

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)
PRETORIA
2004-09-13

CASE NO: 22866/04

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- 10 In the matter between
CENTRE FOR CHILD LAW
ADV ELLIS
and
MINISTER OF HOME AFFAIRS & OTHERS
- 15 DIRECTOR-GENERAL HOME AFFAIRS
MINISTER OF SOCIAL DEVELOPMENT
DIRECTOR GENERAL DEPARTMENT OF
SOCIAL DEVELOPMENT
- 20 THE MEC OF THE GAUTENG DEPARTMENT
OF SOCIAL DEVELOPMENT
- BOSASA (PTY) LTD t/a LINDELA
REPATRIATION CENTRE
- 25 MINISTER OF SAFETY & SECURITY
- NATIONAL COMMISSIONER FOR THE
SOUTH AFRICAN POLICE SERVICES
- 30 COMMISSIONER OF CHILD WELFARE,
KRUGERSDORP
- 1st Applicant
2nd Applicant
1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent

J U D G M E N T

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DE VOS J:

- 1) On Wednesday 8 September 2004 this court granted an order upon an urgent application by the first applicant, the Centre for Child Law and the second applicant, Advocate Ellis, who was appointed by this court as the *curator ad litem* for children in detention at the Lindela repatriation centre during March this year. These are the reasons for the order.
- 2) The order was granted against the first respondent, the Minister of Home Affairs, the second respondent, the Director General Home Affairs, the third respondent, the Minister of Social Development, the fourth respondent, the Director General Department of Social Development, the fifth respondent, the Member of the Executive Committee of the Gauteng Department of Social Development, the sixth respondent, Bosasa (Pty) Ltd t/a Lindela Repatriation Centre, a registered company, the seventh respondent, the Minister of Safety and Security, the eighth respondent, the National Commissioner for the South African Police Services and the ninth respondent, the Commissioner for Child Welfare, Krugersdorp.
- All the respondents, when faced with the application, filed notices stating their intention not to oppose the application and a notice to abide by the decision of this court.
- A summary of the events
- 4) On 3 March 2004 the Centre for Child Law brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at Lindela. At the time of the main application the detained children were not given separate accommodation from the adults also being detained at Lindela. They were also facing imminent and unlawful deportation.
- 5) It now transpires that children who are deported from Lindela back to their countries of origin, are loaded into trucks and taken to the train station. There they are transferred onto the train, transported to their country's border, loaded onto a truck, and taken to the nearest police station within that country.
- 6) The court granted an interdict preventing the Minister of Home Affairs, the Director General Home Affairs and Bosasa from proceeding with the deportation of the children and also appointed Adv Isabel Ellis as *curator ad litem* for the children. The curator's powers and duties included, amongst other things, to investigate the circumstances of the children in detention, to make recommendations to the court regarding their future treatment and to institute legal proceedings in the enforcement of their rights.
- 7) The curator compiled a report which was filed on the court file on 31 March 2004. The report recommended the following:
1. That the Department of Social Development be directed to remove the 92 children then at Lindela with immediate

effect and to place them as a group in a place of safety, preferably Dyambo, pending finalisation of the children's court's inquiries in respect of each child.

2. That the Department of Social Development be directed to effect the said placement within 48 hours after the filing of the curator's report, failing which they were to inform the court and all relevant parties why they could not adhere to the order.
3. That the Department of Home Affairs be directed to enable and allow the Department of Social Development's officials to intercept any child presumed to be under the age of 18 before that a child be admitted to Lindela.
4. That the international social services based within the Department of Social Development be allowed to assist with the gathering of information pertaining to those 92 children's family connections and assist with the children's court's inquiries into the matter.
5. That the Department of Social Development be directed to assist the *curator ad litem* with the investigation and that the children's court inquiries be effected as soon as possible for each child.

6. That the Department of Home Affairs, Social Development and the SAPS liaise with each other in order to find a solution pertaining to any future arrest of any illegal minor child.

8) The children were moved from Lindela to Dyambo (a place of safety) on 2 April 2004. Unfortunately, during May 2004, the Commissioner of the Children's court in Krugersdorp refused to conduct the children's court inquiries in respect of those children because he was of the view that foreign children fall outside the ambit of the Child Care Act. During the same month the curator successfully approached this court with an application to set aside the Commissioner's refusal to conduct children's court proceedings and to compel him to do so.

9) However, since that application which was granted on 21 May 2004, the Department of Social Development has taken no steps whatsoever to bring or cause the children to be brought before the Krugersdorp children's court, in order to afford the children's court Commissioner the opportunity to conduct and finalise children's court's inquiries in respect of each child.

10) It was alleged that the application was urgent due to the fact that 12 unaccompanied foreign children had been in detention since February 2004. It is now already September 2004. Due to such prolonged detention their state of mind has deteriorated to the extent that there have been incidents of attempted escape, threats of suicide and a stabbing. I agree with the applicants that for these reasons it is imperative that the children's court inquiries be finalised in respect of each child in order to resolve the children's predicament.

11) I wish to reiterate that the third, fourth and fifth respondents have

made no attempts to bring them, or cause them to be brought, before the children's court and to investigate the children's circumstances for the purpose of opening and finalising children's court inquiries in accordance with the Child Care Act.

12) The application before me now deals with four issues, namely:

1. The Department of Social Development's failure to bring a group of 123 unaccompanied foreign children presently detained at Dyambo before the Krugersdorp Children's court in order for inquiries to be opened for them in terms of the provisions of section 12(2)(c) of the Child Care Act.
2. The failure by the South African Police Services, the Departments of Social Development and Home Affairs and Bosasa to give effect to section 12(2) of the Child Care Act and their own stated policies to bring unaccompanied foreign children to a children's court in the districts where they have been found.
3. The respondents' failure to reply or comment on the curator's report and/or any other founding papers and correspondences filed by the applicants.
4. The costs of the *curator ad litem* to date.

13) At present, as already stated, there are 13 children left in detention at Dyambo. They are the only remaining children of the original group for whom a curator was appointed in the main application. From the facts stated in the founding affidavit as well as the report filed by the *curator ad litem*, it is apparent that more children are being admitted to Lindela. I find this a situation of extreme concern. Various attempts were made by the applicants to solve the matter. These attempts were met with apathy and disinterest from the parties concerned.

14) It is clear from the curator's report that insufficient resources, inadequate administrative systems and procedural oversights in the handling of children as well as the inaccessibility of legal representation in the adjudication process have further exacerbated the crisis now existing in the treatment of unaccompanied foreign children.

The law, infringement of fundamental rights and prejudice

15) It has already been accepted that persons within our territorial boundaries have the protection of our courts and the constitution.⁶

16) Section 28(2) of the Constitution provides that:

"A child's best interests are of paramount importance in every matter concerning the child".⁷

Although the phrase: "Best interest of the child" is well known in South African Law as it has historically provided the standard in terms of which the Court exercises its inherent jurisdiction as upper guardian of all minors on a wide interpretation, Section 28(2) goes considerably further than the original concept.⁸

⁶ Lawyers for Human Rights vs Minister of Home Affairs 2004(4) SA 125 at 138E-I

⁷ Constitution of the Republic of South Africa Act 108 of 1996

⁸ Minister of Welfare and Population Development vs Fitzpatrick 2000(3) SA 422 CC at

17) Section 28(1) of the Bill of Rights provides protection to children in the following specific manner:

Section 28

- 1] Every child has the right -
- a) To a name and a nationality from birth;
 - b) To family care or parental care, or to appropriate alternative care when removed from the family environment;
 - c) To basic nutrition, shelter, basic health care services and social services;
 - d) To be protected from maltreatment, neglect, abuse or degradation;
 - e) To be protected from exploitative labour practices;
 - f) Not to be required or permitted to perform work or provide services that -
 - i) Are inappropriate for a person of that child's age; or
 - ii) Place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
 - g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under ss 22 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
 - i) Kept separately from detained persons over the age of 18 years; and
 - ii) Treated in a manner, and kept in conditions, that take into account the child's age;
 - h) To have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - i) Not to be used directly in armed conflict, and to be protected in times of armed conflict.

Section 28 should be seen in the context of the Bill of Rights as a whole.⁹

In respect of the socio-economic rights referred to in Section 26 and 27 the Constitutional Court¹⁰ said that this section imposes a negative duty on the State and private parties to desist from preventing or impairing the right of access to socio-economic rights and also positive duties to extend access to socio-economic rights. This duty is however limited.¹¹

In view of the fact that childrens' socio-economic rights are neither

⁹See Liebenberg ESR Preview Vol 5 no. 4 September 2004
 Taking stock - The jurisprudence on childrens' socio-economic rights and its implications for government policy

¹⁰ Government of RSA and Others v Grootboom and Others 2001 (1) SA 46 at p67 para

34) ¹¹ Grootboom para.38

described as a right of "access to" the relevant rights nor qualified as in section 26 and 27 one may conclude that these rights impose a direct duty on the State to ensure that those children who lacks basic necessities of life are provided with them. However in Grootboom¹² it was decided that the primary duty to fulfil a child's socio-economic rights rests on the child's parents or family.

I agree with the view held by Liebenberg that this suggests that the State is under a direct duty to ensure basic socio-economic provision for children who lack family care as do unaccompanied foreign children.

There is thus an active duty on the State to provide those children with the rights and protection set out in section 28.

18) Chapter 3 of the Child Care Act 74 of 1983 provides the necessary mechanisms for the protection of children. It specifically provides that any child who appears to have no parent or guardian or if the parent or guardian cannot be traced or the child has been abandoned or is without visible means of support or lives in circumstances likely to cause or be conducive his or her seduction, abduction or sexual exploitation or lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child, must be brought before a Children's Court for an inquiry to determine whether the child is a child in need of care and whether the child should be removed to a place of safety.

19) Section 33 of the Constitution provides that every person shall have the right to just administrative action, whilst section 34 thereof provides the right to have any dispute resolved through a fair public hearing before a court.

20) Section 13 of the Child Care Act, amongst others, provides that any child who appears to have no parent or guardian, or if the child has a parent or guardian who cannot be traced or has been abandoned or is without visible means of support, or lives in circumstances likely to cause or be conducive to his/her seduction, abduction or sexual exploitation; or who lives in or exposed to circumstances which may seriously harm the physical, mental or social well-being of the child, must be brought before a children's court for an inquiry to determine whether the child is a child in need of care, and whether that child should be removed to a place of safety.

21) Section 12(2)(c) of the Child Care Act, amongst others, provides that any policeman, social worker or authorised officer may remove a child from any place to a place of safety without a warrant if the policeman, social worker or authorised officer has reason to believe that such child's circumstances are as described in the above paragraphs.

22) It seems to me that there can be no doubt that the respondents' behaviour as set out above is a serious infringement of the

¹² para 76 & 77

children's fundamental rights protected in terms of sections 28(2), 28(1)(c), 28(1)(g), 33, 34, 12 and 35 of the Constitution, whilst it also infringes their statutory rights contained in sections 12 and 14 of the Child Care Act.

5 23) The bringing of more children to the Lindela Repatriation Centre subsequent to the curator's report having been filed, is also in my mind a breach not only of the aforementioned statutory rights, but also in direct conflict with the provisions of section 28(2), 28(1)(c), 28(1)(g), 33, 34, 12 and 35 of the Constitution. I am of the view that the detention of these children at Lindela is unlawful and invalid and should cease immediately. Furthermore the way in which these children are being deported is not only unlawful, it is shameful.

10 24) South Africa is also a signatory to certain relevant conventions. These are the United Nations Convention on the Rights of the Child, which affords every child the right to health, the right to social security and to education. Second, the African Charter on the Rights and Welfare of the Child, which similarly affirms every child's right to education and health care. Thirdly, there is the United Nations Convention relating to the status of Refugees, which requires states to provide compulsory primary education for refugee children of a standard equivalent to that provided to its own nationals. It is also important to take into account South Africa's own stated policy in this regard.

20 25) There is a passport instruction, No. 1 of 2004, issued by the Department of Home Affairs, containing the procedure that is supposed to be followed by the particular department. The Department of Social Development's policy is set out in a letter addressed to the Director General of Home Affairs and signed on behalf of the Director General of Social Development. This document is dated 15 November 2001.

25 26) I need only to state that all the respondents' actions insofar as unaccompanied minors are concerned, are in direct opposition to the stated policies as already set out.

30 27) The second applicant also applied for and was granted an order in terms of section 28(1)(h) of the Constitution. This section provides as follows:

35 "Every child has the right to have a legal practitioner assigned to the child by the state and at state expense in civil proceedings affecting the child, if substantial injustice would otherwise result."

40 In the matter of *Soller v G & Another* 2003 (5) SA 430 at 438 the court interpreted the appointment of a legal practitioner in terms of Section 28(1)(h) as

45 "... the task of presenting and arguing the wishes and desires of that child; should also provide adult insight into those wishes and desires which have been confined and entrusted to him/her, as well as supply legal knowledge and expertise on the child's perspective; provide the child with a voice, but is not merely a mouthpiece"

29) The right to legal representation appointed by the state in respect of foreign citizens have furthermore been confirmed in the matter of *S v Thomas* 2001 (2) SACR 608.

5 30) I am of the view that in the circumstances of this case all unaccompanied children that find themselves in South Africa illegally should have legal representation appointed to them by the state. This is especially so in view of the respondents' past track record in this regard.

10 31) If one looks at the facts placed before me and the facts set out in the report filed by the *curator ad litem*, the only conclusion one can reach is that the children are currently being treated in a manner which is horrifying in the extreme. It would be horrifying in the most abject society. In a society like ours which prides itself on its noble sentiments, it is shameful. As South Africans we are justifiably proud of our country and of our democracy which has just celebrated its tenth birthday. We are proud of those policies which are enshrined in the Constitution, a constitution which is unparalleled in Africa, and indeed equals those of the most advanced countries in the world in terms of liberality and compassion. We have Nelson Mandela, who has become an icon world wide because of, amongst other things, his love for all children and continued efforts towards caring for those in need. We subscribe to the principles contained in the international treaties already mentioned. We claim to enforce the laws put in place to protect the rights of illegal immigrants, and especially those pertaining to children. Yet all these lofty ideals become hypocritical nonsense if those policies and sentiments are not translated into action by those who are put in positions of power by the state to do exactly that; who are paid to execute these admirable laws and yet, because of apathy and lack of compassion, fail to do so.

25 31) The order granted is merely the first step towards finding proper solutions to the problem presently faced by unaccompanied foreign children in South Africa. To my mind, the respondents have a duty to liaise with each other, to find a solution and to work on detailed practical arrangements to ensure that unaccompanied foreign children are dealt with in accordance with the principles already set out above. For these reasons it was necessary for me to make the following order:

- 30 "1. First and second applicants' non-compliance with the rules of court is condoned and leave granted for this application to be heard as a matter of urgency;
- 35 2. Directing third, fourth and fifth respondents to bring, or cause to bring, the thirteen (13) unaccompanied foreign children, presently in detention at Dyambu Youth Centre ("Dyambu"), within five (5) days from date of this order, to the Krugersdorp Children's Court in order for inquiries to be opened, conducted and finalised in accordance with the provisions of sections 12 to 14 of the Child Care Act, 74 of 1983 ("Child Care Act");

3. Directing third, fourth and fifth respondents to conclude investigations, or cause such investigations to be concluded, in respect of the personal circumstances of each of the thirteen (13) foreign children detained at Dyambu, within 15 days from date of this order, and to file their reports with this Honourable Court confirming their compliance with this order.
4. Directing first, second and sixth respondents, and their employees, to adhere to the following procedures, with immediate effect, in respect of any unaccompanied foreign child presently detained at Lindela Repatriation Centre ("Lindela"):
- 4.1 To compile a list containing the names, ages, sex, gender and countries of origin of all foreign children presently in detention at Lindela, and within one (1) day of compiling such a list, to provide such to third, fourth and fifth respondents;
- 4.2 To cause and assist third, fourth and fifth respondents to immediately remove these children and place them in an appropriate place of care or place of safety, in accordance with the provisions of section 12(2)(c) of the Child Care Act;
5. Directing third, fourth and fifth respondents to, within fourteen (14) days of removing these children from Lindela to an appropriate place of care or place of safety, cause these children to be brought to the Children's court in order for inquiries to be held, in terms of section 14 of the Child Care Act;
6. Directing first to sixth respondents to, within fifteen (15) days from date of this order, report to this Honourable Court on their compliance with the directions as set out in paragraph 4 and 5 above;
7. Directing seventh and eighth respondents, and their employees, to comply with section 12(2)(c) of the Child Care Act when arresting an unaccompanied foreign child, and to refrain from causing an unaccompanied foreign child to be admitted at Lindela, without such a child first having been dealt with by the Children's Court in accordance with the provisions of section 12 to 14 of the Child Care Act;
8. Directing all the respondents to henceforth give effect to Department of Home Affairs' Passport Control Instruction 1 of 2004 whenever unaccompanied foreign children are encountered;
9. Directing first to fourth and sixth to eighth respondents to file their answers to the application brought under case number 5379/2004 and the curator's final report, dated 21 March 2004, within 15 days from date of this order, thereafter directing the applicants to reply thereto within 10 days after the filing of such answers, whereafter the curator ad litem's final report will be placed on the roll for a final

- order;
10. Ordering the ninth respondent to appoint a legal practitioner for each of the thirteen (13) foreign children presently detained at Dyambu, in terms of section 28(1)(h) of the Constitution of South Africa 108 of 1996, if it appears that a substantial injustice would otherwise result;
11. Directing respondents to inform all relevant employees of this order within five (5) days from date of this order, of which confirmation must be included in any report filed with this Honourable Court;
12. Ordering respondents, save for ninth respondent, to pay the costs of the curator ad litem from date of her appointment to present;
13. Ordering respondents, save for ninth respondent, to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

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