IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, PORT ELIZABETH

Case No.: 3414/2010
Date Heard: 9 February 2012
Date Delivered: 16-02-2012

In the matter between:

**JANNATU ALAM** Plaintiff

and

**THE MINISTER OF HOME AFFAIRS** Defendant

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**JUDGMENT**

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**PICKERING J:**

On 15 November 2010 plaintiff, an adult male, instituted an action against defendant for damages suffered by him in consequence of his alleged wrongful and unlawful arrest and detention by employees of the defendant. The action is defended by the defendant who has demanded security for costs in terms of Rule 47 from the plaintiff in the sum of R250 000 on the grounds that plaintiff is a *peregrinus* who owns no unmortgaged or indeed any immovable property in South Africa. Plaintiff declined to furnish such security and, accordingly, defendant has launched an application for an order directing plaintiff to furnish it.

This matter was heard together with three other similar matters, namely *Babul v The Minister of Home Affairs, case no. 2704/10; Mohammed v The Minister of Home Affairs, case no. 2781/10; and Nasir v The Minister of Home Affairs, case no. 3412/10.* Although the facts in each of these cases differed to some extent the similarity between them is such that counsel were agreed that my decision in this matter would be decisive of the three other applications as well.

It is common cause that plaintiff was born in Bangladesh. He arrived in South Africa via OR Tambo International Airport on 1 October 2008. After his arrival he lodged an

application for refugee status in terms of section 21 of the Refugees Act No 130 of 1998 ("the Act") and was issued with a temporary asylum seeker permit. According to plaintiff this permit was extended from time to time, the final such extension being up to 21 February 2010. He was interviewed by a Refugee Reception Officer on 5 November 2008 and, on the same date, the Refugee Status Determination Officer rejected his application for refugee status. Plaintiff noted an appeal to the Refugee Appeal Board against this decision. That appeal was dismissed on 20 January 2010.

Noteworthy from the decision of the Refugees Appeal Board is that because plaintiff, for some reason undisclosed in these papers, failed to appear at the hearing of the appeal the Board was unable to "*establish whether the criteria for section 3(a) or (b) are met*". In the circumstances the Board found itself unable to resolve the "*factual and credibility issues*" before it and accordingly dismissed the appeal. I should mention that section 3 of the Act deals with the circumstances under which a person would qualify for refugee status.

Also of relevance from the Board's reasons is its statement that *"an application for re-hearing in terms of Rule 20(2)(i) must be supported by an affidavit in which the appellant's claim for refugee status as well as the reasons for the appellant's non-appearance must be clearly set out."*

According to plaintiff he only received notification of the dismissal of his appeal on 19 February 2010, on which date he was arrested without a warrant by employees of the defendant and detained until 18 March 2010 when he was released by order of this Court. So too were the other plaintiffs referred to above arrested but subsequently released by Court order. Although the order granted in the present plaintiff's case does not make it clear that such release was pending the final determination of an application to be brought by plaintiff for the review of the decision to reject his application for asylum it is common cause that such is the case. In the case of the plaintiff Babul, referred to above, his application for review was successful and, on 8 December 2010, Dambuza J granted an order to the effect that the Refugee Appeal Board re-open and re-hear his appeal.

It is these arrests and detentions which have given rise to the various actions of the plaintiffs.

In this regard the defendant admits in the present case that plaintiff was arrested without a warrant of arrest by an immigration officer but pleads that this occurred on 18 February 2010 and that the officer was acting in terms of section 41(1) of the Immigration Act 13 of 2002. Defendant pleads further that the said immigration officer:

> *"3.2.1 requested the Plaintiff to identify himself as either a citizen, permanent resident or foreigner;*
> *3.2.2 was not satisfied that the Plaintiff was entitled to be in South Africa;*
> *3.2.3 interviewed the Plaintiff about his status;*
> *3.2.4 took the Plaintiff into custody without a warrant of arrest;*
> *3.2.5 took reasonable steps to assist the Plaintiff in verifying his status; and*
> *3.2.6 detained the Plaintiff in terms of section 34 of the Immigration Act until 9 March 2010 when he was released."*

In a replication thereto plaintiff denied that the provisions of either section 41(1) or section 34 of the Immigration Act were complied with.

In his affidavit opposing the order sought plaintiff states with regard to the rejection of his application for asylum that he is "*in the process of bringing an application for the judicial review of the decisions taken by the Refugee Status Determination Officer and by the Refugee Appeal Board to reject my application for asylum. In order to further facilitate the drawing of my review application, my attorneys of record have requested access to the file pertaining to my application for asylum in terms of the Promotion of Access to Information Act, 2000, but same has not yet been granted and my asylum application is still pending for determination. I respectfully submit that I am thus presently lawfully residing within the Republic. In the premises I am not a peregrinus."*

In reply thereto Mr Menze, the Senior Legal Administration Officer of the Department of Home Affairs, reiterates that plaintiff is indeed a *peregrinus*. He proceeds to state as follows:

> *"Although the Plaintiff resides in the Republic lawfully (by virtue of his application for asylum being considered), he is not an incola. This is apparent if regard is had to the provisions of the Refugees Act, 1998 (Act No. 130 of 1998) and the Immigration Act. On the Plaintiff's own version, his application for asylum having been rejected and the appeal against the rejection of his application having been dismissed, he is an illegal foreigner with no right of residence in the Republic."*

Significantly, no mention whatsoever is made by Mr Menze of the application for judicial review, which, according to plaintiff, is still pending for determination. The plaintiff's averments in this regard must therefore be accepted.

Mr Bloem, who with Ms Msizi appears for the defendant, has submitted that, having regard to the fact that plaintiff's application for asylum has been rejected, plaintiff cannot claim to be an *incola* of South Africa, despite the fact that a court application for a review of such decision is pending. This is so, he submits, because the Refugees Act makes no provision for an asylum seeker to be recognised as a resident of South Africa before such asylum seeker is granted refugee status. He submits that the Refugees Act "*envisages that for a refugee to obtain residence in South Africa such application would have to be made in terms of the Immigration Act No. 13 of 2002*".

In my view, in the present matter the focus should more properly fall upon *"domicile"* as opposed to *"residence"*.

In *Protea Assurance Co. Ltd v Januszkiewicz* 1989 (4) SA 292 (W) Goldstone J stated as follows at 294F- :

> "*I have not been referred to a single case, and I have found none, where*

*it was held that a non-resident plaintiff who is domiciled within the jurisdiction of the Court can be required to provide security for costs. On the other hand there are cases such as Joosub Salaam [1940 TPD 117] where the Court has had regard to domicile as the relevant test. In my opinion, the proper approach is therefore that domicile or residence of some permanent or settled nature is sufficient to constitute a person an incola for the purpose of being obliged to furnish security for costs."* (My emphasis)

The common law of domicile has now been modified by the Domicile Act No. 3 of 1992 but, insofar as the common law has not been amended, the Act obviously remains a secondary source. See *Boberg*: Law of Persons and the Family 2nd edition p. 90-91. In my view, in the light of such modification, the learned Judge in Sukovs v Van der Walt [1998] 3 All SA 664 (O) erred, with respect, in deciding the issue of domicile on the basis of an intention to reside in South Africa permanently, without reference to the provisions of the Domicile Act.

Section 1 of the Domicile Act provides:

*"(1) Domicile of choice*

*Every person who is of or over the age of 18 years …. shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status..*

*(2) A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period."*

It is accordingly necessary to determine firstly, whether plaintiff is "lawfully present" in South Africa.

In Arse v Minister of Home Affairs 2010 (7) BCLR 640 (SCA) the following was stated at 654A-B:

*'After an asylum seeker permit has been issued to him or her the asylum*

*seeker cannot be regarded as an "illegal foreigner" as contemplated by the Immigration Act.'*

(See too Kiliko and Others v Minister of Home Affairs and Others 2007 (4) BCLR 416 (C); 2006 (4) SA 114 (C) para 27.)

It is clear therefore, in my view, that, whilst plaintiff's application for refugee status was being considered by the relevant authorities, plaintiff was "lawfully present" in South Africa. Indeed, Mr Menze concedes as much in the passage from his affidavit which I have set out above. It follows, in my view, that whilst plaintiff's court application for a review of the decision refusing his refugee status is pending plaintiff remains "lawfully present" in the country.

The provisions of section 21(4)(a) of the Act are also relevant in this regard. They provide:

"(4) *Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-*

*(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4;*"

It was in the light of these provisions, so Mr. Bloem informed me, that the orders releasing the various plaintiffs had been granted.

The fact that plaintiff's presence is precarious because of the possibility of his application to court eventually being dismissed is, in my view, not relevant to the present enquiry as to his domicile save that, as was stated by Cloete J (as he then was) in Toumbis v Antoniou 1999 (1) SA 636 at 641C-J it is "a factor from which his intention to remain permanently may be deduced".

In this regard Cloete J stated further as follows at 641F-G :

> *"Once the Court is satisfied as to the intention of the de cuius, probabilities as to the permanence or otherwise of his continued presence cease to be relevant. The concept of 'residence' must not be confused with the physical element necessary for the acquisition of a domicile of choice. Whatever criteria must be satisfied for the de cuius to be considered 'resident' in South Africa (see Kallos and Sons (Pty) Ltd v Mavromati 1946 WLD 312; Tick v Broude and Another 1973 (1) SA 462 (T) at 469G), it is trite that the physical requirement for the acquisition of a domicile of choice is simply presence in the country concerned."*

Although, as was stressed by Mr. Bloem, the facts in the Toumbis case, *supra*, were markedly different from those in the present matter the principles set out therein are nevertheless, in my view, applicable.

I would refer further to Van Rensburg v Ballinger 1950(4) SA 427 (T), the head note of which reads as follows at 427C-E:

> *"A prohibited immigrant is not by virtue of the mere prohibition debarred from acquiring a domicile in this country.*
>
> *The power of a higher authority to terminate a person's residence in a particular area cannot affect the question whether that person intended to make his permanent abode there. If the power of termination is actually exercised then naturally with the disappearance of physical residence the domicile thus acquired is brought to an end. Until such termination the only effect of the possibility of that power of deportation being exercised by a higher authority is that the person may be taken to realise the precarious character of his residence and consequently may not be held to have formed the intention of making his permanent home in such area."*

In my view therefore, pending the final determination of the plaintiff's court application for review, his presence in this country is lawful (albeit precarious and

permissive).

The next issue to determine is whether or not plaintiff has the intention to settle in South Africa "for an indefinite period" (the *animus manendi*).

This intention is clearly less than the intention to settle in South Africa permanently. The following exposition of "*intention to settle* permanently" in Eilon v Eilon 1965 (1) SA 703 (AD) at 721A is, in my view, incompatible with an intention to settle at a place "*indefinitely*".

> *"(T)he onus of proving a domicile of choice is discharged once physical presence is proved and it is further proved that the de cujus had at the relevant time a fixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country of choice. A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, intention to settle permanently is likewise excluded."*

See too *Boberg*: Law of Persons and the Family at 102-3.

In my view, in the circumstances of the case, it is clearly plaintiff's intention, if permitted, to settle in South Africa for an indefinite period. He has been living in South Africa since October 2008, a period of three years and four months. He is making every effort to remain here; he has applied for refugee status; he has launched or is about to launch court proceedings in order to review and set aside the refusal to grant him such status. In this regard it cannot be said that his application for review has no reasonable prospects of success. It will be remembered that his appeal to the Refugees Appeal Board was not dismissed on the merits but by reason of his non-appearance at the hearing of the appeal. The Board itself, in its reasons, envisaged an application being made for a rehearing. In the case of the plaintiff *Babul* the review application was successful. There is further nothing to refute plaintiff's assertion that he has the intention to settle here indefinitely if permitted.

I should mention that the reference in *Davel and Jordaan*: Law of Persons, 4th ed at p.46 to refugees not acquiring domicile in the place in which they found refuge but instead retaining their last domicile must be read in its proper context. The learned authors are referring to refugees in this context as belonging to a category of persons without a fixed address such as "*hoboes, persons fleeing before the law and those who have abandoned their previous domicile and who have not yet acquired another domicile of choice."* This does not apply in the present case.

I am satisfied therefore that plaintiff is domiciled in South Africa and that he is not a *peregrinus*. The application therefore falls to be dismissed on this basis.

In the event that I were to be wrong in coming to this conclusion I am, however, nevertheless still of the view that the application should be dismissed. As was stated in Magida v The Minister of Police 1987 (1) SA 1 (AD) at 14D-E and 15D-E, where a *peregrinus* alleges that he is unable to furnish security for costs owing to his own impecuniousity, it must be left to the judicial discretion of the Court to decide, having regard to the particular circumstances of the case as well as to considerations of equity and fairness to both the *incola* and the *peregrinus*, whether the latter should be compelled to furnish, or be absolved from furnishing, security for costs. It was stated further therein there is no justification for requiring a Court to exercise its discretion in favour of a *peregrinus* only sparingly. See too: Vanda v Mbuqe v Mbuqe 1993 (4) SA 93 (Tk).

Sight should also not be lost in the determination of this issue of the provisions of s 34 of the Constitution concerning the right of access to the Court. The provisions of Rule 47 must be construed, as far as is possible, consistently therewith.

It seems to me, in the exercise of my discretion, that the nature of plaintiff's action against defendant is of particular relevance. He seeks compensation in respect of defendant's alleged breaches of his right to liberty and the security of his person. He alleges that the employees of the defendant who arrested and detained him did not comply with the relevant provisions of the Immigration Act and that therefore his arrest and detention were unlawful. He was, he says, at the time of his arrest, in

possession of a temporary asylum seekers permit which had not yet expired. He was unaware that his appeal had been dismissed. The very nature of his action against the defendant therefore concerns the lawfulness of his presence in South Africa at the time of his arrest.

It must also be borne in mind that, as an asylum seeker, he is in a particularly vulnerable position. In Union of Refugee Women v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC) at 406G-407E Kondile AJ stated:

> *"[28] Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.*
>
> *[29] The condition of being a refugee has thus been described as implying 'a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse'. This is reflected in South Africa legislation governing the status of refugees …*
>
> *[30] In South Africa, the reception afforded to refugees has particular significance in the light of our history. It is worth mentioning that Hathaway lists apartheid as one of the 'causes of flight' which have resulted in the large numbers of refugees in Africa. During the liberation struggle many of those who now find themselves among our country's leaders were refugees themselves, forced to seek protection from neighbouring States and abroad."*

Mr Bloem stressed the financial prejudice which would be occasioned to the State should the impecunious plaintiff not be ordered to pay the requisite security for costs. This is, of course, a weighty consideration. Such an order, however, would have the effect of precluding plaintiff from proceeding with his action against defendant, an organ of State. In the circumstances, in my view, public interest considerations dictate that he not be denied access to the court.

In my view, therefore, weighing up all the circumstances, it would be fair and just to absolve plaintiff from furnishing security to defendant.

On either basis therefore there is, in my view, no merit in the application. The following order will therefore issue:

The application for security for costs is dismissed with costs, such costs to include the costs of two counsel.

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**J D PICKERING**

**JUDGE OF THE HIGH COURT**

Appearing on behalf of Plaintiff: Adv. Beyleveld S.C and Adv. Moorhouse
Instructed by: McWilliams & Elliott Inc, T. Radloff

Appearing on behalf of Defendant: Adv. Bloem S.C. and Adv. Msizi
Instructed by State Attorneys Offices