REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 41265/2011

DATE:28/11/2011

"REPORTABLE"

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

....
DATE SIGNATURE

In the matter between:

AHMED ABDUL NIBIGIRA Applicant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS Second Respondent

BOSASA (PTY) LTD t/a LEADING PROSPECTS TRADING Third Respondent

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J U D G M E N T

KGOMO, J:

INTRODUCTION

[1] This is an application for the release of the applicant who has been and is still being detained at the Lindela Holding Facility near Krugersdorp, pending his deportation from the Republic of South Africa. I will refer to the facility hereinafter as "*Lindela*".

[2] The applicant is alleged to have been born in Burundi. However, according to the founding affidavit he deposed to in support of this application, he is not and has not been recognised as a national by the Burundian Embassy in South Africa. Neither is he allegedly been recognised as a Tanzanian national, the latter country being the place from whence he came when he ultimately found himself in South Africa.

THE APPLICATION

[3] The applicant launched this application in the Urgent Court of this Court on 28 October 2011, which application served in that Urgent Court on 1 November 2011 for an order:

> "*2.1 Dispensing, so far as needs be, with the forms and service provided for in the Uniform Rules of Court and disposing of this application at such time and place and in such manner and according to such procedure as this Court deems meet in terms of Rule 6(12) of the Rules of Court;*
>
> *2.2 To the extent necessary, permitting the Applicant to bring the present application without exhausting any applicable internal remedies provided for in Section 8 of the Immigration Act 13 of 2002 (Immigration Act);*

2.3 Declaring the detention of the Applicant to be unlawful;

2.4 Directing the Respondents to release the Applicant forthwith;

2.5 To the extent necessary, reviewing and setting aside any decision of a Magistrate's Court to extend a warrant of detention, if any, issued and/or extended in terms of s. 34(1)(d) of the Immigration Act 13 of 2002 as read with Regulation 28(4) of the regulations issued pursuant and/or in terms of the said Immigration Act;

2.6 To the extent necessary, reviewing and setting aside any decision of a Magistrate's Court to issue a warrant of detention confirming the detention is for purposes of deportation in terms of s. 34(1)(b) of the Immigration Act as read with Regulation 28 of the regulations thereto;

2.7 Directing the First and Second Respondents to issue the Applicant with written confirmation that they have received his application for permanent residence under section 31(2)(b) of the Immigration Act;

2.8 Directing the First and Second Respondents to pay the Applicant's costs;

2.9 Directing that the Third Respondent pay the Applicant's costs in the event that it opposes this application;

2.10 *Granting such further or alternative relief as this Court deems fit.*"

[4] The application was opposed by the first and second respondents.

[5] On 1 November 2011 Wepener J in charge of the Urgent Court postponed the matter to the opposed roll of the week starting 7 November 2011 and ending 11 November 2011 due to the fact that he did not find the issues therein contained urgent in addition to the fact that a substantial opposition was mounted. Hence this matter is before me.

[6] In addition to the normal opposition that was raised through the answering affidavit, the first and second respondents, who I will hereinafter refer to as the respondents, raised a point *in limine* of the non-joinder of the magistrate who is alleged in the papers to have extended the applicant's warrant of detention and against whom an order was sought that his conduct and action be reviewed and set aside. The respondents' prayer in respect of this point *in limine* was that the proceedings be held over pending that magistrate's joinder as a party to these proceedings.

BACKGROUND AND SHORT FACTUAL MATRIX

[7] Due to the fact that there is a difference of opinion regarding how it came about that the applicant find himself in South Africa and ultimately at Lindela, I find it necessary to set out both sides allegations as regards this aspect.

APPLICANT'S VERSION

[8] According to the applicant he was allegedly born in Bujimbura, Burundi, on 10 October 1985. No documentation was tendered to substantiate this legally hearsay and thus *prima facie* inadmissible allegation.

[9] For purposes of finality in this matter in the peculiar circumstances prevailing herein, I have decided to deal with the substantial issues, half-closing my eyes to issues like the above which might be hearsay. As such,

for purposes of judgment in this matter, I will accept that the applicant is presently 26 years old.

[10] According to him further, during 1995; when he was allegedly 10 years old, he fled Burundi with his parents and brother to the Democratic Republic of the Congo ("*DRC*") because of the civil war that was raging in Burundi at the time.

[11] Apparently, according to him, his parents were killed in the DRC during or around 1998, as a consequence whereof his and his brother then fled to Tanzania. We would have been 13 years at that time.

[12] He and his brother, so went his story, were recognised as refugees by the Tanzanian Government and the United Nations High Commissioner for Refugees ("*UNHCR*") and they were accommodated at the Kigoma refugee camp. His brother was resettled by the UNHCR to Canada in 2002. He remained in Tanzania until May 2011 when he left for South Africa.

[13] He does not explain how he travelled to South Africa, which is separated from Tanzania by other Southern African countries or under what circumstances he did so.

[14] He arrived in South Africa on or around 9 June 2011 and travelled to Durban where he was arrested on or approximately 10 June 2011 because he could not produce any documentation allowing him to be in South Africa.

[15] He was detained at the Westville Prison for approximately 27 days. Thereafter he was transferred to Lindela where he was admitted and detained since 7 July 2011.

[16] It is his story further, that while so detained at Lindela the officials there arranged that he meet with people from both the Burundian and Tanzanian Embassies in order to facilitate his deportation from South Africa. According to him the Tanzanian Embassy refused to issue him with the requisite one-way travel document which is also referred to as the emergency travel certificate ("*ETC*") because he was allegedly a Burundian. The Burundian Embassy refused to recognise him as a Burundian national because he failed to speak or rather could not speak their native Kirundi language and they also did not want to listen to or accept his explanation that he could not do so because he left Burundi when he was only 10 years old.

[17] His legal representatives, lawyers for Human Rights, wrote to the Burundian Embassy on 17 October 2011 and also sent a reminder to them on 21 October 2011 when a response was not forthcoming, asking them to confirm to them in writing whether or not the applicant, who was registered at Lindela under the names Ahmed Abdul, was a Burundian national. No response thereto was received.

[18] Also on 17 October 2011 they (his legal representatives) also communicated with the officials at Lindela asking the latter to confirm in writing whether or not the applicant had indeed been disowned by the

Burundian Embassy on behalf of Burundi. No response was also received from Lindela.

[19] His legal representatives have also written to UNHCR asking the latter to confirm from their records if his Burundian nationality could be confirmed. To date no response has been received from them too.

[20] He found himself in a position where he was stateless for all practical purposes. As South Africa can only deport him to a specific country the fact that no country "*knew*" him meant that South Africa could not deport him. That was when his legal representatives wrote to the immigration officer responsible for his detention, Mr Alison Hlomane; the head of Lindela, Mr George Masanabo and two other directors of Lindela, Mr Joseph Swartland and Ms Ann Mohube; all of them on 24 October 2011; calling upon them to confirm his detention for purposes of detention by means of a warrant in terms of section 34(1)(b) of the Immigration within 48 hours of their receipt of the letter, followed by a copy of such warrant within the same 48 hours. They also asked that they be notified of the time, date and place where such warrant would be sought so that they could also attend to make representations on his behalf. The letter contained the following threat or reminder:

> "*17. Should you fail to obtain a warrant within 48 hours of this request we are instructed to demand, as we hereby do, the immediate release of our client from detention in terms of s. 34(1)(b) of the Immigration Act.* [sic] *Failing which we are instructed to approach the High Court on an urgent basis for appropriate relief.*

18. *We have copied this notice to the Chief, Magistrate of the Krugersdorp Magistrates' Court and Magistrate du Plessis of the Krugersdorp Magistrates' Court in order to facilitate the arrangement for a date and time for the hearing regarding the warrant of detention within the next 48 hours.*
19. *All of our client's rights are reserved.*"

[21] From his legal representatives he learned that the only response they have received was from Mr Masanabo who informed them that he was at the time working at Home Affairs Head Office and that one Mr Makgabo Kekana was in charge of Lindela as a seconded head for an indefinite period. This response was by e-mail dated 25 October 2011 at 08:50. The same date at 11:39 the legal representatives forwarded the section 34(1)(b) request to Mr Kekana.

[22] Unfortunately he has to date received no warrant as requested. When the date of his affidavit is taken into account, which is 28 October 2011, my understanding of this allegation is that as at this date no warrant in terms of section 34(1)(b) had been received by the applicant.

[23] On 27 October 2011 his legal representatives sent a further letter to Lindela calling for his immediate release. Despite all the above, he is still detained at Lindela and he states that he has been advised that once a warrant of detention in terms of section 34(1)(b) was called for and was not forthcoming within the requisite 48 hours, then he was to be released forthwith.

RESPONDENTS' VERSION

[24] The respondents' version is mostly based on the records at Lindela. According to those records, the applicant was brought to Lindela on 6 July 2011 after having allegedly been previously arrested in a joint operation involving the SA Police Services or Force and the Durban Metro Police after he was found to be an illegal foreigner as he did not possess or have with him documentation entitling him to be in South Arica. He was the brought to Lindela between the 6 and 7 July 2011.

[25] It is their further evidence that according to information imparted to them by Lindela officials the applicant entered South Africa from Tanzania on 30 May 2011 with the purpose or intention of obtaining or to seek employment. A warrant for his detention was issued in Durban on 6 July 2011 under appointment number 16896564. The consecutive number of the warrant as appearing on Annexure "A" to the respondents' answering affidavit is DHA-1725 No. 389052. According to the respondent's further, this warrant authorised the detention of the applicant as an illegal foreigner for 30 days in terms of section 34(1) of the Immigration Act. This warrant has at its bottom the following inscription:

"*NB: No release may be effected without the written authority of an immigration officer by means of a warrant of release referred to in section 34(7) of the Act.*"

[26] Being mindful of the requirements under section 34(1)(d) read with or together with Regulations 28(4)(c) and 28(6) of the Regulations passed under section 7 of the Immigration Act, an application was made to the Krugersdorp Magistrate's Court on 29 July 2011 for the further extension of the applicant's initial 30 days detention, the period requested being a further 90 days. According to the respondents the magistrate so approached granted the application for extension to a further 90 days on 2 August 2011. They further stated that the Lindela people requested and were granted this additional 90 days due to:

"*… the intransigence of both the Burundian and Tanzanian Diplomatic office in coming to the assistance of the Applicant (and, in directly, the South African Government) in establishing the nationality of the Applicant.*"

[27] The respondents explained this diplomatic confirmation issue as follows through the deponent of their affidavit:

"*8.2 This is particularly necessary as a consequence of the fact that many persons facing deportation, deliberately mislead diplomatic staff (interviewing them at the Lindela Holding Facility) of countries which the detainees allege they are nationals of. This is done in order to sow confusion amongst*

> *the diplomats of a number of countries, as a consequence of which, more often than not, all the countries involved in the identification process of an illegal foreigner refuse to acknowledge the nationality of the person concerned, thereby achieving the aim of the* (sic) *detainee namely, to frustrate any attempts to have him deported. I respectively submit that the Applicant is one of those cases.*"

[28] According to the deponent of the respondents' answering affidavit the applicant displayed a more than satisfactory command of or over the English language when he spoke to him, refuting or answering to the allegation by the applicant that he was unable to speak the English language. It is my view that the respondents' answer hereto is at cross purposes with the applicant's averments because my understanding of the latter's utterance was that the Burundian diplomat did not want to acknowledge him as a Burundian because he could not speak the Burundian language, Kirundi.

[29] The long and short of the respondents' case is that when the applicant's legal representative wrote the letters dated 24 October 2011 and 25 October 2011, demanding that they apply for a warrant for his further detention, the extension of the period of detention had already been made, on 29 July 2011 for a period of 90 days. That warrant is attached to the papers as Annexure "B" at folio/page 86 of the paginated record herein. They did not know under what circumstances he (applicant) was detained in Durban by the South African Police prior to him being brought to Lindela on 6 July 2011. They accused the applicant with dishonesty and/or untruthfulness by not informing his legal representative that he was indeed taken before a

magistrate at Krugersdorp on 29 July 2011 for the extension of his warrant of detention.

LEGISLATIVE FRAMEWORK AND PRESCRIPTS

[30] Section 34(1) of the Immigration Act provides as follows:

> "*34.1 … The foreigner concerned –*
>
> *(a) Shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of the Act;*
>
> (b) *May at any time request any officer attending to him or her that his or her detention for purposes of deportation be confirmed by a 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 extent such detention for an adequate period not exceeding 90 calendar days; and*
>
> (e) *Shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.*"

[31] An illegal foreigner is defined in the Immigration Act as:

> "*a foreigner who is in the Republic of South Africa in contravention of the Act.*"

[32] Section 9(1) of the Immigration Act decrees that:

> "*Subject to this Act, no person shall enter or depart from the Republic (of South Africa) at a place other than a port of entry.*"

[33] Section 9(3) which is also material and relevant to the decision of issues in this case provides as follows:

> "*(3) No person shall enter or depart from the Republic –*
>
> *(a) unless in possession of a valid passport;*
>
> *(b) …*
>
> *(c) except at a port of entry, unless –*
>
> *(i) in possession of a certificate issued by the Director-General granting permission upon application to enter or depart from the Republic at a place other than a port of entry within a certain period not exceeding six months at a time, provided that for good cause the Director-General may withdraw such permission; or*
>
> *(ii) exempted as an individual or falling within a category of persons exempted by the Minister, on the recommendation of the Director-General, which exemption may be withdrawn by the Minister;*
>
> *(d) unless the entry or departure is recorded by an immigration officer; and*
>
> *(e) unless examined by an immigration officer as prescribed.*"

[34] Equally, section 9(4) of the Act decrees as follows:

> "*(4) A foreigner who is not the holder of a permanent residence permit may only enter the Republic as contemplated in this section if –*
>
> *(a) his or her passport is valid for not less than 30 days after the expiry of the intended stay; and*
>
> *(b) issued with a valid temporary residence permit, as set out in this Act.*"

[35] Section 33(2) of the Act decrees that:

> "*Any illegal foreigner shall be deported.*"

[36] Sections 34(5), (6) and (7) are in my view, also relevant and should be included in this legislative framework. They decree as follows:

> "*(5) Any person other than a citizen or a permanent residence who having been –*
>
> *(a) removed from the Republic or while being subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or*
>
> *(b) refuses admission, whether before or after the commencement of this Act, has entered the Republic,*
>
> *shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a court and, pending his or her removal, be detained in the manner and at a place determined by the Director-General.*
>
> *(6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.*

(7) On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released, he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant."

[37] Section 35(2) of the Constitution of the Republic of South Africa, 1996 provides that:

"*Everyone who is detained, including every sentenced prisoner, has the right –*

…

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released."

APPLICABLE VISAS AND PERMITS IN TERMS OF THE ACT

[38] The Immigration Act list a number of documentation under which a foreigner may be allowed to remain in the Republic of South Africa.

[39] I have given the definition of an illegal foreigner earlier on. It is important to set out how a foreigner is defined in the Act. He is defined as:

"*… an individual who is not a citizen.*"

[40] The various categories of permits available in terms of the Act are given therein as:

40.1 Transit visa by virtue of section 10B;

40.2 Visitor's permit – section 11;

40.3 Study permit – section 13;

40.4 Treaty permit – section 14;

40.5 Business permit – section 15;

40.6 Crew permit – section 16;

40.7 Medical treatment permit – section 17;

40.8 Relatives permit – section 18;

40.9 Work permit – section 19;

40.10 Retired person's permit – section 20;

40.11 Corporate permit – section 21;

40.12 Exchange permit – section 22;

40.13 Asylum transit permit – section 23; and

40.14 Cross-border and transit permit – section 24.

[41] The permits that were mentioned in the papers filed herein are the work permit and possibly by necessary implication, the asylum transit permit and cross-border transit permit.

[42] There are two types of work permits, namely, the quota work permit and the general work permit. A quota work permit is or may be issued by the Director-General, as prescribed, to a foreigner if that foreigner falls within a

specific professional category or within a specific occupational class determined by the Minister at least annually by notice in the Gazette after consultation with the Ministers of Labour and of Trade and Industry, which allocation of quota permits should not exceed the quota determined and/or set out in the notice. Obviously this permit would be issued strictly to professionals or specified vocational or occupational class of foreigner whose skills are scarce in the Republic. A general work permit may be issued by the Director-General to a foreigner not falling within a category or class contemplated under the classes set out under quota work permit where a prospective employer satisfies the Director-General in the prescribed manner, that despite diligent search he or she has been unable to employ a local citizen with qualifications or skills and experience equivalent to those of the foreigner applicant and/or such employer satisfies the Director-General that the terms and conditions under which he or she intends to employ that foreigner, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens, taking into account applicable collective bargaining agreements and other applicable standards; and that such employer has agreed in writing to notify the Director-General when such foreigner is no longer employed by him/her or is employed in a different capacity or role.

[43] There are allegations in the papers herein that the applicant allegedly told immigration officials that he was in South Africa in search for work. From the exposition of work permits set out above, he does not and will not qualify for a work permit. He is neither a professional or in a sought after or scarce

vocational class. Similarly, his credentials have not and are not being vouched for by a resident citizen employer for him to qualify even for a general work permit.

[44] I have not seen anywhere in the papers where the applicant indicated that he would need or apply for asylum or for an asylum transit permit. It is also the case with the cross-border asylum permit. He is categoric that he wants to be granted a permanent residence permit, not even or let alone a temporary residence permit. He has really set the bar high in his application,unilaterally.

[45] In terms of section 24 of the Act a cross-border and transit permit is issued by the Director-General to an applicant, including a foreigner who is a resident or citizen of a prescribed foreign country with which the Republic shares a border while such Foreigner is in transit to elsewhere.

[46] The applicant does not qualify for this permit. He is not a citizen or resident of a prescribed neighbouring country to the Republic.

[47] In terms of section 23 of the Act, an asylum transit permit may be issued by the Director-General to a person who, at a port of entry, claims to be an asylum seeker. Such a permit is valid for 14 days.

[48] The applicant did not state if he entered South Africa at a recognised port of entry. *Prima facie*, he cannot qualify for this permit, more so that he himself does not lay claim to it.

APPLICATION OF LAWS AND PRESCRIPTS TO FACTS *IN CASU*

[49] The applicant's case revolves around section 34(1)(b) of the Act as has been stated above.

[50] It is common cause that the applicant is an illegal foreigner who entered the Republic at a place other than at a port of entry specifically provided for that purpose. He does not take this Court into his confidence by disclosing where and/or how he did so. Nevertheless it is also common cause that he entered the Republic without being in possession of a valid passport. He also did not obtain the certificates or authorisations set out in provisos (i) and (ii) of subsection (3) of section 34 as well as being in violation of section 9(3)(d) and (e) of the Act.

[51] Section 32(2) of the Act is peremptory : Any illegal foreigner shall be deported. Equally, sections 34(5), (6) and (7) makes it a criminal offence to enter the Republic and be found in circumstances this applicant was found and arrested. What should happen to such a person is set out in subsection (6) and his detention and its mode is set out in subsection (7).

[52] It is also common cause that the applicant was arrested in Durban, KwaZulu-Natal, be it 6 of 7 June 2011 depending which of the two versions to follow. It is common cause that the immigration officers working under the respondents went to fetch him from Westville Prison on 6 July 2011. The circumstances under which he was detained at Westville Prison are not relevant to this case as it relates to SA Police or Metro Police or both, both being divisions of law enforcement. What is material is what happened after the respondents' employees signed for him because from thence onwards certain prescribed processes and procedures kick in and the Immigration Act must be complied with.

[53] In the respondents' answering affidavit it is mentioned that the applicant gave a date of entering South Africa illegally as 30 May 2011. The latter denies this. It is my considered view that nothing should turn on this latter date as its existence does not impact on what should have happened to the applicant or what the respondents' employees should have done. No action has been instituted against the Minister of police and/or the Durban Metro Police.

[54] What is very important is the fact that the applicant's case is that after he was signed for and fetched from Durban his further detention for purposes

of deportation was never confirmed or extended until he launched these proceedings on 28 October 2011.

[55] The respondents' version demonstrates the opposite picture to the one the applicant sketched out or wants this Court to have : A document corresponding with Form 28 prescribed in Regulation 28(1) is attached to the answering affidavit. This form proves that the applicant was properly detained for purposes of deportation on 6 July 2011. That being the case, what was required was that his further detention be validated by a proper order of extension granted by a magistrate within 30 days of 6 July 2011. At folio 86 of the paginated papers filed herein a document is found purporting to be an application to court for extension of detention and authorisation by court for that extension. It relates to Ahmed Abdul or rather Abdul Ahmed, which is, from the applicant's own version, the names which he gave to the authorities when he was arrested. At the bottom of this document a magistrate from Magistrate's Court Krugersdorp purports to have authorised the further detention of the applicant for a further 90 days.

[56] The applicant does not deny the validity or authenticity of the abovementioned two documents. That being so, then it logically means the applicant either told blatant untruths to this Court or lied to his own legal representatives or committed both misdemeanour. That should count when the credibility of the parties herein is evaluated. What the applicant through his counsel is questioning is the fact that the form used by the authorities and on which the magistrate authorised the extension of detention as being not as prescribed in Regulation 28 of the Regulations issued under the Act.

[57] It is my considered view that what is important here is the substance and not the form. The heading of the form clearly reads:

> "*Application to court for extension of detention and a authorisation by court for that extension.*"

[58] The purpose and intention of the officers and officials involved with the issuing and signing of this document cannot be more clearer. It is, in my view, in keeping with the spirit of the applicable legislation. It clearly extends the applicant's detention for purposes of deportation for 90 days further on 2 August 2011. The date is well within the prescribed time frames.

[59] I therefore find that the applicant's objection as to the validity of the form used is without merit.

[60] In a recent judgment of the Supreme Court of Appeal which was delivered on 21 November 2011, Maya JA ruled among others at para [15], page 11 thereof as follows:

> "*A defect in a detention warrant, even one which renders it invalid, cannot supersede the authority of the relevant court order. Therefore, the fugitives in this matter were held in lawful custody not by virtue of a detention warrant (which in the present context amounts to no more than an administrative means of proving … that the person they are requested to receive is lawfully in custody and may therefore be detained in their facility) but by authority of the court …*"

[61] It is my considered view that the magistrate's act in authorising the further detention of the applicant as evidenced by the form used, albeit it being one different to the one required or prescribed in the Regulations, cannot be gainsaid. The applicant was thus lawfully detained for a further 90 days as at the time the order to so extend his detention was authorised. It was equally still within the 90 days when these proceedings were instituted on 28 October 2011.

[62] The applicant's contention is that the 90 days have expired on 2 November 2011, hence he abandoned prayers 5 and 6 of his notice of motion that has to do with the setting aside and reviewing of the magistrate's decision to extend the applicant's detention.

[63] What is also interesting is why the applicant included the above prayers to review and set aside any decision of a magistrate's court to extend a warrant of detention if he at the time the papers were drawn up and issued he was according to him adamant no warrant of extension was ever authorised or issued. It is so that he qualifies these prayers with the words, "*if any*". Yet, it sets the mind racing! Why? I have no possible answer and I do not want to speculate. It is also interesting that he specifically mentions 5.3(1)(d) in his founding Affidavit despite his assertion that no warrant existed at the time.

[64] The other aspect is why did the applicant give his names to the police as Ahmed Abdul whereas his full names are Ahmed Abdul Nibigira. How did

he expect the embassy staff from Burundi and Tanzania to identify him if he gave incomplete personal particulars. The respondents submitted and argued that illegal foreigners usually gave wrong particulars to diplomats coming to identify them to avoid being deprived. The question is, is the submission by the respondents unfounded or too speculative when regard is had to this conduct by the applicant? They submitted that the Applicant deliberately misled the authorities and the diplomatic staff.

[65] It was submitted on behalf of the applicant during the arguments that his detention has been unlawful from the day of his arrest in Durban and that the extension granted by the magistrate were out of time. There is nothing in the founding and replying affidavits where the applicant's arrest is being questioned. It is so that that was done by the police and have nothing to do with the Immigration Act, which is the subject Act in this application. As such it is my considered view that the allegation of unlawful detention before 6 or 7 July 2011 is unfounded and is not even borne by the evidence in the applicant's papers.

[66] With regards to the aspect of the magistrate's extension of the detention warrant being out of time, I have already alluded to it above. For clarity's sake I will repeat it here. The cut-off date in this case is 28 October 2011, which is the date on which this application was launched. The inception date for the chronology herein starts on 6 or 7 July 2011 when the immigration

officials collect and sign for the applicant from the prison authorities in Durban. There is a valid document, paginated folio 85 in the papers herein, titled "*Warrant of detention of illegal foreigner (Section 7(1)(a) read with Section 34(1) Regulation 28(1)*". It is dated 6 July 2011. Thirty (30) days from this date would have expired on 5 August 2011. An extension of the detention by Magistrate Krugersdorp is evidenced by document on paginated folio 86 of the papers herein. It is dated 2 August 2011. This document confirming a court order by the magistrate was issued three (3) days before the mandatory 30 days allowed for the initial detention period could elapse. It is valid for 90 days. The 90 days expires on1 or 2 November 2011. This date is 4 or 5 days counted from 28 October 2011 cut-off date before the 90 days expired as laid down by the law. Consequently, when these proceedings were launched on 28 October 2011, the requisite period allowed during which the warrant of detention would still be valid, had not yet expired. The magistrate's intervention was thus in my considered view and finding still in time.

[67] As already stated hereinbefore the applicant's submissions above regarding the intervention of the magistrate collides directly with the heart and soul of this application, namely, that a magistrate had not extended the validity of the detention warrant in issue herein and that despite his repeated requests and demands that same be done, the respondents have neglected or failed or refused to do so. This is also fatal to the applicant's case.

[68] The applicant's heads of argument are mostly premised or based on the 30 days plus extra 90 days, thus a total of the requisite 120 days having

expired without the respondents acting in keeping or in accordance with section 34(1) of the Act. Several decided cases were quoted to substantiate this point. Unfortunately, in the light of my above findings those authorities cannot avail the applicant.

[69] Several judgments of our Constitutional Court and other high courts including the Supreme Court of Appeal were quoted in support of the culture and spirit of human rights and libertarian guarantees as enshrined in our Constitution. As examples hereof we see *S v Coetzee* 1997 (3) SA 527 (CC) at para 159; *Hamisi v Minister of Home Affairs and Others*, an unreported judgment of Weiner J in this Court under Case No. 32275/2011, handed down on 12 September 2011 and *Jackson Mtegekurara v Minister of Home Affairs and Others*, a yet unreported judgment of Rautenbach AJ also in this Court under Case No. 21599/2011, to name a few.

[70] It is the applicant's argument that he was not afforded the opportunity to make representations in keeping with the provisions set out in Regulation 28(4). The above was the underlying *causa* in the abovementioned unreported South Gauteng High Court judgments referred to above which led to the applicants therein succeeding in their applications. In both judgments, it was also alleged that the applicants could not understand the English language and as such the courts were not satisfied that they understood what had happened.

[71] Incidentally, the applicant is repeating the same defences herein *verbatim*. The problem with this case is that the applicant's credibility is dented as a result of the *faux pas* that I have alluded to above, which, in my view impacts negatively on the believability of his story.

[72] It is my view and finding further, that the applicant's case is distinguishable from the facts in those cases.

[73] It is true that South Africa has one of the best Constitutions in the world which has a Bill of Rights that recognises and protects the rights and interests of its citizens as well as foreigners who find themselves in this country. It is my observation that most judgments concentrate on the rights the citizens and illegal foreigners should enjoy, including when arrested for being in the country without the necessary permission or documentation.

[74] It is about time that we look at the flip side : there is what can be termed the national interest. It is in the national interests of every country that its borders and frontiers are not breached by people scaling or crawling under fences and when arrested for being unlawfully in the country, they lay claim to inviolable rights to be released. Laws of every country are there to be obeyed.

[75] South Africa's Immigration Act categorically decree that all illegal foreigners shall de deported.

[76] Where would the applicant go if there was a need that he be released from detention? Would that court sanctioned release have meant that he should be allowed to roam South Africa despite the fact that he came in illegally and he has no right or papers to allow him to be here? Must the police or immigration officials not arrest and detain him for deportation again?

[77] Surely the above scenario is not what the legislature intended when this Immigration Law was passed.

[78] The applicant has asked this Court to allow him to bring this application without first exhausting the applicable internal remedies provided in section 8 of the Immigration Act 13 of 2002. It is my view and finding that this prayer should not be allowed.

[79] In prayer 7 of the notice of motion the applicant is asking an order that the respondents be directed to issue him with a written confirmation that they have received his application for permanent residence under section 31(2)(b) of the Act.

[80] A look at the applicant's heads of argument reveals his whole basis on which this application is premised. It reads as follows:

> "*1. This is an application for the release of the Applicant who has been detained for over 120 days at the Lindela Holding Facility 'Lindela') in Krugersdorp, pending his deportation from the Republic.*"

[81] I have already indicated above how mistaken or incorrect this basis is.

[82] How consideration of fairness and respect for freedoms of people in the Republic and in any event, anywhere where rights of citizens and non-citizens are respected and enforced should be handled set out by O'Regan J in *S v Coetzee* 1997 (3) SA 527 (CC) where the honourable judge put it as follows at para [159]:

> "[there are] *two different aspects of freedom: the first is concerned particularly with the reasons for which the State may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom … our Constitution recognises that both aspects are important in a democracy: the State may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair*."

[83] The applicant herein is not a citizen of the Republic. Whether he has acquired inherent rights except his right to life and integrity when he entered the Republic in the manner he did is a moot point for analysis at another time. Suffice to say that he was entitled to be treated in a manner that is in line with the principles enshrined in our progressive Constitution until he is deported or allowed to stay in the Republic, whichever may be the ultimate result, depending on the circumstances as they unfold with time.

[84] In *De Lange v Smuts NO* 1998 (3) SA 785 (CC) the Constitutional Court held among others at para [143] that the degree of procedural safeguards required by section 12(1) will normally depend on the nature of the

deprivation and its purpose. To determine if those safeguards were given effect to, the place, duration and purpose of the detention are some of the determining factors.

[85] It cannot be disputed that the applicant was correctly arrested in Durban for being an illegal foreigner. He was then handed over to the relevant and appropriate arm of government, being the Department of Home Affairs. Lindela is a facility contracted with the Department of Home Affairs where people in transit for deportation are held. As such the applicant cannot complain of being detained at Lindela as it is the right place to be. The next question is whether or not the immigration officials dealt with him as prescribed in the Immigration Act and its Regulations.

[86] Although the applicant himself does not say much about having been treated in a manner not prescribed in the Act and Rules or in many words and his counsel's heads of argument refer thereto in a cursory manner, during argument in this Court the latter harped on the accusation that the applicant was not treated as prescribed in the Act and Regulations.

[87] An answer as to which version between the applicant's version and the respondents' version to go along with depends on the credibility of the role players herein, because the respondents refute the applicant's allegations.

[88] If the applicant's version is to be believed, he was never taken before a magistrate for the extension of his warrant until he launched this application.

This averment was refuted by the respondents as set out above and the facts and balance of convenience are on the latter's side. The applicant further avers that he does not have sufficient proficiency in the English language to have intelligibly communicated with the authorities. The respondent's employees deposed to the effect that the applicant commanded above average proficiency in that language. The applicant did not give the authorities his full names. In the circumstances of this case, where no foreign embassy could properly identify the applicant or confirm him as a citizen of their country, one understands why there was such a difficulty : Even the United Nation's body dealing with similar circumstances as shown above will be unable to determine if the applicant was indeed a registered refugee as the applicant asserts. The names he furnished here will not correspond with the names of the UNHCR records.

[89] The applicant also averred that the UNHCR sent his own brother to Canada, separating them in the process. As orphaned brothers it is difficult to imagine how a human rights body would act in such a manner that separates young orphaned refugees. It calls for probabilities to be examined. I do not think that exercise in depth, is appropriate at this stage. It is simply improbable.

[90] The applicant makes heavy weather of the fact that even though the warrant authorised by the magistrate at Krugersdorp has the correct heading, however he contests its validity solely because it is not having the serial number or numerical title similar to the one prescribed in the Regulations. I

have perused these two documents and found out that the message set out in the document used in this case is similar to the one that is contained in the form B1-1726 that is prescribed. The form used here is B1-1727. As explained elsewhere in this judgment, what is paramount is not the form used but the fact whether or not a judicial officer did or did not authorise the applicant's further detention for another 90 days. I find that the magistrate had done so.

[91] The applicant wants this Court to find to the contrary. I cannot do that with a clean conscience. Should I accede to this request by the applicant, I would be saying the magistrate acted fraudulently by writing or affirming what never happened. There are no cogent facts to find that the official documents attached to the respondents' answering affidavit are fakes. Applicant and his counsel also never said that. Consequently, when an assessment is made of the credibility of the applicant, taking into account his unsubstantiable allegations as set out above as well as the fact that he is a person prepared to state something that actually happened did not happen, I would not readily accept the applicant's word above what the version tendered by the respondents entail.

[93] It is my finding therefore that the applicant's accusations of improper conduct towards him by the immigration officials or actions contrary to prescripts cannot be accepted as being possibly true. As such they are rejected.

[94] As set out in *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) at para [2], Cachalia JA held that:

> "*for deportation to be carried out lawfully, the action or procedure used to facilitate an illegal foreigner's removal from the country must be done in terms of the Act.*"

[95] It is my finding that the respondents have not acted contrary to the principles evoked above.

[96] It is thus my finding that the applicant has not made out a case for the grant of the above prayer also. There is no country that is prepared to acknowledge him as a citizen. He has not applied for a refugee status although he belatedly and half-heartedly avers at the end of his founding affidavit that he is an economic refugee. This aspect falls in line with what the respondents deposed to and asserted, namely, that the applicant told officials that he came to South Africa to look for employment in May 2011. It is my considered view and finding that even if that was so, the laws of this land should be respected. As stated above, to obtain work in this country as an alien, one must qualify for a work permit after satisfying the requirements I listed above for the grant of a work permit.

[97] The applicant does not end there : he now also seeks permanent residence permit despite the manner in which he entered South Africa. He was not prepared to be frank with the immigration authorities and this Court and disclose how he entered this country. He does not even start with a

temporary residents' permit. Applicant has displayed an above average degree of arrogance and scant regard for the laws of this country and the respondents may have a case if they do not accede to his demands.

[98] Lastly, it is so that counsel for the applicant abandoned prayers 5 and 6 during arguments. This cause of action was based on their erroneous belief and contention that the magistrate's further extension of his detention warrant had expired on 2 November 2011. As already stated above, this Court should decide issues herein based on the cut-off date of 28 October 2011, being the date on which this application was launched. The Applicant's abandonment of prayers 5 and 6 are thus premature or ill thought

[99] That being so therefore, the respondents' point *in limine* needs to be examined.

[100] It is so that the applicant wanted this Court to review and set aside the order granted by the magistrate in extending the life of the warrant of detention for a further 90 days. He however did not join the magistrate as a party. That would make the proceedings incomplete. I would uphold the point –in limine.

[101] The respondents pleaded and submitted that the application be postponed indefinitely to allow the applicant to join the magistrate.

[102] In the light of the order I intend to give, it is my considered view and finding that the above order would be an exercise in futility. Courts of law are presumed not to intend to issue rulings, orders or judgments that are academic in the circumstances of each particular case.

[103] It is my further finding that the applicant ought to have joined the relevant magistrate to these proceedings. Failure to do so renders them deficient in a fatal way.

ORDER

[104] After perusing the papers filed of record herein, listening to counsel during argument, checking the relevant laws and authorities and fully considering this matter, the following is the order of the court:

104.1 The application by the applicant herein is dismissed;

104.2 In the light of the possible impecuniosity of the applicant it is ordered that each party pays its own costs.

104.3 No formal ruling is made in respect of the point *in limine* although as state above, it stands or should have stood to be upheld.

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N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF JUDGMENT	28 NOVEMBER 2011