IN THE HIGH COURT OF SOUTH AFRICA

WITWATERSRAND LOCAL DIVISION

CASE NO: 5353/2008

ULDE, MANJAR ALI SHAIL YUSUF Applicant

AND

THE MINISTER OF HOME AFFAIRS First Respondent

AND

THE PERSON IN CHARGE, LINDELA DETENTION CENTRE

Second Respondent

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
21/2/08 DATE

JUDGMENT

PER SUTHERLAND AJ:

1. By way of an urgent application, the applicant sought orders that his detention in the Lindela detention centre was unlawful and that the respondents should forthwith release him from their custody.

2. The decision whether or not the detention is lawful relates to the proper application of sections *8, 34 and 41 of the Immigration Act 13 of 2002. (The Act)*.

3. The pertinent portions of these sections are reproduced as follows:

"Section 8 Review and appeal procedures

(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and-

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision-

(a) in a case contemplated in subsection (1) (a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(b) in a case contemplated in subsection (1) (b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.

(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.

(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.

(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.

(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.

Section 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.

(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.

(3).....

(4).....

(5) Any person other than a citizen or a permanent resident who having been-

(a) removed from the Republic or while being subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or

(b) refused admission, whether before or after the commencement of this Act, has entered the Republic,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and, pending his or her removal, be detained in the manner and at the place determined by the Director-General.

(6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

(7) On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant.

(8).....

Section 41 Identification

(1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

(2) .....

The Facts explaining the detention

4. It is common cause that the applicant was detained at the instance of Matone Peter Madia, an Immigration Officer in the Department of Home affairs. The applicant was visiting a friend at Lindela on Wednesday 6 February when confronted by Madia. He was asked for his papers. He did not have papers to offer. He was immediately detained. The urgent application was launched on 7 February. The matter was briefly before court on Friday 8 February whereupon the respondents were given an opportunity to file an answer by Sunday 10 February at 10h00, and the applicant given an opportunity to file a reply by 8H00 on Monday 11 February. These further affidavits were all filed.

5. Although urgency was not conceded, the resistance was token. There simply cannot be a tcogent argument to suggest that a denial of freedom does not *per se* render the application urgent.

6. The application was founded on two grounds to support the averment that the detention was unlawful. First, that the question of his status as an illegal immigrant was the subject matter of criminal proceedings in the Kempton Park Magistrate's Court and that those proceedings debarred the respondents from dealing with his disputed status in another form, and secondly, that the detention that was effected on 6 February was invalid for want of proper compliance (the words in the founding affidavit are ' ..not put into operation..') with the provisions of section 8 of the Act.

7. An effort was made to amplify the grounds in reply and certain arguments were advanced that were not foreshadowed by the founding papers. These forays will be addressed as far as is necessary.

8. A succinct founding affidavit relates four episodes.

   8.1. The first is the arrest of the applicant on 15 January 2008 at OR Tambo International Airport. He and his family were, he alleges, returning from a holiday in India, his country of origin. He was accused of fraudulently acquiring documents allowing his presence in South Africa. His family were dispatched to India and he was taken to the Magistrates' court on charges, he says, of fraud. The exact nature of the charges has not been made known in these papers. The alleged evidence against the applicant is detailed in an affidavit by Vorster, used in resisting a bail application. The allegations are wide ranging about various contraventions of the immigration laws and other laws.

   8.2. Secondly, the applicant was successful in an opposed bail application. He was released on Monday 4 February on R10,000 bail. In the affidavit the applicant deposed to for the bail hearing, annexed to these papers, the applicant relates several details of his residence in South Africa. The gravamen of that account addresses the

likelihood of him standing trial and understandably does not address the issues critical to the present proceedings.

8.3. The third episode was his arrest by Madia at Lindela. The reason he could not proffer any documents was that, it is common cause, the documents he did once have, whatever their validity, were removed from him at the airport, and were in the possession of one, Moodley, an Immigration officer who was driving the prosecution.

8.4. The fourth episode concerns the vain efforts of the applicant's attorney Mr Zehir Omar to persuade Moodley to agree to release the applicant.

9. In the answer, none of these facts are disputed. The deponent was Madia. He states that he effected the detention and acted in terms of Section 41 of the Act. He confirms that the applicant explained that Moodley was in possession of his documents. Madia made contact with Moodley. Madia was then informed of the events described above and details of the case of alleged extensive frauds and contraventions of the Immigration laws. Whether or not these allegations are substantiated or even capable of substantiation is not material to these proceedings and for that reason I do not address them. However, after a further questioning of the applicant, Madia states that he was dissatisfied with the answers and acting in terms of section 34 of the Act decided to detain the applicant. A standard form Notice B1-1756 was given to the applicant. The Form is designed to fulfil the peremptory requirements of section 8(1) of the Act. It contains two parts, one of which is applicable to the applicant as a person alleged to be an illegal immigrant. The relevant portion states:

" B: in respect of a person found to be an illegal immigrant:

To: Manjarali Ysuf Ulde

In terns of Section 8 of the act, you are hereby notified that you may within three days from date of this notice, request the Minister to review the decision to deport you.

(sgnd: M P Madia)	*(S/I/O 3319)*
Immigration officer	*Appointment No*
(Lindela)	*(06/02/2008)*
Place	*Date*

ACKNOWLEDGEMENT OF RECEIPT

I acknowledge receipt of the original of this notice and understand the content thereof:

I intend/ do not intend to request a review of thisc decision.

My written request is attached /will be submitted within three days.

(Sgnd- Illegible)	*06/02/2008*
SIGNATURE OF AFFECTED PERSON	*DATE*

[The document bears the date stamps of Lindela, 6 – 02 – 2008]

10. In the applicant's reply, no rebuttal of the allegations occurs. Save for drawing attention to the fact that Madia's affidavit can be read to mean that the applicant was detained prior to being given the section 8 Notice (ie B1-1756 cited above), the balance of the reply

ventilates arguments which will be addressed elsewhere in this judgment. Portion of the reply reads as follows:

" 10.2 My arrest and detention allegedly in terms of section 41 of the Act is unlawful.

10.3 The procedure for detaining persons set out in terms of section 41 relates to those instances where the persons identity or right to stay in the country is in dispute.

10.4 According to the deponent [ie Madia] he received confirmation from two other immigration officials about my identity. See.....On receiving such confirmation the respondents ought to have released me. They could no longer detain me in terms of section 41. Evident from [Madia's affidavit] is that I was provided with a section 8 (1) notice after I had already been arrested.

10.5 The respondents have also incorrectly applied section 8..... A host of decisions emanating from this honourable court justify my assertion that, in terms of section 8, I ought not to be detained.

10.6 The notice served upon me fails to elaborate on my rights including the fact that I ought not to be detained while I make my decision in terms of section 8(1) to appeal or review the decision to deport. The notice fails to inform me of my rights to remain silent, not to make any incriminating statements or my right to an attorney. The notice is lacking in these material respects.

10.7 Further, I am not able to properly deal with this affidavit while in detention. I have the right to deliberate in private and freedom with access to my friends, family and advisors as to whether to pursue an appeal or review. Such a decision cannot be taken in the gloom of incarceration.

10.8 In fact, I did not even understand the legal implications of the Rule 8 Notice served on me. The Notice was only brought to my attention of my legal Advisers on 10 February 2008, when I received the respondents answering affidavit. I did not understand the importance of the document. Noteworthy is that the document fails to advise me on what steps to take to pursue the review. I did note my decision review the decision to deport me."

The Arguments

11. I address the arguments in turn.

The PAJA argument: Internal remedies not exhausted

12. The respondents advanced the argument that this application to court was premature because it was incumbent on the applicant to exhaust his remedies under section 8 of the act before invoking the court's aid. The submission is founded on these provisions of *section 7(2) of the promotion of Administrative Justice Act 3 of 2000 (PAJA):*

> *(a) "Subject to Paragraph(c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted "*
>
> *(b) ....*
>
> *(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interests of justice."*

This was countered by the applicant, on whose behalf it was argued that Section 35 of the Constitution prevailed in the case of an allegedly unlawful detention by the State. Presumably reference was intended to *section 35(1) (f) of the Constitution* which provides:

"Everyone who is arrested for allegedly committing an offence has the right.....to be released from detention if the interests of justice permit, subject to reasonable conditions.. "

It should be noted that section 35 of the Constitution applies only to accused persons, and cannot be fairly read to apply to administrative action generally.

13. The applicant also relied on what Mabuse AJ held in the unreported case of *Abid Ali & Others v The Minister of Home Affairs; TPD, Case no 36405/2006.* From the judgment it is to be inferred that a similar contention that remedies under the Act had yet to be exhausted was advanced. At p16 Mabuse AJ referred to *Section 7(2) of PAJA*(*supra*) and remarked:

" The provisions of this subsection are peremptory. Unless exceptional circumstances exist as required by sub section 7(2) (c) they should not easily be deviated from. However compliance with the said court order could not prevent the applicants from applying to this court for their release if they believed in good faith that their detention was unlawful."

The reference to the 'said court order' is an earlier order made by Seriti J directing the detained applicants to file representations in terms of section 8 of the Act. The judgment does not say anymore on this aspect.

14. On behalf of the respondent it was argued that in *Houd v Minister of Home Affairs CPD Case No 1433/2006 (Unreported)* Dlodlo J and in *Koyabe the Minister of Home Affairs TPD Case No 4754/2007* Fabricius AJ held contrary to Mabuse AJ in the *Abid Ali Case.* This is incorrect. Both *Houd* and *Koyabe* addressed the question of a review application prior to the exhaustion of the section 8 process in respect of the immigration status of the

aggrieved persons. The point at issue was not the lawfulness of the detention *per se.* These decisions are clearly distinguishable.

15. In my view there is indeed a constitutional guarantee that the lawfulness of a deprivation by the state of the personal liberty of any person may be brought before a court without any intermediary procedure being compulsory. The source of that guarantee is to be found in *section 12(1) (a) of the Constitution* which provides that :

> *" Everyone has the right to freedom and security of person, which includes the right- ....not to be deprived of freedom arbitrarily or without just cause,"*

read with;

Section 34 of the Consitution, which provides:

> *" Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum."*

16. More to the point, the *Immigration Act* contains no *alternative procedure* to deal with a challenge to the lawfulness of a *decision to detain,* pending any further decision on status. Section 34 and section 41 of the Act authorises arrest and detention at the instance of an official of the respondents. It will remain a question for a court in any given case to decide whether or not the act of detention is lawful. If the officials rely on section 34 or 41 to detain and are bona fide in invoking those powers then it behoves them to demonstrate that as a fact. If they fail to prove that fact, a court may set aside the detention. If they succeed to prove that fact, the detention will be lawful.

17. In any event, the primacy of the exhaustion of internal remedies is just that, a preferable remedy. The court is expressly vested with a discretion to excuse non-compliance in the

interests of justice. It seems to me that the topic of personal liberty is likely to properly justify the excusing of non-compliance with an internal remedy. It would rare that it did not. The approach taken on the application of Section 7(2) (a) and (c) hitherto has been pragmatic.(*Earthlife Africa (Cape Town) v Director-General, Department of Environmental affairs and Tourism 2005 (3) SA 156 (C) at paragraphs [41] and [44]; Western Cape Minister of Education v Governing Body, Mikro Primary School 2005 (3) SA 504(c) , 20006 (1) SA 1 (SCA).)*

18. Accordingly, the point raised by the respondent is misdirected.

The argument about the incompetence of two parallel processes

19. The contention of the applicant is that the respondents cannot lawfully prosecute him in a criminal court on contraventions of the immigration laws and also declare him an illegal immigrant.

20. The argument took as its premise that the respondents are the authors of both the criminal charges, pursuant to section 49 of the Act and the process which was the subject of these proceedings in which section 8 of the Act is central to the controversy. Section 49 of the Act provides for several offences. *Section 49(1) (a)* provides that : '*Anyone who enters or remains in ,or departs from the Republic in contravention of the Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months."*

21. The submission is made in the replying affidavit that the law does not allow immigration officers to ignore pending criminal proceedings. Upon this foundation, the conclusion

sought is that if the magistrate saw fit to grant the applicant bail so that he may roam at liberty, the immigration officers could not act in any contradictory way.

22. The resposte to this line of thinking was that the immigration laws are not capable of being construed to deliver such an outcome. I agree; there is no merit in the applicant's argument.

23. The notion of an illegal immigrant being able to prevent his deportation because he was awaiting trial is bizarre. The option to try such a person is that of the State not of the Accused. Unsurprisingly, no authority was cited for the applicant's proposition, nor was the argument supported by anything more than vigorous assertion. Moreover, supposing that a contravention of section 49(1) is the only offence under the Act with which the applicant is charged, the maximum sanction of a fine or imprisonment for three months, illustrates the benign stance taken to its contravention. From Vorster's affidavit, in the bail hearing, attached to the papers, it is plain that multiple frauds is the gravamen of the prosecution case. In any event section 34(6) of the Act authorises deportation before expiry of a sentence.

24. In the replying affidavit, it is argued that to insist on a person making representations in terms of section 8 of the Act whilst at the same time he is being arraigned on a charge in terms of being an illegal immigrant in terms of section 49 of the Act is to deprive a person charged with a crime of the right to silence. This is incorrect. There is, in any event, in our law, no absolute right to silence in relation to state intervention. Section 35(10)(a) of the Constitution guarantees that an accused person may remain silent in relation to the criminal proceedings, but no further. By contrast, *sections 65(2A) and 66 (3) of the Insolvency Act No 24 of 1956,* for example, compels answers in an interrogation, although it limits admissibility of the disclosures to perjury charges. Section 41 of the Act requires

a person to divulge his status as a foreigner. No claim of a right to silence can be invoked to avoid the stare official 'taking such person into custody'.

25. Therefore to insist on compliance with section 8 failing which deportation may follow, is not a violation of an accused person's rights to fair trial.

26. Thus, the arguments about the incompetence of a process under sections 8, or 34 or 41 of the Act taking place simultaneously with a criminal proceeding on a charge in terms of section 49 must fail.

The Section 8 arguments

27. The applicant contended that the prescriptions of section 8 were not met and that such a result was fatal to the lawful detention of the applicant.

28. First it was argued that the text of the notice, admittedly given, failed to meet the requirements of section 8. When pressed to point to the lacuna in the notice, the argument flagged and wandered off into a suggestion that a reading of 'the judges rules' should have been administered including an explanation of *'how'* to exercise the section 8 rights. Plainly, an explanation that reaches those lengths is not prescribed by section 8. The inspiration for these submissions seems to be the idea that a person arrested under section 34 or 41 of the Act must be dealt with in a manner identical to that of an accused person. There are no provisions of the Act that support that conclusion. Self-evidently, the values and norms embodied in the procedures applicable to a person to be tried for an alleged commission of a crime differ materially from the values and norms in appropriate administrative procedures to address the determination of the status of persons suspected of being illegal foreigners. To try to meld the two processes is unhelpful. The Act is

framed to be consistent with the norms of fair administrative action, as guaranteed by *section 33 of the Constitution* and of the provisions of PAJA.

29. It was then asserted that it was incompetent to first detain a suspected illegal immigrant and, at a moment in time thereafter, present a section 8 Notice to the suspected illegal immigrant. In my view, this could not conceivably be the law. Section 8 does not address an arrest. Section 34 does. It is the decision that a person is an illegal immigrant and in turn the decision to deport that triggers section 8. The notion that a section 8 Notice must be given before an arrest to be valid is not warranted.

30. The main thrust of the applicant's case was however squarely based on an approach that it was unlawful to detain a person to whom a section 8 notice had been given, until after the expiry of the prescribed days for the appeal to the minister. The argument included the notion that it was unlawful that the alleged illegal immigrant was obliged to prosecute his appeal, as prescribed, in the 'gloom of incarceration'. This phrase and, indeed the entire inspiration for the case advanced, was derived from the unreported judgment of Bertelsmann J in *Muhamed Khan v Minister of Home Affairs: TPD; Case No 14343/2006, on 2 August 2006,(the Khan Case).* A copy of this judgment was handed up prior to the commencement of argument and it was cited copiously in support of the outcome that the applicant should be released forthwith.

31. The finding by Bertelsmann J at p19 that:

> *"The foreigner is entitled as a matter of law not to be detained immediately after having been informed of the decision to deport him, but to exercise his rights either to appeal to the minister or to apply to the director-general to review or appeal the decision to deport him either in terms of section 8(1) and 8(2) or section 8(4) without*

and before being incarcerated." was the linchpin of the applicant's case, as evidenced in the founding and replying papers and with vigour in argument.

32. The court was exhorted, repeatedly, to apply the *Khan* case approach. The thesis advanced in *Khan* relied, on similar stances adopted in two earlier decisions referred to by BertelsmannJ; *Arisukwu v Minister of Home Affairs 2003 (6) SA 599 (T)* on the equivalent section in repealed *Aliens Act No 96 of 1991,* and *Mohamed v Minister of home Affairs (TPD, Case No 41182/2005(Unreported)* both of which reasoned that there was a right not to held in custody pending deliberations about status.

33. What was wholly absent from the submissions of Mr Omar was any reference to the decision of the full bench in *Jeebhai v Minister of Home affairs and Another 2007 (4) SA 294 (T).* In that decision, the court dealt with the three decisions mentioned, and citing the passage in *Khan* which has been emphasised above, addressed that approach at paragraph [21] as follows:

> *" To the extent that the judgments are to the effect that, after a determination is made in terms of section 8 that a person is an illegal foreigner or a decision is made in terms of section 34 to deport the person, that person is not liable to be detained pending the outcome of appeal or review (to the director-general or the minister as the case may be), we disagree. With thousands of illegal foreigners entering the country every day it would mean there would be literally thousands of people without proper documentation roaming freely all over the country; no country would allow that."*

34. It is thus plain that the approach favoured in *Khan* and the other decisions referred to by it, is not the appropriate basis upon which to apply section 8. A court following the approach advanced by Mr Omar would be acting contrary to a full bench decision binding on it.

35. It follows that there is no merit is the case advanced by Mr Omar to the effect that section 8 has not been properly applied or that the decision to detain the applicant is tainted with unlawfulness.

Mr Omar's conduct

36. Mr Omar's failure to refer to *Jeebhai* and his enthusiastic reliance on *Khan* was criticised by me at the time. I digress from the merits of the matter to address his conduct and what is to be expected from counsel who appear before the courts.

37. In my view it is the obligation of counsel to never mislead a court. Care must be taken that this does not occur through ignorance or negligence. It is self evident that to deliberately mislead a court is a very serious breach of that obligation. A Judge is entitled to take counsel at their word. When an argument is advanced and authority is cited, there is a tacit representation by counsel that no contradictory authority is known to him. Where such a representation is made and there exists a reported superior court's decision in point disapproving the authority cited in support of a proposition, counsel commits an act of negligence if he is ignorant thereof. Where counsel has actual knowledge of the superior court's decision, and remains silent and relies on the disapproved dictum, in my view counsel misleads the court.

38. In this particular instance, Mr Omar appeared in *Jeebhai*. Indeed, a full reading of that case shows that he has good cause to remember *Jeebhai* more than well.

39. When challenged on this breach of counsel's duty, Mr Omar offered facile excuses. First, he suggested that *Jeebhai* was the subject of a petition for leave to appeal and thus, so he thought, such proceedings 'suspended' the judgment! This perspective, in his view,

justified him not mentioning the case. The excuse has only to stated to be pilloried. When this excuse met with disbelief, he sought offer a second explanation; ie that Ngoepe JP in *Jeebhai,* had created 'an exception' to the application of section 8. This too is without foundation. Despite an attempt, no articulate submission could be advanced to support it. He then sought to apologise.

40. In my view an apology does not address the graven of the conduct. It is true that this particular instance of the suppression of important authority in point and the reliance on an authority that had been expressly disapproved did not occur in an *Ex Parte* Proceeding; if it had happened under those circumstances, the misconduct would have been simply aggravated. The suppression did take place in the Motion Court devoted to urgent matters, a court which functions under pressure and on little or token notice to other parties and to the presiding judge. It is a court that, for those reasons, is ever reliant on the integrity of counsel for assistance. It will be rare that a judge is familiar with every branch or topic of law. Counsel really is required to research the law and present an honest account of the law. Counsel is at liberty to try to persuade a court to prefer one decision over another, or to distinguish cases, or to offer novel interpretations, but can never deliberately suppress a reference to an authority that disfavours his case, and even more obviously, counsel can never rely on a dictum in a decision which, to his certain knowledge, has itself been compromised by a superior court's disapproval.

41. *In Jasat v Natal Law Society 2000 (3) SA 44 (SCA) at paragraph [12]* in was held that " *this court has stressed in the past that the profession of attorney is an honourable one and as such demands ' complete honesty, reliability and integrity from its members....'* In *General Council of the Bar v Matthys 2002 (5) SA 1 (ECD) at paragraph [37]* having found that counsel had deliberately mislead a court about his having accepted clashing

briefs in different courts, it was held that such conduct was without question deserving of severe censure.

42. The circumstances of Mr Omar's conduct warranted, in my view, that the matter be referred to the Law Society of the Northern Provinces for an investigation into the propriety of Mr Omar's conduct and a direction that the Law Society report to the Deputy Judge-President on its decision about such conduct by an attorney.

Conclusions

43. In my view the application was meritless and launched recklessly in as much as it relied on false premises for the relief sought. The respondent was furthermore required to prepare an answer over the weekend to meet the urgency of an alleged unlawful detention in haste and at considerable inconvenience. I have already expressed a view on the impropriety of Mr Omar's conduct.

The Order

44. It was for these reasons that I made the order on 11 February 2008 as follows:

(1) The application is dismissed.

(2) The applicant is to pay the costs on the attorney and client scale.

(3) The transcript of these proceedings are to made available as soon as possible and is to accompany a referral to the Law Society of the Northern Provinces of the complaints articulated by me about Mr Omar's failure to draw my attention to the *Jeebhai* Case and his efforts to advance a case on the basis of the *Khan* case.

(4) The Law Society is directed to report the outcome of such enquiry to the Deputy Judge –President of the Witwatersrand Local Division.

Roland Sutherland

ROLAND SUTHERLAND

Acting Judge of the High Court

19 February 2008.

For the applicant:	**Attorney Zehir Omar**
For the Respondents:	**Adv N Bofilates**
Instructed by:	**The State Attorney, Johannesburg**