IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE **CASE NO: 27497/08**

DATE: 29/7/2008

In the matter between:

A MOGUL AND 12 OTHERS APPLICANTS

AND

MINISTER OF HOME AFFAIRS 1st RESPONDENT

THE DEPARTMENT OF HOME AFFAIRS. 2nd RESPONDENT

In re:

CASE NO:27498/08

S MUSTAFA AND 2 OTHERS APPLICANTS

And

MINISTER OF HOME AFFAIRS 1ST RESPONDENT

THE DEPARTMENT OF HOME AFFAIRS. 2nd RESPONDENT

JUDGMENT

MAVUNDLA J.,

[1] The applicants in both cases have approached this court by way of urgency seeking an order:

(a) that any deportation proceedings against the applicants be stopped immediately;

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(b) the applicants be released within 12 hrs from date of the order;

(c) that the applicants be issued with section 22 permits; and that the respondents pay the costs of this application.

[2] Due to the fact that the relief sought in both matters are in principle the same and the legal teams of the respective parties in both matters are the same, I have decided for purposes of convenience to have both matters heard together. The respective legal representatives did not object to this decision. The matters were accordingly heard as one.

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[3] It is common cause that Mr. S Mustafa Mustafa and Mr. KQ Nimaldra, respectively first and second respondents under case number 27498/08 were arrested in March 2008 at the Lesotho border. They were then taken to Lindela[1] where they are being detained. It is stated in the founding affidavit deposed to by their attorney that at the time of their arrest they expressed an intention to apply for asylum. Their attorney states in the founding affidavit that on March 2008 she wrote a letter to the Home Affairs requesting that the applicants be afforded the opportunity to apply for asylum in terms of section 21 of the Refugees Act, No 130 of 1998.

[4] In respect of the third applicant, it is averred that he applied for asylum on his arrival in South Africa in 1998. It is averred that he married a South African citizen in 2001 which

I Lindela is a holding place where illegal immigrants are being held pending their deportation to their countries of origin.

marriage was ended in a divorce in 2007, thus invalidating his accompanying his spouse. He was arrested and detained since October 2007. I need mention that there is however no copy of the alleged marriage certificate nor the divorce order attached. It is however, further averred that at the time of his marriage, an immigration official confiscated his asylum permit and he was told that he could not regularize his stay in the country on two permits simultaneously. There is no explanation what steps he took to secure his release since October 2007.

[5] Their attorney further avers in her affidavit that on 23 May 2008 she inquired telephonically at Lindela as to when the applicants would be released. She was informed by one Mr/s Thlomane and Nesengane that the applicants will not be released since a memorandum exists within the Department that detainees may no longer be released on section 23 permits and further that even when they have applied for asylum, issued with section 22 permits, the applicants will be kept in detention as per judgment in *Cormsa vs Minister of Home Affairs and Other* (case no. 6709/08).

[6] It is further averred that the detention of the applicants does not fall within the ambits of Refugees Act, 130 of 1998, nor of the Immigration At, 13 of 2002 and that there is no proof that they are detained under any of the Acts mentioned, and that therefore their detention is unlawful and unconstitutional.

[7] The attorney further state that on 19 May 2008 she made an urgent application regarding six (6) Bangladeshi nationals who were also arrested and detained under similar

circumstances as applicants one and two. She further avers that an order was granted with the return date that the department stop the deportation of all six applicants, afford them opportunity to apply for asylum, issue them with section 22 permits.

RESPONDENTS' CASE

[8] Mr. Ronney Marhule who describes himself as the Deputy Director for the Deportations in the Department of Home Affairs has deposed to the answering affidavit on behalf of the first and second respondents, in both matters. In respect of case number 27498/08 he challenges urgency. He states that on 12 May 2008 a letter dated even date was received from the applicant's attorney. The said letter informed that the applicants wish to apply for asylum and that they request to be issued with section 22 permits pending the finalization of their applications and that they be released from the Lindela Holding Facility and further stated that their continued detention was not fall within the ambit of the

Refugees Act or Immigration Act. The Directorate Refugee Affairs replied per letter dated 22 May 2008 advising that the correspondence has been sent to Lindela Holding Facility that the 1st and 2nd applicants should be released on section 23 (asylum transit permit). It is further averred that the applicant's attorney, on her own version, she made a

telephone inquiry on 23 May 2008 about the release of the applicants and that she was informed that they would not be released and that they would be kept in detention despite having applied for asylum. The applicants were taken to the Refugee Reception Office in Crown Mines Johannesburg

and were issued with asylum seeker permits in terms of section 22 of the Refugee Act on 4 June 2008.

[9] It is further averred that the applicant's attorney was aware that prior to the lodging of this application, the undertaking contained in the respondent's letter dated 22 May 2008, at least that the 1st and 2nd applicants should be allowed to apply for asylum, had already commenced in that the 1st and 2nd applicants, have applied and have been issued with asylum seeker permits in terms of section 22 of the Refugees Act, pending their status determination.

BACKGROUND INFORMATION

[10] In the answering affidavit it is further stated that the 1st applicant is Bangladeshi national and was arrested by the South African Police Service in Ficksburg for being an illegal foreigner and was duly interviewed in terms of section 41 and his response was recorded in form attached as annexure DHA4 which is attached to the papers. At the time of his arrest the 1st applicant did not indicate that he wants to apply for asylum. It is only upon receipt of the letter dated 22 March 2008 that the Department learnt for the first time that the 1st applicant wanted to apply for asylum. His nationality has not as yet been verified by the Bangladeshi Embassy authorities. The Department learnt for the first time on 22 April 2008 of his intention to apply for asylum. In a letter dated the 22 April 2008 the Department had undertaken to facilitate the first applicant's application. He was duly taken to a Refugee Reception office to apply for asylum which asylum seeker permit was issued on 4 June 2008. The first applicant's detention was extended for a further 60 days on

25 April 2008 and shall have expired by the time this application is heard. It is averred that at the time when the application was launched the first applicant was a holder of asylum seeker permit issued in terms of section 22 and that his detention was lawful.

[11] It is further averred that the second applicant is a Sri Lankan national and he was arrested on 3rd March 2008 for being an illegal foreigner. He was detained in terms of section 34(1) of the Immigration Act in terms of a warrant of detention. He was given a deportation notification in notification the applicant indicated that he shall await his deportation and that his further detention should not be confirmed by a warrant by a court. His deportation notification has been attached as annexure DHA 8. The second applicant is in possession of a valid Sri Lankan passport. His deportation scheduled for 18 June 2008 has since been suspended pending the outcome of this application and outcome of his application for asylum as indicated by his lawyer. The Department has indicated per its letter dated 22 April 2008 that it would facilitate his application for asylum. The second applicant was taken to a Refugee Reception office to apply for asylum and in this regard he was issued with an asylum seeker permit in terms of section 22. In the meantime a warrant of detention was extended for a further 60 days which will expire on 1st June 2008.

[12] In respect of the third applicant it is averred by the respondents that he was arrested by immigration officials in Vereeniging on 27 November 2008 for being an illegal foreigner. He was detained at Lindela on 30 November

2007 in terms of section 34(1) of the Immigration Act. The third respondent was given a deportation notification, in which the third applicant indicated that he shall await his deportation at the first reasonable opportunity whilst he remains in custody. A copy of the relevant deportation notification has been attached an annexure DH10. A preliminary search for his immigration or asylum application records could not be traced. The Department does not have his passport details. The third applicant has not as yet been identified by the Liberian Embassy, which fact causes his deportation delay. No person can be issued with a temporary travel certificate until the high commission of embassy of the
country that person has been confirmed as a national of that particular country. On his arrest in November 2007 the third respondent did not indicate that he wants to apply for asylum. It is until receipt of his attorney's letter on 12 May 2008 that the Department learnt for the first time of his wish to apply for asylum.

[13] The respondents further aver that the warrants of detention of the applicants shall possibly have expired by the time the matter comes to Court. However, applicants remain illegal foreigners with no roots in the Republic of South Africa. To release them at this stage, it would mean that they can roam freely in the country and it would be difficult to trace them.

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[14] Under case number 27497/08 there are thirteen (13) applicants. The founding affidavit is deposed to by the attorney acting on behalf of the applicants. She says that she brings the application on urgent basis on behalf of the

applicants as they are currently "unlawfully" detained in Lindela Holding facility and cannot sign the affidavit due to the strict access control at the holding facility.

[15] In her affidavit the attorney avers that the applicants were arrested at Musina border and detained in Lindela from dates ranging since 18 May 2007 to 16 May 2007 despite having expressed an intention to apply for asylum they were not issued with appropriate permit valid for 14 days in terms of s2(2) of the Regulations to the Refugees Act. She further states that on 29 May 2008 she wrote a letter to the department requesting that the applicants should be afforded an opportunity to apply for asylum and further requested proof of lawful detention. On the very same date she further wrote a letter to the department requesting for the release of the applicant 11 and 12 and further requested proof of lawful detention and also a similar letter in respect of 13th applicant. She further states that she believes that the further detention of the applicants is unlawful and unconstitutional. She contends that the Refugee Act provides for detention of an asylum seeker only if the section 22 permit has been withdrawn. She states that section 22(1) of the Refugees Act provides that pending the outcome of an application for asylum the refugee reception officer must issue to the applicant, an asylum permit. She states that *in casu* the Home Affairs does not issue the applicants with the permit even when they have so applied. She states that the applicants' detention could only be lawful if the provisions of section 34(1)(d) of the Immigration Act have been fully complied with and that the Department of Home Affairs
fails to prove that the aforesaid provisions have been

complied with. She then attaches to her papers a copy of a recent unreported decision in Consortium for Refugees and Immigrants *SA/* Minister of Home Affairs and Another[2]. She states that in her view the Department deliberately withholds the section 22 permits of the applicants in order to institute proceedings against them in terms of section 34 of the Immigration Act. She says that there is a danger that the applicants may be deported without prior notice because four of the people referred to in a letter dated the 10 April 2008 from the Department of Home Affairs and who had applied for asylum and two of these were deported before

they could avail themselves to a refugee officer. She further states that most of the applicants have been in detention for more than six (6) months.

[16] Ms Mnisi has attached a confirmatory affidavit of Muhammed

Abubakar Abdalla who gave her instructions to act on behalf of the applicants. She has also attached, *inter alia* a letter dated 29 May 2008 addressed to the Director of Refugee Affairs Department of Home Affairs whereby she advises that the applicants seek an opportunity to apply for asylum in terms of Act 130 of 1998 and that her clients be issued with section 22 permits after lodging of such applications and that deportation proceedings against them be suspended. She has also attached another letter dated 29 May 2008 addressed to the Director of Refugee Affairs Department of Home Affairs. In this latter letter she points out that she acts on behalf of the 11th and 12th applicants who applied for asylum on 14 November 2007 at the Rosettenville Refugee Reception Office, which applications were rejected and that

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an appeal was lodged by their erstwhile attorney against such rejection as envisaged in section 26 of the Refugee Act. She also demands that she be furnished within 2 days of this letter with proof that the undesirable lengthy detention of her clients is lawful and if so in terms of which Act(s). She has also attached a letter from the Department of Home Affairs which bears an inscription date of 30 May 2008. The said letter informs her that her eleven clients would be sent to Lindela Holding facility to transport her clients to Johannesburg Determination Office on 30 June 2008 to apply for asylum and that they be kept in detention until their cases are finalized.

[17] Mr. Ronney Marhule, the Deputy Director for the Deportations in the Department of Home Affairs, has in this matter also deposed to the answering affidavit on behalf of the respondents. He has referred to all three letters which I have just mentioned in the preceding paragraph. He confirms that the 1st to 10th as well as the 13th applicants were taken to the Refugee Reception office in Crown Mines Johannesburg to apply for asylum and were duly issued with asylum seeker permits in terms of section 22 of the Refugees Act on 5th June 2008. He points out that the application was launched on Monday 9th June 2008 and served on the respondents through the State Attorney's office on the same day. The application gave the respondents up to 12 hrs on the same day to notify the applicant's attorney of any intention to oppose and up to 16 hours the following Tuesday the 10th June 2008 to file their answering affidavit. The matter was enrolled for hearing on 9 June 2008 in the event there was no notice of intention to oppose by the

respondents forthcoming. Since the respondents filed their notice to oppose the matter was then removed from the roll of hearing of the 9th June 2008. There had been no other day.

[18] The respondents further submit that it was clear from their letter dated the 30 May 2008 that it has always the intention of the respondents to further detain the applicants pending the finalization of their status in terms of the Refugee Act 130 of 1998. It is further averred that before the application was launched, it was clear that the alleged unlawful detention of the applicants was disputed. It is further averred that there is no factual allegation made that the respondents intended to deport the applicants and that they have attempted to deport them. It is further averred that the applicants have received the decision in respect of their appeals from the Refugee Appeal Board at least in January 2008. It is further averred that there was no reason to bring this application having regard to the fact the respondents had made an undertaking to take the applicants to the Crown Mines for purposes of applying for their asylum and that they would thereafter be kept in detention pending the determination of their status.

[19] It is further averred that the **1st applicant,** Mr. 'S Akee Mugul (Ageel Mogais a **Pakistani** national and he was arrested on **10 May 2007** by the immigration officials in Pietermaritzburg in Kwa-Zulu. He was interviewed in terms of section 41 of the Immigration Act, which interview was recorded on a form, a copy of which is attached to the papers as annexure DHA 13. In the form the first applicant indicated that he

entered the Republic of South Africa through the OR International Airport and that he has lived in Pietermaritzburg and Johannesburg. He was also found in possession of an asylum seeker permit issued in terms of section 22 of the Refugees Act on 21st February 2006 with expiry date of 20 June 2010. On investigation it was found that the asylum seeker permit was fraudulent and that its file number does not appear on the Departmental records. In this regard a confirmatory affidavit of Ursula Rigney, an official of the Department stationed at Refugee Affairs (annexure DHA 15). The applicant was detained at Lindela on 18 May 2007 in terms of section 34(1) of the Immigration Act in terms of a warrant of detention (annexure DHA 16). The applicant was further given a deportation notice (annexure DHA 17). Deportation process was subsequently commenced with by the Lindela officials. The Pakistan High Commission in Pretoria was contacted to verify the nationality of the applicant. Only on 25 February 2008 did the respondents receive a letter from the Pakistan High Commission confirming the identity of the applicant, and other, and an undertaking to issue him with an emergency travel document. Notwithstanding the undertaking, the Pakistani authorities have not as yet reverted in this regard. Subsequent to receiving the letter of the 29 May 2008 from his attorney indicating that the applicant desires to apply for asylum, the respondent responded to the said letter informing the applicant's attorney that arrangements have been made to have the applicant transported to Johanneburg Asylum Determination office to apply for asylum. The warrant of detention issued in terms of s34(1) of

the Immigration Act expired on 18 August 2008 as the result

of the unwillingness of the Pakistani Authorities in issuing a travel document in respect of the applicant. The magistrate refused to have the warrant further extended.

[20] The **second applicant** is a Bangladeshi national. He was arrested by the South African National Defence in Musina on 11 April 2008 for illegally crossing the border. He was detained at Lindela on 14 April 2008 in terms of a warrant issued in terms of s34(1) of the Immigration Act. He was further given a deportation notification (annexure DHA 19). The second applicant on his arrest, he never indicated to the Immigration officers that he wanted to apply for asylum. Subsequent to the receipt of the letter from his attorney on 29 May 2008 regarding his wish to apply for asylum, arrangements were made for him to be transported to a Refugee Reception office for that purpose. He has since been issued with an asylum seeker permit in terms of s22 of the Refugees Act on 5 June 2008 (annexure DHA 21).

[21] The **third applicant** is a Bangladeshi national. He was arrested by the South African Police Services ("SAPS") in Bethlehem on 22 January 2008. He was detained at Lindela on 14 April 2008 in terms of a warrant issued in terms of s34 (1) of the Immigration Act (annexure DHA 22). He was further given a deportation notification (annexure DHA 23) in which he indicated that he shall await deportation and he does not want his detention to be confirmed by a warrant of court, nor does he want to appeal the decision to have him deported. Arrangements to have him deported were made but these were suspended upon receipt of his attorney's letter of 29 May 2008 informing that he wants to apply for

asylum. His warrant of detention expired on 21 April 2008. The Department has per its letter dated 30 April 2008 undertaken to facilitate his application for asylum seeker permit.

[22] The **fourth applicant** is a Bangladeshi national. He was arrested by the South African Police Services ("SAPS") in Bethlehem on 17 March 2008. He was detained on the same day at Lindela in terms of a warrant issued in terms of s 34(1) of the Immigration Act (annexure DHA24). He was further given a deportation notification (annexure DHA25) on which he indicated that he shall await his deportation whilst in custody. It is only upon receipt of his attorney's letter dated 29 May 2008 that the Department learnt for the first time that he wished to apply for asylum. He was taken to a Refugee Reception to apply for asylum. He has since been granted an asylum seeker permit in terms of s22 of the Refugee Act on 5th June 2008. His warrant for detention was extended for a further 60 days on 20 April 2008 and same has since expired on 19 June 2008.

[23] The **fifth applicant** is a Bangladeshi national. It is further stated that at the time of the deposition to the respondent's affidavit the arrest documents of this applicant could not be found. His records reveal that his warrant of detention was extended on 3 December 2008 for 60 days (annexure DHA 26). (Scrutiny of annexure DHA 26 reveals that this warrant for detention was signed by the applicant on 14 April 2008). On its letter dated 30 April 2008, the Department undertook to facilitate the applicant's application for asylum, which it only became aware of for the first time upon receipt of his

attorney's letter dated 29 May 2008. Bangladeshi High Commission was contacted to confirm the applicant's identity as a Bangladeshi national but has not as yet responded. The applicant's warrant of detention expired on 2 February 2008. The applicant is a holder of a section 22 permit.

[24] The sixth applicant is a Bangladeshi national. He was arrested by immigrant officials at Malestona in Drakensburg Area on 13 March 2008. He was detained at Lindela on 19 March 2008 in terms of a warrant of detention issued in
terms of section 34(1) of the Immigration Act (annexure DHA27). He was given a deportation notification (annexure DHA28). He indicated that he would await his deportation in custody and that he shall not appeal the decision to deport him (annexure DHA28) and that his detention should not be confirmed by a warrant of court. It was upon receipt of his attorney's letter dated 29 March 2008 that the Department learnt for the first time of his wish to apply for asylum and in this regard arrangements to facilitate same were made. The applicant was issued with an asylum seeker permit on 5 June 2008. The warrant for his detention was extended for sixty days but has since expired on 19 June 2008.

[25] The **seventh applicant** is a Bangladeshi national. He was arrested by immigrant officials in King Williams Town on 2 February 2008 for being an illegal immigrant. He was detained at Lindela on 15 February 2008 in terms of a warrant of detention issued in terms of section 34(1) of the Immigration Act (annexure DHA30). He was given a deportation notification (annexure DHA 31). Upon his arrest he never indicated that he wants to apply for asylum. The Department only learnt for the first time that he wanted to

apply for asylum upon receipt of his attorney's letter dated 29 March 2008. Prior to the aforesaid correspondence, the department commenced with deportation arrangements and contacted the Bangladeshi Mission to verify the applicant's identity. On 10 March 2008 Officials of Lindela received correspondence from Bangladeshi Mission verifying the applicant's identity (annexure DHA 32). However, the Bangladeshi Mission has not issued the applicant with a travel document. In the meantime the applicant's detention warrant expired on 15 February 2008. The applicant is a holder of a section 22 permit.

[26] The **eighth applicant** is a Bangladeshi national. He was arrested for being an illegal foreigner on 11 May 2008 by members of the South African Police ("SAPS") service at OR Tambo International Airport. He was detained at Lindela on 16 May 2008 in terms of warrant of detention issued in terms of section 34(1) of the Immigration Act (annexure DHA33) which expired was subsequently extended (annexure DHA34) for 60 days and has since expired on 11 September 2008. The applicant was further given a deportation notification (annexure DHA 35) on which the applicant indicated that he would await for his deportation in custody. He further indicated that he would not appeal the deportation decision and that he does not want the warrant of detention to be confirmed by court. On his arrest the eighth applicant did not indicate that he wants to apply for asylum. Upon receipt of the letter from his attorney on 29 May 2008 that he wants to apply for asylum, the Department facilitated for his asylum application. The applicant has since

been issued with an asylum seeker permit in terms of section 22 of the Refugees Act on 5 June 2008.

[27] **The ninth applicant** is a Bangladeshi national and he was arrested by the South African Police Services ("SAPS") in Musina on 1 April 2008 for crossing the border. He was detained on the same day at Lindela in terms of a warrant issued in terms of s34(1) of the Immigration Act (annexure DHA36). He was further given a deportation notification (annexure DHA37) on which he indicated that he shall await his deportation whilst in custody. It is only upon receipt of his attorney's letter dated 29 May 2008 that the Department learnt for the first time that he wished to apply for asylum. The applicant's application for asylum was facilitated as he was taken to a Refugee Reception office in this regard and he was issued with an asylum seeker permit in terms of section 22 of the Refugees Act on 5 June 2008. His warrant for detention was extended for a further 90 days and it was to expire on 29 July 2008 (annexure DHA 38).

[28] **The tenth applicant** is a Bangladeshi national and he was arrested by the South African Police Services ("SAPS") in Musina on 1 April 2008 for crossing the border. He was detained on the same day at Lindela in terms of a warrant issued in terms of s34(1) of the Immigration Act (annexure DHA39). He was further given a deportation notification (annexure DHA 40) on which he indicated that he shall await his deportation whilst in custody. It is only upon receipt of his attorney's letter dated 29 May 2008 that the Department learnt for the first time that he wished to apply for asylum. The applicant's warrant for detention was extended for a

further 90 days and it will expire on 29 July 2008. It is further averred that the applicant is a holder of a section 22 asylum seeker permit and he is in lawful detention. The extension is attached as annexure DHA41.

[29] **The eleventh** applicant is a Bangladeshi national and he was arrested by immigration officials on 5 September 2007 in Kroonstad for being in the Republic illegally. He was detained at Lindela on 6 September 2007 in terms of a warrant of detention in terms of section 34(1) of the Immigration Act. The warrant of detention is attached as annexure DHA 42. The applicant was further given a detention notification in which he indicated that he shall await deportation whilst in custody and that he shall not appeal the decision for his deportation and that his detention should not be confirmed by a warrant of a court. A copy of the detention notification is attached as annexure DHA 43. It

is further averred that prior to his arrest the applicant had applied for asylum. His application for asylum was rejected in November 2007, which rejection he appealed. The Refugee Appeal Board rejected his appeal and the decision of the Refugee Status Department Officer (RSDO) was confirmed, *vide* annexure DHA 44 which is a letter of the RAB advising of its decision. Subsequent thereto the officials of Lindela per letter dated 4 February 2008 requested the Bangladeshi High Commission to confirm the applicant's identity and to issue him with a temporal travel permit but the High Commission has failed to do so. As a result the applicant's application could not be finalized. The unwillingness of the Bangladeshi High Commission to assist with the deportation of the applicant, the warrants of his

detention issued in terms of section 34(1) of Immigration Act expired and the magistrate would not extend them further.

[30] **The twelfth applicant** is a Bangladeshi national and he was arrested by the immigration officials on 6 June 2007 in Kroonstad for being in the Republic illegally. He was detained at Lindela on the same day in terms of a warrant issued in terms of section 34(1) of the Immigration Act (annexure DHA 45). The applicant was further given a deportation notification in which he indicated that he would await his deportation whilst in custody and that he would not appeal the deportation decision (annexure DHA 46) and that the warrant of detention should not be confirmed by court. Prior to his arrest the applicant had applied for asylum, however, he was kept in detention pending his asylum status determination which was subsequently rejected in November 2007. His appeal against the rejection of his asylum application was rejected by the Refugee Appeal Board. In January 2008 the Refugee Appeal Board made its decision in regard to the applicant and his appeal was rejected. The decision of the Refugee Status Department Official to reject the applicant's application for asylum as unfounded was confirmed and the applicant was informed of this decision per letter (annexure DHA 47). Subsequent thereto the Lindela officials addressed a letter dated 4 February 2008 to Bangladeshi High Commission requesting confirmation of the applicant's identity and issue of a temporal travel documents. Although the Bangladeshi High Commission has confirmed the identity of the applicant, however his temporal travelling documents have not been issued. This resulted in the warrants of detention of the applicant issued in terms of

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section 34(1) of the Immigration Act expiring on 11 April 2008. The magistrate would not extend the warrants of detention any further. At the time this application was launched the applicant had been in lawful detention and a holder of section 22 permit.

[31] **Thirteenth applicant** is a Bangladeshi national and he was arrested by the South African Police Services (SAPS) in Cofimbava, Umtata on 29 February 2008 as an illegal foreigner for purposes of deportation. The warrant of detention has been attached as annexure DHA48. The applicant was issued with a deportation notice on which he indicated that he would await his deportation in custody and that he would not appeal the deportation decision and that the warrant of detention should not be confirmed by a magistrate, *vide* annexure DHA 49. Upon his arrest the applicant never indicated to the immigration officers that he wished to apply for asylum. It is only until receipt of his attorney's letter on 29 March 2008 that the department became aware of the fact that the applicant wished to apply for asylum. In its letter dated 30 April 2008 the department undertook to facilitate the applicant's application for asylum. The applicant was taken to a Refugee Reception office to apply for asylum and in this regard he was issued with an asylum seeker permit in terms of section 22 of the Refugee Act on 5 June 2008, which was given to him. The applicant's warrant for detention expired on 16 May 2008. The applicant has been in lawful detention and a holder of a section 22 permit.

Ad urgency

[32] Both applications *in casu* were issued on 9 June 2008. The respondents were served with the applications in the morning of 9 June 2008 at 10h30. They were called upon to indicate their intention to oppose in writing on or before 12h00 on Monday 09 June 2008. They were called upon to file their answering affidavit on or before 16h00 on Tuesday 10 June 2008. Further the respondents were informed that if there is no notice of intention to oppose, the application will be made at 14h00 Monday 09 June 2008. In my view, the circumstances of this case did not justify the jettison of the time frames as demanded by rule 6(5) of the Uniform Rules of the High Court. An applicant in urgent applications must demonstrate on its papers that there are special circumstances that make the matter extremely urgent[3]. I say so because there was no threat that the applicants were about to be deported that very afternoon nor shortly thereafter, thus warranting the truncating of the time frames prescribed by Rule 6(5) of the Uniform Court Rules.

3 Vide Gallagher v Norman's Transport Lines (Pty) Ltd 1992 (3) SA 500 (WLD) at 502 between H& J - 503B, where Flemming DJP said inter alia, that: "The mere existence of some urgency cannot therefore justify an applicant not using Form 2(a) of the First Schedule to the Uniform Rules. The rules do not tolerate the illogical knee-jerk reaction that, once there is any amount of urgency, that form of notice of motion may be jettisoned…", vide also 1L &B Marcow Cateres v Greaterman's SA 1981 (4) SA 108 (CPD) at 110A where the Court pointed out that there are degrees of urgency.

[33] In the matter of Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makinn's Furniture Manufacturers)[4], the court dealt with the question of urgency and abridgment of time frames and the various degrees of urgency and said:

"1. The question is whether there must be a departure at all from the time prescribed in Rule 6(5)(b). Usually this involves a departure from the time of seven days which must elapse from the date of service of the papers until the stated day for hearing. Once that is so, this requirement may be ignored and the application may be set down for hearing on the first available motion day but regard must be had to the necessity of filing the papers with the Registrar by the preceding Thursday so that it can come onto the following week's motion roll which will be prepared by the Motion Court Judge on duty for that week.

2. Only if the matter is so urgent that the applicant cannot wait for the next motion day, from "the point of view of his obligation to file the papers by the preceding Thursday, can he consider placing it in the roll first the next Tuesday, without having filed his papers by the previous Thursday.

3. Only if the urgency be such that the applicant dare not wait even for the next Tuesday, may he set the matter down for hearing on the next Court day at the normal time of 10.00a.m. or for the same day if the Court has not yet adjourned.

On the practical level it will follow that there must be a marked degree of urgency before it is justifiable not to use Form 2(a). It

4 1977 (4) SA 135 (W) at 136A-137E

> may be that the time elements involved or other circumstances justify dispensing with all prior notice to the respondent."

[34] *In casu*, some of the applicants were arrested in 2007, some were arrested in the early part of the year 2008. They did not approach the Court shortly after their arrest. There was an unexplained delay to approach the Court on the part of the applicants. I am of the view that this application, on urgency, it is lacking. The application is opportunistic and ill conceived and influenced by the decision of Motloung AJ, in the matter of *Cormsa vs Minister of Home Affairs and Other (supra*). The relevant decision dealt with the periods during which illegal refugees could be held in detention. I do not intend to deal with this matter on the context of the decision of Motloung AJ.

[35] It is trite that each and every case must be considered on its own facts and merits. I have decided not to interrogate the issues that are raised in the aforesaid Motloung AJ decision. It would be noted that the applicants *in casu* seek, *inter alia*, an order directing the respondents to release the applicants within 12 hrs of the granting of such an order. It would be noted further that the applicants seek *inter alia* that the applicants be issued with section 22 permits. In view of the fact that the applicants had been informed through their attorneys that they would be transported to Johannesburg Refugee Centre so that they can apply for the relevant

section 22 asylum seeker permit, there was certainly no urgency at all, as I have already stated herein above.

[36] In motion proceedings, where there are opposing versions, the Court will decide the case on the version as stated by the respondent and either grant the order sought, if the facts as stated by the respondent and admitted by the applicant justify the granting of such order[5]. *In casu*, the respondents have stated that the applicants have been given an opportunity to apply for section 22 asylum seeker permit prior to the applicants launching this application[6]. This averment has not been disputed by the applicants and must therefore be accepted. It means that there was no reason at all for the applicants to have brought the application on such urgent basis in the light of such undertaking.

[37] It is important to note that in **the matter of *Kiliko v Minister of Home Affairs*[7] Van Reenen as she then was, said:**

"[27... until an asylum seeker permit has been issued to a foreigner who has entered the Republic of South Africa in conflict with the provisions of section 9(4) of the Immigration Act, he or she is an illegal foreigner and subject to apprehension, detention and deportation in terms of s32, 33 and 34 of the Immigration Act."

5 Vide Tamarilo (Pty) Ltd v BN Aitken (Pty) Ltd 1982 (1) SA 398 (AD) at 430G-431B; and Plascon Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (AD) at 634E-635B

6 In the matter of Cape Text Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C), at 529G-H where Corbett, J as he then was, said that the test is that "where there was a dispute as to the facts, a final interdict should only be granted in notice proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such order."

7 2007 [1] SA 97 at 107

[38] In the matter of *Jeebhai v Minister of Home Affairs and Another*[8] the Full Bench referred to the matters of *Muhamed Khan and Others v Minister of Home Affairs and Others*,

case No 15343/06, TPD which was brought by people detained for deportation and in which judgment reference was made to the judgments in *Arisukwu and Others v Minister of Home Affairs* 2003 (6) SA 599(T) and *Muhammed v Minister of Home Affairs and Another*, case No 41182/05, through Ngoepe JP *et all* said:

> "[21] To the extent that the judgments are to the effect that, after a determination is made in terms of s8 that the person is an illegal foreigner or a decision is taken in terms of s34 to deport the person, that person is not liable to be detained pending the outcome of appeal or review (to the Director-General and/or the Minister as the case may be), we disagree. With thousands of illegal foreigners entering the country every day it would mean there would be literally thousands of people without proper documentation roaming freely all over the country; no country would allow that. With the level of crime in the country, it is difficult to see how, realistically speaking, that could be allowed. It must, for example, be remembered that people without proper documentation have not had their fingerprints recorded anywhere.
>
> [22] Even if a person detained to be an illegal foreigner in terms of s8 were not liable to be detained pending the outcome of an appeal against that determination, the situation would surely have to change once a decision in terms of s34 is coupled to such determination. In such a case, whether or not a person may be detained must be determined by a conjunctive reading of the two sections. That person will still be entitled to invoke the appeal and/or review proceedings against either or both decisions. Certainly s34 is unequivocal about the authority to detain pending deportation; indeed one can detain even without a

8 2007 (4) SA 294 (TPD) at 303

> warrant. A detention *per* se, if in accordance with acceptable standards, cannot disable a detainee from making a proper decision; it is common practice in civilised world. There are literally thousands of people sought to be deported. It would be unworkable to say that immigration officers make an appointment with potential deportees to come back for possible deportation in the event of their representations failing, and then
> release them. How many of them would keep their appointment once their representations have failed? There are simply no resources to trace them."

[39] The respondents have stated that the applicants were arrested as illegal immigrants. This has not been disputed by the applicants. I accordingly accept that the applicants were illegal refugees. The applicants remain illegal refugees so long as they have not been accorded asylum refugees
status, consequently bound to be deported to their country of origin. I sanguine myself with what was said in the *Jeebhai v Minister of Home Affairs and Another (supra)* matter. To merely have illegal refugees released simply because it is alleged that their further detention is unlawful, will result in a situation where the numbers of refugees roaming the streets of the Republic ever increasing to unacceptable and uncontrollable proportions. I am also of the view that no country in the world, no matter how much it is human rights orientated, will allow that foreigners should swell into its borders unchecked, and that they must be freed from detention without much ado. The Courts must be careful in dealing with these matters of illegal foreigners, a too liberal
approach might result in foreigners, taking advantage of such liberal approach by the courts to free them purely because they have been in detention for more than a

number of certain days. *In casu*, there is an averment that some of the embassies of the countries of origin of some of the applicants, not co-operating in facilitating the identification of the applicants nor furnishing them with travelling documents. It is in the interest of the security and stability of any country that the influx of foreigners must be carefully and strictly monitored and controlled by the relevant institutions designed for that purpose. Certainly it cannot be the courts that assume the role of such institutions. In my view, courts must refrain from taking a too liberal approach in matters pertaining to the release of foreign nationals from detention centres before the status of such foreign national in the Republic has been dealt with by the relevant institution created for such purpose.

[40] For the reasons set out herein above, the applicants have not persuaded me that they are entitled to the relief they seek, [9] in particular, *inter alia*, that they should be released from detention summarily. I am therefore of the view that both applications must be dismissed with costs. It has been brought to my attention that some of the applicants have decided to request that they be deported. Whatever the situations is, I am of the view that the respondents are entitled to its costs. Whether the respondents would be in a position to recoup such costs is not a matter for the deliberation by this Court. The respondents employed the

9 In the matter of Cape Text Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C),at 529G-H where Corbett, J as he then was, said that the test is that "where there was a dispute as to the facts, a final interdict should only be granted in notice proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such order."

services of two counsel. Having regard to the short period the respondents were afforded to file their answering paper in both applications, I am of the view that the services of two counsel was justified.

[41] In the result I make the following orders:

CASE NO:27498/08

1. That the application in respect of all three applicants is dismissed.
2. That all three applicants are ordered jointly and severally, the one paying, the others to be absolved, to pay the costs of this application, which costs shall include the costs of two counsel,

CASE NO: *27497/08*

1. That the application in respect of all thirteen applicants is dismissed.
2. That the applicants are ordered jointly and severally, the one paying the others to be absolved, to pay the costs of this application, which costs shall include the costs of two counsel.

N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

HEARD ON THE : 08/07/08
DATE OF JUDGMENT: 29/07/08
APPLICANT'S ATT : MS. KM MINISI
APPLICANT'S ADV : MS. A GRANOVA
RESPONDENT'S ATT: STATE ATTORNEY.
RESPONDENT ADV : MR. BOFILATOS, with
RESPONDENT ADV : MS. D CHABEDI