REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE : NO
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED: NO

DATE 15/08/14 SIGNATURE

CASE NO:2014/27993

In the matter between:

OMARI IDO ABDI Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS Second Respondent

BOSASA (PTY) LTD T/A LEADING PROSPECTS TRADING Third Respondent

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CASE NO:2014/27995

In the matter between:

ORAFU HENRY	Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
BOSASA (PTY) LTD T/A LEADING PROSPECTS TRADING	Third Respondent

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JUDGMENT

MAYAT J

[1] The above two applications were two of ten applications against the above three respondents, which were set down in the urgent court on Tuesday the 5th of August, 2014. All ten applicants sought to secure their release from detention at the Lindela Holding Facility in Krugersdorp ("Lindela") as a matter of urgency.

[2] Both applications (as well as virtually all the remaining applications referred to above) were instituted on the Thursday the 31st of August 2014 and served on the office of the State Attorney at an unspecified time on the same day, ostensibly on behalf of the first and second respondents, the Minister of Home Affairs and the Director General of the Department of Home Affairs, respectively. The third respondent in all the applications is a company, which manages Lindela as a holding facility for illegal aliens. Unless the context indicates otherwise, a reference in this judgment to "the respondents" shall mean the first and second respondents.

[3] By agreement between the parties on the 5th of August 2014, three applications (including the present two applications) were stood down for hearing on Friday, the 8th of August 2014 to enable the respondents to file answering affidavits and for the applicants to reply, if they considered it necessary. From the remaining seven applications, a few applications were removed from the urgent roll at the instance of the attorney(s) for the applicants concerned, and the applicants in the rest of the applications were released on the basis of orders granted by me, pursuant to agreements between the parties.

[4] Against this background, the present two applications by Ido Abdi Omari ("Omari") under case number 2014/27993 and Henry Orafu ("Orafu") under case number 2014/27995 constitute two of the three matters stood down for hearing on Friday the 8th of August 2014. Messrs Mzamo ("Mzamo") and Buthelezi ("Buthelezi") from Mzamo Attorneys represented the applicants in all three matters, which were stood down. To the extent that it is relevant in this context, after receiving one answering affidavit from the respondents relating to all three matters, which were stood down, Mazamo removed the application by a certain Hussein Omari ("Hussein") from the urgent roll on Friday. It may be mentioned in this respect that the application by the said Hussein (who had the same surname as Omari) was instituted under case number 2014/27997. After the respondents filed answering papers indicating that Hussein had been convicted and imprisoned on a charge of robbery with aggravating circumstances, Mzamo requested the court to remove Hussein's application from the urgent roll. It was also indicated at the time that Hussein was no longer at Lindela, and was apparently transferred from Lindela to a prison.

[5] As both the above applications (as well as the remaining eight applications against the respondents) related to the liberty of individuals, all the said applications were inherently urgent. However, even though the curtailment of time limits for filing affidavits was not in issue in both the applications which fall within the ambit of the present judgment, I was compelled to strike both applications from my urgent roll, primarily for want of

compliance with other rules pertaining to motion proceedings. I indicated at the time that my reasons for the orders handed down by me would be given in due course, and I proceed now to do so.

[6] It may be mentioned by way of general background that all the applications against the respondents on my urgent roll (including the present two applications) were instituted on or about Thursday, the 31st of July 2014. Mzamo as well as attorneys from two other firms set down all ten applications for hearing in the urgent court on Tuesday, the 5th of August 2014. In all cases, including the present two cases, the respondents were notified in terms of the applicable notices of motion that if they intended opposing the applications, they were required to notify the applicants' attorneys in writing, email or facsimile on or before 10h00 on the 1st of August 2014 and to deliver answering affidavits, if any, on or before 10h00 on the 4th of August 2014. Thereafter, as already indicated, after arrangements were made for the filing of answering papers by the respondents in three of the ten applications, three matters (including the present two applications) were stood down to the 8th of August 2014.

[7] It may be mentioned at a general level in relation to all ten applications before me that on the 5th of August 2014, I pointed out a number of anomalies and discrepancies in all ten applications before me. By way of example, it appeared that even though Buthelezi had commissioned affidavits for colleagues (who were attorneys of record in other matters), apparently at Lindela on or about the 31st of July 2014, he had also signed notices of motion on the 31st of July 2014 in Johannesburg. To take another example, the signature by Hussein on his founding affidavit was not dated by the commissioner of oaths, who had apparently commissioned the said affidavit. As it turned, Mzamo subsequently indicated that Hussein was not at Lindela.

[8] Specifically, as regards the present applications, Omari seeks an order by way of urgency that his continued detention from an unspecified date be declared unlawful, subject to him approaching a Refugee Reception Office in the Republic of South Africa in terms of the Refugees Act, 130 of 1998. Orafu

also seeks by way of urgency an order that his continued detention from the 18th of July 2014 be declared unlawful. In addition, he seeks an order that the respondents be directed immediately to release him forthwith, subject to him completing the process of lodging an appeal in terms section 8 of the Immigration Act, 13 of 2002 ("the Immigration Act") or instituting a review in terms of the Promotion of Administrative Justice Act 3 of 2000. Orafu further seeks an order that the respondents immediately return his temporary resident permit application receipt.

[9] The signature of Omari on the power of attorney apparently signed by him on the 23rd of July 2014 is completely different to his signature on his founding affidavit, apparently signed by him in front of a commissioner of oaths on the 30th of July 2014. Similarly, the signature of Orafu on the power of attorney apparently signed by him on the 23rd of July 2014 is completely different to his signature on his founding affidavit, apparently signed by him in front of a commissioner of oaths on the 30th of July 2014. Matters were further confused by the lack of supporting documents in the Omari case as well as the case of Hussein, who shared the same surname with Omari.

[10] Omari states in his founding affidavit, which he signed on the 30th of July 2014 that he is a Somalian national who is an asylum seeker in the Republic of South Africa, presently detained at Lindela. He further states that he entered South Africa in 2009, when he applied for asylum. Whilst Omari and his legal representatives do not incorporate any definitive identification papers in the founding papers before the court, Omari suggests that the Crown Mines Refugee Reception Centre issued a temporary permit to him at an unspecified date. He also states in his founding affidavit that he subsequently lost his "asylum paper" at an unspecified date. He asserts in this regard that he does not remember his permit number, even though he went several times to the refugee office at unspecified dates for the renewal of his permit without success. The further suggestions by Omari relating to a future appeal or review proceedings are somewhat vague. Be that as it may, Omari states in his founding affidavit that he has been asking immigration officers at

Lindela to check his asylum status on their system, but has been informed that their system does not show his name.

[11] In these circumstances, whilst Omari avers in his founding affidavit that he is entitled to sojourn temporarily in the Republic of South Africa, pending the outcome of an application by him to obtain an asylum seeker's permit, he does not indicate when he submitted his application, nor does he indicate when he was arrested. However, without specifying the date of his arrest, he asserts in his founding affidavit both that he has been in detention for more than 30 days without having had an opportunity to present his case before a court of law, and that he has been in Lindela for more than 120 days. I may add that one or both of the latter averments relating to the period of unlawful detention were generically made in the founding papers in all ten applications before me.

[12] Omari also makes reference in his affidavit to a letter from his attorney dated the 22nd of July 2014, which is annexed to his affidavit, but does not confirm the contents of the said letter. It is stated in the said letter that Omari was arrested at Carltonville on the 24th of November 2013 by members of the South African Police, and that he conveyed to the police that his asylum permit was destroyed by fire in his shack at an unspecified date by people who were protesting for service delivery. As already indicated, Omari says nothing in his founding affidavit about the destruction of his asylum permit in these circumstances, nor does he disclose the date of his arrest and detention. There are accordingly contradictory statements in the founding papers relating to the period of Omari's unlawful detention and the confusion in this respect is exacerbated by the fact that other averments are somewhat vague and apparently conflated with averments relating to Hussein.

[13] Orafu states in his founding affidavit that he is a Nigerian national married to a South African citizen. He further states that he entered South Africa on the 24th of July 2006, having entered at OR Tambo International Airport, where he was issued with a visitor's visa valid for 30 days. Thereafter he states that in August 2006, he married a South African citizen. He asserts

that he subsequently applied for a temporary residence permit at an unspecified date to reside with his spouse at Springs and his residence permit was endorsed on his passport for two years at that stage. He further asserts that he was previously arrested in 2007 and transferred to Lindela, but was released. He also states that he subsequently applied in 2012 for permanent residence.

[14] Orafu indicates that in "July 201" (*sic*) he was arrested by the police for possession of drugs and will be appearing in court on the 5th of August 2014 (the very same date on which his urgent application was set down by Mzamo in urgent court). He further indicates that the investigating officer in the criminal matter against him took his passport and his temporary residence permit application receipt. Whilst he does not name the investigating officer concerned, he annexes to his founding papers his bail receipt in relation to the criminal matter. As regards his residence permit, Orafu states that he received a text message on the 20th of June 2014 from the first respondent notifying him that his permanent residence permit application had been finalized and ready for collection. However, he asserts that when he went to collect the said permit, he was informed, to his surprise, that his application had been rejected. Thereafter, he states that he lodged an appeal and whilst he was gathering papers, requested from him for the said appeal, (apparently by the respondents), he was arrested on the 18th of July 2014.

[15] In an answering affidavit relating to both the present applications as well as the application by Hussein, Joshua Makhaza ("Makhaza"), the Assistant Director Legal Services, for both the first and second respondents gives an overview at a general level of the problems experienced by the respondents in matters of this nature. He accordingly plausibly points out in this context inter alia that the respondents can only effectively expedite investigations in relation to all applications if the applicants concerned are properly and explicitly identified, preferably on the basis of documents such as passports from their country of origin.

[16] Mkhaza also points out in his answering affidavit at a general level that even though the office of the State Attorney co-operates with respondents in matters of this nature, the time periods for answering affidavits, as in the present cases are typically so limited by the applicants' attorneys that the respondents are often not even in a position to consider whether or not to oppose an urgent application and/or to instruct the office of the State Attorney. This is particularly so as it appeared that the same attorneys instituted numerous applications at the same time with identical time limits. Be that as it may, as already indicated, pursuant to concessions made by counsel appointed by the respondents, most of the urgent matters before me this week were removed and/or settled.

[17] Mkhaza emphasizes in his affidavit that notwithstanding the fact that all the present applications are inherently urgent, all the applicants in each case are obliged in terms of rule 6(12)(b) to set out explicitly and clearly the factual averments on which they rely. It is accordingly also emphasized that the applicants are compelled in terms of rule 18(4) to set out a clear and concise statement of material facts on which they rely, with sufficient particularity to enable the respondents to reply thereto.

[18] Both applicants did not file replying affidavits, apparently due to logistical difficulties encountered by Mzamo. Both matters were accordingly heard on the basis of the founding papers and the contents thereof, which were not disputed by the respondents.

[19] Leaving aside the curtailed time limits given to the respondents in all applications of this nature and the logistical problems encountered by the respondents in investigating factual averments relating to each applicant, counsel for the respondents correctly submitted that legal practitioners representing such applicants are obliged to make out a case for unlawful detention in the founding papers in each case with sufficient particularity in accordance with the rules. This is so not only by virtue of the fact that the respondents must be in a position to respond to the factual averments, but also to enable the urgent court to assess the case of each applicant. As such,

it goes without saying that legal practitioners can generally not do justice to their clients' cases on the basis of sloppy, vague and contradictory founding papers, which are not substantiated with appropriate documentation.

[20] It is also my view that given the anomalies and contradictions in all the founding papers before me, the practitioners concerned have collectively rendered a disservice to the affected applicants. I emphasize in this context that whilst only two of the urgent applications in this week were effectively opposed by the respondents, and even though some the remaining ten applications were released pursuant to concessions by the respondents, I noted that the founding papers in virtually all the applications, often apparently drafted by the same practitioners, were generally sketchy and incorporated glaring inconsistencies.

[21] It may also be mentioned in relation to both the applications that the clear provisions of section 34(1)(d) of the Immigration Act is to the effect that an "illegal foreigner" may not be detained for a period longer than 30 calendar days "without a warrant of a Court which on good grounds may extend such detention for an adequate period not exceeding 90 calendar days". Whilst the unlawful detention of any person, even if he is an 'illegal foreigner' can never be justified, it is trite that applicants seeking to be released must at the very least demonstrate that they have been unlawfully detained in contravention of section 34(1)(d). As such, applicants who seek an order releasing them from unlawful detention in contravention of section 34(1)(d) must set out all material facts which renders their detention unlawful and, at the very least, they must put forward factual averments which demonstrate that they have been unlawfully detained for more than 30 days without a warrant of court.

[22] In these circumstances, even if the court overlooks the discrepancies in the signatures of Omari, and even if the court overlooks the fact that his true identity appears to be completely undocumented, it is my view that the vague and inconsistent suggestions relating to the date of Omari's averred unlawful detention, renders his founding affidavit non-compliant with the applicable rules pertaining to the facts relied upon by him. Counsel for the respondents

correctly pointed out in this context that in the absence of substantiating documentation, and the apparent admission by Mzamo that Hussein (who shared the same surname as Omari) was detained pursuant to a court order relating to a criminal case, the identity of the applicant before me was not entirely clear. This was of course exacerbated by the fact that the averred signatures of Omari as reflected on a power of attorney and on his founding affidavit, a week later, were completely different. More importantly, the date of commencement of his averred unlawful detention was not explicitly specified, nor was the averred period of his unlawful detention clearly specified (given the contradictions referred to above). For these and related reasons, it is my view that Mzamo's additional suggestions from the bar, which were not always consistent with the founding papers, did not advance the case of Omari.

[23] For different reasons, even if one overlooks the discrepancies in the signatures in the Ofaru case, it appears that the founding papers did not make out a case for the contravention of section 34(1)(d), if only by virtue of the fact that a period of 30 days has not passed since the 18th of July 2014, the averred date of Ofaru's arrest.

[24] Against this background, even though both the present applications were manifestly urgent, the founding papers in both the present applications did not set out material facts in clear and precise terms, which established (even on a *prima facie* basis) that Omari and/or Orafu had been unlawfully detained by the respondents in contravention of the Immigration Act. The problematic aspects of the founding affidavits in both cases were in my view solely attributable to the legal practitioners, who drafted and compiled the founding papers. This is particularly so as in Omari's case, a very simple fact relating to the commencement date of his averred unlawful arrest is not clearly disclosed and in Orafu's case, a period of at least 30 days has obviously not passed from the 18th of July 2014 as envisaged in the Immigration Act.

[25] In the final analysis, even though rules relating to non-compliance with time limits are almost always condoned in matters which warrant an urgent hearing, it is trite that non-compliance with simple rules pertaining to placing material facts in an affidavit (such as the date of arrest and the period of detention in applications of this nature) cannot generally be condoned in urgent applications. Therefore, whilst I am cognizant of the fact that both the present applications relate to the fundamental right of liberty, it is also my view that both applicants have regrettably not been served well by their attorney. Therefore, the relief claimed in both applications cannot be granted in these circumstances and I am compelled to strike both the present applications from the urgent roll.

[26] The respondents did not seek costs in the event that both the present applications were struck from my urgent roll, but I confirm that given my views on the conduct of the practitioners concerned, I would have been inclined to hear submissions pertaining to whether costs on a punitive scale *de bonis propriis* were appropriate. As it turned out, I was not requested to do so. Be that as it may, for the reasons given, I was compelled in both cases to strike the matters from my urgent roll, with no order as to costs.

DATED AT JOHANNESBURG THIS 15th DAY OF AUGUST 2014

MAYAT J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA

Attorneys for Applicant:	Mzamo Attorneys
Counsel for First and Second Respondents :	M Gumbi
Date of Hearing :	5th and 8th August 2014
Date of Judgment :	15th of August 2014