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IN GAUTENG SOUTH HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 52898/09

DATE: 07/01/2010

**DELETE WHICHEVER IS NOT APPLICABLE**

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES /  
NO

(3) REVISED.

DATE:\_\_\_\_\_ SIGNATURE\_\_\_\_\_

MUSTAFA AMAN ARSE

Applicant

and

10 MINISTER OF HOME AFFAIRS & 2 OTHERS

Respondents

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J U D G M E N T

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WILLIS J: The applicant has approached the court by way of urgency, seeking an interdict preventing the respondents from deporting him until his status under the Refugees Act, No. 130 of 1998 has been finally determined; declaring his detention from 2 June 2009 to be unlawful; and directing that he be released forthwith and certain ancillary relief.

20 Unfortunately, because the application has been brought by way of urgency it is not possible for me to do justice fully in my reasons which I consider it appropriate that I should give now precisely by reason of the urgency of the matter.

The applicant entered the Republic of South Africa during the first week of December 2008 via Beit Bridge, this being the port of entry.

Five months later, on 26 May 2009, he was arrested as an illegal foreigner in terms of Section 34(1) of the Immigration Act, No. 13 of 2002. He was arrested at Queenstown.

He was transferred to Lindela and detained there from 2 June 2009 pending his deportation. On 3 September 2009, eight months after he had entered the Republic of South Africa, and some three months after his arrest and detention, he claimed asylum in terms of the Refugees Act 130 of 1998.

He made an application, as I have indicated, in terms of this Act  
10 and a permit in terms of Section 22 of the Refugees Act was issued to him. His application for asylum was dismissed. On 17 September 2009 he signed a power of attorney authorising Lawyers for Human Rights to assist him in the lodging and prosecuting of an appeal.

On 4 December 2009 the Refugee Appeal Board heard the appeal by the applicant. The applicant was not, however, represented at that appeal hearing. The decision of the Refugee Appeal Board is still pending.

The respondents have given an undertaking that the applicant will not be deported pending the outcome of the appeal hearing of the  
20 Refugee Appeal Board. Accordingly, that aspect of the relief sought need not be considered precisely because of the clear undertaking that has been given by the respondents.

What remains to be considered is whether the detention of the applicant is unlawful and whether he should immediately be released upon the order of the court. The applicant has been in detention for a

period in excess of 120 days. Clearly it is most undesirable that a person should be detained for such a lengthy period of time.

When the matter came before me on Tuesday, 5 January 2010, I indicated my unhappiness at the applicant remaining in detention and inquired whether the parties could not explore the possibility of his being released upon certain conditions. I indicated *prima facie* from the view the kind of conditions that I could consider appropriate.

The parties went away to consider their respective positions. Today, in court, the respondents have suggested that there should be an  
10 undertaking by a lawful resident in South Africa to provide the applicant with shelter, that he should pay R2 000.00 as security to the office of the nearest inspection or reception office, whichever is convenient. It has also been suggested that the money could be paid into court. This is clearly a so-called “with prejudice” offer.

Furthermore, the respondent suggested that should report to the nearest refugee reception office every Tuesday and Friday between 08:00 am and 16:00 pm until the outcome of the appeal hearing. These conditions were rejected by the applicant as being unacceptable. *Inter alia*, counsel for the applicant said that the applicant did not have the  
20 money to pay the sum of R2 000.00 security.

Freedom of a person is undoubtedly a right of great importance enshrined the constitution and respected in numerous judgments by the courts. On the other hand, the obvious question arises: if this person who entered the country illegally is unable to come up with any person who would provide him with shelter and he is unable pay the reasonable

sum of R2 000.00 as security, how is that person to survive in South Africa without any means of support?

The problems for that particular person and for the broader society are, in my view, obvious. The courts can take judicial notice of the fact that we have high levels of crime in this country and we have high levels of unemployment and we have high levels of illegal immigration into the country. This is a toxic mix of unfortunate circumstances.

While the court obviously has to have regard to the importance  
10 of a person having freedom, the court must also have regard to the practicalities that would arise in ordering the release of a person such as this, who cannot even comply with eminently reasonable conditions put forward by the respondents.

The question that then needs to be considered is whether there is any absolute statutory unlawfulness in the continuing detention of the applicant. Counsel for the applicants has referred me to Section 29 of the Immigration Act which provides that a person may not be detained for a period more than 30 days without a review by the High Court. The matter has now been reviewed. But Section 29 does not provide an  
20 absolute right to be released from detention?

Counsel for the applicant also relied on Section 22 of the Refugees Act, the section that relates to permits being issued to an asylum seeker. Section 22(1) of the Refugees Act provides as follows:-

“The refugee reception officer must, pending the outcome of an application in terms of Section 21(1),

issue the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the standing committee which are not in conflict with the constitution or international law and are endorsed by the refugee reception officer on the permit.”

Counsel for the applicant submitted that the words “allowing the applicant to sojourn in the Republic temporarily” necessarily entail that the person should be allowed to remain in South Africa, free from  
10 detention at the Lindela refugee camp. I disagree.

The right to sojourn does not necessarily entail a right to move about freely in South Africa with any restrictions. The applicant is sojourning in South Africa, he is not going to be deported or sent out of South Africa pending the outcome of his appeal relating to asylum status. He is indeed sojourning in South Africa, albeit under restriction.

I accept that this case raises important issues of principle. Counsel for the respondents was most concerned about the precedent that would be created in persons entering the country illegally, waiting until they are apprehended, then applying for asylum status and then  
20 seeking court orders that they be released “into the wilderness” so to speak.

There are indeed very real difficulties for the state authorities if this is to be an accepted position in South Africa. There are several cases where the Constitutional Court has emphasised that no right is absolute, none of the rights in terms of the Constitution is absolute and

that a balancing act has to be undertaken between the differing rights that prevail in the country, more especially, in terms of the Constitution.

Clearly the applicant has a right to freedom. On the other hand the state has a legitimate interest in trying to curb illegal immigration, in trying to keep track of persons who have entered the country illegally and ensuring that persons who do not have places of shelter and who do not have any visible means of support, are not free to roam the streets.

I wish to record that I am indeed unhappy that the applicant has  
10 been detained for so long. On the other hand, as I have already indicated, the respondents have suggested eminently reasonable conditions that could have attached to the applicant's release. These conditions were unacceptable to the applicant and accordingly, in my view, the application must fail.

Counsel for the respondents very fairly conceded that, if the application was dismissed, it would be inappropriate to make an order for costs against the applicant. In any event, quite obviously, if he cannot afford even to put up R2 000.00 as security for his sojourn in South Africa, any order as to costs would be hollow. The following is the  
20 order of the court:

The application is dismissed.

COUNSEL FOR THE APPLICANT

Advocate I de Vos

INSTRUCTED BY

Lawyers For Human Rights

COUNSEL FOR THE RESPONDENT

Advocate N Manaka

INSTRUCTED BY

State Attorney

DATE OF HEARING

05/01/2010

and 07/01/2010

10 DATE OF JUDGMENT

07/01/2010