

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 26921/2019

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

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Date

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ML TWALA

In the matter between:

**S A
(ASYLUM NO: PTANGA006040515)**

APPLICANT

AND

**THE MINISTER OF HOME AFFAIRS
RESPONDENT**

FIRST

THE DIRECTION GENERAL

**DEPARTMENT OF HOME AFFAIRS
RESPONDENT**

SECOND

BOSASA (PTY) LTD

THIRD RESPONDENT

JUDGMENT

TWALA J

[1] In this application which served before the urgent Court, the applicant seeks an order against the respondents in the following terms:

- I. Dispensing, so far as need be, with the forms and service provided for in the Uniform Rules of Court and disposing of this application at such time and place and in such manner and according to such procedure as this Court deems meet in terms of rule 6(12) of the rules of this Court;
- II. Declaring the detention of the applicant unlawful;
- III. The respondents are directed to release the applicant from detention from Lindela Holding Facility forthwith;
- IV. To the extent necessary, permitting the applicants to bring this application without exhausting any applicable internal remedies provided for in section 8 of the Immigration Act 13 of 2002;
- V. To the extent necessary, reviewing and setting aside any decision of a Magistrate' Court to extend a warrant of detention, if an issue or extended in terms of section 34(1)(d) of the Immigration Act read with Regulation 28(4) of the regulation thereto;

- VI. The respondents are directed to re-issue the applicants with asylum seekers permit in terms of section 22 of the Refugees Act 130 of 1998 pending the outcome of the Review proceeding at the Gauteng High Court (Pretoria), under case number 2019/00149;
- VII. Interdicting the respondents from deporting the applicants unless and until their status under the Refugees Act, 130 of a998, has been lawfully and finally determined;
- VIII. The respondents are directed to pay costs of this application jointly and severally one paying the other to be absolved.

[2] Although the respondents did not file any opposing papers, they nevertheless opposed the application. Further, it is noteworthy that prayers VII and VIII of the notice of motion are phrased as though there is more than one applicant whereas only one applicant has been cited.

[3] It is common cause that the applicant, a Nigerian national was issued with an Asylum Seeker Temporal Permit No: PTANGA006040515 on the 21st June 2018 which permit expired on the 20th of September 2018. In July 2018 he was arrested for fraud and was sentenced to 18 months imprisonment on the 12th of February 2019. He has now served 5 months of his sentence and released on parole but transferred to Lindela on the 11th of July 2019 on the recommendation that he be deported. It is further not in dispute that the applicant filed an application for review of the refusal of his asylum permit with the Gauteng Division of the High Court on the 7th of January 2019.

- [4] Counsel for the applicant contended that the applicant cannot be detained for the purposes of deportation to his country of origin whilst he has a review application pending before the Court regarding the refusal of his application as an asylum seeker. The detention of the applicant, so it was contended, is unlawful since he has now been detained for more than 30 days without an order of Court in terms of the Refugees Act. The authorities must justify the further detention of the applicant but have failed to do so.
- [5] Counsel for the respondents contended that the matter is not urgent since the detention was effected on the 11th of July 2019 and it is only now that the applicant is approaching this Court on urgency. The respondents were only served with the papers and given only 2 days to respond and this is prejudicial to the respondents. The applicant testified in its founding affidavit that it is the Department of Correctional Service that recommended its deportation and transferred it to Lindela for that purpose. However, the applicant has failed to join the Department of Correctional Service in these proceedings. Further, so the argument went, the applicant has failed to establish why it did not prosecute its application for review nor why it was not prepared to exhaust all the internal remedies available to it in terms of the law. The applicant has failed to take the Court into confidence and testify as when he was to be deported nor to show papers to that effect. He has failed to disclose whether he is a prohibited or unlawful immigrant as provided by the law.
- [6] It is trite law and in terms of the bill of the rights enshrined in the Constitution of the Republic of South Africa Act, 108 of 1996 that,

everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

[7] The Refugees Act, 130 of 1998 (*“The Act”*) provides as follows:

“Section 29

Restriction of detention:

29(1) No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a judge of the High Court of the provincial division in whose area of jurisdiction the person is detained, designated by the Judge President of that division for that purpose and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days.”

[8] There is a plethora of authority that the liberty and freedom of person is paramount to the extent that his detention even for a minute is unlawful if such detention is not justified in law. I am of the respectful view therefore that if the detention of the applicant is against the law, as in this case it is against s29 of the Act, the matter then becomes urgent and requires the urgent attention of the Court.

[9] I find myself in agreement with counsel for the applicant that the respondents have failed to establish that the further detention of the applicant is justified after he has been detained for a period exceeding 30 days as

required by the Act. It is my considered view therefore that the detention of the applicant is unjustified and unlawful and he should therefore be released.

[10] Having made the above finding, I am of the view that it is not competent of this Court to direct the Home Affairs Department on what it needs to do in this matter and therefore do not find it necessary to accede to the other prayers in the notice of motion.

[11] In the circumstances, I make the following order:

1. Prayers 1, 2 , 3 and 8 of the notice of motion are granted.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 30th August 2019

Date of Judgment: 4th September 2019

For the Applicant: Adv L. Dikokomele

**Instructed by: Tony Okorie Attorneys
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For the Respondents: Adv. J Malema

**Instructed by: State Attorney
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