IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2011-05-20

Case Number: 22852/11

REPORTBALE

In the matter between:

JERRY OFENSE PHALE	Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
MINISTER OF POLICE	Third Respondent
STATION COMMANDER: RUSTENBURG POLICE STATION	Fourth Respondent

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JUDGMENT

SOUTHWOOD J

[1] The applicant is to be tried on charges of fraud and contravening the Immigration Act 13 of 2002 ('the Act') in the Rustenburg magistrates' court. During March 2011 the applicant applied to the Rustenburg magistrates' court to be released on bail. The investigating officer in

his criminal case did not object to the applicant being released but the second respondent did. On 4 April 2011 the court ordered that the applicant be released on bail of R3 000 subject to stringent reporting conditions. On the same day an official of the Department of Home Affairs addressed a 'Warrant of Detention of an Illegal Foreigner' in terms of the Act to the Rustenburg SAPS. The warrant reads as follows:

'DEPARTMENT: HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA

WARRANT OF DETENTION OF AN ILLEGAL FOREIGNER

[Section 34(1), 34(5) and 34(8) of Act No. 13 of 2002: Regulation 39(2)]

To: Station Commissioner
Head of Prison/Detention facility
Rustenburg SAPS

As OFENTSE JERRY PITSOE
has made himself/herself liable to deportation/removal from the Republic and for detention pending such deportation/removal in terms of section 34(1)/34(5)/34(8) of the Immigration Act, 2002, you are
hereby ordered to detain the said ILLEGAL FOREIGNER FROM BOTSWANA
until such time he/she is deported/removed from the Republic.

NB: No release may be effected without the written authority of an immigration officer by means of a

warrant of release referred to in regulation 39(12) of the regulations published in terms of the Immigration Act, 2002 (Act No. 13 of 2002).

Immigration Officer

Above the words 'OFENTSE JERRY PITSOE' there is an arrow pointing to the words which have been inserted: 'to be re-arrested' and underneath that 'must be re-arrested after paying Bail'.

The signature of the immigration officer is illegible.

Immediately after the court ordered that he be released on bail officials of the second respondent informed the applicant that he would be re-arrested as soon as he paid bail. Rather than be re-arrested under the warrant issued in terms of the Act the applicant has not paid bail. On 13 April 2011 the applicant launched an urgent application seeking the following relief:

'1. Reviewing, setting aside and declaring unlawful the warrant of detention which purports to be issued and/or extended in accordance with section 34(1) of the Immigration Act, 13 of 2002, read with regulation 39(2) of the regulations thereto dated 4 April 2011;

2. Interdicting the Respondents from re-arresting the Applicant on the basis that he is an "illegal foreigner" or any other charges relating to, or as a result of, his pending criminal proceedings in the Rustenburg Magistrate's Court under case number D265/11, or his

pending civil proceedings in the South Gauteng High Court under case number 51010/10;

3. Directing the Respondents, upon payment of bail, to forthwith release the Applicant in accordance with his bail conditions.'

[2] The first and second respondents oppose the application and have filed an answering affidavit deposed to by Mr. Jurie de Wet an immigration officer in the employ of the second respondent who testified in the applicant's bail application. The applicant seeks final relief on notice of motion and insofar as there are disputes of fact on the affidavits the principles set out in ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A)** at 634F-635C must be applied. See also ***National Director of Public Prosecutions v Zuma*** **2009 (2) SA 277 (SCA)** para 26.

[3] It appears from Mr. De Wet's answering affidavit that the second respondent's officials consider that the applicant is a flight risk and that the inference is inescapable that the second respondent's officials issued the warrant on 4 April 2011 simply to prevent the applicant from evading deportation to Botswana.

[4] The following facts are common cause or are not in dispute:

(1) the applicant who also goes under the surname 'Pitsoe' is a Botswana citizen, born in Botswana on 15 August 1970, his father a South African citizen and his mother a Botswana citizen;

(2) the applicant has lived in both Botswana and South Africa and returned to Botswana in 1996. When in South Africa the applicant has lived with an aunt in Rustenburg;

(3) in 2009 the applicant was accused of murder in Botswana and fled to South Africa: he feared that he would not receive a fair trial and that if he is found guilty the death penalty could be imposed;

(4) in November 2009 the applicant was arrested in South Africa and extradition proceedings were brought against him in the Mankweng magistrates' court in Limpopo;

(5) on 2 March 2010 the extradition proceedings against the applicant were withdrawn apparently because the Botswana government refused to give an assurance that the applicant would not be subject to a death sentence if found guilty;

(6) on 3 March 2010 officials under the control of the first and second respondents detained the applicant as an 'illegal

foreigner' in terms of the Act and took him to the Lindela Holding Facility where he was detained 'for the purposes of deportation';

(7) from 4 March 2010 until 28 February 2011 the applicant was detained at the Lindela Holding Facility;

(8) on 22 December 2010, while he was being detained, the applicant launched an application against *inter alia* the first and second respondents in the South Gauteng High Court under case number 51010/2010 seeking, firstly (in Part A of the notice of motion), an order directing the first and second respondents and the third respondent in the application, Bosasa (Pty) Ltd, to release the applicant from detention and an order, pending final determination of the relief sought in part B of the notice of motion, prohibiting the respondents from taking any action whatsoever to cause the applicant to be deported, extradited or removed from South Africa to Botswana and secondly, (in part B of the notice of motion), orders:

'1. Condoning, to the extent necessary, the applicant's failure to exhaust any applicable internal remedies provided for in the Immigration Act 13 of 2002;

2. Reviewing, setting aside and declaring invalid the decision to declare the applicant as an illegal foreigner,

3. Declaring the detention of the applicant unlawful and unconstitutional;

4. Reviewing and setting aside the decision of the first and/or second respondent that the applicant is to be deported and/or removed from South Africa to the Republic of Botswana without first obtaining a written assurance from the Government of the Republic of Botswana that he will not face the death penalty in Botswana under any circumstances;

5. Declaring the deportation and/or extradition and/or removal of the applicant to the Republic of Botswana unlawful and unconstitutional, to the extent that such deportation and/or extradition and/or removal be carried out without the written assurance from the Government of Botswana that the applicant will not face the death penalty there under any circumstances;

6. Prohibiting the respondents from taking any action whatsoever to cause the applicant to be deported, extradited or removed from South Africa to Botswana until and unless the Government of the Republic of Botswana provides a written assurance to the respondents that the applicant will not be subject to the death penalty in Botswana under any circumstances';

(9) the applicant's application for final relief under case number 51010/10 is to be heard on 23 and 24 May 2011 together with a

similar application for the same relief brought by Emmanuel Tsebe against the first and second respondents under case number 27682/10;

(10) before the applicant's application for interim relief could be heard on 25 January 2011 the first and second respondents gave an undertaking to the applicant that pending the finalisation of the applicant's application alternatively receipt of an assurance by the Government of Botswana that the death penalty will not be imposed on the applicant, or if imposed, will not be carried out, the applicant would not be deported to Botswana. In the same letter dated 19 January 2011 the state attorney informed the applicant that he would be charged with contravening the Act in the course of the following week;

(11) on the strength of the first and second respondents' undertaking the applicant withdrew his application for interim relief;

(12) on 28 February 2011 officials of the Department of Home Affairs took the applicant from the Lindela Holding Facility to the Rustenburg Police Station to be charged with contravening the Act;

(13) on 2 March 2011 the applicant appeared in the Rustenburg magistrates' court and applied for bail. The application was postponed to 8 March 2011;

(14) on 8 March 2011 the state opposed the grant of bail and tendered the evidence of Mr. J.J. de Wet (the deponent to the respondents' answering affidavit), the senior immigration officer in Gauteng, who testified that the applicant was a fugitive from justice and therefore considered to be an 'undesirable person' in terms of section 29 of the Act and that as an 'undesirable person' the applicant is not eligible for any status in terms of the Act and must be considered an illegal foreigner;

(15) on 4 April 2011 the Rustenburg magistrates' court granted bail on the following conditions:

'1. The applicant must report every Monday to Saturday between the hours of 6am and 6pm at the Rustenburg Police Station;

2. He must report every Monday, Wednesday and Friday between the hours of 8am and 4pm at the local immigration office;

3. SAPS investigating officer, Mr. Phahlele, must assist as far as possible with the monitoring of his reporting at both the police station and the immigration office; and

4. He must not interfere with any witnesses or evidence in the matter';

(16) in granting bail the magistrates' court was required to consider a report from a Correctional Services official which concluded that section 62(f) of the Criminal Procedure Act 51 of 1977 is not recommended for the applicant (i.e. a further bail condition should not be imposed that the applicant be placed under the supervision of a probation officer or correctional official) and the evidence of the investigating officer who did not object to the grant of bail.

[5] The right not be deprived of freedom arbitrarily or without just cause applies to all persons in South Africa whether they are there illegally or not – ***Lawyers for Human Rights and Another v Minister of Home Affairs and Another*** **2004 (4) SA 125 (CC)** paras 26-27. It is also well-established that –

1. Any detention is *prima facie* unlawful;

2. The onus is on the detaining power to justify the detention;

3. Every detained person has the absolute right not to be detained for one second longer than necessary where the state cannot justify his detention;

4. If the detaining power is unable to justify the detention the detainee must consequently be released immediately. See ***Arse v Minister of Home Affairs*** **2010 (7) BCLR 640 (SCA)** paras 5 and 10.

[6] It will be remembered that the officials of the Department purported to act in terms of section 34 of the Act when issuing the warrant. The relevant provisions of the Act provide that –

> 'a "foreigner" means an individual who is not a citizen'
>
> '"illegal foreigner" means a foreigner who is in the Republic in contravention of the Act'
>
> '"deport or deportation" means the action or procedure aimed at causing an illegal foreigner to leave the Republic in terms of the Act'
>
> '"undesirable person" means a person contemplated in section 30' which provides that specified foreigners may be declared undesirable by the Director General, including (f) anyone who is a fugitive from justice'
>
> 'Section 32 Illegal foreigners –

(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.

(2) Any illegal foreigner shall be deported'

'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.'

[7] In ***Ulde v Minister of Home Affairs and Others*** **[2009] ZASCA 34** (31/3/09) at para 7 the court said with regard to the exercise of the discretion in terms of section 34(1) of the Act:

'Bearing in mind that we are dealing here with the deprivation of a person's liberty (albeit of an illegal foreigner's), the immigration officer must still construe the exercise of his discretion *in favorem libertatis* when deciding whether or not to arrest or detain a person under s 34(1) – and be guided by certain minimum standards in making the decision. Our courts have over the years stated these standards as imposing an obligation on the repository of a discretionary power to demonstrate that he has "applied his mind to the matter" – in the celebrated formulation of Colman J in ***Northwest Townships (Pty) Ltd v The Administrator of the Transvaal***

> "(A) failure by the person vested with the discretion to apply his mind to the matter (includes) capriciousness, a failure on the part of the person enjoined to make the decision, to appreciate the nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and the application of wrong principles."'

In para 11 the court found that once the decision had been taken to charge the appellant, and the magistrate had decided to release him on bail, this should have been taken into account as a relevant and material factor in a further decision to detain him and that the fact that

the magistrate had decided to grant bail could not be ignored and that by ignoring the order the respondent had detained the applicant for unacceptable reasons.

[8] In his answering affidavit Mr. De Wet records the respondents' reasons for the issue of the warrant as follows:

> '12.2 Within the context, however, of deportation, the considerations are vastly different to those which the Honourable Magistrate needed to apply. I say so by virtue of the fact that the purpose and intention of the Criminal Procedure Act, is materially different to that of the detention which the First and Second Respondents seek of the Applicant in terms of the Immigration Act. The objective of the former is to secure a conviction whilst the objective of the latter is to secure the person of an illegal foreigner in order that a deportation may be given effect to.
>
> 12.3 It is inconceivable that a deportation can take place without the physical detaining of an illegal foreigner's person. I say so by virtue of the fact that, as part of the deportation process, an illegal foreigner needs to be identified by the embassy/high commission of the country of origin of the illegal foreigner. The only manner in which this can take place, is by physically taking the illegal foreigner to the embassy/high commission concerned. It is inconceivable that such a person, if released, will, by his own volition, report to an embassy/high commission for purposes of identification and it is also even more unlikely that an illegal foreigner is

going to report to the Department's Deportation Holding Facility, for purposes of the deportation upon being requested to do so.

12.4 The Department has faced countless instances where illegal foreigners who have been released after an initial detention period of 120 days, simply fail to report as and when required, for purposes of effecting or finalising the deportation of the individual concerned. It simply does not happen.'

And, in his answer to the applicant's allegations that although the reporting conditions are onerous he would be able to abide by the conditions in order to secure his release; that he would present himself for trial and that in view of the charges against him and his view that he did not unlawfully obtain his South African ID book, it is in his interest that he see these charge through to their finality, de Wet simply dismissed these allegations as 'not sufficient' and commented –

'The history of the Applicant and his movement throughout the Republic of South Africa, as a fugitive, from the justice system within both South Africa and Botswana are sufficient to justify the reasonable belief, as an Immigration Officer, that the Applicant will simply "vanish under the radar", not to be seen in the event of the hearing in Johannesburg in the South Gauteng High Court not being in his favour. This presents the dilemma faced by officials in the employ of the Department of Home Affairs in particular, when it concerns the flight risk of individuals who have no roots whatsoever in the Republic of South Africa. The Applicant is one of them.'

[9] At the outset it must be noted that De Wet did not issue the warrant and he does not say that he authorised the issue of the warrant or instructed that the warrant be issued after taking these considerations into account. The person who issued the warrant has not made an affidavit to explain why he/she issued the warrant and consequently it cannot even be suggested that the warrant was issued on de Wet's instructions after proper consideration of the relevant circumstances. The respondents have therefore not explained why the warrant was issued, and, in the absence of satisfactory reasons the issue of the warrant appears to be arbitrary and cannot stand.

[10] Even if Mr. De Wet's evidence must be considered as the reasons for issuing the warrant they are unacceptable for the following reasons:

(i) they show that in every case where a person is deported the respondents detain the person – the respondents therefore do not properly apply their mind in every case. The situation is therefore the same as that in the ***Ulde*** case;

(ii) the respondents did not have the facts on which to base a reasonable belief that the applicant is a flight risk. The applicant's history does not show that he is a fugitive from justice in both South Africa and Botswana. There is no evidence that the applicant has been charged or even arrested on any charge in Botswana and thereafter absconded. At best the

statement is partially true – the applicant is evading the processes of the criminal law system in Botswana regarding a murder charge by coming to and remaining in South Africa – see ***Escom v Rademeyer* 1985 (2) SA 654 (T)** at 657J-661I and in particular at 658H and 661I. As far as South Africa is concerned the statement is completely untrue and it is in fact completely misleading. There is no evidence whatsoever to show that in South Africa the applicant knows that the machinery of the law requires his attendance to face charges against him and that he is keeping himself outside the reach of the law. In addition there is no evidence of any crimes committed by the applicant in South Africa. The Correctional Services report prepared for the Rustenburg magistrates' court says with regard to Criminal and other behaviour in general –

'(i) Present crime:
Fraud

(ii) Previous convictions:
The accused indicated that he does not have previous convictions

(iii) Suspended/postponed sentences:
No suspended or postponed sentences

(iv) Previous sentences of correctional supervision/parole placements:
No previous sentences of correctional supervision or parole placements

(v) Violation of parole conditions/ escapes/ absconding

No violation of parole conditions, escapes or absconding.'

(iii) the respondents did not wish to detain the applicant for the purpose of deportation. They simply wanted to detain him so that he would be available for deportation in the event that the Johannesburg High Court refuses his application. The respondents had undertaken not to deport the applicant pending the outcome of the application. The respondents therefore knew that for a period of at least six weeks the applicant could not be deported. The respondents therefore issued the warrant for the applicant's arrest for a purpose not authorised by the Act – see ***Jeebhai and Others v Minister of Home Affairs and Another*** **2009 (5) SA 54 (SCA)** para 48; ***Minister of Safety and Security v Sekhoto*** **2011 (2) All SA 157 (SCA)** paras 28-31.

[11] The respondents have therefore not shown that the warrant was lawful and the applicant is entitled to relief. For present purposes it is not necessary to consider all the other arguments presented.

[12] The following order is made:

I The Warrant of Detention of an Illegal Foreigner issued on 4 April 2011 in terms of section 34(1) of Act 13 of 2001 (a copy of

which is annexed to the applicant's founding affidavit as Annexure JOP 1) is declared to be unlawful and is set aside;

II Until the applicant's application in the South Gauteng High Court under case number 51010/2010 is finally disposed of the respondents are interdicted from re-arresting the applicant because he is an 'illegal foreigner' or on other charges relating to his pending criminal proceedings in the Rustenburg magistrates' court under case number D265/11;

III The respondents are ordered to release the applicant forthwith upon payment of his bail in accordance with the bail conditions of the Rustenburg magistrates' court on 4 April 2011;

IV The first and second respondents are ordered to pay the applicant's costs of this application subject to any other costs order already in force.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 22852/11

HEARD ON: 17 May 2011

FOR THE APPLICANT: ADV. N.T. LEWIS

INSTRUCTED BY: Pretoria Law Clinic

FOR THE RESPONDENT: ADV. G. BOFILATOS SC

INSTRUCTED BY: State Attorney

DATE OF JUDGMENT: 20 May 2011