



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2016/ 01352

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
DATE

.....
SIGNATURE

In the matter between:

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and

THE MINISTER OF HOME AFFAIRS

THE MINISTER OF POLICE

THE BOSASA GROUP OF COMPANIES

t/a LINDELA REPATRIATION FACILITY

and

THE COMMISSION FOR GENDER EQUALITY

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

First Respondent

Second Respondent

Third Respondent

Amicus Curiae

JUDGMENT

MODIBA J:

INTRODUCTION

[1] I heard this application in the urgent motion court. After considering the papers and hearing counsel, I granted an order for *inter alia* the release of the detainees from the Lindela Repatriation Centre (Lindela), that the detainees (the detainees) be accommodated at a home of safety; as well as an order directing the first and second respondents to deal with the detainees in terms of the provisions of the Prevention of Combatting of Trafficking in Persons (PCTP) Act 7 of 2013. The order would operate as an interim order pending the delivery of this judgment.

[2] The application was only opposed by the first respondent. The Commission for Gender Equality (*amicus*) intervened as *amicus curiae* at my invitation, and was admitted by agreement of the detainees and the first respondent. I invited the *amicus* to assist the court with certain factual enquiries and to make submissions on legal issues that arose from the papers but not addressed by the parties. These arose mainly from an allegation by the first respondent that the detainees are suspected of being victims of the crime of trafficking in persons for the purpose of sexual exploitation. I requested the *amicus* to investigate the circumstances of the detainees and report back to the court with recommendations on the appropriate legal response to their plight. I am indebted to the *amicus* for their prompt and positive response to my invitation, as well as to the *pro bono* legal team for the *amicus*, Advocate Llewellyn Morland and their instructing attorneys, for availing themselves on an urgent basis, for promptly investigating the circumstances of the detainees and for providing me with a succinct but valuable report.

BACKGROUND FACTS

[3] The detainees are 4 (four) female citizens of the Kingdom of Thailand (Thailand). They are detained at Lindela in the custody of the third respondent pending their deportation to Thailand. They are detained for contravening section 41 (1) (c) of the Immigration Act 13 of 2002. They were arrested on 20 November 2015 and detained at the Johannesburg Police Station from 20 November 2015 until 3 December 2015, when they were relocated to Lindela. More than two months after their arrest when this application came before me, they were still detained at Lindela.

[4] At the hearing of this application, I *mero motu* raised a concern whether the detainees' founding and supporting affidavits were deposed to in the presence of the commissioner of oaths. Counsel for the detainees tendered the evidence of the detainees' instructing attorney to address my concern. I refused him permission to lead this evidence because in respect of the facts within the knowledge of the commissioner of oaths, the evidence constitutes inadmissible hearsay evidence. I dealt with this application over several days in the week it was on the urgent motion court roll. The detainees' instructing attorney had several opportunities to address my concern but failed to do so.

[5] Although on the face of the notice of motion and supporting affidavits, the application purports to be brought by the detainees, I am not satisfied that the application is indeed brought by them. My dissatisfaction with the manner in which their founding and supporting affidavits are deposed to is based on the following grounds:

5.1 It is common cause that all four applicants are Thai speaking and have at best a poor command of English. Evidently, they signed their affidavits using non-English alphabets. The legal team for the amicus interviewed the detainees at Lindela on 28 January 2016. They were assisted by a Thai translator. The detainees' affidavits are deposed to in English. No evidence has been put before the court regarding how their affidavits were translated;

5.2 The commissioner of oaths certificate that appears on the affidavits is in English. There is no evidence attesting to the language in which the oath was administered to the detainees;

5.3 According to the certificate by the commissioner of oaths, all the detainees deposed to the affidavits at Krugersdorp on 19 January 2016. The place, date and time of deposition is hand written in English in the commissioner of oath's certificate. The commissioner of oaths signed the affidavits using a pen with a different colour and ink type. The commissioner of oaths stated a business address in Nigel, which he allegedly wrote by hand on these affidavits;

5.4 The detainees' attorney also deposed to a supporting affidavit. *Ex facie*, a pen with the same colour and type of ink was used for signature of the attorney, the signatures of the detainees as well as the insertions in the commissioner of oaths' certificate.

5.5 Of all the deponents, the detainees' attorney is the only person who understands English.

[6] In light of the above facts, I am not satisfied that the oath was administered by the commissioner of oaths, that the detainees signed their affidavits in his presence and that the detainees have personal knowledge of the contents of their affidavits.

[7] Notwithstanding my dissatisfaction with the appropriateness of the application for the release of the detainees, I am concerned that the first respondent has detained them for more than 30 days pending their deportation and has failed to put a version before court explaining his delay in deporting them. Furthermore, the first respondent and the *amicus* have raised issues of public interest that warrant that I grant the detainees further relief in the interests of justice.

[8] The first respondent brought to my attention that there is a strong likelihood that the detainees are persons who have been trafficked. The first respondent point out that when informed that they are to be deported, they opted not to appeal against their impending deportation. Instead, they agreed to be deported. Their sudden change of stance is according to the first respondent suspicious. The first respondent contended that as suspected victims of trafficking in persons, the detainees require the protection of this court. Therefore the court should not release them but rather allow the first respondent to deport them to their home country, Thailand. Interestingly in the founding affidavit the detainees are not open with the court regarding the circumstances that led to their arrest.

[9] According to the first respondent the detainees were arrested during a duly authorized raid on a hotel in Johannesburg. The raid was conducted by members of the first and second respondents. The raid was precipitated by information received by these respondents that the hotel was operating a brothel and was used as a distribution centre for the trafficking and smuggling of human beings into South Africa. The detainees are part of 40 (forty) Thai women that were arrested during the raid.

[10] On 24 November, the detainees were interviewed by an immigration officer who informed them of the reason for their detention. The interviewing officer recorded the interview on (DHA-1746) Form 6. The detainees informed the interviewing officer that they do not

understand English. A Thai interpreter was made available and provided interpretation services during the interview. Pursuant to their interviews, all the detainees were issued with the various notices in relation to their detention and pending deportation.¹ The detainees dispute that they were served with these notices.

[11] According to the first respondent, the position of the detainees is as follows:

11.1 SL deposed to an affidavit that when she was arrested, she was working as a sex worker at the hotel where the arrest took place.

11.2 TH entered the country on 15 October 2012. Her visa expired on 2 December 2012.

11.3 CD entered the country on 15 August 2015. Her visa expired on 15 September 2015.

11.4 CK entered the country on 3 September 2015. Her visa expired on 3 November 2014.

11.5 All the detainees entered South Africa on 30 (thirty) days visitors' visas. Although she was in possession of a valid visa when she was arrested, SL invalidated her visa by engaging in remunerated work. Therefore she was been correctly arrested with the intention to deport her. Since their visas expired, TH, CD and CK remained in the country illegally and failed to take any steps to regularize their stay. Similarly to SL, the other three detainees were also engaged in sex work at the hotel where they were arrested.

[12] The report by the *amicus* supports the first respondent's submission that the detainees are possible victims of trafficking. The *amicus* therefore, recommends that the detainees be processed in terms of the provisions of the PCTP Act. All counsel including counsel who was briefed by the attorney who purports to represent the detainees accepted the report of the *amicus*.

¹ All the detainees were issued with the following notices:

- (a) a warrant of detention of an illegal foreigner (Issued in terms of section 7(1) (g) read with section 34 (1) (a) and Regulation 33 (2) referred to as (DHA-1724) Form 29).
- (b) a notice of a decision adversely affecting the rights of a person informing the applicants that due to being in the country in contravention of section 49 (1) (c) of Act 13 of 2002, a decision to deport the applicants has been made in terms of section 8(3) of the aforesaid Act. (Issued in terms of section 7 (1) (g) read with section 8(3) and regulation 7(2) Part C referred to as (DHA-1714A) Form 2).
- (c) a notice regarding the right to request a review by Minister (Issued in terms of section 8(1) and regulation 7(1) Part A referred to as (DHA-1756) Form 1). The said notice does not indicate whether the applicants elected to request a review of the decision to deport them by the Minister of Home Affairs.
- (d) a notification of deportation (Issued in terms of section 7(1) (g) read with section 34 (1) (a) and Regulation 33 (2) referred to as (DHA-1724) Form 29); notifying the applicants that they are to be deported to their country of origin Thailand and that they have the right to appeal the decision to deport them to the Direction General within 10 working days of the date of receipt of the said notice. The applicants elected not to have their detention confirmed by a warrant of court. They also elected not to appeal the decision to deport them. They elected to be deported at the first reasonable opportunity.

[13] The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime² (UN Protocol) confirms that trafficking in persons is a complex global phenomenon, perpetrated by organized crime syndicates often operating across several criminal jurisdictions. The prevention, detection and prosecution of incidents of trafficking in persons as well as the identification and protection of suspected victims of trafficking in persons requires a coordinated response by various government agencies and civil society organizations. Responsible government agencies also require extra jurisdictional powers to deal with incidents of trafficking in persons and smuggling perpetrated beyond South African borders. Until the enactment of PCTPA, South African criminal legal system lacked the capacity to deal with the offence of trafficking in persons.

[14] Trafficking in persons violates the following constitutionally entrenched rights of the victims of trafficking: (a) the right to human dignity,³ (b) the right to equality,⁴ (c) the right to freedom and security of the person,⁵ which includes the right not to be deprived of freedom arbitrarily or without just cause, and not to be treated in a cruel, inhuman or degrading way⁶ and (d) the right not to be subjected to slavery, servitude or forced labour.⁷ The Constitution imposes a positive duty on the state and on all its organs not to perform any act that infringes the entrenched rights, including the right to human dignity and freedom and security of the person. (*Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)*).⁸ Therefore the government has a positive constitutional duty to protect suspected victims of trafficking in persons.

² Adopted by the UN in 2000 and entered into force on 25 December 2003.

³ Section 10 of the Constitution.

⁴ Section 9 of the Constitution.

⁵ Section 12 of the Constitution.

⁶ Section 12 (1) (a) and (e) the Constitution.

⁷ Section 13 of the Constitution.

⁸ 2001 (4) SA 938 (CC) para 44 referred to with approval in *Woji v Minister of Police* 2015 (1) SACR 409 (SCA) at para 28.

[15] The South African government is a signatory to the UN Protocol. The protocol urges member states to enact legislation to facilitate the domestic implementation of the UN Protocol by member states. PCTP Act was enacted on 29 July 2013 to facilitate the implementation of the South African government's obligations in terms of the UN Protocol. It came into operation on 9 August 2015.⁹ It makes provision for:

- 15.1 the offence of trafficking in persons and other offences associated with trafficking in persons;
- 15.2 penalties that may be imposed in respect of these offences;
- 15.3 measures to protect and assist victims of trafficking in persons,
- 15.4 a coordinated implementation, application and administration of the Act by the departments of home affairs, South African police service, the department of social development and civil society organizations, to mention a few role players.

[16] PCTPA primarily serves to prevent and combat the trafficking in persons within and beyond the borders of the Republic of South Africa. All incidents of suspected or actual trafficking in persons ought to be dealt with in terms of the PCTP Act. Any person, who on reasonable grounds suspects that an adult person is a victim of trafficking, ought to report that suspicion to a police official for investigation.¹⁰ The *amicus* submitted that the raid that was conducted at the hotel where the detainees were arrested on 20 November 2016 was conducted in terms of this legislation. Section 19(5)(a)(i) empowers a police official who receives such information to enter the premises where the suspected trafficking in person activities are taking place without a warrant, if he has reasonable grounds to believe that the safety of a person suspected to be a victim of trafficking is at risk.¹¹ Where necessary, as a measure of last resort and with the written consent of the person concerned, take her into protective custody if there is an immediate threat to the safety of that person, for a period until the station commander of the relevant police station is satisfied that the threat has ceased to exist. Thereafter the police official may place that person in temporary safe care.¹² The relevant

⁹ The Act was published in *Government Gazette* 36715 dated 29 July, 2013.

¹⁰ Section 19 (2).

¹¹ Section 19 (5) (a) (i).

¹² Section 19 (5) (a) (ii).

police official must within 24 hours refer the person to an accredited organization and notify the provincial department of social development of that person. If the person is a foreigner, the police official must inform her that he or she may apply for a visitor's visa to remain in the Republic for a recovery and reflection period.¹³

[17] Furthermore, the PCTP Act requires the police, to the extent reasonable, to render such assistance to the person as may be necessary in the circumstances, including, but not limited to assisting the person to obtain medical treatment and transporting that person to a place of temporary safe care or an accredited organization.¹⁴

[18] On receiving notification of or referral of the person, the provincial department of social development must without delay, in the prescribed manner, assess whether the person concerned is a victim of trafficking, after taking into account the prescribed information obtained from the South African Police Service. On concluding the assessment, if satisfied that the person is a victim of trafficking, the provincial head must immediately issue a letter of recognition, as prescribed, to the victim.

[19] No criminal prosecution may be instituted or proceeded with against a person suspected to be a victim of trafficking without the written authorization of the Director of Public Prosecutions having jurisdiction.¹⁵ The letter of recognition serves as a ground for the withdrawal of the criminal prosecution or the discharge of the victim of trafficking, if the prosecutor is satisfied that the offence was committed as a direct result of the person's position as a victim of trafficking.¹⁶

[20] Although in their application for an entry, search and seizure warrant, members of the first and second respondents' expressed an intention to rescue victims of trafficking in persons from the hotel, in the said application, there is express mention of how they will deal with foreigners who are found to have contravened the Immigration Act. However, there is no reference to PCTP Act and how suspected victims of trafficking in persons would be dealt with in terms of the latter Act. In accordance to the raid strategy employed by members of the first and second respondents, the only legislation applied to the detainees is the Immigration Act,

¹³ Section 19 (5) (c) read with section 15.

¹⁴ Section 19 (7) (a) (b).

¹⁵ Section 22 (4).

¹⁶ Section 22 (3).

despite information received from an informant that females from Thailand are forced to work at the hotel as sex workers, and despite confirmation by three of the detainees of aspects of the information received from the informant. It is no evidence that further investigation was conducted to confirm suspicions that the women were indeed trafficked from Thailand and that they were coerced to work as sex workers has been placed before this court.

[21] Within two weeks of their arrest, the women were transferred from the Johannesburg Central Police Station to Lindela pending deportation. More than two months after they were arrested, they are still detained. In his answering affidavit, the first respondent did not provide any explanation for the delay in deporting the detainees. The second respondent did not oppose the application. Therefore he did not place any version before the court regarding further investigations undertaken following the detainees' arrest. On the first respondent's version, a decision to deport the detainees was taken almost immediately following their arrest. This beseeches the question whether any further investigation of the allegations of trafficking in persons, smuggling and distribution, and coerced sex work for the benefit of third parties was undertaken following the raid, whether *prima facie* evidence of these activities was procured, whether any suspects were arrested on charges of trafficking in persons, contravention of the Criminal Law Amendment (Sexual Offences and Related Matters) Act 32 of 2007 or any other law and if so whether any of the detainees were not required to testify against the perpetrators. That a decision to deport the detainees was taken almost immediately following their arrest warrants an inference that no further investigations were conducted and that none of the detainees were required to testify against perpetrators of the alleged trafficking in persons.

[22] It is globally accepted that victims of trafficking are vulnerable for several reasons. They come from poor economic backgrounds. They are normally arrested for being in a foreign country illegally. They depend on their traffickers for sustenance. They may normally suffer from capture-bonding, also known as the Stockholm syndrome¹⁷ and therefore find it challenging to accept reclamation from their traffickers. The *amicus* confirms this in its report. Persons

¹⁷ A psychological phenomenon in which hostages express empathy and sympathy and have positive feelings toward their captors, sometimes to the point of defending and identifying with the captors (https://en.wikipedia.org/wiki/Stockholm_syndrome).

suspected of being trafficked may have been manipulated and live in fear because their families in their countries of origin are threatened. They are also coerced into sex work and other illegal activities, which they may gradually find solace in because they may perceive such activities to be their only means of livelihood. Where they earn income from sex work, they may be using it to support their families back home. They are therefore unlikely to accept their vulnerability. For these reasons they are not placed to make decisions in their best interest. They are also unlikely to accept that they are exploited by third parties and therefore may not have an appreciation of the need for protection. It is for this reason that they are difficult to identify and once identified, to offer the appropriate protection.

[23] Where they are found to be in the country unlawfully as in the case of the detainees in this application simply deporting them back to their country of origin may further threaten their safety because the reach of their traffickers may extend beyond South Africa. Deporting them to Thailand without any assessment regarding whether they are indeed victims of trafficking and whether it is safe for them to return to Thailand may further compromise their safety.

[24] Although in the case of the detainees, they seem to fit the profile provided by the informants of the first and second respondents, it is unclear whether the detainees were simply working as sex workers or whether they were held contrary to their will and forced to work as sex workers. Information received by the first and second respondents only led to a suspicion.¹⁸ *Prima facie* evidence proving the latter scenario is lacking from the case of the first respondents. Interviews conducted with the detainees by the *amicus* for reasons set out above did not yield this information most probably because as stated above, persons suspected of being trafficked may not accept their vulnerability and may lack an appreciation of their need for protection. Typically with foreign persons who are trafficking suspects, the *amicus* also reports to have encountered a language barrier when interviewing the detainees despite being assisted by an interpreter. The interpreter who assisted during the interviews is not a sworn interpreter. The *amicus* raised a concern that the interpreter who assisted the *amicus* was involved with the

¹⁸ In *Powell NO v Van der Merwe NO and others 2005 (5) SA 62 (SCA)* at 36, the SCA adopted the following definition of suspicion: "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect but cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of a *prima facie* proof is the end."

detainees from inception and therefore may have relayed to the legal team of the *amicus* what he or she knows as opposed to what the detainees were relating during the interview.

[25] Given that the suspected victims of trafficking are often not in a position to act in their best interest, a determination of their status can simply not be made based on information received from them. A determination whether a person is a victim of trafficking in persons requires a triangulated investigation. To address this problem, the PCTP Act provides for the accommodation of suspected victims at a place of safety and an assessment to be conducted by the department of social development on the strength of information received from members of the second respondent. The second respondent ought to furnish information gathered from its investigations to assist the department of social development to properly assess the detainees. An investigation by members of the second respondent is in any event pivotal to secure the prosecution of any persons who are found to have participated in the trafficking in persons and sexual exploitation value chain of the detainees as provided for in the PCTP Act.

[26] I find it astonishing that members of the first and second respondents undertook such a large operation in an attempt to erupt what seems to be a large scale trafficking in persons hub but failed to apply the appropriate legislation, and in doing so potentially compromised the protection of the suspected victims. I am mindful that PCTP Act only came into operation some 3 (three) months prior to the raid at which the detainees were arrested. However it was enacted two years prior and in the intervening time, the first and second respondents had reasonable time to apprise their members of the provisions of the PCTP Act. The first and second respondents ought to take reasonable measures to ensure that its members are apprised of the contents of the Act and its regulations and that the Act is applied by all its members when dealing with incidents where trafficking in persons is suspected to take place.

[27] In line with the court's decision in *Carmichele*, failure by the first and second respondents to deal with the detainees in terms of the PCTP Act, in the light of information received from an informant and having regard to the extent to which aspects of this information

was confirmed by the detainees, constitutes failure to fulfill their positive constitutional duty to abstain from any act that infringes the entrenched constitutional rights of any person. It also denies the detainees the protection offered by the PCTP Act.

[28] In the foregoing, I agree with the *amicus* that the appropriate response to the detainees' circumstances is to deal with them in terms of the PCTP Act. Should they be found not to be victims of trafficking in persons, then they may be dealt with in terms of the Immigration Act and other applicable legislation. The same applies to all the women who were arrested from the same raid should any still be detained at Lindela.

[29] In the premises, I make the following order:

ORDER

1. The matter is declared as urgent and accordingly the time periods and forms of service are dispensed with to allow the matter to be heard as such;
2. Alternative relief set out hereunder is granted in the interests of justice:

2.1 The detainees shall be released from Lindela upon receipt of this order;

2.2 The first respondent *alternatively* the second respondent shall be responsible to immediately escort the detainees to a designated place of safety ("the facility") referred to in section 19 (1) (b) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 and hand the detainees into the care of persons in charge of the aforesaid facility;

- 2.3 The name and address of the facility is ordered to remain confidential and shall not be published or disclosed and shall be kept as confidential by the legal representatives of all parties;
- 2.4 The names of the detainees are not to be publicised;
- 2.5 The first, alternatively the second respondent shall contact the director of the facility in order to determine the address thereof;
- 2.6 Should the detainees require medical treatment the first, alternatively the second respondent shall take the detainees to a suitable medical facility for the required treatment and thereafter return the detainees to the aforesaid facility;
- 2.7 The relevant provisions of the Prevention and Combating of Trafficking in Persons Act 7 of 2013 shall be evoked and effect given thereto by the first and second respondents, the department of social development and any other relevant department of State;
- 2.8 As soon as the detainees are issued with the letter of recognition envisaged in section 19(10) of the Prevention and Combating of Trafficking in Persons Act 7 of 2013, the first respondent is ordered to return the passports of the detainees and;
3. Should the department of social development find that the detainees are not victims of trafficking in persons that:
- 3.1 The detainees are ordered to remain in the place of safety or another accredited organisation until such time as their status in the Republic is regularised and that they have the lawful right to remain further,, alternatively that:
- 3.2 Should the detainees not procure the right to lawfully remain within the Republic, that the first respondent shall be entitled to deal with them in terms of the Immigration Act or other applicable legislation.
4. Any further ancillary issues connected herewith are to be dealt with on the ordinary roll, save that the detainees or respondents may approach this court for such further relief on

reasonable notice and after filing such additional papers as may be appropriate, should the need arise for such further relief.

5. The first and second respondents are ordered to immediately deal with any persons arrested on the raid conducted on 20 November 2015 at the hotel where the detainees were apprehended in terms of the Prevention and Combating of Trafficking in Persons Act 7 of 2013;
6. Costs are reserved for determination at a later stage.
7. The Registrar of this Court is ordered to cause this judgment and the order made herein to be served on:
 - 7.1 The Provincial Coordinator
Organized Crime
Directorate for Priority Crime Investigation
South African Police Service
 - 7.2 Human Trafficking
Organized Crime
Directorate for Priority Crime Investigation
South African Police Service
 - 7.3 The Station Commander
South African Police Service
Johannesburg Central Police Station
1 Commissioner Street, Johannesburg
 - 7.4 The Director General
Gauteng Department of Social Development
69 Commissioner Street, Johannesburg
 - 7.5 The Chief Director
Constitutional Implementation

Department of Justice and Constitutional Development
329 Pretorius Street, Pretoria

MODIBA J

APPEARENCES:

Counsel for the Appellant/ Plaintiff:

Instructed by:

Counsel for the First Respondent/ Defendant:

Instructed by:

Counsel for the *amicus*

Date of hearing: 26, 27, 29 January 2016

Date of judgment: 26 February 2016