IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 22621/2011

In the matter between:

VIOLETTA MUKHAMADIVA **Applicant**

And

THE DIRECTOR-GENERAL DEPARTMENT OF HOME AFFAIRS **First Respondent**

THE MINISTER OF HOME AFFAIRS **Second Respondent**

JUDGMENT: 23 October 2012

DAVIS J

[1] On 21 November 2011 this Court found that the chief immigration officer at Cape Town International Airport, Mr Hans Grobbler, was not guilty of contempt of a court order which had been granted on 06 November 2011. The background to this dispute is set out in the judgment of 21 November 2011, and I need not repeat it in this judgment. Of relevance however was Mr Grobbler's evidence that, when seized with the order of this Court, he contacted his supervisor, Mr Geneva Hendricks, who advised him not to accept the order because the parties cited were only first and second respondent. That evidence raised a serious concern as to the procedures which immigration officials adopt upon being served with court orders.

[2] Pursuant to this judgment, the court ordered that the first respondent, through his delegee in the Western Cape who happened to be the head of immigration, Mr Patrick Tariq Mellet, provide this Court with a report as to what procedures are adopted by officials when a court order is issued, particularly if it is issued on an urgent basis. Further, he was to report to the court as to exactly what departmental officials were instructed to do when a court order is issued and, further, to provide the court with a plan that had been adopted or will be adopted to educate immigration officers to comply with the constitutional requirements of this country, and in particular to comply with court orders.

[3] Mr Mellet duly replied on 29 February 2012 with a report which is attached to this judgment. I am indebted to him. On 19 March 2012 applicant's counsel provided submissions with regard to this report and this, in turn, prompted a supplementary report from Mr Mellet which was provided to this Court on 16 March 2012.

[4] Mr Albertus, who appeared on behalf of the respondents, contended in argument which followed the submission of the written reports, that this court had no jurisdiction over the respondents, particularly with regard to making a further order in that the issue of respondents' policy had not been placed in dispute. The respondents however were clearly before this court in that it was alleged that there had been deliberate failure on the part of officials of first and second respondent to comply with a court order granted after an urgent application.

[5] One of the reasons for finding that Mr Grobbler was not in contempt of court was the evidence that he provided as to how he had followed the advice and hence the procedures which are adopted by first respondent with regard to orders of court issued on the basis of urgency to officials who are about to extradite or deport a particular person, who is the subject of the application.

[6] In a specific question addressed to the parties by this court on 29 February 2012 the difficulty confronting this Court was expressed thus:

> "*The question that I wish to have addressed, particularly with reference to the International Civil Aviation Organisation, is how a court order could be enforced in the following circumstances. Assume a parent of a toddler approached the court as a matter of urgency to prevent her ex-husband from secreting her child out of the country. An order is granted on an interim basis that is subject to a rule nisi on a 24 hour date of return. How could such a court order be implemented in light of the discussions in which I have made reference concerning the CICA*?"

This question sought to focus upon the importance of insuring that respondent has a policy which is both constitutionally compliant and ensures that the principle of legality in South Africa enjoys meticulous compliance.

[7] In his report, Mr Mellet contends that there could be no "*external intrusion or interference in the so called international transit zone of the international airport nor do the sterile immigration and customs security areas within the*

international zone." Hence, his officials are unable to give effect to court orders once the affected person is in the international transit zone.

[8] Mr Mellet continues:

> "*Immigration has no authority over a traveller once he or she has been denied entry into South Africa as such passenger remains under the author of the airline (which brought such passenger to South Africa) at all times and he or she is cleared to cross the border line barriers in the sterile area.*"

Mr Mellet finds the source of this restricted approach in the Convention of International Civil Aviation (CICA) and the law governing International Civil Aviation Organisation (ICAO) of the United Nations to which South Africa is a signatory and which provides, in his view, justification for the conclusion that immigration officials have no authority in the international transit sector. In summary therefore, he contends thus:

> "*Immigration officials have no mandate to:*
>
> - *hold a passenger (denied entry) in detention at the airport;*
> - *marshal a passenger in any manner after that passenger has been signed off to remain in the custody of an Airline;*
> - *pursue a passenger or interfere in any way with a passenger or airline within the International Transit Zone, on an aircraft or on the apron or any other apron when the flight is in transit on an international flight schedule;*

- *interfere with the movements of any aircraft because of issues of inadmissibility of a passenger.*"

It is this approach, which Mr Mellet contends forms the core of the protocol adopted by the respondents. It is this reading of the relevant law which is then employed to justify the refusal to implement the court order which had been issued by this court and which gave rise to the proceedings against Mr Grobbler.

[9] Regrettably, it would appear that Mr Mellet's approach to the law is not entirely correct. There does not appear to be any provision of the Convection of the International Civil Aviation which provides that the territorial laws of a country do not apply in certain parts of the airport. It is possible to enact such laws. For example, France passed legislation creating 'international zones' in its airport in order to avoid admitting asylum seekers and the responsibility to care for them. There is no similar or equivalent legislation in South Africa. See, for example, John Dugard *International Law* (4ed) at 263

[10] In **Lawyers for Human Rights v Minster of Home Affairs** 2004 (4) SA 125 (CC), the Constitutional Court was confronted with the issue as to whether the Bill of Rights (Chapter 2 of the Republic of South Arica Constitution Act 108 of 1996) was applicable to people who had been detained either at sea or at airports before being formally admitted into South Africa. The reach of the Bill of Rights was expressed as follows by Yacoob J:

"These rights in particular s 12 and 35 (2) of the Constitution are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea – or airports merely because they have not entered South Africa formerly would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained in a ship in South African waters cannot turn to South African courts for protection or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African court."

This approach was extended by the Supreme Court of Appeal in **Abdi v Minister of Home Affairs** 2011 [3] All SA 117 (SCA). In this case, two people, who had been deported from Namibia to Somalia through OR Tambo International Airport, were held in the 'inadmissible facility' at that airport. The Minister of Home Affairs contended that, while the applicants were in this facility, they were not, in law, in South Africa and the South African authorities and courts had no jurisdiction over them. This argument was unambiguously rejected by the Supreme Court of Appeal. Bertelsmann AJA, citing the judgment in **Lawyers for Human Rights** said,

"The argument that a South African court has no jurisdiction over the inadmissible facility by virtue of the fiction that it does not form part of the Republic's territory is wrong." Para 28

Bertelsmann AJA went on to say at para 29:

"The suggestion that a Namibian deportation order precludes the South African authorities and courts from dealing with the case of a Namibian

deportee who is held in an inadmissible facility at a South African port of entry is untenable. If correct, it would constitute an unwarranted administrative intrusion into the affairs of the Republic, a sovereign state. This suggestion is foreign to international law."

[11] These cases notwithstanding, the question arises as to whether the Convention of International Civil Aviation is applicable in these situations. In this connection Mr Mellet has sought to invoke Annex 9 to the Convention. Annex 9 divides the responsibility for custody and control over a passenger into three separate phases:

"*1. From embarkation until the passenger is accepted for examination by the public authority, the passenger is under the custody and control of the airline carrier.*

2. While the passenger is being examined to determine admission, until he or she is admitted or returned to the custody of the carrier, the passenger is under the custody and control of the public authorities.

3. if the person is:

3.1 Admitted, they remain in the custody of the public authorities;

3.2 Refused admission, he or she is returned to the custody and control of the carrier."

These three phases determine the responsibility for the custody and control of a passenger in terms of an examination as to whether the passenger has been

examined for admission and whether the passenger had been granted or refused admission. The location, that is the zone in which the person is to be found, does not appear to be the central concern of Annex 9. Indeed in the 10th addition to Annex 9 in 1997 provision is made:

> "*The responsibility of the operator shall include the custody of passengers and crew between the aircraft and the terminal building and within a terminal building transit area it being understood that the contracting state may, if it so wishes, relieve the operator from all, or part of this responsibility.*"

The 12th addition of Annex 9 does not include a similar provision, but, without an express exclusion, the residual power of the contracting state to take control of persons who have been regarded as inadmissible must surely be inherent in the very purpose of Annex 9. Mr Mellet omits to deal with these implications of Annex 9.

[12] More significantly, s 165 of the *Republic of South African Constitution Act* 108 of 1996 requires that organs of state through legislative and other measures must assist and protect the courts to ensure the independence, impartiality, dignity and accessibility and effectiveness of the courts.

[13] On the basis of Mr Mellet's argument, these provisions would be significantly undermined, I may add, not by any express reading of Annex 9 but, at best, for him on the strength of Annex 9: 516 which provides that the

contracting state shall not prevent the departure of an operators aircraft pending a determination of admissibility of any of it arriving passengers.

[14] Thus, when immigration refers to an aircraft having left it means that boarding has closed. Immigration officials' responsibility, on Mr Mellet's argument, ends after its last contact with the traveller, either at the time the traveller has been cleared for entry or the time that the passenger is denied entry at the border line barrier. The express words of Item 5.6 reflect its purpose: it is designed to prevent a state from delaying a flight because there may be inadmissible passengers on a different incoming flight. It has nothing to say about the enforceability of a court order that requires the removal of someone from a plane nor is anything provided which deals with the powers of immigration or any other state agency to enforce a court order.

[15] In summary, Mr Mellet's report provides no legal justification for the approach that he has adopted. There is both international and South African law, apart from that which I have already cited, which dictates that the opposite of Mr Mellet's approach should be followed by respondent.

[16] In **van der Merwe v Taylor NO** 2008 (1) SA 1 (CC) the Constitutional Court dealt with the question of legality of a seizure currency. Applicant had bordered an aircraft before the custom officials determined he had violated the

exchange control regulations. They then removed him from the aircraft and seized the currency. There appears to be no suggestion in this case that either the customs officials were not entitled to nor prohibited from boarding the aircraft. In **Lan v OR Tambo International Airport** 2011 (3) SA 641 (GNP) an order was obtained for the release of a person being detained in the transit zone at OR Tambo International Airport. The first order was ignored. However the applicant's lawyers obtained a second order which was enforced. The applicant was released from the transit area pending a determination by the Court of her admissibility.

[17] It was precisely this set of circumstance that confronted the case of applicant and which resulted in a refusal to comply with an order. It is important to emphasise that the order of the Court of 06 November 2011 provided that the applicant be detained at Cape Town International Airport until the next morning when both affected parties would have been afforded an opportunity to present their respective cases before the court concerning the applicant's repatriation.

[18] To the extent that this conclusion requires further weight, in **Amuur v France The European Court of Human Rights** (1996) 23 EHRR 533 held that France remained bound by its international obligations towards people in its territory, even though the people concerned were held in international zone of an airport.

[19] Given the approach adopted by Mr Mellet, it is regrettable that I need to refer to **Abdi**, *supra* where Bertelsmann AJA noted with regard to the Department of Home Affairs:

> *"It is a matter of a comment that the respondents were parties to that matter (Lawyers for Human Rights) and the Constitutional Court rejected a similar argument that it was advanced in the court below and before us."* Para 21

[20] In summary, the report which is attached by Mr Mellet to this judgment is manifestly flawed. It cannot, either under international law nor under our Constitution, justify the approach to the enforcement of court orders that he outlined therein. There is case law which dictates that the exact opposite approach should be adopted. Were Mr Mellet's approached to be followed it would mean that many orders of our Courts, given on an urgent basis, and dealing, for example, with the abduction of children or other forms of criminal activity would be stymied by the Department of Home Affairs which it must be emphasised is not above the law.

[21] For these reasons this judgment will be made available to both respondents with the objective that an adequate policy reflecting the Department's commitment to the Constitution and the rule of law be followed in the future. It will also be made available to the South African Human Rights Commission with a view to ensuring that it assists the Department, if necessary,

and helps promote that the Department's respect for the rule of law, within the specific context of this kind of case.

[22] The Court is indebted to Mr Katz who together with Mr Bishop, prepared extremely useful submissions which were of considerable assistance in examining the approach which had been set out by Mr Mellet.

DAVIS J