REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/14516

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

....
DATE SIGNATURE

In the matter between:

MLICHENE POWER **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**

JUDGMENT

RATSHIBVUMO AJ:

Introduction:

1. On 25 April 2013, Mr. Mlichene Power ("the Applicant") moved an urgent application seeking an order in the following terms:
    a) Condoning Applicant's non-compliance with the rules relating to service and time periods and dealing with this matter as one of urgency in terms of Rule 6 (12) of the Uniform Rules of Court;
    b) An order declaring his continued detention unlawful;
    c) An order directing the Respondents to issue the Applicant with a temporary asylum seeker permit in accordance with section 22 of the Refugees Act 130 of 1998 ("the Refugees Act");
    d) An order directing the Respondents to release him immediately and
    e) Costs order against the Respondent.

The matter was postponed on 02 May 2013 to 14 May 2013 to allow the Respondents to file Answering Affidavits by 07 May 2013 and for the Applicant to file his Replying Affidavit by 09 May 2013 by Mabesele J. The Court also ordered that the Applicant should not be deported pending the finalisation of this application.

Background

2. For reasons that will become clearer later, it is necessary to give the background of the case as narrated by the Applicant separately from that presented by the Respondent. The Applicant is an Ethiopian national. In his Founding Affidavit he claims to have arrived in the Republic of South Africa (South Africa) in January 2011 running away from political persecution in his country of origin. His intention was to apply for asylum, which he eventually did but it expired. He made two trips to the offices of the Department of Home Affairs in order to renew it, but was turned back without assistance. It was on his third visit there (in December 2012) that he

was arrested and detained at a police station for a number of days. He was handed over to the Respondents on 21 December 2012. By the time he moved this application he had been in custody for over 4 months and the Respondents furnished him no reasons for his detention. He also alleges that he was taken by the Respondents to the Ethiopian Embassy for identification and for travelling documents, with a view to have him deported.

3. In an Answering Affidavit deposed for the First and Second Respondents, Mr. Buthelezi, an Immigration Officer of the Department of Home Affairs disputes much of the Applicant's allegations. According to him, the Applicant was arrested on 20 December 2012 and was served with the Notification of Deportation as per Annexure "NB1". In it, it appears that the Applicant was informed of the right to appeal the decision to deport him and he chose not to do so. Contrary to the Applicant's averments that he arrived in the Republic in January 2011, Mr. Buthelezi alleges that the Applicant was convicted of a crime of Armed Robbery in 1998 under a different name. As for the lengthy detention of the Applicant, Mr. Buthelezi blames this on the Applicant not being positively identified by the officers from the Ethiopian embassy, owing to him using different names. Attached to the Respondents' Answering Affidavit marked Annexure "NB2" is a document issued by the Department of Justice and Constitutional Development dated 26 August 2002 containing details of the person sentenced therein in 1998.

4. The information extracted from Annexure "NB2" indicates that a person named CHARLES MUCHENE, then aged 34 and South African born was convicted of 8 criminal offences. Unfortunately, the details of the charges and the sentences imposed are referred to annexures which were not attached to the Respondent's affidavit. What is, however, clear is that the case was

opened at John Vorster Square (the current Johannesburg Central Police Station) under CAS: 1486/05/1997; that the crimes were committed on 17 May 1997; that he was convicted and sentenced on 27 March 1998 and that on 30 May 2005 he was given a 6 months special remission to the sentence. Whatever sentence was imposed, it is clear that it was a lengthy prison sentence which he served. It is not clear as to the date he was released and if there were conditions attached thereto.

5. In his Replying Affidavit, the Applicant contends that he signed Annexure "NB1" because he was asked to, but he did not understand the contents thereof. He believed that he exhausted all the internal remedies before bringing this application. He further admits that he is the person who was arrested and sentenced for armed robbery as alleged by the Respondents.

Issues

6. Two issues raised by the Applicant have to be determined independent of each other.

   Issue 1: Whether the Applicant is a refugee entitled to an asylum seeker permit.

   Issue 2: Whether the period the Applicant has been in detention is permissible for purposes of deportation in terms of the Immigration Act 13 of 2002 ("the Immigration Act").

7. It was submitted on the Applicant's behalf that once he voiced the intention to apply for asylum, he is entitled to be released in terms of the Refugees Act. Counsel placed heavy reliance on the matters of ***Bula and Others v Minister of Home Affairs and Others***[1] **and** ***Arse v Minister of Home***

[1] 2012 (4) SA 560 (SCA).

Affairs and Others[2] in support of this contention. In my view, the facts in *Bula* and *Arse* are readily distinguishable from the present case.

It is opportune to pause for a moment to revisit the decisions alluded to. The *ratio* in *Bula* was arrived at by the Supreme Court of Appeal (the SCA) pursuant to the provisions of the Refugees Act. Regulation 2(2) of the Refugees Act provides:

> "2(2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1) but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

8. The SCA found in *Bula* that

> "It is clear that the appellants, when they were detained at Lindela, communicated to the department's officials and enforcement officers by the letter referred to earlier in this judgment that they intended to apply for asylum. Once the appellants, through their attorneys, indicated an intention to apply for asylum they became entitled to be treated in terms of reg 2(2) and to be issued with an appropriate permit valid for 14 days, within which they were obliged to approach a refugee reception office to complete an asylum application."[3]

With this in mind it is noteworthy that none of the Applicants in *Bula* had a record of previous convictions, either in South Africa or from their Country of origin, as distinct from this matter.

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[2] 2012 (4) SA 544 (SCA.

[3] *Bula and Others v Minister of Home Affairs and Others supra* at paragraph 72.

9. Lastly, the circumstances making the Applicants in *Bula* refugees who sought asylum in South Africa were laid bare to the Court. They fled from State persecution flowing from their support of the opposition party. The details including the names of the party, their movements and detailed dates were well documented before the Court. None of their averments (regarding the reason they fled from their country of origin) could be countered.[4]

10. In contradistinction, the Applicant in this matter chose not to disclose anything as to why he needed asylum in South Africa. What he states in his affidavit is that he arrived in South Africa in January 2011. He states in vacuum that he was running away from political persecution in his country. He states that he was issued with an asylum seeker permit which expired. He gives no details as to when or where he applied for it, when and where it was given and when it expired. In light of the concessions made by the Applicant in his Replying Affidavit, we now know that he was economic with the truth when he said he arrived in South Africa in 2011, since he was here in 1997 already. Without giving any clarity about which part of his Founding Affidavit was incorrect and which one (if any) was true, the Applicant simply admits to the conviction and states nothing further. He does not explain how he was convicted in South Africa before his arrival. It remains unknown if he indeed applied and was issued with the permit since no dates where given for the Respondents to verify.

11. Further to this there is no allegation by the Applicant suggesting that when he was detained at Lindela, he voiced the intention to apply for asylum. All he alleges is that he asked to be released so he could legalise his stay in the

[4] *Bula and Others v Minister of Home Affairs and Others supra* at paragraph 4 & 5.

country. For the stated reasons, the circumstances of the Applicant are not similar to those raised in *Bula*.

12. Even if the Applicant was to apply for an asylum in South Africa, he would not lawfully qualify for same in view of the provisions of the Refugees Act. Section 4 (1) (b) of the Refugees Act provides,

> "Exclusion from refugee status.—(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she—
>
> (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or…"

It is common cause that the Applicant was convicted of crimes of *inter alia*, armed robbery in South Africa and served a term of incarceration.

13. Counsel for the Applicant argues that although the Applicant was convicted as such, it does not follow that through the conviction and sentence, he is automatically disqualified from being a refugee. He contended that one would have to be declared an "undesirable person" by the Director General of the Department of Home Affairs in accordance with section 30 (1) of the Immigration Act. The said declaration did not take place in respect of the Applicant and the Applicant, so it was submitted, was entitled to have his day of declaration if it would happen, after which he may appeal against such declaration. Section 30 of the Immigration Act provides,

> 30. Undesirable persons.—(1) The following foreigners may be declared undesirable by the Director-General, as prescribed, and <u>after such declaration, do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit</u>: …

(g) anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the Republic, with the exclusion of certain prescribed offences…

(2) Upon application by the affected person, the Minister may for good cause waive any of the grounds of undesirability.

[*Own emphasis*]

14. In the matter of *Mateku v Minister of Home Affairs and Others,*[5] Makume J held that "When the Applicant's term of imprisonment expired he was transferred to Lindela with the sole intention to deporting because he had automatically been declared an undesirable alien... That declaration of judicial incompetence (being unfit to possess a firearm) and the imprisonment having ensued it was not necessary for the Director (General) to issue a separate declaration. The declaration was automatic and followed upon the conviction."[6]

15. It is my respectful view that the declaration of any person as being undesirable in accordance with section 30 of the Immigration Act has nothing to do with the application for asylum or the Refugees Act. The whole purpose of the declaration in section 30(1) is that, as section 30(1) provides "…after such declaration, [the persons] do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit." It follows that it is only when the Director General of the Department of Home Affairs wishes to have a convicted person precluded from qualifying for a visa, admission into the Republic, a temporary or a permanent residence permit, that he would make such a declaration. The

[5] Case no. 2012/34977 handed down on 28 November 2012 by the South Gauteng High Court, Johannesburg
[6] At paragraphs 25 & 26.

process of applying for asylum by a refugee is a different process *sui generis* not referred to in section 30.

16. Equally, I do not find any ground for the argument that when the Act disqualifies certain persons as being "excluded from refugees' status," it should still be considered if they qualify. I would agree with these sentiments if there was a dispute on whether the Applicant was convicted as provided for in section 4 (1) (b) of the Refugees Act, for one would need to have his day for such a determination to be made. Once a determination is made to the effect that the Applicant was convicted, or that there is no dispute on that fact; the Department and its officers have no discretion to qualify a disqualified person. There is however, a discretion afforded the Minister to waive any of the grounds of undesirability, when dealing with those declared undesirable. From this exposition by the Court, the Applicant is *prima facie* disqualified from refugees' status by virtue of his convictions and sentence.

Unlawful detention

17. It was submitted for the Applicant that the detention beyond the statutory limit was unlawful. There is nothing on papers before me to suggest that the Applicant was issued with a permit and that his detention may have been due to a withdrawal of the same by the First respondent in terms of sections 23 and 29 of the Refugees Act. In fact, Annexure "NB1" shows that the detention of the Applicant was in accordance with the provisions of section 34 of the Immigration Act. Section 34 (1) (d) of the Immigration Act provides,

> "Deportation and detention of illegal foreigners.—(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or

her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned—

(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."

18. It appears to be common cause that the Applicant was detained for 4 months without any detention warrant signed by the Court as stipulated in section 34 of the Immigration Act. Without such detention warrant, the maximum the Respondents would be entitled to detain the Applicant would be 30 days. The Respondents contend in the Answering Affidavit that the Applicant's detention for longer than is permissible was because he could not be positively identified by the officials from the Ethiopian Embassy, owing to the Applicant using a different name at the time of such identification.

19. In his Replying Affidavit the Applicant contends that the name that he used at Lindela is the name that is used when the Ethiopian Embassy issue the Emergency Travel Certificate (ETC). He further states 'the issue of multiple identities is not sufficient ground to deport me.' While Annexure "NB2" confirms that the Applicant has another name than the one he used for purposes of this application, he seems to concede in the statement quoted above that he has multiple identities. But he fails to indicate which one is the said name that he used at Lindela which he claims is the name the embassy would use for issuing him with the ETC. It appears that there is merit in the contention that the Applicant is the author of his misfortunes. The question is whether that justifies the detention of the Applicant.

20. In *Arse v Minister of Home Affairs and Others*[7] the SCA held that once a person established that he had been detained, the detaining authority had the burden to justify the detention. The detention of the Applicant would be unlawful even if the Refugees Act was to be used as a basis for his detention, since the Applicant was detained for longer than 30 days without a review of his detention by a High Court.[8] Counsel for the Respondent submitted that if the Court orders the release of the Applicant, it could be the last they ever see him because he has multiple identities. It seems likely that the Respondents may find it difficult to trace the Applicant judging by the period he has been in the Country and the difficulty in identifying him by his own embassy officials. But such does not justify the blatant ignorance of the statutory provisions which started when the Applicant was detained for longer than 30 days without any attempt to have the detention of the Applicant confirmed by the Court. Given the background of the Applicant having multiple names and the difficulty in identifying him, I have no doubt that the Court would have authorised such further detention, up to the required maximum statutory limit.

21. A detained person has an absolute right (which belongs to both citizens and foreigners) not to be deprived of his freedom for one second longer than permissible by law by an official who cannot justify such detention.[9] Chapter 2 of the Constitution[10]: The Bill Of Rights provides in section 7 that, Rights-

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[7] *Supra*
[8] See section 29 (1) of the Refugees Act.
[9] *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC); *Silver v Minister of Safety and Security* 1997 (4) SA 657 (W) at 661 and *Rowan v Minister of Safety & Security NO* [2011] JOL 26906 (GSJ).
[10] The Constitution of the Republic of South Africa, Act 108 of 1996

7.1 This Bill Of Rights is a cornerstone of democracy in South Africa. It enshrines the rights all people(my emphasis) on our country and affirms the democratic values of human dignity, equality and freedom.

7.2 The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

7.3 The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

(Section 36 of the Bill:Limitation of Rights provides:

36.1 the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the realition between the limitation and its purpose, and

(e) less restrictive means to achieve the purpose.

36.2 Except as provided in seubsection (1) or in any other provision of the Constitution, no law may limit any right entrenced in the Bill of Rights.

22. The To this end, section 35(2)(d) of the Constitution entitles any person who is detained to challenge his or her detention before a Court and, if the detention is unlawful, 'to be released.'"[11] While it appears that the Respondent had a clear right to deport the Applicant, failure to respect and uphold the laws of the Country cannot be condoned by the Courts.[12]

[11] *Arse v Minister of Home Affairs and Others supra* at paragraph 11

[12] Sec 8.1 of the Constitution provides, "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state"

23. The SCA held that "[a] Court, generally, cannot impose conditions for the release of a person unlawfully detained. Any decision that allows further detention of the Applicant would be furthering the unlawful detention by the Respondents. While it could be true that once released, the Respondents may not be able to trace the Applicant, it can be said of the Respondents that they would be the authors of such misfortunes in that while the mechanism was there through which the detention could be made lawful, they decided to turn a blind eye to it. In a criminal matter, by way of analogy, even if a person has committed serious crimes, Courts will notwithstanding the seriousness of the charges he faces, order the release of the detainee if his detention is longer than 48 hours.[13] In the matter at hand the detention has exceeded the threshold of both the Immigration Act and Refugee Act, without any basis for the limitation of the constitutionally entrenched rights of the Applicant in sections 9(1) and 34 of the Constitution, notwithstanding his *mala fides*.

24. In the result, the Applicant was unsuccessful in showing that he is an asylum seeker or that he qualifies to be a refugee. The Respondents were as such within their right to deport him. He was, however, successful in showing that his detention is unlawful.

Costs

25. It is clear from the above that the Applicant did not make a full disclosure when he brought this application on urgent basis. He misconstrued the truth about the date he arrived in South Africa. While there is partial success in his

[13] *Rowan v Minister of Safety & Security NO supra.*

application, the Court is of the view that it should express its displeasure by not awarding him the costs that otherwise he would be entitled to.[14]

26. For the reasons stated above, I make the following order:-

1. The Applicant's detention is declared to be unlawful.
2. The Applicant is to be released forthwith.
3. There is no order as to costs.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard:	**22 May 2013**
Judgment Delivered:	**13 June 2013**
For the Applicant:	**Adv. TL Dikolomela**
Instructed by:	**Mafuwane MJ Attorneys Johannesburg**
For the Respondent:	**Adv. M Gumbi**
Instructed by:	**State Attorneys Johannesburg**

[14] *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 288E–F and *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 349