REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/[redacted].

(2) OF INTEREST TO OTHER JUDGES: YES/[redacted].

(3) REVISED.

DATE 12/02/10 SIGNATURE

CASE NO: 10/01187

In the matter between:

HOOMAN HASSANI	First Applicant
HOOTAN HASSANI	Second 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

DUKADA, AJ:

[1] On 14 January 2010 the applicants, who are foreigners and illegal immigrants in the country, instituted proceedings against the respondents in this Court for reliefs which can be summarised as follows:

1.1 Declaring the detention of the applicants invalid, of no force and legal effect;

1.2 Directing the respondents to release the applicants from Lindela Holding Facility forthwith;

1.3 Interdicting and restraining the respondents from deporting the applicants pending the outcome of their application for temporary asylum permits; and

1.4 Directing the respondents to assist the applicants in their applications for temporary asylum permits.

[2] The application is opposed by the respondents. It is common cause that on 27 September 2009 the two applicants were arrested at O R Tambo International Airport whilst they were *in transit* to England. They were taken to Kempton Park Police Station where they were detained until 2 October 2009. On 2 October 2009 the applicants were brought to Lindela Holding Facility of the respondents and detained for purpose of deportation from South Africa to their own country.

[3] It is also common cause that the applicants are still to date in detention at Lindela Holding Facility. In their papers, the applicants contend that the continued detention is invalid because it is now in excess of the maximum statutory period of 120 days.

[4] When the matter was heard on 3 February 2010, counsel for the respondents argued that the application was premature because at the time it was brought a period of 120 days had not yet expired. Therefore, the application should be dismissed. Conversely, Ms Mji, who is appearing on behalf of the applicants, argued that the evidence now before court undisputedly shows that the applicants have been in detention in excess of the maximum statutory period of 120 days. She urged the court to deal with the matter as it is today and declare the continued detention of the applicants invalid.

[5] Both parties have dealt extensively with the provisions of the Refugees Act (No. 103 of 1998) and their relevance to the facts of this case. For reasons set out more fully hereunder, I do not find it necessary to deal with the provisions of this legislation in determining whether the continued detention of the applicants is valid or not. What is clear from the papers is that to date the applicants have not yet applied for a temporary asylum permit in terms of the provisions of the Refugees Act. Therefore, the Act cannot apply in this case. The validity or otherwise of the detention of the applicants should be determined by examining the provisions of the Immigration Act (No. 13 of 2002). In any event, it is the case of the applicants that they were detained in terms of section 34(1)(d) of the Immigration Act.

[6] The relevant provisions of section 34 of the Immigration Act read:

> *"(1) Without need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General, provided that the foreigner concerned –*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) ...*
>
> *(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days,"*

[7] In her argument, Ms Mji also drew the attention of the court to the provisions of Regulation 28(4) of the Regulations promulgated in terms of the Immigration Act. Succinctly, the sub-regulation provides that representations of the detained person or persons should be placed before the magistrate when the extension of 90 days is sought by the authorities. I do not find this sub-regulation relevant to these proceedings because the applicants are not attacking the decision of the magistrate who ordered the extension of their detention for a period of 90 days after the 30 days had expired.

[8] During her argument, Ms Mji relied on the unreported judgments of this Court in *Aruforse v Minister of Home Affairs and 2 Others;* Case No. 2010/1189 and *Consortium For Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others*; Case No. 6709/08. In both cases this Court held that the detention of applicants in terms of the

provisions of section 34(1)(d) of the Immigration Act for a period longer than 120 days was invalid.

[9] In *Consortium For Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others* (*supra*) at p 29 Motloung J, justifying his conclusion, held:

> "*In this respect my view is that to interpret the Act in the manner that Mr Bofilatos contends it should, would clearly result in rendering the application of the Immigration Act unconstitutional because the effect of what he contends for is that for all intents and purposes there would be no time limit for which an illegal immigrant can be kept in custody. The 90 day period can be asked for continuously ad infinitum in his words. That is clearly absurd in my view and cannot be sustained. And to the extent that that contention could be sustained it would obviously lead to abuse, and if one has regard to the kind of liberty that is in issue, the freedom of an individual, that kind of contention cannot be sustained.*
>
> *In short I find that a correct interpretation of Section 34 of the Immigration Act is that it provides for 30 days initial detention and if that detention has to be in excess of the said 30 days, an extension has to be provided by the magistrate on good and reasonable grounds and even then for an adequate period. In my mind this means for a period as far as necessary and only to the extent of that necessity. But in any event no extension can ever exceed a period of 90 days.*"

[10] Later in his judgment, the learned Judge emphasised the need for a restrictive interpretation of the provisions of the Immigration Act in the light of the rights entrenched in the Constitution.

[11] Meyer J, in *Aruforse v Minister of Home Affairs and 2 Others (supra)* found that the interpretation given (i.e. a detention must not exceed a period of 120 days) cannot defeat the purpose of section 34(1)(d) of the Act. The learned Judge went further:

> "*In terms of its preamble the Act aims at putting in place a new system of immigration control which inter alia ensures that: immigration laws are efficiently and effectively enforced, deploying to this end the significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration; immigration control is performed within the highest applicable standards of human rights protection; a human rights based culture of enforcement is promoted; and civil society is educated on the rights of foreigners and refugees.*" (at pages 10 and 11)

[12] In coming to this conclusion, the court rejected the unreported decision of this Court in *Adela Mbalinga Akwen v Minister of Home Affairs and Another*; Case No. 46875/07 in which Preller J said:

> "*In my view there is nothing in the wording of this subsection that suggests that after the detention has been extended for 90 days initially, it may not then be extended for a further 90 days.*
>
> *That seems to be in accordance with the thinking which appears from the judgment of the full bench of this division to which I have been referred, namely Jeebhl v The Minister of Home Affairs which was reported in July 2007. It fits in with the obvious intention of the statute, namely to deport illegal foreigners from this country in appropriate circumstances.*
>
> *It is a known fact that there are a vast number of known criminals in this country who are simply not prosecuted because the police cannot locate them. It must follow that a person who is here illegally and who is detained while facing the possibility of a deportation will likewise disappear and not be found by the immigration authorities. I think, therefore, that the purpose of the Act will be defeated if this Section is interpreted more strictly than is necessary.*"

[13] Conversely, Ms Manaka, who appeared on behalf of the respondents, argued valiantly that the merits of this case justify a detention of applicants for more than 120 days. For this contention she relied on the false information furnished by the applicants about their identity and nationality to the immigration officers and the Iranian Embassy which, according to her, is the main reason for the delay to finalise the matter. Ms Manaka also referred to "*practical and logistical problems*" facing the immigration officers though she could not elaborate on the nature of such problems.

[14] Significantly, Ms Manaka relied on the unreported judgment of this Court by Willis J in *Arse v Minister of Home Affairs and 2 Others*; Case No. 52898/09 for the contention that a period of detention in excess of 120 days is justified in this case. At page 6 of the judgment, the learned Judge states:

> "*There are indeed very real difficulties for the state authorities if this is to be an accepted position in South Africa. There are several cases where the Constitutional Court has emphasised that no right is absolute, none of the rights in terms of the Constitution is absolute and that a balancing act has to be undertaken between the differing rights that prevail in the country, more especially, in terms of the Constitution.*
>
> *Clearly the applicant has a right to freedom. On the other hand the state has a legitimate interest in trying to curb illegal immigration, in trying to keep track of persons who have entered the country illegally and ensuring that persons who do not have places of shelter and who do not have any visible means of support, are not free to roam the streets.*" (at page 6; para [10])

The court dismissed the application on the ground that the detention of applicants beyond a period of 120 days was justified. In the alternative, Ms Manaka argued that this matter should be postponed pending the outcome of

the Supreme Court of Appeal in the matter of *Arse v Minister of Home Affairs and 2 Others (supra)*.

[15] The applicants' cause of action is founded on a statute i.e. section 34(1)(d) of the Immigration Act. In *R v Padsha* 1923 AD 281 at 308 Kotze JA articulated eloquently the principle of legality in administrative law as follows:

> *"It is a generally accepted rule of universal application that a power must be exercised within the prescribed limitations and for the purpose intended and no other."*

(See also *S v Mngadi and Others* 1986 (1) SA 526 (N).)

[16] Where the intention of the legislature is clearly expressed, it is the duty of courts to give effect to the clear meaning and not to improve the legislation (see *Ex Parte Slater, Walker Securities (SA) Ltd* 1974 (4) SA 657 (W) and *Strauss v Strauss* 1971 (1) SA 585 (T)).

[17] A court has a duty to apply the plain, literal or grammatical sense of the words of a statute and not to fill in gaps which the legislature seems to have omitted (see *S v Thole* 1962 (2) SA 90 (N) at 92F-F). The criterion is what the language says rather than what the legislature meant (see *S v Nathaniel and Others* 1987 (2) SA 225).

[18] A strict construction is placed on statutory provisions which interfere with elementary rights. Further, an interpretation which avoids harshness and injustice will, if possible, be adopted (see *Dadoo Ltd and Others v*

Krugersdorp Municipality 1920 AD 530 at 552; see also *Djama v Government of Namibia* 1993 (1) SA 387 (Nm) at 395A-B and the authorities cited therein; *Nombanga and Another v Minister of Police, Transkei, and Others* 1992 (3) SA 988 (TK) at 992E and *S v Ndlovu* 1983 (4) SA 507 (AD)). The assumption should be that the legislature means what it says (see *S v Thole* 1962 (2) SA 90 (N) at 92F-G).

[19] In *Joosub v Immigrants' Appeal Board* 1920 CPD 109 at 111 the court held:

> "*The law favours liberty and the upholding of rights, and the Court must act in this spirit, except where in the particular instance it is clear that the Legislature has otherwise intended.*"

Centlivres CJ, in *R v Sachs* 1953 (1) SA 392 (AD) express the position as follows:

> "*Courts of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the Executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute.*" (at 399H)

[20] In my view, the language of the legislature in section 34(1)(d) of the Immigration Act is clear and unambiguous. It requires no appeal to the recognised canons of construction of statutes. The use of the words "*adequate period*" and "*not exceeding*" in subsection (1)(d) of section 34 of the Act put the intention of the legislature beyond doubt. Why would the legislature expressly mention 90 days as the adequate period if the real

intention was to permit an extension of detention beyond 120 days. If the real intention of the legislature was to allow an unlimited period, why is the 90 calendar days expressly mentioned in the subsection?

[21] If the reasoning of the court in *Arse v Minister of Home Affairs and 2 Others (supra)* is followed to its logical conclusion, it means the entire subsection (1)(d) of section 34 of the Act has no meaning because the detention of an illegal immigrant can be extended for a further 90 days on various occasions, even if the total number of days can amount to a year or more. I agree with Motloung J in *Consortium for Refugees and Migrants in South Africa and Others v Minister of Home Affairs and Others (supra)* that such an interpretation of subsection (1)(d) of section 34 would open the power to abuse. Moreover, the interpretation would make it almost impossible for the court to protect a detainee by way of review because the immigration officer would endeavour to furnish compelling reasons why the extension of detention is on each occasion necessary.

[22] The obvious example of abuse of the power enjoined by the respondents in section 34(1)(d) of the Act is this case. As already stated, the applicants were arrested on 27 September 2009; they were detained at Lindela Holding Facility on 2 October 2009 and are still in detention since then. The respondents have not placed evidence before court indicating what they have been doing since the day of arrest and detention of the applicants except to refer to false information furnished by the applicants and their failure to co-operate with the immigration officers and the Iranian Embassy. The

respondents have made it very clear that nothing can be done in the circumstances. Their attitude, though not expressly stated, is that the applicants would remain in detention as long as they do not co-operate with the immigration officers.

[23] On 5 January 2010 the Acting Chief Director of the first respondent wrote to a representative of the applicants advising that on 15 January 2010 the applicants will be transported from Lindela Holding Facility to Crown Mines Refugee Reception Office for application of asylum and finalisation of their asylum applications. In their replying affidavit, the applicants have stated that to date this has not been done. It was also confirmed by counsel for the applicants and was not disputed by the respondents' counsel.

[24] In any event, even if the respondents had furnished an explanation, no matter how convincing and compelling it might have been, there would have been no justification in law for the extension of applicants' detention beyond a period of 120 days.

[25] Consequently, I respectfully differ with Willis J (in *Arse v Minister of Home Affairs and 2 Others* (*supra*)) for concluding that a period in excess of 120 days is justified because the right of the applicants was not absolute but subject to limitation by the Constitution. A contrary argument is that it is the very Constitution the applicants in this case are relying on. The limitation clause of the Constitution has no application in the present case because the

legislature has set out the periods of detention in section 34(1)(d) of the Act expressly and without ambiguity.

[26] To give a *carte blanche* power to an immigration officer when the legislature has clearly restricted the exercise of that power would offend the principle of legality and nullify the jurisprudence developed by this principle since the decision of the then Appellate Division in *R v Padsha* (*supra*).

[27] That "*There is nothing in the wording of this subsection that suggests that after the detention has been extended for 90 days initially, it may not then be extended for a further 90 days*", as stated by Preller J in *Adela Mbalinga Akwen v The Minister of Home Affairs and Another* (*supra*), is incorrect. The learned Judge failed to give weight to the words "*adequate period*" and "*not exceeding*" in subsection (1)(d) of section 34 of the Act. More important, the power enjoined by the functionary in the subsection is clearly restricted because the functionary must show "*good and objective grounds*" when applying to the magistrate for the extension of detention of an illegal immigrant for a period of 90 days. A further flaw in the judgment of the court in *Adela Mbalinga Akwen v The Minister of Home Affairs and Another* (*supra*) is that the court ignored its obligation to give a restrictive interpretation to the subsection because it interferes with the liberty of an individual.

[28] There can be no justification for any contention that at the time the Immigration Act was passed the legislature was not aware about the practical and logistical problems that would confront the immigration officers when

dealing with illegal immigrants and administering the provisions of the Immigration Act. The legislature was also aware about the problems mentioned by the court in *Adela Mbalinga Akwen v The Minister of Home Affairs and Another* (*supra*). The interpretation of the provisions of section 34(1)(d) of the Immigration Act in the unreported judgments of *Arse v Minister of Home Affairs and 2 Others (supra*) and *Adela Mbalinga Akwen v The Minister of Home Affairs and Another (supra*) is obviously wrong. If the interpretation is applied to the subsection, it would obfuscate the subsection, create uncertainty in the minds of those who are affected by it and give an unfair advantage to the functionary who is administering the legislation.

[29] Even if the provisions of the Refugees Act were applicable to the applicants, that would not have any impact to the issue to the decided because the detention of the applicants is in terms of the provisions of section 34(1)(d) of the Immigration Act. The applicability of the Refugees Act to the applicants cannot cure an invalid detention.

[30] The alternative argument by counsel for the respondents cannot be sustained. Should the matter be postponed pending the outcome of the appeal in *Arse v Minister of Home Affairs and 2 Others (supra*), the applicants would suffer irremediable prejudice in the event of the Supreme Court of Appeal endorsing my conclusions in this matter.

[31] Accordingly, I grant the following order:

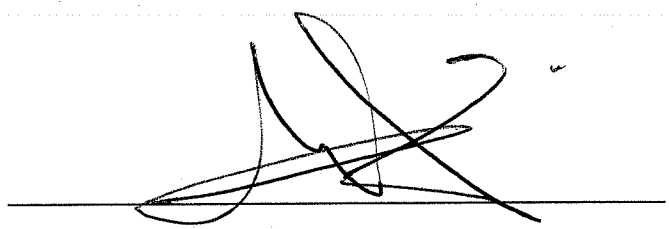
1. The detention of applications at Lindela Holding Facility is declared invalid, of no force and legal effect;

2. The respondents are ordered to release the applicants from Lindela Holding Facility forthwith;

3. The respondents are ordered to assist the applicants in their applications for asylum in terms of the provisions of the Refugees Act;

4. The respondents are interdicted and restrained from deporting the applicants pending the outcome of the applicants' applications for asylum;

5. The first respondent is ordered to pay costs of the application.



N DUKADA
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

DATE OF HEARING 3 FEBRUARY 2010

DATE OF HEARING	3 FEBRUARY 2010
DATE OF JUDGMENT	5 FEBRUARY 2010
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