**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

Case No.: 2394/2009

In the matter between:-

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| **FATIMA SHERENISA** | 1st Plaintiff/Respondent |
| **NELISWE SENGOANE** | 2nd Plaintiff/Respondent |
| **ISAK TENKI MARITI** | 3rd Plaintiff/Respondent |

and

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| **MINISTER VAN VEILIGHEID EN SEKURITEIT** | 1st Defendant/Applicant |
| **MINISTER VAN JUSTISIE** | 2nd Defendant/Applicant |

**HEARD ON:** 11 NOVEMBER 2010

**JUDGMENT BY:** MATLAPENG, AJ

**DELIVERED ON:** 25 NOVEMBER 2010

[1] The two defendants are seeking an order in terms of rule 47(3) of the Uniform Rules of Court compelling the second plaintiff to pay an amount of R 150 000-00 to the defendants as security for costs.

[2] On 6 September 2005 second plaintiff and others were arrested by the police and later prosecuted for allegedly committing several offences. They were denied bail and kept in custody till 4 September 2008 when the prosecution was finalised. In 2009 they sued out a summons in this court claiming damages against the

two defendants for unlawful arrest and detention.

[3] The defendants submit that the second plaintiff is a *peregrinus* and are thus entitled to demand security for costs from her. Second plaintiff on the other hand submits that she is a born a bred South African and an *incola* of this court and there exists no reason for the defendants to demand security for costs from her.

[4] The law is settled that a *peregrinus* may be called upon to give security for costs. Where there is dispute regarding a person's status, a two stage approach is taken to resolve it. The first stage is to determine whether a person is a *peregrinus* or *incola*. If it is found that such a person is a *peregrinus*, the next stage is whether the court will exercise the discretion which it has to absolve him or her from the obligation to give security. See **JOOSUB v SALAAM** 1940 TPD 177.

[5] It is for the defendants to allege and prove that the second plaintiff is a *peregrinus*. In support of their assertion, the defendants instituted an investigation against the second plaintiff to verify her status. A Mr Vorster who is an Assistant Director in the Department of Home Affairs employed in the Directorate: Counter

Corruption, investigated this matter. His investigations entailed checking the Movement Control System (MCS) of the Department which records all entries in and departures of people from the Republic of South Africa. He also checked the Population Registration System (PRS) which contains all the personal data of citizens and permanent residents of the Republic of South Africa. His finding is that the second plaintiff is not a citizen of the Republic and she is in fact an illegal immigrant.

[6] This conclusion is based on several anomalies in the records of the files in his possession chief of which are the following: The second plaintiff gives her date of birth as 12 August 1991. When he checked the PRS he found that the second plaintiff's birth was only recorded on 15 September 2005 whereas she was arrested on 6 September 2005. This is nine days after her arrest and may mean that she registered her birth whilst in custody.

[7] The identity document the second plaintiff presented was issued on 3 February 2010. It is the only one issued in her name. There is no source document on the microfilm in support of the application for identity document as well as the birth certificate.

[8] At the time of her arrests second plaintiff gave her date of birth as 6 September 1986 and 6 September 1987, her place of birth as Eblobene Swaziland and home language as Swazi. She now claims that she was born in Maokeng Kroonstad. However the information in the police docket is that she resides only at Maokeng but born at Eblobeni with Swazi being her language. The police could only have obtained this information from her.

[9] In the MCS, there is no record of the second plaintiff either leaving or coming into the Republic. Thus it cannot be determined that the second plaintiff lawfully came through the borders of the Republic.

[10] The authorities are clear that the term *incola* encompasses not only domicile but also residence but to what extent such residence is, is not clear. In the **JOOSUB**-case it is stated at 179:

> *"It appears from the authorities … that ordinarily the fact of residence in a country combined with the intention to reside there permanently will entitle the person so residing to be held to be an incola; whether anything less than this will suffice it is unnecessary for me to decide. Apart therefore, from the fact that respondent is a prohibited immigrant and from the results flowing therefrom, there is no doubt that he would be an incola."*

In the leading case of **MAGIDA v MINISTER OF POLICE** 1987 (1)

SA 1 (A) the Supreme Court of Appeal did not clarify the question. It stated at 13I that domicile is no longer the sole criterion in determining whether or not a person is an *incola* subject to the jurisdiction of the court. Residence (other that temporary residence) may suffice as a criterion. However, for the purposes of that case the court did not find it necessary to determine the precise nature of such residence.

[11] In her affidavit resisting this application she submits that she attended school until standard five at Maokeng. She was born at Maokeng, has no relatives in Swaziland does not know Eblobene and only heard from her mother that her father was a Swazi. She further submits that she was arrested at Maokeng in 2005 and after her release she was arrested and kept in custody for a further period of four months by officials of the Department of Home Affairs. She has been residing at this place since then. There is no documentary proof in support of this assertion either by way of records from school or confirmatory affidavit from the principal or even her mother.

[12] I was requested when evaluating her version to adopt a benevolent approach because time was limited within which to obtain this information. I am not satisfied that the second plaintiff

was unable to timeously obtain the information moreover taking into account that she is residing with her mother. Other than the submissions that time was limited, I have not been informed why a mother would abandon her 14 year old child to the harsh and inhospitable world of detention taking into account the allegation that second plaintiff was detained for a period of three years and further not to come to her assistance when she instituted this action.

[13] The second plaintiff claims that she was born in 1991 which means that she was only 14 years at the time of arrest. I am of the view that the police obtained the date of 1986/1987 from her. She was denied bail and kept in custody. It is highly unlikely that she would have failed to inform the court hearing the bail application that she is a minor with the attendant advantage that such status confers on detainees. Her mother, who she claim is also resident at Maokeng would have assisted and in all likelihood she would have been left in custody of her guardian (being her mother). It seems clear to me that the mother the second plaintiff is claiming to be residing with is just a mirage.

[14] There is a factual dispute in this matter relating to whether the

second plaintiff is a *peregrinus* or not. However, having regard to the test laid down in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) I am of the view that the dispute can be decided on affidavits as the allegations by the second plaintiff amount to bare denials. In my judgment the version of the second plaintiff is so highly improbable and untenable when considered against the background of the incontrovertible surrounding circumstance of this case and as such it is rejected.

[15] It is manifest that the second plaintiff has been residing in the jurisdiction of this court for a considerable period at least according to the papers before me since 2005. Her arrival in the Republic and consequently her right to reside is under cloud as there is a reasonable suspicion that she may be an illegal immigrant. In my mind, for residence to be taken into account in the determination of whether a person is a foreigner or *incola*, such residence should have been acquired in a legal manner. Although the second plaintiff may have had the necessary intention to permanently reside and be domiciled in the area of jurisdiction of this court, her suspected illegal status disqualifies her. I come to the conclusion and am satisfied that on the facts placed before me, it has been

shown that the second plaintiff is not only a *peregrinus* but probably an illegal immigrant.

[16] The next stage is for this court to exercise its judicial discretion to determine whether to compel or absolve the second plaintiff to give security. In this regard it will be guided by the circumstances of the case as well as the consideration of fairness and equity to both the *peregrinus* and the *incola*. In **MAGIDA** the court stated at 14E – F judicial discretion is exercised:

> *"…by having due regard to the particular circumstances of the case as well as considerations of equity and fairness to both the incola and the peregrinus to decide whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. Nor is there any justification for requiring the Court to exercise its discretion in favour of a peregrinus only sparingly."*

[17] Some of the consideration may include the following: residential and domicile circumstances of the *peregrinus,* the financial circumstances as a *peregrinus* may effectively due to lack of means be precluded and excluded from prosecuting his case, the character of the *peregrinus*. **VANDA v MBUQE & MBUQE; NOMOYI v MBUQE** 1993 (4) SA 93 (TK).

[18] In **SILVERCRAFT HELICOPTERS (SWITZERLAND) LTD AND ANOTHER v ZONNEKUS MANSIONS (PTY) LTD, AND TWO OTHER CASES** 2009 (5) SA 602 (C) it is stated that the court has to see that justice is not denied by unreasonable obstacles being placed in the way of person seeking redress. In my mind this tallies with the right of access to courts enshrined in our Bill of Rights in s 34 of the Constitution of the Republic of South Africa 1996. This right is available to all the people in our country. It does not matter whether a person is a citizen or a foreigner and also whether such a foreigner is documented or not. Although a demand for security is not a matter of substantive law but only a procedural step, it should not have the unintended result of limiting the right of access to court.

[19] Coming to the facts before me the second plaintiff has been resident in this court's area of jurisdiction at least since 2005. After her release from custody the officials of the Department of Home Affairs arrested her and detained her for a period of four months apparently with a view of repatriating her to her country of origin. However, she was released and she is still resident at Kroonstad. She is unemployed has no immovable property. However, that is

not surprising taking into account her age and level of education. She has a fixed address. The defendants are two government departments who, in case they are inclined to exact any cost order they may obtain against this indigent plaintiff, will easily enforce in Swaziland.

[20] Taking all these into consideration, I am of the view that to accede to the defendants' application will be to place obstacles in the second plaintiff's quest for justice.

[21] The last issue relates to costs which were reserved and held over on 4 November 2010 when the current application was lodged and on 9 November 2010 when the main trial was postponed pending the finalisation of this application. It was submitted on behalf of the two defendants that this court should also hold the issue of costs in abeyance for the trial court to determine as that court would be in a better position to decide this issue. I disagree. I hold the view that this court is also in a good position to decide on this issue. This was also the submission on behalf of the second plaintiff.

[22] In terms of rule 47(1) a party entitled and desiring to demand security for costs from another shall as soon as is practicable after

the commencement of the proceedings deliver a notice setting forth the grounds upon which such security is claimed and the amount demanded. Second plaintiff issue a summons on 15 May 2009 and the defendants entered appearance to defend on 11 June 2009. On 14 September 2009 the defendants delivered the requisite notice. They did not receive any favourable reply and they did nothing. The pleading were closed, a date of trial was applied for and obtained and the matter was set down for 9, 10 and 12 November 2010. It was only on 7 October 2010 that they requested the registrar to determine security for costs after lapse of one year since their original notice. On 4 of November 2010, when the matter was on the cusp of going to trial, the two defendants approached the court with an application in terms of rule 47(3). The reason they give for having waited so long is that they were still investigating the status of the second plaintiff. As a result, hearing on 4 of November 2010 was postponed as well as the main trial on 9 November 2010. Their explanation cannot be accepted.

[23] It must be kept in mind that the two defendants are government departments. Furthermore, sight should also not be lost of the fact that the second plaintiff was detained as an illegal immigrant for a

further four months after her release from custody in respect of the criminal trial in 2005. With all the investigative might at their disposal, the two defendants want this court to believe and accept that they could not do their investigation timeously. This court regards the excuse as flimsy and totally not acceptable. I am of the view that the two defendants should because of their conduct, be held responsible for the wasted costs.

In the circumstances I make the following order.

1. The application is dismissed with costs which costs shall include the wasted costs of 4 November 2010 and 9 November 2010.

2. The second plaintiff is absolved from delivering security for costs to the defendants.

**D.I. MATLAPENG, AJ**

On behalf of Plaintiff: Adv. M. Mphaga

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| | Instructed by:<br>State Attorney<br>BLOEMFONTEIN |
| On behalf of Defendant: | Adv. H.J. Benade<br>Instructed by:<br>Symington & De Kok<br>BLOEMFONTEIN |

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