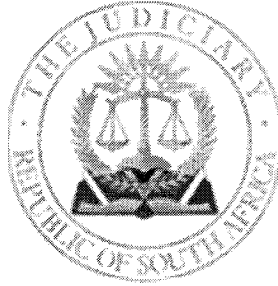


REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED.
..... SIGNATURE	12.11.2019 DATE

CASE NO: 34739/2019  
34738/2019

In the matter between:

**SYLVIAN MANIX RADIO**

**APPLICANT**

And

**THE MINISTER OF HOME AFFAIRS**

**FIRST RESPONDENT**

**THE DIRECTOR-GENERAL –**

**DEPARTMENT OF HOME AFFAIRS**

**SECOND RESPONDENT**

**LINDELA HOLDING FACILITY (BOSASA)**

**THIRD RESPONDENT**

In the matter between:

**NGANDOGASA GATACIA**

**APPLICANT**

And

**THE MINISTER OF HOME AFFAIRS**

**FIRST RESPONDENT**

**THE DIRECTOR-GENERAL –**

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**JUDGMENT**

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**WINDELL J:**

**INTRODUCTION**

[1] On 1 November 2019 this court ordered the immediate release of the two applicants from detention at the Lindela Holding Facility. These are the reasons.

[2] The circumstances of the applicants and the facts leading to their detention are similar. The applicants, Mr Gatacia and Mr Radio, are both Congolese citizens that fled the Democratic Republic of Congo ("the DRC") on different dates in fear of persecution and of their lives. Upon their arrival in South Africa they were both issued with temporary asylum seeker permits. It is common cause that their asylum seeker permits were renewed on more than one occasion. Both applicants' applications were rejected by the Refugee Status Determination Officer in terms of s24 (3)(b) of the Refugees Act 130 of 1998 ("the Refugees Act") on the basis that it was unfounded. Mr Radio appealed the decision. He was given dates on which the Refugee Appeal Board will hear his appeal matter but he never attended the hearing. The respondents contend in their answering affidavit that his "matter was not finalised due to his failure to attend appeal hearings". On the information available to the respondents his last valid permit to sojourn in South Africa expired on 21 April

2015. At the time of the hearing the respondents were unable to retrieve Mr Gatacia's file at the Department of Home Affairs as they were "offline". However, according to his last asylum seeker permit he was "booked for an appeal hearing". His last valid permit expired on 3 July 2017.

[3] During December 2018 Mr Radio was arrested by the SAPS for "possession of suspected stolen property" and "being in the country illegally". He was convicted and sentenced on 29 April 2019 to 12 month's imprisonment. Mr Gatacia was also arrested by the SAPS on a separate occasion for "malicious damage to property" and "assault with the intent to do grievous bodily harm" and was sentenced on 12 April 2019 to 12 months imprisonment. Both applicants were released on parole: Mr Gatacia on 13 August 2019 and Mr Radio on 31 July 2019. Upon their release on parole they were not released from imprisonment but handed over to Department of Home Affairs with the instruction that they must be deported.

[4] The applicants raised a point *in limine*, which in my view dispose of the matters, without the need to determine the merits. That is whether there are valid warrants of detention permitting the detention of the applicants.

## **WARRANT OF DETENTION**

[5] The respondents submit that the applicants are detained in terms of Section 34 (1) of the Immigration Act. The section reads 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 of whether such*

*foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned-*

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

*(b) may at any time request any officer attending to him or her that his or her detention for the 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 a Court which on good and reasonable grounds may extend 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."*

[6] On 29 June 2017 the Constitutional Court declared section 34(1)(b) and (d) inconsistent with s12(1) and 35(2)(d) of the Constitution as these sections do not afford a detainee the right to appear in person before a court. Both section 34(1)(b) and (d) were declared invalid, but the invalidity was suspended for 24 months from the date of the order to enable Parliament to correct the defect. In paragraph 4 of the order the court ordered that:

*“Pending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under s 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days”.*

The court also ordered that in the event of Parliament failing to pass corrective legislation within 24 months, the declaration of invalidity shall operate prospectively.

[7] There is no indication that the applicants were brought before a court in person within 48 hours after their arrest nor is there any indication that they appeared in person before the magistrate when their detention was subsequently extended. In any event, the 24 months expired on 29 June 2019. Counsel for the respondents confirmed during the hearing that the Immigration Act has not been amended during the suspension period. From the available sources at present it would appear that Sections 34(1)(b) and (d) are invalid and there are no other sections in the Immigration Act warranting the further detention of an illegal immigrant after his or her initial appearance in court.

[8] The applicants should therefore be released with immediate effect. The respondents contend that the applicants should be released into the care of the Department of Correctional Services in order for them to serve the rest of their sentence. The Department of Correctional Services is not a party before the court and there are insufficient facts before this court to justify such an order.

[9] In the result the following order is made:

1. The applications for the release of Mr Gatacia and Mr Radio from detention are granted with costs.
2. The applicants are to be released from detention with immediate effect.



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**L. WINDELL**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

APPEARANCES

Counsel for appellant:	Adv. TL Dikolomela
Instructed by:	Tony Akorie Attorneys
Counsel for respondents:	Nthabiseng Thokoane
Instructed by:	Office of the State Attorney, Johannesburg
Date matter heard:	11 October 2019, 22 October 2019 and 1 November 2019
Judgment date:	1 November 2019