

IN THE NORTH GAUTENG HIGH COURT – PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 70261/2009

THE HONOURABLE ACTING JUSTICE ROELOF DU PLESSIS

In the application of:

11/10/2010

LIN GUI LAN

and

OR TAMBO INTERNATIONAL AIRPORT
DEPARTMENT OF HOME AFFAIRS
IMMIGRATION ADMISSIONS

SOUTH AFRICAN AIRWAYS

DELETED APPLICATION	
(1) REPORTABLE: YES	YES
(2) INTEREST TO OTHER JUDGES: YES/NO	YES
(3) REVISED:	11/10/2010
SIGNATURE	

First Respondent

Second Respondent

JUDGMENT

- [1] In this matter the applicant brought an application on an urgent basis on Friday, 20 November 2009, which application was brought by a family member of the applicant on her behalf, to obtain relief pertaining to her detention at OR Tambo International Airport.
- [2] The applicant is a Chinese national who was then employed as a credit controller by Chung Fung (Pty) Ltd t/a Dragon City, doing business in Fordsburg, Johannesburg. She obtained until February 2007, an extension of a temporary residence permit in terms of

section 10 of the Immigration Act No 13 of 2002 (hereinafter referred to as "the Act"). According to the permit she was granted an extension of her temporary residence status in South Africa, which was valid until 15 December 2009. She apparently continued to work at Dragon City until 17 July 2008 whereafter, with the express permission of her employer, she returned to China as her daughter was giving birth to a baby girl and she wanted to be there for the birth. In China she became ill and could not return to South Africa. She then reached an agreement with her employer to extend her stay in China pending her healthy recovery.

- [3] She knew that the permit would expire on 15 December 2009 and therefore she returned to South Africa on 20 November 2009 in order to comply with the provisions of her permit and to continue with her employment at Dragon City. She and her employer intended to renew her work permit.
- [4] Her niece, Lam Shuk Ching accompanied her on 19 November 2009 on flight SA 287 from Hong Kong to South Africa. Her niece was to assist her in English, especially to communicate with doctors in South Africa. The flight arrived at OR Tambo International Airport on 7h10 on Friday, 20 November 2009.
- [5] She was approached whilst proceeding through immigration, by an immigration officer with the surname of Mogale, who perused her

passport and permit, and who asked her certain questions which she could not answer because she could not speak English. She was then escorted to the immigration office with Ching and Mogale, where he asked Ching the same questions, which were then translated.

- [6] On a question what her reason was for coming to South Africa, she answered that she was coming back to South Africa to continue working at Dragon City. However, Mogale was aggressive and dismissive of her and *inter alia* made the comment that it was impossible for her to be returning to work, alleging that she was too old to work. He asked questions about the reason why she was out of the country for such a long period and did not seem satisfied with the answer.
- [7] Mogale then made copies of her passport and permit and completed certain documents which he instructed her to sign. She refused to sign the documents because she said she did not understand the documents. She and Ching were then left in the immigration office for a period of approximately one hour whereafter a policeman was called and Ching was told to go.
- [8] Applicant's attorney, Mr Strauss, contacted Mogale and explained to him that applicant's employer would immediately be applying for an extension of her work permit in terms of section 19 of the

Immigration Act, No 13 of 2002. He told Mogale that he would see to it that she will comply with the provisions of the Act and that the necessary financial guarantees would be given. Mogale simply told Strauss that he was not interested and put the phone down on him. This appears to have been the attitude of all the immigration officials involved in this matter.

- [9] At 15h00 a representative from South African Airways tried to give applicant a return ticket to Hong Kong, which she refused to accept. Seven representatives from the Immigration Department as well as members of South African Airways attempted to convince her to follow them to board the return flight to Hong Kong. She refused. They then physically picked her up and started carrying her to the departure lounge. She was kicking, screaming and crying hysterically. A Chinese male person who witnessed what was happening told them to return her to the holding cell until her attorney arrived.
- [10] She was then left in the national transfer area with a policeman from the South African Police Services guarding her. She remained there without food, water or warm clothing. This continued until the following afternoon (Saturday).

[11] Late that Friday afternoon attorneys representing the applicant brought an urgent application before me to prevent the deportation of the applicant back to China.

[12] I was presented with a notice of motion which I marked "X", meaning to convey that the contents of the notice of motion would constitute a court order on an urgent basis. I also signed the notice of motion at the end thereof and it was officially stamped by my registrar.

[13] Ching gave oral evidence at court pertaining to the situation of the applicant. Although it was not clear to me what the factual position was, and I could not decide who was right or wrong, I decided to grant an order requesting the department to give reasons why the following order was not to be made, which reasons had to be given on a return date, the next Tuesday, 24 November 2009:

"1. Rule nisi is issued, with a return date of the 24th November 2009 in the urgent court, when the respondent shall give reasons why the following order should not be made:

1.1 that the applicant shall not be deported from South Africa;

1.2 that the respondent shall act towards the applicant in accordance with all official permit and authorisation issued to her;

1.3 that the respondent is ordered to immediately return the applicant to no 39 Kloof State, Bedford View;

- 1.4 *that the applicant's documentation including her passport be returned to her;*
- 1.5 *that the cost of this application should be reserved."*

[14] The order was telefaxed by the applicant's attorney to the airport Home Affairs Immigration Admissions Office immediately after it was granted. I decided to grant the order on the basis of the evidence of Ching.

[15] Ching returned to the airport with applicant's counsel and attorney to arrange applicant's release. The immigration officers refused to release the applicant. The attorney made certain phonecalls to a certain Mr TP Kgoale, a director of immigration, Mr Mociane Mangena, an immigration officer and also Mr MacKay, the Deputy Director of Immigration. They were all requested by the attorney to release the applicant on the basis of the court order.

[16] I was also contacted during Friday evening by the counsel who acted on behalf of the applicant, informing me that the immigration officials refused to adhere to the court order. I then requested my registrar to speak to Mr MacKay and to explain to him that I had granted a court order. He refused. I then personally spoke to Mr MacKay who told me that he knew the law better than any Judge did and that he was not going to release the applicant. He also summarily terminated the telephone call by putting the phone down.

I also telephonically spoke to Mr Kgoale (who also first refused to believe my registrar when she phoned him) who had the same attitude. There was no further attempt made to verify the correctness of the court order, except that a Mr Bofilatos, who practises as counsel in Pretoria, telephoned me late Friday evening to find out if it was in fact I who granted the order. I confirmed that it was. A little bit later on the Friday evening I also received a telephone call from Mr Kgoale apolosing to me, by way of a message he left on my phone.

- [17] The immigration officials blatantly ignored the first court order that I had granted. On Saturday, 21 November 2009 the lawyers for the applicant as well as Ching and representatives of the applicant's employer arrived at the airport to once again endeavour to persuade the officials to adhere to the court order. They still refused. The attorney Mr Strauss, who is the attorney who acted for the employer, arrived at the airport at 11h00 that day to attempt to have the applicant released. He was apparently informed by Mr MacKay that they had the right to disregard the first court order, and that he himself decided to disregard it.
- [18] There was, no attempt to approach me to have the court order set aside, amended or varied in any way by the department. Mogale told the attorney, Motsaung, that the first court order was just a piece of paper, and that the applicant would nevertheless be

deported at 16h00 on 20 November 2009. Mr Strauss also then discussed the matter with Mr Deon Erasmus, a legal advisor for the South African Department of Home Affairs, who explained that the matter would be opposed on 24 November 2009. Strauss indicated to him that it would be inhumane to keep the applicant detained until the hearing could take place. Strauss explained to him that an application for contempt of court against the representatives of the department would be brought by applicant's lawyers, should applicant not be released.

11 I was then approached again urgently by the lawyers of the applicant on Saturday, 21 November 2009. I granted a second court order, which reads as follows:

- "1. *The Minister of Home Affairs, the First respondent, the Second Respondent, or any other person or party in whose custody the Applicant may currently be, is ordered to release the Applicant from such custody immediately, and to return all her documentation including her passport;*
2. *The SA Police Service is ordered to take the Applicant into their custody immediately wherever she may be found, and to return the Applicant to No 39 Kloof Estate, Bedfordview immediately;*
3. *The following persons are ordered to give all assistance necessary to effect prayers 1 and 2. Furthermore, they shall appear before the above Court on Monday 23 November 2009 at 14h00 to give reasons why they should not be found guilty of contempt of this Court and sentenced accordingly-*
 - 3.1 *Mr T P Kgoale – Director of Immigration*
 - 3.2 *Mr Mociane Mangena – Immigration Officer*

3.3 *Mr Jackie MacKay – Deputy Director General of Immigration.*

4. *The Respondents shall provide this Court with written reasons before 10h00 on Tuesday, 24 November 2009, why the Applicant should be deported from South Africa.*
5. *The Applicant shall file an affidavit explaining all events that occurred after the Court Order on Friday, 20 November 2009, was granted, with this Court before 14h00 on Monday, 23 November 2009, and serve it on the Respondents;*
6. *The Applicant is ordered to appear in Court on Tuesday, 24 November 2009 personally at 10h00;*
7. *Service of this Court Order may be effected by the Sheriff or the SAPS, or the Applicant's attorney, and for purposes of Prayer 3, service on the officers of First Respondent or OR Tambo Airport shall be sufficient."*

[20] This order was telefaxed to Attorney Strauss immediately after it was granted by myself. It was then communicated by Mr Strauss to various representatives of the department, including Mr MacKay and Mr Erasmus as well as Louisa Zondo, the Head Legal Advisor for South African Airways. South African Airways indicated immediately that they would comply with both court orders, but at 18h00 on the Saturday, the applicant had not been released yet. Eventually, after a further threat to Mr Erasmus that an application would be brought on an urgent basis for him, Kgoale, Mangena, MacKay and any other immigration officials participating in the refusal to comply with the court orders, to be incarcerated for

contempt of court, Mr Erasmus gave instructions to release the applicant. She was eventually released at 19h30 on the Saturday.

[21] An application was then brought by the applicant for hearing on Friday, 27 November 2009 in terms of which the applicant asked that Mr Kgoale, Mangena and MacKay be found in contempt of both court orders and committing them to prison. When the parties appeared on Tuesday, 24 November 2009 I specifically asked the applicant's legal representatives whether they intended to bring a substantive application for such relief, which they confirmed. I therefore believe that the process followed was fair, as all parties had the opportunity to file papers, and the relevant persons who were subject to the contempt of court proceedings, knew what was alleged and complained of by applicant, as required in *S v Mamabolo* 2001 (3) SA 409 (CC).

[22] The Department of Home Affairs filed opposing papers in respect of the deportation and contempt of court proceedings. The affidavit relating to the contempt of court application was deposed to by Mr MacKay. However, the first step in the approach of respondent was to bring an application for my recusal on the basis that I was biased. I will deal with that application hereunder.

[23] Mr MacKay explained that he had seen the applicant's passport and that he had noticed an endorsement of a work permit. He

asked the officials for the grounds of the applicant having been refused entry, upon which they pointed out what the basis was. I will deal therewith hereunder. He stated that he was satisfied with the explanation and that he had held discussions with the attorneys of the applicant thereafter. The first court order was then given to him. He noticed that the document was titled "Notice of Motion" and decided that he was not going to regard that as a court order. He states in the affidavit that he is a layperson whose interpretation was that it was not a court order but a notice of motion. A person in his position working in the immigration department, is not a layperson. I have no doubt that he knows the difference between a notice of motion and a court order. His attempt, as far as I am concerned, to explain that he was a layperson who did not understand the difference between a court order and a notice of motion, is untrue and is rejected.

[74] He simply held the view that the document was not a court order and that he does not have to comply therewith. I find it extremely strange that he did not attempt to make sure that it was in fact a court order. There is a telephone number throughout the weekend available through which the urgent judge and his registrar could be contacted. A simple telephone call would have explained the situation and he would then have known that it was a court order. He says in his affidavit that he resolved not to be pressurised by the attorneys and to make a decision *ex facie* the document which

would not accord with the document. He therefore, of his own accord, simply decided to disbelieve attorneys, who are officers of this court, and to decide himself if he would comply with the court order or not. He says the following: "*I was not impressed by these threats*", regarding threats that he would be held in contempt of court, which were made by the applicant's employer and the attorneys. As I have mentioned, he **disbelieved my registrar and refused to speak or listen to me.**

[25] He then apparently referred the matter to legal services of the department and especially Adv Deon Erasmus, Chief Director Legal Services. He states that he was prepared to request South African Airways not to remove the applicant from the Republic of South Africa, but that she should be transferred to the inadmissible facility to remain under the care of South African Airways. This was contradicted by the version of the applicant who states that there was an attempt to forcibly deport her, through assault and violence.

[26] He also says that he refused to speak to me when I was requested by the lawyers of applicant to contact him. I need not elaborate on this statement in the light of what I have stated before.

[27] He says that the first time he had had sight of the second court order, was when it was presented to him on Sunday, 22 November 2009 when he consulted with the department's counsel. He then

states that it was never his intention not to obey the court order. However, his general attitude, his refusal to believe my registrar and thereafter to speak to me over the telephone, his refusal to determine if it was a court order or not by simply phoning the after hours telephone number, and his attempt to explain that he thought that the document constituting the first court order was in fact a notice of motion, indicates otherwise.

[26] The following is disconcerting, as expressed in his affidavit regarding court orders:

"This however takes place in a regulated manner and it is a strict instruction to the officials concerned that they only respond to written court orders on which certain identifying features need to be present, before such document is accepted as a valid court order."

[29] It is therefore clearly left to the discretion of officials to decide if a court order is according to them a court order or not, and if they themselves decide that a document is not a court order, they may simply refuse to adhere thereto. There is no provision for taking steps to determine the veracity of any court order built into this procedure. This is a further indication of the arrogant approach towards court orders by these officials.

[30] He then states in his affidavit that the first court order was *ex facie* the content thereof not a court order and that he simply therefore on

the basis thereof, refused to adhere thereto. He does not explain why he did not want to accept the word of one counsel and two attorneys who attempted to explain to him that they were present when the court order was granted, why he did not want to speak to me over the phone, or why he did not attempt to phone me after hours, in order to determine the veracity of the court order. He was apparently of the view that his own decision pertaining to the veracity of a court order, was good enough and justified.

[31] In his affidavit he attempts to argue that the problems were created by the applicant's legal representatives, and that they should have rectified the court order. That is simply in my view no answer. A simple phone call to the after hours number at the Pretoria High Court would have provided him with all the necessary information he needed to determine if it was a true court order or not. He chose not to do so and has not explained to this court why he did not do so.

[32] It is important however, that Mr MacKay states that if the court was inconvenienced by the events of 20 to 21 November 2009, a deep and sincere apology was offered.

[33] Mr Kgoale was apparently on his way to a funeral when these incidents occurred on the Friday. He stated that he could not simply react to a telephone call by a person purporting to be an attorney insisting that a court order was faxed to his fax number. I

have mentioned that Mr Kgoale left a message on my cellphone that same evening apologising, after Adv Bofilatos had determined that I had indeed granted the order. This explanation and apology was also referred to in the affidavit of Mr MacKay. Mr Kgoale confirmed in a supporting affidavit these facts and I accept that he intended to make an apology.

[34] Mr Mogale is an immigration officer at the Immigration Hall. He is responsible for verifying passports and endorsements therein and to make decisions in respect of any problems arising therefrom. It was Mogale who had decided that the applicant should not be allowed into the country. He questioned the fact that the applicant was away for such a long period of time and he denies that the applicant told him that she was ill. He stated that the only reason given to him for the long absence was the fact that applicant's daughter had given birth. He also stated that the applicant had said that she had not applied for an extension of her existing work permit. He then decided to deport her. He issued a notice in terms of section 8 (1) of the Act and conveyed the content to the applicant through an interpreter. The applicant refused to sign the notice. Mogale refused to adhere to a request of the lawyer of the applicant, based on the court order.

[35] On Saturday, 21 November 2009 Mogale had been informed again of the court order by Mr Matsaung, the attorney of applicant.

Mogale refused to release the applicant. He was later approached by Mr Strauss and then saw the court order for the first time. He told Strauss that he had no authority to release the applicant, but that he had referred the matter to his superiors. He never saw the first court order. He only saw the second order and saw the first order only during consultation with counsel on the Sunday.

[36] In the replying affidavit to the contempt of court application, the applicant stated that the officials of the department throughout the matter felt that they were not obliged to comply with any orders of the court. There was furthermore no application for condonation for late filing of their affidavits and no substantial application was launched timeously for my recusal. It was submitted that this was indicative of the approach of the respondents to this court.

[37] Applicant stated that she was entitled to travel to South Africa and to be permitted entry as a result of her permit. She also confirmed that her employer wanted to extend her employment.

[38] Mr MacKay also deposed to an affidavit pertaining to the merits of the deportation, and the decision taken in terms of section 8 (1) of the Act. He referred to the procedures in sections 8 and 35 of the Act. He submitted that the officials of the department substantially complied with the procedure in terms of section 8 (1) and section 35. He argued that there was a review procedure available and

provided for in the Act and the regulations thereunder, and that the application could not have been brought before such remedies were exhausted. He submitted that an application such as the one brought by the applicant materially undermines the procedures which have been provided for in the statutory provisions to deal with the situation that presented itself. He submitted that the issue to be decided was whether or not the immigration officials were entitled to have refused the applicant entry into the Republic of South Africa. He stated that when a person presents a permit which is about to expire, officials are required to question the person wishing to seek entry into South Africa as to the purpose for the visit and steps that may be taken in order to extend the permit.

[36] He alleged that the applicant stated that the purpose of the visit was a social visit. The investigations further showed apparently that she had entered South Africa on a Taiwanese passport on 25 November 2006, but that the extension of the work permit was endorsed on a different passport, namely one of the Peoples of the Republic of China. An extension of the applicant's work permit was granted on 12 February 2007. Applicant left the Republic on 13 February 2007. Although there is an endorsement to that effect in the passport there is allegedly no record of this movement of the applicant in the control records of the department. She then entered South Africa again on 26 October 2007 using the passport

of the Peoples Republic of China and thereafter departed from South Africa on 17 July 2008 on the same passport.

[41] The departure on 13 February 2008 was apparently not recorded in the systems of the department. Applicant had only spent nine months in South Africa after her work permit was extended on 12 February 2007, and applicant had not applied for extension of her permit that was to expire on 15 December 2009.

[41] As a result of the foregoing Mr Mogale refused the applicant entry into South Africa. Mr MacKay states that he agreed with Mr Mogale regarding his decision not to permit the applicant entry into South Africa. He states that Mogale was justified in his decision to refuse admission to the applicant.

[42] It is necessary to refer to the notice issued by Mogale in terms of section 8 (1) of the Act. This notice was issued in respect of a person refused admission at a port of entry. A note was made that the applicant refused to sign the notice. It was dated 20 November 2009. The notice of refusal of the entry into the Republic of South Africa in terms of section 34 (8) of the Act was addressed to the applicant and stated the following:

"You are in terms of the provisions of sections 29 (1), 30 (1), 34 (8) of the Immigration Act, 2002 (Act No 13 of 2002) refused admission to the Republic of South Africa as you have failed to comply with the examination procedure."

A note was made that the applicant refused to sign this document.

[43] This, on the face of it, contradicts the allegations made by representatives of the department in this regard in their affidavits.

[44] In the replying affidavit the applicant stated that the notice in terms of section 8 (1) was not signed by the interpreter. This is a valid point. However, the notice in terms of section 34 (8) stipulates that the applicant had failed to comply with the examination procedure. She was not provided with the services of a recognised interpreter and she did not know what examination procedure was referred to. She stated that no examination could take place because the department's representatives could not speak Chinese and she could not speak any other language. She stated that, having been in possession of a valid work permit which expired only on 15 December 2009, she was entitled to travel to South Africa, and that the department's officials were not justified in refusing her entry into the country. She travelled with the permission of her employer, who wishes to employ her. She stated that her employer was prepared to comply with the provisions of section 19 of the Act to ensure the renewal of her work permit and her continued employment. She denied the information pertaining to her various entries and stated emphatically that that information was incorrect.

THE DEPORTATION APPLICATION

[45] Section 8 (1) of the Immigration Act provides as follows:

"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 ..."

[46] Section 34 deals with deportation and detention of illegal foreigners and section 34 (1) reads as follows:

"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 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 day, and*
- (e) *shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."*

[47] Section 35 (8) reads as follows:

"A person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission in the prescribed manner, as well as for any costs related to such detention and removal incurred by the Department."

[48] Regulations 6 (1), 6 (2) and 6 (3) (a) provide as follows:

"6. Admission and departure

- (1) *An application for a certificate contemplated in section 9 (3) (c) (i) of the Act shall be on a form substantially corresponding to Form 4 contained in Annexure "A".*
- (2) *An examination contemplated in section 9 (3) (e) of the Act shall take place when a person presents himself or herself to an immigration officer.*
- (3) *A person contemplated in subregulation (2) shall –*
 - (a) *satisfy the immigration officer that he or she –*

- (i) *is not an illegal foreigner by producing a valid passport and visa or permit;*
- (ii) *is not a prohibited person by providing that he or she is in compliance with section 29 of the Act;*
- (iii) *if previously declared an undesirable person, has complied with section 30 (2) of the Act; or*
- (iv) *is not in contravention of the Act by producing a permit commensurate with the activities to be undertaken by him or her in the Republic."*

[43] Regulation 6 (6), 6 (9) and 6 (10) read as follows:

- "(6) *An immigration officer who has not been satisfied as contemplated in subregulation 3 (a), may interview that person and shall record the general contents of that interview on a form that substantially corresponds to Form 7 contained in Annexure A.*
- (9) *When examining a person before his or her departure from the Republic, an immigrant officer shall ensure that that person is not –*
 - (a) *a fugitive from justice; or*
 - (b) *the subject of a court order that orders the Department to prevent his or her departure.*
- (10) *An immigration officer who finds a person to be a person contemplated in subregulation 9 (a) or (b), shall refuse that person to depart."*

[50] It is important to note the contents of regulation 6 and to test the actions of Mr Mogale against these requirements. Mr Mogale must have been satisfied that the applicant was not an illegal foreigner

through her producing a valid passport and her valid work permit. She could not have been a prohibited person or undesirable person in terms of regulation 6 (3) and that she did not act in contravention of the Act. She therefore must have satisfied Mr Mogale in terms of regulation 6 (3). The interview is referred to in regulation 6 (6) where an immigration officer has not been satisfied as contemplated in regulation 3 (a). The general contents of the interview must be recorded in a form substantially corresponding to form 7 contained in annexure "A" to the regulations.

[51] Conspicuously absent in the papers in this matter is such a form. Furthermore an interview must only take place once an immigration officer has not been satisfied as contemplated in sub-regulation 3 (a). I have already pointed out that the applicant complied with all the requirements of regulation 6 (3) and any interview must therefore have been *ultra vires*.

[52] Regulation 6 (9) provides that during an examination the immigration officer must ensure that a person is not a fugitive from justice or the subject of a court order that orders the department to prevent his or her departure. Only in the case of an immigration officer who finds a person to be a person contemplated in sub-regulation 9 (a) or (b), he/she shall refuse that the person may depart.

[53] It is therefore clear that the examination conducted by Mr Mogale was *ultra vires*, and the reasons given in the affidavits in this matter for refusing the applicant access to South Africa are simply not in terms of the law.

[54] The professed knowledge and experience of Mr MacKay, Mr Kgoale and Mr Mogale, apparently does not accord with the provisions of the Act and the regulations.

[55] I have therefore come to the conclusion that the detention and refusal to admit the applicant was unlawful and *ultra vires*.

[56] It follows therefore that the applicant was detained unlawfully at the airport, and that the application for her release made by Ching, and the order that I had granted in that regard, was justified.

[57] After argument on 27 November 2009 I granted an appropriate court order in terms of which I refused the recusal application, reserved judgment on the contempt of court application and costs of the three separate applications, and in terms of which I granted ancillary relief.

[58] The original order was therefore justified and in accordance with the legal position when the order was made.

THE CONTEMPT OF COURT APPLICATION

[59] I have already pointed out above the reasons why the application for contempt of court in respect of Mr Kgoale, Mr MacKay and Mr Mogale was brought. I have given long and hard consideration to this issue.

[60] I have also considered the decision of *Fakie NO v CCI Systems (Pty) Ltd*¹ where contempt of court in civil proceedings was considered by the Supreme Court of Appeal.

[61] I have taken into account that the standard of proof is "beyond reasonable doubt" and not a "preponderance of probabilities", such as in normal civil proceedings.

[62] I have also taken into account that once an applicant proves the existence of a court order, and service thereof, and non-compliance, a respondent bears the evidential burden to show a reasonable possibility that non-compliance was not lawful or *mala fide*. This is obviously applicable to any time period that elapsed before compliance with any court order.

[63] The following was stated by Cameron JA in paragraphs 6 to 10 of his judgment:

¹ 2006 (4) SA 326 (SCA)

- [6] *It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.*
- [7] *The form of proceeding CCI invoked appears to have been received into South African law from English law and is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not do something (ad factum praestandum), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.*
- [8] *In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.*
- [9] *The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*
- [10] *These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable*

non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

[64] I also refer to paragraphs 29 and 30 that read as follows:

"[29] Since the applicant in punitive committal proceedings must prove contempt beyond reasonable doubt, why should a lesser standard be warranted when committal is sought for coercion alone? In my view, there can be no reason. Pickering J pointed out in Uncedo that the application of two different standards of proof, depending on whether the initiator chooses to lay a criminal charge or proceed civilly, is unwarrantable, because it introduces 'a certain degree of arbitrariness.' This applies the more if the standard of proof were to depend on the objective with which the initiator proceeds, and would run counter to this Court's analysis in Beyers, which pointed to the ineluctably criminal dimension of the remedy granted even in proceedings aimed at coercion".

[30] While the applicant may disavow punishment as a motive (a matter to which I return), the means the court is asked to employ remain the same: the public sanction of imprisonment for disobedience of a court order. The invocation of that sanction, in my view, requires conclusive proof. No less than punitive committal, purely coercive committal uses imprisonment, or its threat; and whenever loss of liberty for disobedience of an order of court is threatened it seems to me necessary and proper that the infraction should be proved conclusively."

and paragraphs 38, 39, 40 and 41:

"[38] Given our very different constitutional setting, the approach of the English, Australian and Canadian Courts seem convincing to me. As they have found, there is no true dichotomy between proceedings in the

public interest and proceedings in the interest of the individual, because even where the individual acts merely to secure compliance, the proceedings have an inevitable public dimension – to vindicate judicial authority. Kirk-Cohen J put it thus on behalf of the Full Court:

'Contempt of court is not an issue inter partes, it is an issue between the court and the party who has not complied with a mandatory order of court'.

Elaborating this, Plasket J pointed out in the Victoria Park Ratepayers case that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government. There is thus a public interest element in every contempt committal. He went on to explain that when viewed in the constitutional context

'it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system ... That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest'.

[39] These expositions seem to me compelling. A court, in considering committal for contempt, can never disavow the public dimension of its order. This means that the use of committals for contempt cannot be sundered according to whether they are punitive or coercive. In each, objective (enforcement) and means (imprisonment), are identical. And the standard of proof must likewise be identical.

[40] This approach conforms with the true nature of this form of the crime of contempt of court. As pointed out earlier, this does not consist in mere disobedience to a court order, but in the contumacious disrespect for judicial authority that is so manifested. It also conforms with the analysis in Beyers above, where this Court held that, even though enforcement is the primary purpose of committal, it is nevertheless not imposed merely because the obligation has not been observed, 'but on the basis of the criminal contempt of court that is associated with it'.

The punitive and public dimensions are therefore inextricable; and coherence requires that the criminal standard of proof should apply in all applications for contempt committal.

[41] *Finally, as pointed out earlier, this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in Burchell that, in most cases, the change in the incidence and nature of the onus will not make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt."*

[65] The applicant has clearly proved the two court orders, service, and non-compliance immediately after service. However, there was only at a later stage compliance. The respondents must provide evidence raising reasonable doubt as to whether non-compliance was wilful and *mala fide*. The question arises if wilful and *mala fide* actions for a period of time, and compliance thereafter, justifies a finding against those alleged to have acted in contempt of court.

[75] I have, as I have mentioned, given long consideration to this question.

[37] It was eventually not necessary to grant a committal order calling for compliance, which is one of the mechanisms utilised to ensure compliance. I have furthermore considered the apology of Mr MacKay in the papers supported by Mr Kgoale and Mr Mogale, and also the apology made telephonically to me by Mr Kgoale.

[38] Under the circumstances I cannot bring myself to come to a finding beyond reasonable doubt that the three persons acted wilfully and *mala fide* throughout the whole time period. I have no doubt that Mr MacKay acted originally, after service of the first court order, in such a fashion. That was only purged as a result of his much later actions and behaviour. However, if this court had not intervened strongly as it had done, I believe that the applicant would have been deported back to Hong Kong, notwithstanding the first court order.

[39] Insofar as Mr Mogale is concerned, his evidence was that he referred the matter to his superiors. I cannot beyond reasonable doubt find that he had acted wilfully and *mala fide* regarding any of the court orders. The same is applicable to Mr Kgoale. I also take into account the fact that Mr Kgoale on the Friday evening already apologised to me over the phone and that he was not present at the airport. The difficulty lies with the actions of Mr MacKay. This application is not an application to attempt to enforce a court order as, when the application was brought, there had already been

compliance with the original two court orders I had granted on the Friday and the Saturday. I therefore only have to consider the question if Mr MacKay had at some stage before there was compliance with the court orders wilfully and *mala fide* refused to comply therewith.

[70] It appears from *inter alia Fakie NO v CII Systems (Pty) Ltd*² that a private litigant who has obtained a court order requiring an opponent to do or not do something, may approach the court again in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court and imposing the sanction. It appears to me that a purpose of the sanction is aimed at inducing compliance with the court order³.

[71] However the question arises if a court can simply ignore the fact that a person for a specific period of time acted in contempt of a court order, and then thereafter, through much force and persuasion, changed his mind to then comply with the court order. Should such a person be regarded as not having committed the offence, should a court order be sought against him in that regard? I do not think so. Once the requirements of the offence have been established to have existed at a certain period in time, and once it is found that no valid offence has been raised in that regard, a positive finding should follow.

² 2006 (4) SA 326 (SCA)

³ *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* 2009 (3) SA 305 (W) at 23

[72] It must be kept in mind that contempt of court proceedings are not only directed towards the perpetrator, but are directed towards the protection of the courts, respect towards the courts and court orders, and the protection of the integrity of the court system. Non-compliance at a specific period in time cannot therefore simply be ignored because compliance did in fact occur at a later stage.

[73] Regarding the procedure followed, I must point out that all those concerned were given the opportunity to file whatever papers they wanted in the exercise of their right to give reasons why they should not be found guilty of contempt of court. They knew exactly what the allegations were that were levied against them, as they were set out in the application for committal. There is therefore in my view no question of anyone not having had proper knowledge of the complaints against him, nor has anyone not been given a fair and reasonable opportunity to explain himself.

[74] As opposed to the foregoing, there are decisions in the Natal Provincial Division, namely *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others*⁴ followed by *Naidu and Others v Naidoo and Another*⁵ where the courts came to the conclusion that a litigant has no *locus standi* to seek an order for contempt arising out of a breach of an order obtained, in a proceeding where the

⁴ 1956 (1) SA 105 (N)

⁵ 1993 (4) SA 542 (D&CLD)

punishment is not to calculated to cause compliance with the order, but is brought at a later stage, after compliance had been attained.

[75] I am however of the view that non-compliance with a court order, at a specific given period in time, constituting an offence that has been committed at that time, cannot or should be ignored by a court simply because of the fact that there was at a later stage compliance with the court order. That renders the remedy only applicable to a situation where a person has refused to obey a court order, and the court is requested to strengthen its court order by way of a threat of a guilty finding of contempt, and a suitable order ensuring compliance.

[76] Such a procedure may lend itself to the eventual enforcement of court orders, but there seems to be no element of protection of the integrity of the courts and the enforcement of respect towards the courts and court orders. I respectfully therefore differ from the approach in the Natal Provincial Division referred to above, and I come to the conclusion that once a party to any proceedings has shown that there was at any given time non-compliance with a court order, that was wilful and *mala fide*, a finding of contempt of court can be made. Obviously later compliance with a court order will have a substantial effect on the penalty flowing from such a finding. It should however not preclude the granting of such an order should it be requested.

[77] In this matter an order was requested and asked for that Mr Mogale, Mr Kgoale and Mr MacKay be found guilty of contempt of court. I have already given my reasons why the first two mentioned persons should not be found guilty of contempt of court. However in the case of Mr MacKay, I am of the view that his approach to the original court order, and also the second order issued by me during the course of the Saturday, showed a clear and unarguable disdain and disrespect towards the courts. There was a wilful and *mala fide* disregard of this court's court orders. I therefore come to the conclusion that the application should succeed in respect of Mr MacKay, but that the later compliance with my two court orders, justifies a sanction of a warning only.

THE RECUSAL APPLICATION

[78] The first respondent brought a recusal application on the grounds that when the application was called during the afternoon of Monday, 23 November 2009, I enquired from applicant's counsel as to whether or not applicant wished to bring a contempt of court application, after which I requested the parties to agree to the filing of papers in respect thereof. Reference was also made to the fact that I in passing, remarked that I wished to dispose of the matter myself and that I would want to do so before 27 November 2009.

[79] Mr MacKay stated that all the persons involved in the matter were of the view that I would be acting contrary to the constitutional rights of himself, Mr Mogale and Mr Kgoale, who were in the position of accused persons, should I entertain the contempt of court proceedings *mero moto*.

[80] He stated that it was most unusual and disturbing that the court invited the applicant to lodge contempt of court proceedings and that the court intended to hear that application itself. (I did not invite the applicant to bring such an application, but merely asked if they intended to bring such an application).

[81] He also complained about the fact that there was no particularity as to the case which they had to face. He also referred to the fact that I telephonically attempted to speak to those who refused to comply with the court order, and he made the allegation that it was inappropriate for a judicial officer to become involved in the execution of a court order. (I simply wanted to confirm the authenticity of the order, and nothing else).

[82] A number of further grounds were referred to which I need not deal with as they mostly concern the abovementioned issues.

[83] I wish to state clearly and emphatically that I was deeply concerned about the reports that I had received from the counsel and

attorneys who had appeared before me, of officials apparently in an arrogant way refusing to comply with court orders. I am also of the view that, if I had not through my registrar, and later personally attempted to speak to the officials concerned, the applicant would have been deported, notwithstanding the merits of her situation referred to above. I was of the view that a friendly and informative telephone call by my registrar to those concerned would have yielded the necessary results. In the end, my registrar was simply laughed off and treated with contempt. It was at that time that I decided to speak to the persons myself. This was the case in respect of Mr MacKay in particular. I again point out that if he had gone to the trouble to phone the after hours telephone number of the urgent court, he would have easily been able to have determined the status of the first court order and he could have acted in accordance therewith. He simply decided, apparently, that it was not necessary.

[84] The fact that I had acted in such a fashion cannot give rise to any perception that I would have been biased. It was furthermore only because I was acting in the urgent court, after hours, over a weekend.

[85] Furthermore, the way I dealt with the matter in the urgent court and the opportunities given to the parties to file papers, in my view,

could never have lead to any perception that I was biased or would be biased.

[86] The test is to determine if there is a perception that a judicial officer will not be impartial⁶. In the light of the foregoing facts no such reasonable conclusion could have been made.

[87] When the application was brought and argued, I was of the view that there could not have been any reasonable perception of *bias*, and I came to the conclusion that the application had to be refused. I was of the view that the application was simply brought as part of a tactical strategy employed by the respondents, and I therefore came to the conclusion that no proper case was made out for purposes of my recusal. I therefore refused the application and indicated that I would give reasons later, which I do herewith.

[88] I have therefore come to the conclusion that the relief in terms of the application for contempt of court should only be granted on the basis aforesaid. I have also come to the conclusion that the application for my recusal was correctly refused. I am furthermore of the view that the court order granted by myself on 20 November 2009 was correctly justified, as was the order granted on 27 November 2009.

S v Basson 2007 (3) SA 582 (CC) at 27

COSTS

[89] That leaves only the issue of costs. I am of the view that the applicant was, taking into account all three applications, substantially successful in respect of the relief sought regarding her deportation, as well as in respect of the recusal application. Furthermore, I have already pointed out that the actions of the representatives of the first respondent were not acceptable under the circumstances, even though I could not bring myself to come to a finding beyond reasonable doubt that they all wilfully did not comply with the court orders. However, their actions in my view, without a doubt, warrant sanction and I am therefore of the view that the first respondent should pay the costs of the applicant in respect of all three of the applications.

I therefore make the following order:

- "1. The order granted on 27 November 2009 is confirmed and first respondent shall pay the costs in respect thereof;
2. The application for recusal is dismissed with costs;

3. Deputy Director-General MacKay is found guilty of contempt of court and is warned;
4. The costs of the application of the contempt of court application shall be paid by first respondent."

SIGNED AT PRETORIA THIS 11th DAY OF OCTOBER 2010.



ACTING JUDGE ROELOF DU PLESSIS –
HIGH COURT OF SOUTH AFRICA
GAUTENG NORTH DIVISION

LIN GUI LAN/OR TAMBO AND ANOTHER

On behalf of applicant:

**Kirparl Attorneys
(Mr Michael Strauss)
459 Leyds Street
3rd Floor
Schindler House
Sunnyside
Pretoria**

**Adv LM Hodes SC
Tel: 0825622222**

On behalf of respondents:

**The State Attorney
(Ref: Mrs Gladys Dladla)
Bothongo Heights
3rd Floor
Room 304
Andries Street
Pretoria**

Adv G Bofilatos