

SILVA v MINISTER OF SAFETY AND SECURITY 1997 (4) SA 657 (W) A

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Citation 1997 (4) SA 657 (W)

Case No 23344/96

Court Witwatersrand Local Division

Judge Heher J

Heard October 5, 1996

Judgment October 5, 1996

Counsel C Van Der Spuy for the applicant

H Van Eden for the respondent

Annotations [Link to Case Annotations](#)

[zFNz]Flynote : Sleutelwoorde

Immigration - Aliens - Removal from the Republic in terms of s 44 of Aliens Control Act 96 of 1991 - Detention of person in B terms of s 44 - Application for interdict de homine libero exhibendo for person's release - Conduct of officials of Department of Home Affairs and of police - Such officials C of department cannot take steps to deprive person of liberty and then place themselves, even bona fide, beyond reach of administration of justice when required to justify detention - Police not to take instructions from another department and detain persons in consequence thereof without ensuring that they are in position to justify such detention - Police to ensure that they can make contact with officials of other department at soonest possible time. D Immigration - Aliens - Removal from the Republic in terms of s 44 of Aliens Control Act 96 of 1991 - Detention of person in terms of s 44 - Application for interdict de homine libero exhibendo for person's release - Respondent seeking postponement of application to enable explanation for detention from Department of Home Affairs to be put before Court - No information placed before E Court as to potential harm flowing from early or premature release of person - Speculative whether any harm would be suffered - Postponement refused.

[zHNz]Headnote : Kopnota

Officials of the Department of Home Affairs cannot take the necessary steps to deprive a F person of his or her liberty, acting within their powers in terms of s 44 of the Aliens Control Act 96 of 1991 for the purpose of having such person removed from the Republic, and then place themselves, even if bona fide, beyond the reach of the administration of justice when they are required to justify that detention (in response, as in casu, to an application for an interdict de homine libero exhibendo for the release of such person). The police, on the other hand, G cannot and should not take instructions from another department (in casu the Department of Home Affairs) and detain persons in consequence of those instructions, without making absolutely sure that they are in a position to justify that detention, and if that justification needs contact with the officials of the other department, that they are in a position to make such H contact at the soonest possible time. The liberty of the individual cannot depend on whether the wheels of State administration run smoothly or not. The liberty of the individual is sacrosanct in the Courts. (At 661I--662C.)

The applicant applied in a Local Division, as a matter of urgency, for an interdict de homine libero exhibendo following on the arrest and detention of her brother by a policeman. The I arrest and detention had apparently been effected in terms of the provisions of s 44 of the Aliens Control Act 96 of 1991. The application was first heard by a Judge on a Friday night after the applicant and later her attorney had been trying to locate her detained brother and secure his release since the Thursday when he was arrested. The matter was adjourned to the Saturday morning to enable the respondent to read the papers and make the necessary enquiries. On the Saturday J

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morning the respondent applied for the postponement of the application to the Monday A morning to enable him to obtain an explanation justifying the arrest from officials of the Department of Home Affairs.

Held, that, if the Court was satisfied that some potential harm flowing from the early or premature release of the applicant's brother had been made apparent, it would be taken into B account, but, for reasons which were beyond the control of the respondent's counsel and attorney, no such information had been placed before the Court and it was a matter of speculation as to whether any such harm would be suffered. (At 662C/D--E.)

Held, further, that the contact between the police and the Department of Home Affairs had C apparently not been such that the one really knew what the other was about or sufficiently cared about what the other was doing to maintain the necessary contact which would enable the Court to give a judgment which might favour the administration of justice in the broader sense. As the position of the detained person was in the circumstances paramount, the application for the postponement had to be

refused and the respondent directed forthwith to release the applicant's brother. (At 662E/F--G.) D

Annotations:

[zSTz]Statutes Considered

Statutes

The Aliens Control Act 96 of 1991, s 44 (prior to its amendment by s 24 of the Aliens Control Amendment Act 76 of 1995): see Juta's Statutes of South Africa 1995 vol 5 at 2-21. E

[zCIz]Case Information

Application for an interdict de homine libero exhibendo. The facts appear from the reasons for judgment.

C van der Spuy for the applicant.

H van Eeden for the respondent.

[zJDz]Judgment

Heher J : There is before me an application for what is known as an interdict de homine F libero exhibendo. The precise terms of the relief claimed, which is sought as a matter of urgency, are the following:

1. Condoning the applicant's non-compliance with the usual Rules pertaining to service and time periods.
2. Ordering the respondent forthwith to release Sergio Orlando De Cruz Costa from G custody.
3. Costs of suit on the attorney and client scale.

The application is brought by the sister of a detained person. She has stated in her affidavit that her brother is currently being kept in custody at the Newlands Police Station against his will. H Newlands is within the jurisdiction of this Court. She says that her brother has been in South Africa for approximately two years and has been employed as a mechanic at a company called Vaaltex for 14 months. He is permanently resident in South Africa and is in possession of a duly authorised permanent residence permit. He currently resides at 263 Park Street, I Belgravia, where he has been resident since January 1995. He travels on a European Community passport.

She deposes that on Thursday, 3 October 1996 (that is to say the day before yesterday), her brother sent her to a travel agency with a request that she should arrange travel documents, enabling him to travel to Switzerland, where he was to take

part in a soccer match. She complied with his request and delivered his passport into the custody of the owner J

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of the travel agency. Later in the morning that person 'phoned her and explained that her A brother was required to collect his passport. The deponent then took him by motor vehicle to the travel agency and left him there. At approximately 11:00 she received a call from the owner of the travel agency, who said that the travel agency's driver had returned from the Department of Home Affairs office with a report that her brother had been detained at that office. B

The deponent, who says that she can hardly speak English, realised that she would need help and while she was considering what to do she was 'phoned by a lady who introduced herself as Anna and who informed her that she had been requested by her brother to telephone her as he C had been arrested. She then contacted her present attorney of record, who took steps to secure the release of her brother, as is described in the affidavit of the attorney.

In that affidavit the attorney says that she was contacted at about 14:30 on Friday, 4 October, by the brother-in-law of the applicant, Mr Morreira, who explained that a relative of his had D been arrested and asked her to take steps to secure his release. The relative was the Sergio Costa referred to in the notice of motion.

The attorney then made enquiries to determine what the facts of the matter were. She contacted Newlands Police Station as the applicant had advised her that she had been told that E her brother had been taken there. The attorney was informed that the detained person was not there and that she should enquire at the Department of Home Affairs. She then telephoned the Department of Home Affairs and spoke to a Mr Raubenheimer, who was not aware of the circumstances of the matter and referred her to a centre known as Dujambu Lundela, which is located outside Krugersdorp and which is apparently a temporary detention centre for illegal F immigrants.

When the attorney 'phoned that place she was advised that there were no immigration officers on duty and consequently she could not be assisted. She then reverted to Mr Raubenheimer at the Department of Home Affairs, who referred her in turn to a Mr Van Vuuren, an investigating G officer at the Immigration Department. The attorney, however, was unsuccessful in attempting to make contact with Mr Van Vuuren.

She then spoke to a Mr Dellasa, also at Home Affairs, but he was also unaware of the matter and he suggested that she should contact the department again on Monday morning. She then H telephoned the Department of Home Affairs in Pretoria and was referred to a Mrs Brink, whom she believes to be the regional officer at Krugersdorp, in charge of illegal immigration affairs. Mrs Brink promised assistance, although she

had no personal knowledge of the matter. She undertook to return the enquiry of the attorney. I

At approximately 18:00 in the evening a Mr Muller contacted her, presumably from the department. He advised that he was at the detention centre in Krugersdorp, but that Sergio Costa was not being detained there. Muller said that he could assist only if the attorney was able to find Costa. He left his home number and left it up to the attorney to trace him. J

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The attorney then says that after numerous enquiries at many police stations she finally tracked A Costa down and he was indeed at Newlands Police Station. She thereupon contacted Muller again, who advised that he could only assist her once Costa had been transferred to Lundela and after he had seen Costa's papers. In the circumstances of the matter neither option was open to the attorney. B

It was then decided to launch an urgent application. Contact was made last night with the Senior State Attorney and the details of Mr Muller's telephone number and his position were apparently communicated to the State Attorney.

An attempt was made to bring an urgent application before me last night, but, since I was C advised that the representative of the respondent, which in this case is the Minister of Safety and Security, had probably not had time to read the papers and that he probably would need time to make such enquiries as were necessary, I suggested to the attorney that the matter should stand until 10:00 this morning.

Accordingly the matter was called at 10:00 today (Saturday) and I was furnished with a copy D of the affidavit and the notice of motion, to which I have just referred. The Minister of Safety and Security was represented by counsel. Counsel disclosed to me that he, with the assistance of the State Attorney, had attempted to find out the facts of this matter and to contact the E persons responsible for the detention. Counsel handed up to me a document which appears to be an official removal warrant, issued under the Aliens Control Act 96 of 1991, which states:

'To all immigration and police officers. As De Cruz Costa Sergio Orlando, whose fingerprints appear on the reverse side, has made himself liable to removal from the Republic in terms of s 44 F of the said Act, you are hereby ordered to remove the said person from the Republic under proper escort and subject to the detention as provided for in terms of this Act. Removal from the Republic of South Africa shall be effected via Newlands Police Station and the responsible immigrational police office shall impress below left thumbprint of the abovementioned person when he is removed and certify that prints were taken by him.'

There is a signature and what appears to be some sort of number following on that signature. G The identity of the signatory is not obvious. The identification appearing below the signature is 'Minister of Home Affairs', but it seems highly probable that this is not the Minister's signature but some representative of the Department of Home Affairs. The document is dated 4 October H 1996 at Johannesburg and it bears what appears to be the official stamp of the Department of Home Affairs, dated on that day.

Counsel for the respondent indicated that he did not wish to file affidavits and would rely upon this removal warrant. Counsel for the applicant, when asked as to his attitude to the I admissibility of the document, said that he denied the contents of the warrant and he denied that it was true and correct, although he agreed that the document appeared to be a warrant, issued in terms of s 44.

After some debate between counsel and myself, counsel for the respondent applied for a postponement of this matter until Monday. The basis for counsel's application was that his client, who is effectively the South African Police, were acting on the instructions and carrying out J

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the requirements of the Department of Home Affairs in terms of s 44 of the Aliens Control Act, A 1991. Section 44 reads as follows: *

'(1) An immigration officer shall cause any person who is a prohibited person and enters or is found in the Republic to be removed therefrom.

(2) Any person (other than a South African citizen by birth or descent) who -

(a) having been removed from the Republic or, while being subject to an order issued under a law B to leave the Republic, returns thereto without lawful authority or fails to comply with such an order; or

(b) having been refused permission to enter the Republic, whether before or after the commencement of this Act, has entered the Republic,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not C exceeding 12 months and may, if not already under detention, be arrested without warrant and removed from the Republic under a warrant issued by the Minister and, pending his removal, be detained in the manner and at the place determined by the Director-General.'

Subsection (3) is not relevant at the present stage.

Counsel for the respondent has said that it would appear on the information available to him D that the officials of the department have acted under this section and that the detained person must be a person who has previously been refused permission to enter

the Republic and has come to South Africa and remained here notwithstanding that prohibition. E

Counsel has submitted that the public face of justice demands that the department be given time to put its explanation before the Court. He has also said, though I do not agree with him in this regard, that the Department of Home Affairs should have been cited in these proceedings. Counsel for the respondent has submitted that, if a postponement is granted until Monday, the probabilities are that he will be able to contact the necessary witnesses. F

Now it seems that on the papers before me the applicant has made out what appears to be a prima facie case for the unlawfulness of the brother's detention. Whether that be so or not the onus is on the respondent, as the department detaining the brother of the applicant, to justify his G continued detention.

Were this a normal case, that is to say a matter of some commercial expediency or a matter involving something less than the freedom of the individual, I would have no hesitation at all in granting the postponement that has been sought. However, a detained person has an absolute H right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention. I have, by reference to the founding affidavit, referred to the attempts that were made on Friday and the lack of success that was visited upon the attorney's contacts with the Department of Home Affairs.

There are two aspects to this. From the point of view of the Department of Home Affairs, it I seems to me that the officials cannot take the necessary steps to deprive a man of his liberty, acting within their

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powers under the Act (as may be), and then place themselves, bona fide no doubt, beyond A reach of the administration of justice when they are required to justify that detention.

From the side of the police, the police cannot and should not take instructions from another department and detain persons in consequence of those instructions, without making absolutely B sure that they are in a position to justify that detention and, if that justification needs contact with the officials of the other department, that they are in a position to make such contact at the soonest possible time. I do not think the liberty of the individual can depend on whether the wheels of State administration run smoothly or not. The liberty of the individual must be sacrosanct in these Courts. C

In saying that I do not leave out of account that what I have referred to as the public face of justice may also place demands upon the adjudication of cases by these Courts. If I were satisfied that some potential harm had been made apparent, which

would flow from the early or D premature release, as the case may be, of this particular individual, I would take that into account. However, for reasons which are beyond the control of counsel for the respondent and his attorney, no such information has been placed before me and it is a mere matter of speculation as to whether any harm will be suffered.

I therefore have come to the conclusion, with some hesitation, that this is a case where the E application for a postponement should not be granted. The department took the brother of the applicant into custody on Thursday. The contact between the police and the Department of Home Affairs has apparently not been such that the one really knows what the other is about or sufficiently cares about what the other is doing to maintain the necessary contact which would F enable this Court to give judgment which might favour the administration of justice in the broader sense. I have before me only the position of the detained person. I think that in the circumstances that is paramount. The order that I make is that the respondent is directed forthwith to release Sergio Orlando De Cruz Costa from custody. The respondent is to pay the G costs of this application.

Applicant's Attorney: J Bredenkamp. Respondent's Attorney: State Attorney.