REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: YES

25/6/19
DATE

RT SUTHERLAND

CASE NO: 18338/2019 and 18339/2019

In the matter between

NGAYI KYABU **PLAINTIFF**

and

MINISTER OF HOME AFFAIRS **DEFENDANT**

J U D G M E N T

SUTHERLAND J:[1]

[1] Before the Court are three related applications. They are the application by Samson Roaruca in case number 2019/18340, the application by Lumgethi Alpha, in case number 2019/18339 and the application by Ngoyi Kyabu in case number 2019/18338.

[2] The applications are in identical terms and all of them seek an order against the respondent, the Minister of Home Affairs, and the authorities in charge of the Lindela Detention Centre, to release the applicants from detention.

[3] The matter was initially on the roll on 28 May 2019 having been set down on 23 May on that urgent court roll. At that time, the judge presiding afforded the respondent an opportunity to file answering papers. Those answering papers were filed and the matter was re-enrolled on 11 June 2019 and it is that hearing which is taking place at this time.

[4] In short, the applicants each make out a case for a release based on their request to apply for asylum in terms of Regulation 2(2) of the Regulations in terms of the Refugees Act 130 of 1998.[2] Once such a request is made, it is incumbent upon the authorities to facilitate such an application by the issuing of a 14 day permit to facilitate, within that period, an application to be made by that person, for asylum. That these are the circumstances which prevail in each of the three cases is not

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[1] This is a revised and slightly amplified version of the ex tempore judgment delivered on 11 June 2019.
[2] See Bula v Minister of Home Affairs 2012 (4) SA 560 (SCA) at esp [72]; Ruta v Minister of Home Affairs 2019 (2) SA 329 (CC)

disputed by the respondent. The respondent concedes that the applicants are, on these grounds, entitled to be released and granted such a 14 day permit.

[5] The only real controversy which arises in the matter is whether or not a costs order should be made in favour of the applicants. This controversy gives rise to certain policy considerations about matters such these.

[6] It has been argued on behalf of the applicants that a demand had been made on 20 May 2019 in respect of each of the applicants and that in that demand the following was said (the material portions differ only in respect of the identity of the applicant):

> "Our client is currently been detained at the Lindela Deportation Centre in Krugersdorp. Per our client's instruction he arrived in South Africa on 20 April 2019 having fled his country of origin in fear of his life.
> We do not here set out the details of our client's asylum claim due to the confidential manner thereof and in accordance with Section 21(5) of the Refugees Act 130 of 1998 which preserves the confidential nature of our client's claim. Such details will be set out in the application for recognition as an asylum seeker in terms of the aforementioned Act which will be submitted at any refugee reception office if given the opportunity.
> Out client further instructs us that the arrest was effected on the 20th of April 2019 at the Beit Bridge Border Port of Entry by immigration officials with the assistance of the police.
> Our client further instructs us that detention followed at the Messina Police Station for almost three weeks before being transferred to the Lindela Deportation Centre in Johannesburg.
> Despite that our client expressed his intention to apply for asylum the immigration and the South African Police Service officials did not assist him."

[7] The letter goes on to quote Regulation 2(2) and Section 21(4) of the Refugees Act. The letter then continues:

> "As an asylum seeker our client cannot be deported and his detention for the purposes of deportation without affording him an opportunity to exhaust his rights under the Refugees Act is unlawful. Deporting our client would be a violation of the principle of non-revoulement as well as a contravention of the Refugees Act 130 of 1998 and South Africa's obligations under International Law.
> In the light of the above we are then instructed to demand as we hereby do that:
>
> (1) All deportation proceedings against our client be immediately halted.
> (2) Our client be immediately released and afforded the opportunity to apply for asylum.
>
> We kindly request that you provide us with a warrant of release by no later than the 22nd of May 2019 by end of business, stating that our client will be immediately released.
> The above request is to avoid litigation and cost by all means and should we not receive such notice as outlined above we will take further steps as may be advised to approach and appropriate Court for urgent release with cost against the Department of Home Affairs."

[8] A number of things are apparent from this letter which are important. The first is that the letter was transmitted by e-mail to the following address, *litigation@dha.gov.za*. It was marked for the attention of the "legal advisor" and the name of the individual who was sought to be released was furnished in the document.

[9] Secondly, the respondent was given 48 hours within which to respond to this letter. It must be said that the expectation that a government department could react within that period of time seems to be inappropriate. It would imply that immediately

the e-mail was received it would be taken to the desk of someone in a position of authority to deal with it. That person would have had to communicate with the Lindela Detention Centre in order to determine the facts and the circumstances, compose a bundle of documents that would facilitate consideration of those circumstances and compose a letter responding to the attorney of the applicant.

[10] Needless to say, there was no response to that letter and on 23 May, a Thursday, the three applications were set down for the following Tuesday when it was postponed for an answer to filed, and ultimately came before me on this occasion.

[11] It seems apparent to me that the time period given for response is unrealistic. Although it is not necessary to determine what a reasonable period would be in the circumstances, I would be surprised to learn that a period of less than a week, to order to deal with the letter, would be appropriate. It is true that a denial liberty is unacceptable where no lawful reason exists to deprive a person thereof, but the realities of bureaucratic administration must be given its due, within reason.

[12] When this consideration was raised in the debate with counsel, the point was made that regardless of whether or not there was an opportunity to respond to the letter before it was set down, by the following Tuesday, a full week would have then elapsed, and yet at that stage there was still no response of a substantive nature to the demand for the release.

[13] It is a notorious fact that the matters are served on the state attorney, on behalf of the relevant government department. Service was effected on the Thursday for the following Tuesday. These documents are received at the office of the state attorney and then handed to attorneys in employ of the state attorney, who *ipso facto* have, at that moment, no information whatsoever about the substance of the application and therefore have to, in one way or another, make contact with the Department of Home Affairs in order to obtain instructions, armed only with the name of the individual who is sought to be released and the fact that he is in the Lindela Deportation Centre.

[14] That the state attorney is not in a state of readiness on the Tuesday to deal with the matter on a substantive basis should be no surprise to anyone, and the request by the state attorney under such circumstances for an opportunity to file an answering affidavit, once the relevant information has been gathered, is by no means unreasonable.

[15] These logistical circumstances are pertinent to the question of whether or not there was an unreasonable delay in responding to the demand and, in consequence, if it was appropriate or inappropriate for the applicant to approach court so quickly or appropriate for the state attorney, initially, to oppose the application and, only later, concede it its merits once it had been provided with information and instructions.

[16] It has been argued on behalf of the respondent that under circumstances such as this it is not reasonably possible to respond more speedily and that in the

circumstances, despite the fact that the order for the release of the applicants is to be made, there should be no adverse cost order against the respondent.

[17] I may also point out that, at least in these matters, there is no evidence adduced on the papers that the letter which I have quoted was actually transmitted successfully to the e-mail address given. The applications take for granted that it occurred. In the answering papers filed on behalf of the respondent the matter of whether or not the letter was received at any time, whether within the two day period or otherwise, is not addressed and therefore that matter remains open. This is a point which ought to be answered specifically.

[18] In my view, a number of general considerations need to be taken into account. The first is that in determining whether or not the Department of Home Affairs has unreasonably delayed, in any sense, is to be determined by a determination of when the first request was made for asylum application status. On the papers before us, apart from general and unsubstantiated remarks that at some vague moment in the past some request was made, which is not possible to verify, the only apparent time when a clear application was made was on 20 May when the attorneys, acting on behalf of the applicants, made the demand quoted above. If it is in fact the case of any of these applicants that a demand was made at an earlier time it has not been fleshed out in these papers. In general, the allegation of such a request ought to be made perfectly clear and a date should be cited, and if not, an explanation offered why a date cannot be given. These facts would facilitate the determination as regards costs to be made on the most comprehensive basis.

[19] Secondly, in this matter, the respondent has filed various documents which were filled in by various officials from the time of the arrest until the time this matter came to court. In none of these documents is there an indication of a request for asylum, although the individual applicants referred to their desire to leave their home countries and to come here as being derived from "political" considerations. It cannot therefore be discerned from that record that any demand to be offered refugee application status occurred earlier than 20 May, although whether, in truth, it occurred cannot be determined. It may be that the officials who dealt with the applicants studiously avoided inviting them to apply for asylum, despite having declared that their motivation to leave their home country was "political". That might be thought to unethical but certainly not unlawful.

[20] The respondent, justly in my view, has complaints about being put under great pressure to respond to the attorney's demand and to be at peril of an adverse costs order when it did not respond earlier.

[21] In order to cater for a fair outcome it seems to me that as a matter of general application, and specifically in this case, costs ought not to be ordered at this stage but should be reserved. This approach should be adopted as the general approach to costs in matters in which a release from detention is sought on the grounds that a request has been made for an opportunity to apply for asylum.

[23] Accordingly, in my view the appropriate order to make in regard to costs would be that they be reserved pending the outcome of an application for asylum which naturally is to be lodged by the applicant within 14 days of the date of this

order. Once that application has been resolved the matter may be set down for a costs order if needs be. If no application for asylum is made the logical consequences would follow.

[24] I have been provided with a draft order in respect of each of the applicants and I will read out one order which will be applicable to all three of the applicants, adapted as I had indicated, in respect of each individual applicant.

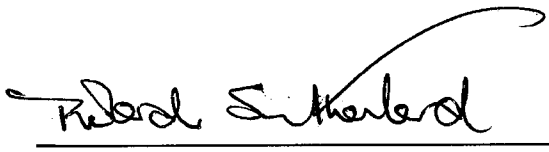
The Order

(1) Each of the three applicants must be released immediately by the respondent detention at the Lindela Detention Centre.

(2) The respondents are interdicted from deporting the applicants from the Republic unless and until their status under the Refugee Act 130 of 1998 has been lawfully and finally determined.

(3) The respondents are directed in terms of Regulation 2(2) of the Regulations under the Refugees Act 130 of 1998 to consider the applicants' applications for the appropriate permit valid for 14 days within which the applicants must approach a refugee reception office to complete the asylum applications.

(4) The costs are reserved pending the outcome of an application for asylum lodged by each of the applicants within 14 days of the date of this order.



ROLAND SUTHERLAND
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of Hearing: 11 June 2019

Date of Judgment: 11 June 2019

Revision: 25 June 2019

For the Applicant:

Adv C Z Muza

For the First Respondent:

Adv N M Mtsweni