IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 13695/2015

DATE: 12 AUGUST 2015

In the matter between:

LLOYD MUCHATSI Applicant

And

OFFICER IN CHARGE, POLLSMOOR PRISON 1st Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES 2nd Respondent

PROVINCIAL MANAGER OF THE DEPARTMENT OF HOME AFFAIRS CAPE TOWN 3rd Respondent

DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS 4th Respondent

MINISTER OF DEPARTMENT OF HOME AFFAIRS 5th Respondent

CASE NO: 13696/2015

In the matter between

FEBBIE CHIDHAKWA Applicant

and

OFFICER IN CHARGE MILNERTON POLICE STATION 1st Respondent

MINISTER OF POLICE 2nd Respondent

DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS 3rd Respondent

MINISTER OF DEPARTMENT OF
HOME AFFAIRS 4th Respondent

CASE NO: 13711/2015

In the matter between

PATIENCE MUPANDUKI Applicant

and

OFFICER IN CHARGE MILNERTON
POLICE STATION 1st Respondent

MINISTER OF POLICE 2nd Respondent

DIRECTOR GENERAL OF THE
DEPARTMENT OF HOME AFFAIRS 3rd Respondent

MINISTER OF DEPARTMENT OF
HOME AFFAIRS 4th Respondent

J U D G M E N T

DAVIS, J:

Introduction

Migration is one of the great contemporary global problems. As the present form of economic globalisation increases, a pace, the division between the developed and the developing

world and, in particular between stable societies and those that are fractured, violent and, in many instances ungovernable, have become more distinct and have created a greater phenomenon of migration than would have been the case, two or three decades ago.

This global development has raised the key question of whether freedom of movement can be constrained to be a reasonable or, indeed even a rational response, to the problems of global inequality. In some ways this case, in which three applicants have entered South Africa, for a state of some desperation is reflective of this contemporary phenomen. It highlights the exquisite problem of balancing between freedom of movement and adequate regulation.

The three applicants launched an application as a matter of urgency. They were arrested on the grounds of being illegal foreigners in South Africa. In the case of the first and second applicants, on the 16th July 2015 and on the 2nd July 2015, in the case of third applicant.

Subsequent to their arrests, the applicants were detained pending their deportation from South Africa. In terms of these applications, they sought their release from custody. It is relevant to examine the backgrounds of all three applicants.

The first applicant was arrested as I've indicated on the 16th July 2015. Following her arrest, she was detained at the Milnerton police station pending deportation from South Africa.

She entered South African on the 1st June 2015 and was issued with a temporary visa that expired on the 16th June 2015. It is common cause that she is illegally in South Africa, because she has overstayed the duration of the visa. She had taken up employment in Sea Point, Cape Town which appears also to be an act in contravention of the temporary visa which was issued to her.

The second applicant, was arrested on the 16th July 2015. Pursuant to her arrest she was detained at the Milnerton police station pending her deportation. On 11 May 2015 she was issued with a temporary visa which expired on 29 June 2015. Again, as in the case of first applicant, she admits that she has stayed beyond the duration of her temporary visa and that she is therefore illegally in South Africa.

The third applicant, was arrested on 2nd July 2015. On the 3rd July 2015 it appears that the respondent verified that he had not applied for asylum, was not in possession of any valid visa, which had authorised either his stay or employment in South Africa. He was transported on the 3rd July 2015 to

Pollsmoor prison where he was detained pending his deportation.

He alleges that he applied for a temporary work permit on the 31st December 2010, in support of this he has attached an acknowledgment of receipt of application. However, on the papers there is no indication as to what steps he has taken subsequent to that date to determine the status of his application or to regularise his stay in South Africa.

The Relevant Legislative Framework

The Immigration Act 13/2002 ('the Act') provides for the regulation of admission of foreigners to, their residence in and departure from South Africa. Of relevance is section 34(1) of the Act which reads thus:

> "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 to a place determine by the Director General,

provided the foreigner concerned…"

It appears that the arrest and detention of the applicants, on the grounds of the illegal foreigner, was based on section 34(1) of the Act. Consequently absent a constitutional challenge to this legislation, the arrest and the detention of the applicants, pending their deportation, has to be considered to be lawful by this Court.

In the light that there was no constitutional challenge to the relevant section, the question arises as to what the applicant's case. It appears to me on the papers that two fundamental points were raised by the applicants, both of which were confirmed by Mr Kuzinya who appeared on behalf of the applicants:

1. It was contended that when issued with the requisite Form 29 (the deportation notice) the applicants did not sign this document and their relevant rights were not explained to them fully. This form reads, to the extent that is relevant;

"As you are an illegal foreigner, you are hereby notified that you are to be deported to your country of origin, namely Zimbabwe. In terms of section 34(1)(a) and (b) of

the Act, you have the right to:

(a) Appeal the decision to the Director-General in terms of Section 8(4) of the Act within 10 working days from date of receipt of this notice; or

(b) At any time request the officer attending to you to have your detention for the purpose of deportation confirmed by a warrant of the Court.

NB: Should you choose not to exercise the rights mentioned above, you shall be detained pending your deportation. You will not be allowed to return to the Republic unless you obtain the necessary lawful authority in this regard."

2. Applicants were held, so it was contended, in conditions which are manifestly contrary to the minimum required standards for holding individuals whom respondents seek to deport, given that they are in breach of section 34 of the Act.

I turn then to the first of the two contentions. The problem with the allegations, that the applicants were not properly informed of their rights to appeal and to have their detention confirmed

by a Court, is that to so find I would need to accept applicants' version that the deportation forms, which were attached to the papers, were never seen by the applicants and were never signed by the applicants. In effect the signatures which appears were fraudulently inserted by representatives of the respondents and thus the entire document constituted an act of fraud, perpetrated on the applicants and on this Court.

On these papers, without more, this finding cannot justifiably made. Firstly, in respondents' papers this averment is hotly contested. Secondly, to contend that the signatures which are attached to the papers are not those of the applicants as Mr Kuzinya has contended, would mean that I would be compelled to accept evidence from the bar. This on its own simply cannot be done. In short, on these papers, this contention stands to be rejected.

As to the second argument, each of the applicants have set out serious allegations of neglect in their conditions while in detention.

In brief, first applicant contends that she was detained in what she refers to as "despicable conditions" at the Milnerton police station where she has not been allowed to attend to her oral hygiene with potentially 'devastating effects'. She avers that

she has observed a fellow cell mate's health deteriorate to an extent that that the cell mate had to be temporarily removed from the cells by emergency medical services.

She has suffered an irritation to the skin at the back of her buttocks and her thighs. No facilities were made available to exercise and she continues to be detained in a dimly lit holding cell. She has been denied adequate nutrition and the food which has been provided does not comprise of a balanced diet. She was advised that the only way she would be released from custody was if she would provide for the costs of air travel.

Insofar as second applicant is concerned, she too complains about what she refers to as the despicable conditions at the Milnerton police station. Like first applicant she has not been able to attend to her oral hygiene. She has suffered the trauma of observing the deterioration of a cell mate's deteriorating health and has suffered irritations to the skin. She confirms that no facilities were made available for her to exercise and she has been detained in a dimly lit holding cell. Similar to the first applicant, she refers to the inadequate food that has been supplied.

Third applicant is being held in the awaiting trial section at Pollsmoor prison, amongst alleged criminals, some of who have

been accused of committing very serious crimes. He complains that his detention has been in conditions which manifestly do not meet the minimum standards required.

In the light of these averments, it is necessary to deal with the conditions in which potential deportees are held.

Conditions of Immigration Detention

In a recent judgment of Rahim v Minister of Home Affairs [2015] (JOL 33310 SCA) the Supreme Court of Appeal awarded damages to unlawfully detained foreign nationals. It found that detainees could not be detained at prisons as the Director-General of Home Affairs had not issued the requisite designation under section 34(1) of the Act.

Navsa ADP (as he then was) in coming to this finding, made detailed reference to the Report of the Special Rapporteur of the Human Rights Council of the United Nations on the Rights of Migrants of 2012. At para 33 the Special Rapporteur states:

> "The Standard Minimum Rules for the Treatment of Prisoners provide that persons imprisoned under a non-criminal process shall be kept separate from persons in prison for a criminal offence. Additionally the Working

Group on Arbitrary Detention stated in its deliberation number 5, that custody must be effected in a public establishment specifically intended for this purpose or, when for practical reasons, this is not the case, the asylum seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law. At the regional level, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas provide that asylum or refugee status seekers and persons deprived of liberty due to migration shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges." cited at para 18.

Navsa ADP went on to refer to paragraph 34 of this report which reads:

"However, information received by the Special Rapporteur indicates that migrants are detained in a wide range of places including prisons, police stations, dedicated immigration detention centres, unofficial migration detention centres, military bases, private security company compounds, disused warehouses, airports, ships etc. These detention facilities are placed under the responsibility of many different public authorities at local, regional, national level, which makes it difficult to ensure

that consistent enforcement of standards of detention. Migrants may also be moved quite quickly from one detention facility to another, which also makes monitoring difficult. Moreover, migrants are often detained in facilities which are located far from urban centres making access difficult for family, interpreters, lawyers and NGO's which in turn limits the right of the migrant to effective communication."

Referring to section 34(1) of the Act, Navsa ADP noted that this section regulates the conditions of detention. In his view, detention could only take place as prescribed by section 34(1). This meant that detention could only take place in a manner and at a place determined by the Director-General. As the learned Judge of Appeal then stated at para 20:

"The exercise of public powers constrained by the principle of legality which is the foundation of the rule of law. In s 34(1) the words that dictate the manner and place of detention are deliberate and not superfluous. Detention pending deportation can only occur according to its prescripts."

In dealing with the facts in Rahim, the Court held that the burden was on the respondent to show that the Director-

General had made a determination in terms of section 34(1). As Navsa ADP, then said:

> "No attempt was made to show that any part of the St Albans prison or any part of any police holding cells or indeed even in respect of Lindela detention centre, was determined by the Director-General in accordance with international norms to be a place at which illegal foreigners were to be detained pending deportation. The making of a determination by the Director-General under s 34(1) of the IA seems, on the face, to be a relatively simple exercise while at the same time being crucially important in upholding the rights of detained foreign persons. No attempt was made by the respondent to justify the failure to do so. And although the issue did not arise for a final determination in this case, I would add that it seems to me that such a determination must be publicly proclaimed as this is vital for certainty and effective administration according to constitutional and international standards para 24.

Subsequent to this decision, the Director-General reacted to this judgment by issuing Government Notice 534 on 22nd June 2015 (Government Gazette number 38903:22 June 2015) To the extent that it is relevant to this case it states:

"The determination of places of detention of illegal foreigners pending deportation.

I Mr Mkuseli Apeleni, Director-General: Department of Home Affairs determine in terms of section 34(1) of the Immigration Act... Lindela Holding Facility and any detention facilities and offices under the management or managed on behalf of or in partnership with the Department of Home Affairs, as places of detention of illegal foreigners pending deportation.

The minimum standards relating to detention of illegal foreigners shall be as prescribed in regulation 33(5) of the Immigration Regulations, 2014."

These standards contain the following requirements:

"1. Accommodation:

(a) The detainee shall be provided accommodation with adequate space, lighting, ventilation, sanitary installations and general health conditions and access to basic health facilities;

(b) Every detainee shall be provided with a bed,

mattress and at least one blanket;

(c) Male and female detainees shall be kept separate from each other: provided that this does not apply to spouses;

(d) Detained minors shall be kept separate from adults and accommodation appropriate to their age…

(e) Detainees of a specific age or falling in separate health categories or security risk categories shall be kept separately;

(f) There may be a deviation in the above standards if so approved by the Director-General at a particular detention centre: provided that such a deviation is for the purposes of support services or medical treatment: provided further that there shall not be any deviation in respect of sleeping accommodation

2. Nutrition:

(a) Each detainee shall be provided with an adequate balanced diet;

(b) The diet shall make provision for nutritional requirements of children, pregnant women and other categories of detainees whose physical condition requires a special diet.

(c) The medical officer may order a variation in the prescribed diet for a detainee and the intervals at which the food is served, when such variation is required for medical reasons.

(d) Food shall be well prepared and served at intervals not less than four and a half hours and not more than 14 hours between the evening meal and breakfast during a 24 hour period.

(e) Clean drinking water shall be available at all times for every detainee.

3. Hygiene:

(a) Each detainee shall keep his or her person,

clothing, bedding and room clean and tidy.

(b) The department shall provide the means to comply with item 3 (a)

I agree with Ms de la Hunt, who appeared on behalf of the *amicus*, that this particular notice is vague and that it may not pass legal muster as a proper designation in terms of section 34(1) of the Act as interpreted in the Rahim case, particularly if it seeks to allow any and all detention facilities in the country to be so designated. This would impose a duty upon the Director-General to determine whether the minimum standards of detention as set out in the Immigration Regulations 2014 have been or will be complied with when such a facility is used for detention for immigration purposes.

Any detention centre in which an immigration detainee is held must comply with the minimum standards of detention as set out in the Immigration Regulations to which I have already made reference. Only designation facilities that comply with these regulations can fall legally within a legal designation. The published regulations should have so stated this key requirement expressly.

In this case, the applicants complain about poor nutrition and

treatment, contrary to paragraph 2 of the minimum standards. If one examines the averments in papers, tea and bread and samp and beans served to applicants do not constitute the adequate balanced diet envisaged by the regulations. It appears that the general conditions of detention at the Milnerton police station are substandard. It is presumably for this reason that respondents desired that applicants not to be detained for any further period at the police station, as it was inadequate to hold detainees for this purpose.

The complaints about the putrid conditions, an inability to clean their clothes, brush teeth, use sanitary supplies and the afflictions of rashes due to unsanitary toilet facilities are deeply disturbing and confirm this apprehension.

I should add that, although this did not appear to be part of applicant's case, as Ms de la Hunt pointed out, the Milnerton police station has not being determined as a place of detention in terms of section 34(1) of the Act. For this reason, there is no question that applicants detention at the police station was unlawful. The respondents are required to detain illegal foreigners at designated detention facilities, at which facilities the minimum standards are met. Neither can the awaiting trial prison section at Pollsmoor pass legal muster, in that it is not a discrete section of the prison designated specifically for the

category of persons such as applicants.

There is no doubt that what occurred as described in these papers, imperfectly as they were drafted, is sufficient to justify a conclusion that there was illegality in the conduct which resulted in the detention of the applicants both at the Milnerton police station or and Pollsmoor.

I will return to the consequence of this finding presently. I indicated earlier that section 34(1) of the Act was not subject to a constitutional challenge. I was informed, however, by Ms de la Hunt that Lawyers for Human Rights, the amicus, had filed an application in the Gauteng High Court, seeking to declare section 34(1)(b) of the Act to be unconstitutional. To the extent that this section requires a detainee to request that his or her detention be confirmed by a court rather than containing a clear requirement that a detention must be confirmed by a court, this is a disturbing feature which may, and I do not express a firm view thereon, constitute a constitutional defect in the design of the Act.

Given the cruel history of detention without trial in South Africa and the debilitating consequences for categories for detainees who suffer this treatment, many of them who may battle to speak English (this is not necessarily the case with

Zimbabwean applicants), there should, in my view, be an automatic safeguard built into this legislation by way of direct court supervision. Given that this was not part of the present challenge, I will not say more about this issue.

Conclusion

In the light of the conclusions at which I have arrived, it had been my intention to ensure that the applicants could no longer be held in conditions which were in breach of the regulations. I was, however, sympathetic to the point raised by the third and fourth respondents that, were I simply to release these detainees and as, it is common cause that they were illegally in South Africa, it would be exceedingly difficult for the respondents to re-arrest them. Given this situation, this could not be viewed as a case similar to a bail hearing where it can be determined that an accused has a fixed address and that regular reportage to the police will occur.

However on Friday 7th August, shortly after hearing argument, I was informed by Ms Slingers, who appeared on behalf of third and fourth respondents, that the applicants were to be transported to Lindela Holding Facility. There was nothing on the papers, nor any representation from the applicants not the amicus, that if they were to be held at Lindela, this would be in

breach of any of the conditions to which I have made reference.

In the result the only basis by which I could have held in favour of the applicants has been removed. To have released the applicants, all of whom are illegally in South Africa on these papers, on any other basis may have been proved problematic given their illegal residence in South Africa.

The application therefore stands to be dismissed. Although Ms Slingers sought costs against applicants, *de bonis propriis* for the shoddy and in her view, unmotivated application, the course of action taken on behalf of the applicants does not merit such an order. There were important concerns raised by applicants which I have already articulated and which certainly would not justify such an order.

I am indebted to Ms de la Hunt who represented Lawyers for Human Rights (LHR), as amicus, to LHR: I am grateful for the extremely thoughtful and helpful submissions that were made. Without these submissions this task would have been made all the more difficult.

In the result, the application is dismissed. There is no order as to costs.

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DAVIS, J