IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

CASE NUMBER: 39171/2014

3/2/2016

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

2.2.2015
DATE **SIGNATURE**

In the matter between:

LAWYERS FOR HUMAN RIGHTS	Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
MINISTER OF POLICE	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
BOBASA (PTY) LTD t/a LEADING PROSPECTS TRADING	Fifth Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant, acting *inter alia* on behalf of persons detained under the Immigration Act and the Refugees Act, in essence seeks an order declaring section 34(1)(b) and (d) of the Immigration Act 13 of 2002 ("the Immigration Act") unconstitutional and invalid.

[2] Initially the first to fourth respondents opposed the relief claimed by the applicant. On 16 September 2015 the fourth respondent, however, filed a notice to abide by the decision of the court.

[3] Although the third respondent expressed its intention to oppose the relief claimed by the applicant, the third respondent failed to file an answering affidavit.

[4] In the premises, the only parties opposing the relief claimed by the applicant is the first and second respondents, who will collectively be referred to herein as "Home Affairs".

PRELIMINARY ISSUE

[5] Home Affairs brought an application to strike out certain portions of the applicant's founding affidavit. The application is opposed by the applicant. By agreement between the parties, the application was heard as part and parcel of the main application and will be dealt with *infra*.

IMMIGRATION ACT, 13 OF 2002

[6] Section 34(1) of the Immigration Act falls under the Enforcement and Monitoring provisions of the Act and reads as follows:

> *"34 Deportation and detention of illegal foreigners*
>
> *(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."

[7] The detention and deportation of illegal foreigners is further regulated by regulation 33 of the Immigration Regulations enacted on 22 May 2014. The relevant sub-regulations read as follows:

"*Arrest, detention and deportation of illegal foreigners*

33(1) if the arrest, detention and deportation of an illegal foreigner in terms of *section 34(1) of the Act is effected by means of a warrant, such warrant shall be issued by an immigration officer to such illegal foreigner, which warrant shall be in the form of Form 28 illustrated in Annexure A.*

(2) *The notification of the deportation of an illegal foreigner contemplated in section 34 (1) (a) of the Act shall be on Form 29 illustrated in Annexure A.*

(3) The confirmation of detention for purposes of deportation contemplated in section 34 (1) (b) of the Act shall be on Form 30 illustrated in Annexure A.

(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 on the detainee, serve on that detainee a notification of his or her aforesaid intention on Form 31 illustrated in Annexure A.

(b) afford the detainee the opportunity to make written 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 of Form 32 illustrated in Annexure A, together with any written representations that may have been submitted by the detainee in terms of paragraph (b).

(5) The minimum standards with regard to detention as contemplated by section 34(1)(e) of the Act are as set out in Annexure B.

(6) A court may authorise the extension contemplated in sub-regulation (4) on Form 32 illustrated in Annexure A."

[8] Section 34(1)(b) read with sub-regulation 33(3) does not afford a detainee an automatic right to have the lawfulness of his/her detention confirmed by a court nor does it provide for an appearance in court.

[9] Similarly, section 34(1)(d) read with sub-regulation 33(4) provides for the extension of the period of detention of a detainee without affording the detainee a right to appear in court to challenge the request for an extension.

CONSTITUTION CHALLENGE

[10] The applicant contends that the failure to afford detainees the automatic right to appear in a court to have the lawfulness of their detention and/or extension thereof confirmed, limits their rights contained in section 35(1)(d) and 35(2)(d) *alternatively* section 12(1) of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

Section 35

[11] Section 35 encompasses the rights of arrested, detained and accused persons. Section 35(1) (d) and 35(2) (d) reads respectively as follows:

"35. (1) Everyone who is arrested for allegedly committing an offence has the right:-

(a) .....;
(b) .....;
(c) .....;
(d) to be brought before court a court as soon as reasonably possible, but not later than-
(i) 48 hours after the arrest; or
(ii) the end of the first court day after the expiry of 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;"

and

"35. (2)(d) Everyone who is detained, including every sentenced prisoner, has the right-

(a) ....;
(b) .....;
(c) .....;.

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released; "

[12] In respect of the right to be brought before a court subsequent to one's arrest, Mr Bofilatos SC, counsel for Home Affairs, submitted that the arrest in terms of section 34(1) of the Immigration Act is for purposes of deportation and not because the arrested person has *"allegedly committed an offence"* as contemplated in section 35(1). I pause to mention, that the Immigration Act does contain a specific penal provision in section 49. Section 49(1)(a) and (b) read as follows:

"49 Offences

(1) (a) Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.

(b) Any illegal foreigner who fails to depart when so ordered by the Director- General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years."

[13] Insofar as an arrest is only for the purpose of the deportation of an arrested person and not due to a contravention of the provisions of section 49(1) of the Act, the argument advanced by Mr Bofilatos SC, appears to be convincing.

[14] However, even if Mr Bofilatos SC is correct in this regard, the right of a detained person to challenge the lawfulness of his or her detention in person before a court contained in section 35(2) (d) remains in issue.

[15] Once an illegal foreigner is arrested and thereafter detained pending his or her deportation, the provisions of section 35(2)(d) applies. The section does not exclude certain classes of detained persons and specifically states that *"Everyone who is detained,....., has the right....."*.

[16] Mr Bofilatos SC conceded that the right contained in section 35(2)(d) is applicable to illegal immigrants. He, however, contended that section 34(1)(b) does entitle an illegal immigrant to request that his or her detention be

confirmed by a warrant of Court and that section 34(1)(d) makes a warrant by Court a prerequisite to further detention.

[17] This proposition, however, has two difficulties:

i. firstly, the section does not provide for an automatic right to appear in a court; and

ii. secondly, it does not specify that such appearance should be in person.

[18] The importance of judicial oversight over an administrative detention was emphasised by the Constitutional Court in *De Lange v Smuts NO and Others* 1998 (3) SA 785 CC at paragraph [26] to [28]:

"[26] When viewed against its historical background, the first and most egregious form of deprivation of physical liberty which springs to mind when considering the construction of the expression 'detained without trial' in s 12(1) (b) is the notorious administrative detention without trial for purposes of political control. This took place during the constitutional dispensation under various statutory provisions which were effectively insulated against meaningful judicial control. Effective judicial control was excluded prior to the commencement of the detention and throughout its duration. During such detention, and facilitated by this exclusion of judicial control, the grossest violations of the life and the bodily, mental and spiritual integrity of detainees occurred. This manifestation of detention without trial was a virtual negation of the rule of law and had serious negative consequences for the credibility and status of the judiciary in this country.

[27] Even where a derogation from a s 12(1) (b) right has validly taken place [28] in consequence of a state of emergency duly declared under the provisions of the 1996 Constitution, [29] and such derogation has excluded a trial prior to detention, detailed and stringent provisions are made for the protection of the detainee and in particular for subsequent judicial control by the courts over the detention. [30] it is difficult to imagine that

any form of detention without trial which takes place for purposes of political control and is not constitutionally sanctioned under the state of emergency provisions of s 37 could properly be justified under s 36. It is, however, unnecessary to decide that issue in the present case. History nevertheless emphasises how important the right not to be detained without trial is and how important proper judicial control is in order to prevent the abuses which must almost inevitably flow from such judicially uncontrolled detention. "

[19] The judgment was concerned with section 66(3) of the Insolvency Act, 24 of 1936, which section confers upon a presiding officer at an insolvency enquiry the right to commit unco-operative witnesses to prison.

[20] Although the Court dealt with detention without a trial, the underlying principle that any detention should be subject to judicial oversight, remains the same.

[21] The court emphasised the separation of powers between the Judiciary and the Executive and held that the power to commit a person to prison falls squarely within the sphere of judicial power and can, therefore, not be exercised by non-judicial officers.

[22] The importance of the separation of powers was further discussed at paragraph [63], to wit:

"The principle articulated in Brimson and implicit in the jurisprudence of other democracies is clear: only judicial officers may, consistent with the proper separation of government powers, commit recalcitrant witnesses to prison. Judicial officers enjoy complete independence form the prosecutorial arm of the State and are therefore well-placed to curb possible abuse of prosecutorial power. However, were executive branch officials to be invested with the power to compel, upon pain of imprisonment, co-operation with their investigative demands, this necessary check on the prosecutorial power

would vanish because it would allow the executive to pass judgment on the lawfulness of its own prosecutorial decisions."

[23] The fact that a similar right to judicial oversight is contained in section 35(2)(d) was recognised in *De Lange v Smuts NO and Others, supra.* [See: *De Lange v Smuts NO and Others, supra* at para [64]].

[24] The power to detain an illegal immigrant is exercised by the Executive through an immigration officer who is a non-judicial officer. As alluded to earlier, section 34(1) (b) and (d) does not provide for judicial oversight in respect of each and every person that is detained in terms of the section nor does it provide for an appearance in court.

[25] On face value section 34(1) (b) and (d) therefore limits the rights contained in section 35(2)(d).

[26] Faced with the aforesaid difficulty, Mr Bofilatos SC argued that, even if all detentions in terms of the Immigration Act should be subject to judicial scrutiny, an illegal immigrant need not appear in person in court. He contended that the words *"in person" in* section 35(2) (d) does not envisage a physical presence in court.

[27] The importance of a detained person appearing in court in person is obvious and has been summarised by Mr Budlender, counsel for the applicant, in his heads of argument as follows:

"55.1. The magistrate is able to explain to the detainee how the process works and to inform him of his rights and status.

55.2. The detainee is given the opportunity to seek legal representation. Legal representatives, in turn, are able to access and communicate with clients.

55.3 The magistrate is able to ask questions to elicit information from the detainee and to interrogate answers to obtain a more detailed account. This ensures that all relevant information is put before the court. This is not possible with a single, final written submission.

55.4 Detainees who are illiterate are able to describe verbally why their detention should not be extended.

55.5 The magistrate will be able to detect and correct obvious oversights such as instances where –

55.5.1 individuals have valid legal documents but have been unable to retrieve them, or

55.5.2 individuals meet the legal requirements for refugee or asylum status but have been unable to obtain the correct documents due to bureaucratic issues at the Home Affairs offices, or

55.5.3 Unaccompanied children have been recorded as adults but are clearly younger than 18 years old.

55.6 The magistrate will be able to observe the physical wellbeing of the detainee and determine the need for medical treatment if any."

[28] In the premises, the contention that a detained person need not be physically in court is without merit. An appearance in open court bestows legitimacy on the detention and provides a certain measure of security and comfort to the detainee. Section 34(1) (b) and 34(1) (d), therefore, limits the section 35(2)(d) rights of a detained illegal immigrant.

[29] In view of the aforesaid finding, it is not necessary to consider the *alternative* argument based on the right not to be detained without a trial provided for in section 12(1) (b) of the Constitution.

JUSTIFICATION OF LIMITATION

[30] Once a limitation of a fundamental right has been established, the burden to justify the limitation under section 36(1) of the Constitution rests on the party asserting that the limitation is justifiable.

[31] The manner in which a limitation should be justified has been the subject of judicial scrutiny. In *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC) at para 19, the Constitutional Court held as follows:

[32] Home Affairs failed dismally in satisfying the clear requisites cited aforesaid.

[33] The deponent to the answering affidavit filed on behalf of Home Affairs, Modiri Matthews, is the Chief Director, Inspectorate at Home Affairs. Mr Matthews relied on statistical data in respect of the number of persons that were deported in the 2013/2014 financial hear without attaching the source of the information in confirmation thereof, to his affidavit. Be that as it may, Mr Matthews then enters the realm of the judiciary and submits that at least 500 more people per working day will need to appear in court. According to Mr Matthews this will overburden the already strained resources of the State and more specifically will increase the work load of the already overburdened magistrates' courts.

[34] No facts underlying this bold statement are contained in the answering affidavit. Even if one attempts to consider this ground of justification, the correct Government Department to raise this point is the Fourth Respondent. As alluded to earlier, the Fourth Respondent does not oppose the relief claimed by the applicant and has to the contrary, filed a notice to abide by the decision of this court.

[35] In the premises, Home Affairs has not provided any justification for the limitation of the fundamental right contained in section 35(2)(d).

APPROPRIATE REMEDY

[36] In view of the aforesaid finding, the applicant is, in terms of section 172(1)(a) of the Constitution, entitled to a declaration that:

i. section 34(1)(b) of the Immigration Act, 13 of 2002 is unconstitutional and invalid to the extent that it requires a detainee to request that his or her detention be confirmed by a Court rather than granting an automatic right that such detention be confirmed by appearing in person in Court; and

ii. section 34(1)(d) of the Immigration Act, 13 of 2002 is unconstitutional and invalid to the extent that it provides for an extension of the period of detention without affording the detainee the right to appear in court in person at the time the request is made.

[37] The issue then arise whether further relief should be granted to regulate the impact of the declaration of invalidity. Several remedial techniques have been considered by the Constitutional Court and in *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 CC, O'Regan J referred to the following techniques at paragraph [94]:

"The unconstitutionality can be rectified by the remedial techniques of severance and reading-in. ...."

[38] In *Shinga v The State* 2007 (4) SA 611 CC, Yacoob J considered the technique of severance and reading-in at para [56]:

"Similar considerations apply to the finding of unconstitutionality based on the fact that ss (5) (a) is objectionable. The setting-aside of whole of s 309C (5) will create a void in the petition procedure which would then become unworkable. The defect can be remedied only by adjusting the provision so as to increase the number of judges required to consider petitions for leave to appeal. The remedies of severance and reading-in can effectively be used to craft this provision so that it is consistent with the Constitution. This is

because the guidelines set out in the cases of this Court for this kind of recrafting have been met.[101]*....."*

[39] The present wording of section 34(1)(b) does provide that the detention of a detainee may be confirmed by a warrant of court. In order to tailor the section to comply with the constitutional rights of detainees, is, however, not a simple matter of severance and reading-in as envisaged in *Shinga v The State, supra*. In order to retain the clear intention of the Legislator and still comply with the requirement that the remedy provided herein must be just and equitable, the applicant proposed that the section provides as follows:

> *"(b) must be brought before a court in person within 48 hours of his or her detention, in order for the Court to determine whether to confirm the detention, failing which the foreigner shall immediately be released."*

[40] In my view, the suggestion *supra* will prevent an unduly strained application of the severance and reading-in techniques. The gist of the section is saved through a reshuffling of the words in order to ensure compliance with the Constitution.

[41] Section 34(1)(d) is somewhat different, the section can be saved by severing the words *"a warrant of Court which"* and reading-in the following words *"appearing in Court in person, which Court ".*

[42] The applicant succeeded in its application and the normal cost order should follow.

APPLICATION TO STRIKE OUT

[43] Home Affairs pray that certain paragraphs and an annexure attached to the applicant's founding affidavit be strike.

[44] The annexure "LL8" consists of a list of urgent applications brought in the Gauteng High Court, Pretoria and Johannesburg on behalf of detainees for

their immediate realise form detention. One hundred and fifteen cases brought from 2009 to 2013 appear on the list. I pause to mention that Home Affairs was the respondent in each of these matters.

[45] On 14 September 2015 Home Affairs served a rule 35(12) notice on the applicant, calling on the applicant to produce for inspection all documents in all the cases referred to in annexure "LL8".

[46] In response to the notice, the applicant addressed a letter to Home Affairs on 7 October 2015. In the letter the applicant contends that the notice is impermissible and an abuse of process. Two grounds were relied upon for the aforesaid conclusion, to wit:

i. Home Affairs had, prior to the service of the notice in terms of rule 35(12), filed an answering affidavit dealing with the relevant allegations made in reliance on annexure "LL8";

ii. all of the applications were served on the State Attorney and therefore Home Affairs is in possession thereof.

[47] In view of the stance taken by the applicant, Home Affairs lodged the application to strike the paragraphs dealing with annexure "LL8" and the annexure itself.

[48] Should a party fail to respond to a notice in terms of rule 35(12), such party may not, save with the leave of the court, rely on the documents requested in the notice.

[49] Uniform rule 6(15) provides for an application to strike out from any affidavit matter which is *"scandalous, vexatious or irrelevant"*. In *Erasmus Superior Court Practice,* Van Loggerenberg, second edition at D1-89, the aforesaid terms are defined as follows:

(a) Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.

(b) Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

(c) Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter."

[50] Home Affairs did not rely on any of the aforesaid grounds in their affidavit in support of the striking out application.

[51] In the premises, Home Affairs failed to make out a case for the relief sought in the application to strike out and consequently the application is dismissed with costs.

ORDER

The following order is made:

1. It is declared that:

   i. section 34(1)(b) of the Immigration Act, 13 of 2002 is unconstitutional and invalid to the extent that it requires a detainee to request that his or her detention be confirmed by a Court rather than granting an automatic right that such detention be confirmed by appearing in person in Court; and

   ii. section 34(1)(d) of the Immigration Act, 13 of 2002 is unconstitutional and invalid to the extent that it provides for an extension of the period of detention without affording the detainee the right to appear in court in person at the time the request is made.

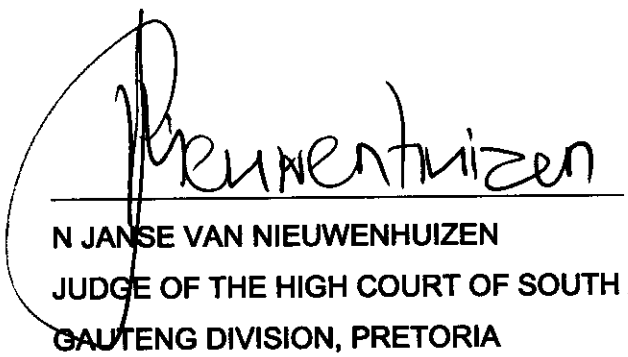
2. Section 34(1)(b) is to be read as though it provides as follows:

"(b)must be brought before a court in person within 48 hours of his or her detention, in order for the Court to determine whether to confirm the detention, failing which the foreigner shall immediately be released."

3. The words *"a warrant of Court which"* in section 34(1) (d) is severed from the section and the words *"appearing in Court in person, which Court "* are to be read into the section.

4. The first and second respondents are ordered to pay the costs of the application.

5. The application to strike out is dismissed with costs.



N JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant	:	Advocate Budlender
		Advocate Ferreira
Instructed by	:	Lawyers for Human Rights, Pretoria
Counsel for the Respondent:		Advocate Bofilatos SC
		Advocate Mboweni
Instructed by	:	State Attorney Pretoria