 28 is, in my view, unlawful. In any event the warrant cannot, by extension, be used as an excuse by the respondents to extend the detention of the other individual applicants. Their continued detention was unlawful. See also *Sikuola v Minister of Home Affairs and Others* [2012] ZAGPJHC 98.

[34] The respondents' contention that the applicants should have reviewed the issue of the warrant instead of challenging its validity is, in my view, misplaced. The applicants seek a declaratory order that their continued detention is unlawful. They do not complain about the warrant purportedly

issued by the Chief Magistrate. In any event in *Municipal Manager: Quakeni and Others v F V General Trading CC* 4 All SA 231 (SCA) where a similar argument was raised with regard to an invalid contract instead of reviewing such contract, the court, in that matter, said the appellant had '*raised the question of the legality of the contract squarely, just as it would have done in a formal review. In these circumstances, substance must triumph over form … The appellants' failure to bring formal review proceedings under PAJA is no reason to deny them relief*'. The applicants have squarely raised the legality of respondents' practice. Their failure to bring formal review proceedings regarding the issue of the warrant is of no moment.

[35] With regard to the declaratory relief relating to detention of illegal foreigners for a period longer than the maximum 120 days, the respondents readily concede that they are not entitled to do so but contend that it is impossible to comply with the law because the Department of Home Affairs ("*the Department*") is unable to ensure that the illegal foreigners are deported within the said 120 days. The reasons advanced by the Department is that the individual foreigners concerned refuse to furnish the '*Inspectorate with their correct identities and places of origin*' and that their embassies fail and/or refuse to co-operate in identifying their citizens timeously or at all. And sometimes their embassies fail to issue the concerned illegal foreigners with emergency travel documents to facilitate the deportation. On this basis, the respondents contend and argue that it is impossible to comply with the law.

[36] The respondents' reliance on impossibility to comply with the clear provisions of the law is misplaced. On the papers there is no evidence that the individual applicants lied about their identity or country of origin. There is furthermore no evidence that the embassies concerned are un-cooperative in issuing emergency travel documents and that in the event of such embassies co-operating with the Department, the emergency travel documents cannot be issued within 120 days. The respondents' contention that impossibility to comply with the law is therefore necessary and justifiable, is untenable. The detention of illegal foreigners beyond 120 days without a warrant is unlawful and unconstitutional. The detention of the individual applicants beyond the 120 days is illegal.

[37] In argument, counsel for the respondents readily conceded that his clients' argument is not that 120 days is insufficient for his clients to comply therewith and which would necessitate the Department to approach Parliament to change the law. He, however, maintained the respondents' stance that it is the illegal foreigners and their embassies that do not co-operate with the Department. Counsel was unable to advance any cogent reasons why political pressure could not be exerted on the relevant embassies to co-operate. As things stand, it is neither necessary nor justifiable to illegally detain foreigners beyond 120 days without a warrant. The conduct is unlawful and unconstitutional and '*inimical to the rule of law and to the development of a society based on dignity, equality and freedom*.'

[38] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para [58] the court, stating that local government shall regulate its affairs within the law, stated the above stated principle thus –

> "*[58] It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law …*"

The respondents cannot therefore detain illegal foreigners beyond 120 days without a valid legal warrant.

[39] In *Arse v Minister of Home Affairs* 2012 (4) 544 (SCA) the Supreme Court of Appeal at para [9] stated the maximum period of detention permitted under section 34(1)(d) of the Act as 120 days, i.e. the initial period of 30 days, followed by the extended period or periods not exceeding 90 days.

[40] In the circumstances, the respondents' conduct of detaining illegal foreigners beyond the maximum 120 days is unlawful and unconstitutional. There can be no basis for the argument, as the respondents do, that there is a discretion to extend the maximum detention period beyond 120 days whenever it is necessary or justifiable. The contended necessity and the justification have no source in law. In any event the contended discretion is inconsistent with section 12(1)(b) of the Constitution which prohibit the respondents to detain the illegal foreigners without trial.

[41] Lastly, it is unhelpful for the respondents to submit and argue that if illegal foreigners are released on certain conditions after the expiry of 120 days, such foreigners would not comply with the conditions of their release. The submission and argument is without any legal basis. The Act does not authorise conditional release after the expiry of 120 days. On expiry of the 120 days, the illegal foreigners must be released. In *Arse* the Supreme Court of Appeal at para [11], rejecting the imposition of conditions, stated that '*…it seems to me, that the Constitution does not permit the imposition of conditions on a person … for his release*.'

[42] The applicants also seek a systemic relief ordering the respondents to cease the ongoing violations of the Act and to report to SAHRC on a regular basis, at least quarterly, the steps (a) taken to comply with the above orders; (b) to furnish SAHRC with particulars of all persons detained at Lindela in excess of 30 days; and (c) the basis for such person's continued detention and to produce any valid warrants issued; and lastly (d) allowing SAHRC access to Lindela.

[43] The respondents resist the systemic relief on the basis that the orders sought '*amount to over-regulation of the executive*' and that in any event SAHRC has the powers to monitor and assess the observance of human rights in terms of section 184(1)(c) of the Constitution.

[44] Despite numerous court orders requiring the Department to release people from Lindela, respondents' unlawful and unconstitutional conduct

persist. The urgent court roll of this division is crowded by applications emanating from Lindela. Invariably, the respondents' unlawful conduct only ceases once an urgent application for release of the person, detained contrary to the provisions of the Act, is launched. The opposition of this matter by the respondents and their submissions and argument, that it is necessary and justifiable to detain persons illegally, reveal one thing and one thing only: that it cannot be left to the respondents to comply with the provisions of the Act and to act accordingly. An order without continued monitoring and reporting will be ineffective in vindicating the rights of detainees at Lindela.

[45] On 18 February 2000, more than fourteen years ago, Boruchowitz J granted an order in terms whereof the respondents were ordered not to detain any person at Lindela for more than 30 days in terms of the Aliens Control Act 96 of 1991, the predecessor of the Act. Since then, this Court and many other courts all over the country, including the Supreme Court of Appeal, have stated that detention of illegal foreigners for more than 30 days and 120 days without a valid warrant of arrest is unlawful and unconstitutional. In spite of these judicial pronouncements, the respondents still persist in detaining illegal foreigners for more than 30 days and a maximum of 120 days without valid warrants having been issued. This is so in the face of the Constitutional Court in *Fedsure Life* having authoritatively stated that '*the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law* ….'

[46] In support of systemic relief, the applicants have attached reports by national and international organisations reporting on illegal and unconstitutional practices at Lindela where illegal foreigners are detained prior to their deportation. In 2005, the UN Working Group on Arbitrary Detentions noted that people are '*arrested, and sent to a repatriation centre and deported with no other form of process or recourse, sometimes spending months in detention awaiting removal*.' In 2007, Amnesty International reported forty-four detainees had been held between 35 days and 16 months. In 2008, the Office of the High Commission of Human Rights noted that in South Africa, a democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms, '*migrants … run the risk of being arrested (including wrongfully), detained (including for longer periods than authorised by law: in 2006 hundreds of suspected illegal immigrants detained at Lindela Repatriation Centre were unlawfully held beyond the period allowed under the Immigration Act (30 days and 120 days with a court warrant) and deported*.'

[47] In 2009, the Lawyers for Human Rights ("*LHR*"), on their own, brought 13 applications to have persons released from detention as they were being held at Lindela for more than 120 days. In 2010, the LHR litigated a further 8 matters concerning detainees held for more than 120 days at Lindela. During 2011, the UN Special Rapporteur recognised that '*the biggest challenge was the absence of monitoring and oversight in existing procedures with regard to immigration, including detention*.'

[48] Despite the judicial pronouncements and both the national and international reports condemning these practices, the respondents persist in these unlawful and unconstitutional practices. It is as a result of these unlawful and unconstitutional practices that SAHRC and PASSOP seek an order for systemic relief. In opposition the respondents can only say the order sought by SAHRC and PASSOP is '*overregulation of the Executive*'. And I understand their submission and argument to be that the granting of such relief would encroach on the principle of separation of powers. Furthermore, the respondents submit and argue that the several reports attached are hearsay and therefore unhelpful to the applicants' cause.

[49] Although the reports are hearsay, in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, should, in the interests of justice, particularly where such reports are utilized by the applicants in vindication of violation of human rights be admitted as evidence. In *Kaunda and Others v The President of the Republic of South Africa* 2005 (4) SA 235 CC the Constitutional Court had regard to similar reports. At para [123] the Court reasoned as follows:

'*...Whilst this Court cannot and should not make a finding as to the present position in Equatorial Guinea on the basis of only these reports, it cannot ignore the seriousness of the allegations that have been made. They are reports of investigations conducted by reputable international organisations and a Special Rapporteur appointed by the United Nations Human Rights Committee. The fact that such investigations were made and reports given is*

itself relevant in the circumstances of this case.' See also *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T). In any event, the reports are public documents and are indeed consistent with the unlawful and unconstitutional practices of the respondents, which practices are undisputed.

[50] In the context of the relief sought by the applicants, it is instructive to recall what the Constitutional Court said in *Minister of Home Affairs and Others v Tsebe and Others; Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA 467 CC. The Court in refusing repatriation of an accused person suspected of committing murder in Botswana, and on conviction facing a death penalty, at paras [67] and [68] said the following –

> '*We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things. One of those things is that no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killing as a punishment and we will not hand such person over to another country where to do so will expose him to the real risk of the imposition and execution of the death penalty upon him. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.*
>
> *If we as society or the State hand somebody over to another State where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone.*'

[51] In the present matter, we cannot fail the individual applicants. They deserve nothing but conduct that is lawful and has a source in law; conduct which promotes the right to human dignity that is conferred on everyone of us by the Constitution. In any event, in terms of section 172(1)(b) of the Constitution, the court has powers to declare any conduct, such as the respondents' conduct, that is inconsistent with the Constitution, invalid and its stead may make an order that is just and equitable and to '*allow the competent authority (the respondents) to correct the defect*.' This, in my view, is not usurping the executive powers. In exercising this power, the court is merely doing what it is authorised to do by the Constitution, our supreme law.

[52] Based on the aforegoing, it is declared that –

52.1 The detention of the Fourth, Fifth, Seventh, Ninth, Tenth, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Nineteenth, Twenty-Second, Twenty-Third, Twenty-Fourth, Twenty-Fifth, Twenty-Ninth, Thirtieth, Thirty-Third, and Thirty-Sixth applicants at the Lindela Repatriation Centre was unlawful.

52.2 The actions and/or practices of the first and second respondents set out in paragraphs 52.2.1 to 52.2.4 below are unlawful and unconstitutional:

52.2.1 Detaining persons for a period exceeding 30 calendar days from the date on which that person

was first arrested and detained, pending his or her removal from the country, in the absence of a valid and lawful warrant issued by a magistrate's court on good and reasonable grounds for a period not exceeding 90 calendar days in terms of section 34(1)(d) of the Immigration Act 13 of 2002 ("*the Act*").

52.2.2 Exercising their powers and functions on the basis of a miscalculation of the period referred to in section 34(1)(d) of the Act, on the mistaken basis that the 30 day period commences with the arrival of the person detained at the Lindela Repatriation Centre, instead of applying the section on the correct basis that the 30 day period commences on the date when the person is first arrested and detained under s 34(1), or when the period for detention under s 41 permitted by s 34(2) expires, and includes the period of detention prior to the person arriving at the Lindela Repatriation Centre.

52.2.3 Obtaining and enforcing a warrant for detention after the said 30 day period as contemplated in s

34(1)(d) of the Act without following a fair procedure as previously required by regulation 28 of the Regulations promulgated under the Act (GN R616 in GG 27725 of 27 June 2005), and now required by regulation 33 of the Regulations promulgated under the Act (GN R413 in GG 37679 of 22 May 2014) and in particular failing to serve on the relevant detainee a copy of the prescribed notice and affording such detainee a fair opportunity to make submissions in relation to the proposed extension of his or her detention and in failing to ensure that such representations are conveyed to the magistrate for purposes of proper consideration thereof prior to making a decision on whether or not to issue the warrant for further detention.

52.2.4 Detaining persons for a period in excess of 120 days.

52.3 The first, second and fourth respondents are directed to take all steps reasonably necessary or appropriate, without delay, to ensure that the practices referred to in paragraphs 52.2.1-52.2.4 above are terminated forthwith, and in particular to ensure that:

52.3.1 No person is detained for a period exceeding 30 calendar days from the date on which that person was first arrested and detained, pending his or her removal from the country, in the absence of a valid and lawful warrant issued by a magistrate's court on good and reasonable grounds for a period not exceeding 90 calendar days in terms of the Act.

52.3.2 Their powers and functions are exercised on the basis of the period referred to in section 34(1)(d) of the Act, on the basis that the 30 day period commences on the date when the person is first arrested and detained under s 34(1), or when the period for detention under s 41 permitted by s 34(2) expires, and includes the period of detention prior to the person arriving at the Lindela Repatriation Centre.

52.3.3 A warrant is obtained for detention after the said 30 day period as contemplated in s 34(1)(d) of the Act by following a fair procedure as required by regulation 33 of the Regulations promulgated under the Act (GN R413 in GG 37679 of 22 May 2014), and in particular to serve on the relevant detainee a copy of the prescribed notice and

affording such detainee a fair opportunity to make submissions in relation to the proposed extension of his or her detention and to ensure that such representations are conveyed to the magistrate for purposes of proper consideration thereof prior to making a decision on whether or not to issue the warrant for further detention.

52.3.4 No person is detained for a period in excess of 120 days.

52.4 The first to fourth respondents are directed to provide the first applicant, on a regular and at least quarterly basis, with a written report (including any information currently being furnished to the first applicant) setting out:

52.4.1 The steps taken to comply with this order on an ongoing basis and in particular the steps taken to ensure that no person is detained in contravention of this order.

52.4.2 Full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of

that person's initial arrest and detention, including the following:

52.4.2.1 The person's full names.

52.4.2.2 The person's country of origin.

52.4.2.3 The reason for the person's detention.

52.4.2.4 The date on which that person was arrested.

52.4.2.5 The basis on which they seek to justify that person's continued detention beyond the 30 day period and whether a warrant for extension of the detention beyond 30 days has been authorised in terms of section 34(1)(d) of the Immigration Act (with a copy of such warrants to be provided).

52.5 The first to fourth respondents are directed to provide the first applicant, on a regular and at least quarterly basis, with access to the Lindela Repatriation Centre and the detainees.

52.6 The applicants may approach this court for further relief on reasonable notice and after filing such additional papers as may be appropriate, should the need arise for further relief to be sought.

52.7 The first and second respondents are ordered to pay the costs of this application, including the costs of two counsel.

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M P TSOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR APPLICANT: Paul Kennedy SC & Michael Bishop

INSTRUCTED BY: Legal Resources Centre

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INSTRUCTED BY: The State Attorney

DATE OF HEARING: 7 August 2014

DATE OF JUDGMENT: 28 August 2014