REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **33524/2014**

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

In the matter between:

A T 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

JUDGMENT

Goedhart AJ

[1] The applicant, a Senegalese national, sought asylum in South Africa. He arrived in South Africa in July 2012 and was granted a temporary asylum seekers permit in terms of section 22 of the Refugees Act 130 of 1998 ("the Refugees Act"), which was extended on a number of occasions.

[2] On 11 December 2014, the applicant was approached by two immigration officials who were not convinced that his temporary permit was valid. His permit was confiscated. He was transferred to the Free State Police Station where he remained in custody until 19 December 2014, when he was taken to court.

[3] On 19 December 2014, he was charged with being an illegal foreigner. He applied for bail with the assistance of the Legal Aid Board. The State opposed the application for bail. It appears that the matter was postponed, presumably to 8 January 2015.[1]

[4] The applicant's application for bail was successful. However, although he was granted bail, upon his release, the applicant was immediately rearrested by the same immigration official. He was then taken from the Free State to Pretoria Central Police Station where he was detained until 20 January 2015, when he was transferred to the Lindela Detention Facility for deportation.

[5] The applicant inquired about his asylum permit, but was informed that his asylum claim had been rejected. He then requested his legal representatives

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[1] The date in the founding affidavit is 8 January 2014, which logically cannot be correct.

to commence with a Rule 53 review application which was launched on 9 February 2015.

[6] The applicant's attorney addressed a letter of demand to the Department of Home Affairs on 9 February 2015. The letter of demand sets out that the applicant has commenced an application for review, and that his continued detention was unlawful and that the applicant be furnished with a warrant of release by 10h00 on 12 February 2015.

[7] No warrant of release having been received, the applicant launched an urgent application for his release. The urgent application was served upon the State Attorney on 12 February 2015.

[8] On 17 February 2015 Mailula J granted an order directing that the applicant be forthwith released from the Lindela Detention Facility. Further, that the respondents were directed, in terms of Regulation 2(2) of the Refugees Act to re-issue the applicant with a temporary asylum seekers permit in terms of section 22 of the Refugees Act pending the finalisation the review application. Costs were reserved.

[9] In this application, the applicant seeks an order for costs against the respondents relative to the proceedings of 17 February 2015, as well as the costs of the current application.

[10] The current application seeking costs was launched on 17 January 2018. The first and second respondent delivered an answering affidavit on 20 April 2018. Mr Wittes, the Legal Administration Officer of the first and second respondents deposed to the answering affidavit. He is responsible for all

immigration matters which fall under the jurisdiction of the Chief Directorate of Legal Services.

[11] The opposition is premised upon the following:

11.1 The order of 17 February 2015 does not contain an order that the applicant's detention was unlawful;

11.2 There are logistical problems, and the respondents are given a very short time within which to investigate matters of this nature;

11.3 The investigations require the co-operation of the country of origin of the foreign national to enable the respondents to verify the identity of the foreign national. The respondents experience that the countries of origin are unco-operative or recalcitrant making the verification process difficult;

11.4 The letter of demand of 9 February 2015 came to his attention on 11 February 2015;

11.5 The urgent application was launched on Thursday, 12 February 2015 for hearing on Tuesday, 17 February 2015 leaving the respondents with very little time within which to respond;

11.6 The urgent application was "avoidable and unnecessary" and the review application had not been completed, making the urgent application premature.

[12] Whilst the respondents were at pains to point out the logistical difficulties experienced by the respondents, nowhere in the answering affidavit to this application do the first and second respondents set out on what basis it contends that its officials were justified in detaining the applicant. Given the facts set out by the applicant in his founding affidavit, an explanation for the conduct of the immigration officials ought to have been forthcoming. More particularly, why the immigration official saw fit to detain the applicant

immediately after he was released on bail after he had been detained without a warrant from 11 December 2014 to 8 January 2015. This resulted in his further detention until the order of 17 February 2015.

[13] The first and second respondent fail to deal with the flagrant disregard of the procedural requirements set out in the Refugees Act and the Regulations thereto, as well as the provisions of the Immigration Act, 13 of 2002 in the answering affidavit. The respondents also do not provide any information as to the outcome of the review application launched by the applicant. Given that the application seeking an order for the reserved costs was launched in January 2018, the respondents had ample opportunity between 17 February 2015 and 24 April 2018 to complete its investigations and to place the relevant information before the court.

[14] In *Ulde v Minister of Home Affairs and another 2009 (4) SA 522 (SCA),* Cachalia JA held [at paras 7 and 8]:

> "Bearing in mind that we are dealing here 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:
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> > '(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.'
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> The approach I have outlined is now subsumed under s 12(1)(a) of the Constitution which provides that freedom may not be deprived 'arbitrarily or without just cause'. Simply put, a person may not be deprived of his freedom for unacceptable reasons. However, once

the decision-maker has demonstrated that the discretion has been properly exercised, a court will not interfere, even if it appears that the wrong decision was made." (footnotes omitted) (own emphasis)

[15] On the facts presented, the detention of the applicant was unjustified and in breach of his right to freedom and security of person and not to be deprived of his freedom arbitrarily and without cause, as enshrined in section 12 of the Constitution. The conduct of the immigration officials as set out in the founding affidavit remains unexplained and uncontested on the papers before me. Under these circumstances, the first and second respondents' opposition to the application for costs was ill-advised. The suggestion that the urgent application was "premature" given the review application, and that the applicant's internal remedies ought to have been exhausted, is without merit on the uncontested facts.

[16] The third respondent did not oppose the relief sought by the applicant. Given the judgment in *Murray & others NNO v African Global Holdings (Pty) Ltd (306/2019) [2019] ZASCA 152 (22/11/2019),* no information in regard to the third respondent's current status was placed before me. I therefore make no order against the third respondent.

[17] In the result, I make the following order:

17.1 The first and second respondents are to pay the applicant's costs of the urgent application launched on 12 February 2015, culminating in the order of 17 February 2015, on an opposed basis, as well as the costs of this application, on the attorney and client scale, jointly and severally, the one paying the other to be absolved.

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G-M Goedhart
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF:	Adv T L Dikolomela
PLAINTIFF'S ATTORNEYS:	Melford Monwa Attorneys
COUNSEL FOR THE DEFENDANT:	Adv P Muthige
DEFENDANT'S ATTORNEYS:	State Attorney: Johannesburg
DATE OF HEARING:	25 November 2019
DATE OF JUDGMENT:	27 November. 2019