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IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 15/05/2009
CASE NO: 5824/2009

UNREPORTABLE

In the matter between:

LAWYERS FOR HUMAN RIGHTS

APPLICANT

And

THE MINISTER OF SAFETY
AND SECURITY + 17

RESPONDENTS

JUDGMENT

RAULINGA, J

1. Introduction

This is an urgent application concerning the lawfulness of the detention centre for persons said to be “*illegal foreigners*”, which is operated by the South African Police Service under the command of the station commissioner of the Musina Police Station in the Limpopo Province.

The detention facility is located on the Soutpansberg Military Grounds approximately 5 kilometres from Musina and is commonly referred to as “SMG”. Apparently SMG is an extension of the Musina Police Station.

The applicant seeks the following orders:

- “1. Dispensing, so far as need be, with the forms and service provided for in the Uniform Rules of Court and disposing of this application at such time and place and in such manner and according to such procedure as this Court deems meet in terms of rule 6(12) of the rules of this Court;*

- 2. Declaring that:*
 - 2.1 the use of the Soutpansberg Military Grounds (SMG) detention facility for detention and/or deportation under the Immigration Act 13 of 2002 is unlawful;*

2.2 *the conditions of detention at the SMG detention facility are unlawful and unconstitutional; and*

2.3 *the conditions of detention and practices with regard to children at the SMG detention facility are unlawful and unconstitutional.*

3. *Directing the first to eight respondents to forthwith comply with their obligations in relation to children at the SMG detention facility arising from the Constitution, the Child Care Act 74 of 1983, the Children's Act 38 of 2005 and the Immigration Act 13 of 2002, including but not limited to:*

3.1 *dispatching social workers to assist unaccompanied children;*

3.2 *halting the deportation of unaccompanied children;*

3.3 *halting the detention of unaccompanied children; and*

3.4 *halting the detention of all children in conditions and circumstances that breach the aforesaid legal provisions.*

4. *Directing the sixth respondent to decide, within two weeks of the date of this order, whether the SMG detention facility is a designated place of detention in terms of section 34(1) of the Immigration Act 13 of 2002, and to advise this Court and the Applicant accordingly on affidavit within two court days of such decision.*

4.1 *In the event of the sixth respondent deciding that SMG detention facility is not a designated place of detention in terms of section 34(1) of the Immigration Act 13 of 2002, directing the first to eight respondents to close the SMG detention*

facility within one month of the sixth respondent's decision.

4.2 In the event of the sixth respondent deciding that SMG detention facility is a designated place of detention in terms of section 34(1) of the Immigration Act 13 of 2002, directing the first to eight respondents to ensure that the conditions of detention at the SMG detention facility comply with all legal obligations in relation to the conditions of detention within one month of the sixth respondent's decision.

5. Directing:

5.1 the first to eighth Respondents to file with this Court and the Applicant reports on affidavit setting out all steps taken pursuant to the orders in paragraphs 3, 4.1 and 4.2 above, within one month of the sixth respondent's decision.

5.2 *that the Applicant and/or any of the Respondents may re-enroll this matter for hearing at any stage, if necessary on duly supplemented papers, to deal with any need for further orders arising out of the orders set out in paragraphs 3, 4.1 and 4.2 above.*

6. *Directing that the Applicant's costs be paid, jointly and severally, by any and all Respondents opposing any part of the relief sought."*

Three primary issues were raised by the applicant.

First, the status of the SMG detention facility. Section 34 of the Immigration Act 13 of 2002 (*"the Immigration Act"*) requires that an immigration officer may detain an illegal foreigner "in a manner and at a place determined by the Director-General, subject to certain further requirements. This therefore means that illegal foreigners may only be detained by immigration officers at places determined by the Director-General of Home Affairs. The SMG detention facility has not been designated in this manner by

the Director-General, nor are immigration officers responsible for running it. Police officers are dealing with detention and deportation of illegal foreigners at the facility. Accordingly, the facility and the activities that take place there are presently unlawful.

Second, the conditions of the detention at the SMG detention facility do not meet the standards of detention set in the Immigration Act, the Immigration Regulations, the Constitution and International Law. Due to the extreme nature of these conditions and the devastating impact on the detainees, the facility should either abide by the abovementioned standards and legal provisions or it should be immediately closed.

Third, the detention of minors, accompanied and unaccompanied, at the SMG detention facility is manifestly unlawful. It contravenes sections 28(1)(g) and 28(2) of the Constitution, the Child Care Act 74 of 1983, Children's Act 38 of 2005, the Immigration Act and the Regulations.

2. Urgency

After hearing submissions by the three counsel on urgency, I found that urgency exists based on the following reasons:

- The matter concerns the deprivation of liberty of a large number of illegal foreigners whose continued and future unlawful detention may cause unwarranted danger to their lives.
- There are serious allegations that unaccompanied minors are also being arrested, detained and deported to their countries of origin.

3. Dispute of Fact

The first to fourth respondents (SAPS) deny applicant's averments in question with a statement or bald denial that fails to deal in detail with the founding affidavit. Because probabilities do not arise one will have to examine whether the denials are genuine real or *bona fide* dispute of fact.

There are a number of common cause facts which are clear from the papers. It is common cause that the SMG facility is used

to detain and deport illegal foreigners from South Africa to their respective countries. There are unaccompanied children and male and female adults kept at the SMG. The SAPS acts as an agent of the Department of Home Affairs. The word agent has been given a meaning that suits an interpretation as envisaged in terms of section 39 of the Constitution – See below. The Department of Home Affairs attaches a different meaning to this word, but they agree that SAPS acts as their agent.

The SAPS respondents dispute that the conditions at the SMG are appalling and that they do not meet the requirements or standards as stated in the Constitution and other legislation and international covenants. They also dispute that the conditions under which the unaccompanied minors are detained in the SMG do not meet the minimum standards.

In *Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 3 SA 623 (A). The following dictum is relevant to this case:

“... It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other

form of relief, may be granted if those facts averred in the appellant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. ... Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers."

A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed – *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 3 371 (SCA) para 13.

The SAPS respondents do not add meat to the bone they instead make a number of concessions. The Home Affairs respondents make a bare denial that they are not responsible for the SMG.

I am not convinced that the respondents dealt with the dispute seriously. I am of the view that the matter can be decided on papers with reliance on common cause issues.

4. Background

Since July 2008 the representative of the applicant, until his access was denied in October 2008, made regular daily visits to SMG where he consulted with detainees, SAPS officials and immigration officers before the deportation of each day. He regularly witnessed the detention and deportation of unaccompanied minors, without reference to the sixth and/ or seventh respondents or their local agents. Illegal foreigners were deported without reference to immigration officers or the provisions regarding deportation under the Immigration Act. People seeking asylum or holding valid permits were also deported. Some had their documents destroyed by the police or National Defence

Force members. About the beginning of November 2008 the sixth respondent disclaimed oversight of SMG.

In the absence of immigration officers at SMG, detainees are sometimes detained and deported by SAPS without investigation or verification of their status by the Department of Home Affairs (DHA). He also witnessed the beating of the detainees with a rubber hose as a punitive measure or mechanism of crowd control. After observing unaccompanied children detained at SMG, he contacted the Department of Social Development (seventh and eighth respondents) but many a time no social workers were dispatched.

The SAPS respondents contend that the Soutpansberg Military Ground (SMG) is an extension of Musina Police Station Holding Cells. As a result of overcrowding at the Musina Police Station Holding Cells, as a result of the influx of illegal foreigners into South Africa, and in view of the fact that the Department of Home Affairs does not have a facility where the illegal foreigners should be kept before deportation, the South African Police Service (SAPS) as the organ responsible for the overseeing and management of the border post negotiated with SAMDF to utilise

the facility as an extension of the holding cells of Musina Police Station.

They further content that the SAPS is mandated by section 41 of the Immigration Act 13 of 2002 to take the illegal foreigners into custody and if necessary detain them in terms of section 34 of the aforesaid Act. The SAPS respondents concede that children are detained at the SMG and are also deported from there. They, however, deny that the conditions at the SMG do not meet the minimum standards required in terms of the Immigration Act, because this is not necessary since the facility is not established and managed by the Department of Home Affairs.

The fifth and sixth respondents (DHA) insist that the Minister of Home Affairs is in the process of finalising a special dispensation which will apply to all Zimbabwean nationals. The dispensation will provide for temporary exemption to all Zimbabwean nationals in terms of the provisions of section 31(2) of the Immigration Act 13 of 2002. The Minister is desirous of expediting the establishment of at least ten locations, nationally, where Zimbabweans will be obliged to apply for such a special dispensation. SMG does not seem to be one of those sites. This

will therefore mean that all illegal foreigners who are not Zimbabwean nationals will be comfortably be detained at the SMG where section 41 of the Act is implemented.

The seventh and eighth respondents (Social Development) have elected to abide by the order of the court.

5. Interpretation of Relevant Provisions of the Immigration Act 13 of 2002

It is prudent to premise the analysis of this application on the interpretation of relevant provisions of the Immigration Act 13 of 2002.

Section 34(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 –

- (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;*
- (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;*
- (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;*

(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; and*

(e) *shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.*

(2) ...

(3) *The Director-General may order a foreigner subject to deportation to deposit a sum sufficient to cover in whole or in part the expenses related to his or her deportation, detention, maintenance and custody and an officer may in the prescribed manner enforce payment of such deposit.”*

Section 41:

“When so requested by an immigration officer a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.”

Regulation 28(1):

“(1) The detention and deportation of an illegal foreigner contemplated in section 34(1) of the Act shall be by means of a warrant issued by an immigration officer, which warrant shall substantially correspond to Form 28 contained in Annexure A.

- (2) *The notification of the deportation of an illegal foreigner contemplated in section 34(1)(a) of the Act shall be in a form substantially corresponding to Form 29 contained in Annexure A.*
- (3) *The confirmation of deportation contemplated in section 34(1)(b) of the Act shall be on a form substantially corresponding to Form 30 contained in Annexure A.*
- (4) *An immigration officer intending to apply for the extension of the detention period in terms of section 34(1)(d) of the Act shall –*

 - (a) *within 20 days following the arrest of the detainee, serve on that detainee a notification of his or her intention on a form substantially corresponding to Form 31 contained in Annexure A;*

(b) afford the detainee the opportunity to make representations in this regard within three days of the notification contemplated in paragraph (a) having been served on him or her; and

(c) within 25 days following the arrest of the detainee, submit with the clerk of the court an application for the extension of the period of detention on a form substantially corresponding to Form 32 contained in Annexure A.

(5) The minimum standards with regard to detention as contemplated in section 34(1)(e) of the Act are as determined in Annexure B.”

Annexure B: Minimum Standards of Detention:

“(1) Accommodation

(a) Detainees shall be provided accommodation with adequate space,

lighting, ventilation, sanitary installations and general health conditions and access to basic health facilities.

(b) Every detainee shall be provided with a bed, mattress and at least one blanket.

(c) Male and female detainees shall be kept separate from each other: Provided that this does not apply to spouses.

(d) Detained minors shall be kept separate from adults and in accommodation appropriate to their age: Provided that minors shall not be kept separate from their parents or guardians: Provided further that unaccompanied minors shall not be detained.

(e) Detainees of a specific age, or falling in separate health categories or security risk categories, shall be kept separate.

(f) *There may be a deviation from the above standards if so approved by the Director-General at a particular detention centre: Provided that such a deviation is for purposes of support services or medical treatment: Provided further that there shall not be any deviation in respect of sleeping accommodation.*

2. *Nutrition*

(a) *Each detainee shall be provided with an adequate balanced diet.*

(b) *The diet shall make provision for nutritional requirements of children, pregnant women and any other category of detainees whose physical condition requires a special diet.*

(c) *The medical officer may order a variation in the prescribed diet for a detainee and the intervals at which the food is served, when*

such variation is required for medical reasons.

(d) Food shall be well prepared and served at intervals not less than four and a half hours and not more than 2/4 hours between the evening meal and breakfast during a 24 hour period.

(e) Clean drinking water shall be available at all times to every detainee.

3. Hygiene

(a) Every detainee shall keep his or her person, clothing, bedding and room clean and tidy.

(b) The Department shall provide the means to comply with item 3(a)."

The procedure in section 34(1) of the Immigration Act is invoked in order to detain and deport the illegal foreigners from

South Africa back to their respective countries. “*The immigration officer may without the need for a warrant arrest an illegal foreigner or cause him or her to be arrested.*” This means that the immigration officer may himself arrest or seek the assistance of the police to arrest on his behalf. ... “*and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported*” ... Therefore the arrest is discretionary, however, even if the said illegal foreigner is not arrested the immigration officer may deport him or her or seek the assistance of the police to deport the said person ... “*and may, pending his or her deportation, detain him or her or cause him or her to be detained*” ... The immigration officer may himself detain or seek the assistance of the police to detain the said person ... “*in a manner and at a place determined by the Director-General*”, ... The manner in which the illegal foreigners may be detained and the place where the illegal foreigners are to be detained must be determined by the Director-General of Home Affairs. I say “*shall*” because the last “*may*” before “*pending*” only refers to “*detain him or her or cause him or her to be detained*”. As already seen above deportation is peremptory because shall is used before “*deport*”. Therefore “*in the manner and place determined by the Director-General*” would fall outside “*may*” and it becomes

peremptory as well. The “*may*” before detain is discretionary in that the immigration office has a choice to detain or not to detain.

The corresponding duty by the police in terms of section 41(1) of this Act gives the police the same powers as the immigration officer only in as far as identification and taking the said person into custody is concerned. If necessary, the immigration officer or police officer may detain the said person in terms of section 34. It therefore holds that the illegal foreigners must be detained in the manner and at a place determined by the Director-General of Home Affairs.

The following is of paramount importance. Section 34(1) ends with “*provided that the foreigner concerned*”:

- (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

- (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs,

when possible, practicable and available in a language that he or she understands;

- (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights. (My emphasis)

It is my view that these subsections are peremptory.

Section 39(2) of the final constitution comes to the assistance of the court when interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The practical techniques of interpretation as discussed by Du Plessis and Conder (1994) *Understanding South Africa's Transitional Bills of Rights*: Juta 73-74 and Du Plessis (2002) *Re-interpretation of Statutes* 197-274 were accepted in *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (CC) 422 para 17.

Section 39(2) is a peremptory provision, which means that all courts, tribunals or forums must review the aim and purpose of legislation in the light of the Bill of Rights. Plain meanings and so-called, unambiguous texts are no longer sufficient – Christo Botha – The new “*Constitutional*” Approach to statutory interpretation.

Interpretation of statutes starts with the Constitution, and not with the legislative text. NGCOBO J said the following in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (7) BCLR (CC) at paras 72, 80 and 90:

“The starting point in interpreting any legislation is the Constitution ... first, the interpretation that is placed upon a statute must where possible be one that would advance at least an identifiable value enshrined in the Bill of Rights; and second the statute must be capable of such interpretation ... (legislation) must be interpreted purposively to promote the spirit, purport and objects of the Bill of Rights ... the emerging trend in statutory construction is to have regard to the

context in which words occur, even where the words to be construed are clear and unambiguous.”

The constitution is not a symbolic document. It is also a transformative document, a commitment to positive action that includes socio-economic rights in the Bill of Rights. It is for that reason that when interpreting any statute that involves socio-economic rights, the approach must be value-laden. The aim must be to develop jurisprudence that promotes and protects human rights.

The Immigration Act 13 of 2002 aims at setting in place a new system of immigration control which ensures *inter alia*, that –

- interdepartmental coordination and public consultations enrich the functions of immigration control.

- immigration control is performed within the highest applicable standards of human rights protection.

- a human rights based culture of enforcement is promoted.
- the international obligations of the Republic are complied with; etcetera.

The interpretation of the provisions of the Immigration Act should therefore be given a meaning that is less onerous and ensures that vested rights will not be affected. The interpretation must grant a benefit to those who live in the country.

6. Interpretation of Socio-Economic Rights

In interpreting the provisions of Act 13 of 2002 (the Immigration Act) one must be mindful of the fact that the Constitution (Act 108 of 1996) places an overarching obligation on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 7 establishes that the rights in the Bill of Rights impose a combination of negative and positive duties on the state. I may summarise some of the aspects as: The duty to respect requires the state to refrain from law or conduct that directly or indirectly interferes with people's enjoyment of socio-economic rights. The duty to promote is sometimes regarded as a

dimension of the duty to fulfil socio-economic rights. Sandra Liebenberg – Constitutional Law of South Africa 2nd edition volume 2 – 33-6. *In casu* the category of rights entrenched are “*everyone to have access to adequate housing, health care services, sufficient food and water and social security*”. The next rung of these entrenched rights is children’s socio-economic rights and including the socio-economic rights of detained persons. The third category covers rights in terms of section 26(3) and 27(3) of the final Constitution.

Although socio-economic rights are not universally accepted fundamental rights, the Constitutional Court held that the Constitutional Principle II did not require them to be incorporated in the Bill of Rights as justiciable rights. It observed that socio-economic rights are at least to some extent justiciable. The fact that socio-economic rights will almost inevitable give rise to budgetary implications is not a bar to their justiciability. At a minimum, socio-economic rights can be negatively protected from improper invasion – *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) at 800 paras 76-78.

The justiciability of socio-economic rights was further discussed in *Grootboom and Others v Government of the Republic of South Africa and Others* 2001 1 SA 46 (CC) and *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC). In *Minister of Health and others v Treatment Action Campaign and others* 2002 5 SA 721 (CC) paras 29-30 the court affirmed that the negative duty to refrain from preventing or impairing the relevant socio-economic rights, recognised in *Grootboom supra* applied equally to section 27(1).

The court then reaffirmed that section 27(2) defines and limits the full extent of the positive obligation imposed by section 27(1). There is no separate positive right under section 27(1). This means that all positive obligations on the state from the most basic to more extensive levels of fulfilment will be subject to the qualifications in the second subsections of sections 26 and 27. The state is therefore expected to act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis. Further that courts are not institutionally equipped to make the wide ranging factual and political enquiries necessary for determining what the minimum core standards should be. The state's obligation in that regard

requires it to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right.

The respondents may succeed if they raise a defence to a claim alleging that their progress in realising the rights is unreasonable in that there are no available resources – Section 26(2) and 27(2) of the final constitution. However, the budgetary constraints will not succeed in all cases – the Constitutional Court outlined the requirements in the TAC case *supra*.

Section 36(1) establishes that the rights in the Bill of Rights may be limited. Any limitation to a right must be in terms of general application and is only permissible to the extent that the limitation is reasonable and justiciable in an open and democratic society based on human dignity, equality and freedom. However, the extent of the limit to obligations in respect of socio-economic rights must be publicly defined – *Sandra Liebenberg supra* 33-54.

There is a duty imposed on the state to ensure that all children are provided with basic necessities of life – particularly unaccompanied children. This is justified on the basis that

children living in poverty are particularly vulnerable and not in a position to meet their own socio-economic needs. *Sandra Liebenberg supra* 33-49 and section 28(1)(c) of the Constitution.

7. Application of socio-economic rights to sections 34 and 41 and the relevant regulations of the Immigration Act no 13 of 2002.

The SAPS respondents do not give a list of practical difficulties which they claim the country faces. They only say that the country faces an influx of Zimbabwean citizens and that as a result the conditions of detention at the SMG detention facility constitute a justiciable limitation of the constitutional rights of the detainees. This explanation does not meet the reasonableness required in terms of section 36 of the final Constitution.

In casu there is no law of general application. The respondents did not give any detail of the unavailability of resources. Instead they conceded that the fact that the facility does not meet the standards is merely because it is an extension of the police station cells – this concession was made by the SAPS. The accommodation limitation may only be implemented if

there is compliance with annexure “B” – (1)(f) – Minimum standards of detention. The provisions under annexure “B” are peremptory. The respondents on behalf of the state are obliged to provide accommodation, nutrition and hygiene to all the detainees according to the minimum standards of detention. The requirements of section 36 of the Constitution do not come to their rescue.

The interpretation of socio-economic rights in the Constitution applies to the Immigration Act. There is a duty upon all the respondents, to respect, protect, promote and fulfil these rights. There is no law of general application. There is no reasonable limitation that is justifiable in a free, open and democratic society. Annexure “B” (1)(f) of the Regulations to the Act operates against any argument that section 36 of the final constitution may advance the cause of SAPS respondents.

On their own version the SAPS respondents say that the diet fed to the detainees is as stated by the applicant. This simply means that the minimum dietary standards are not met – this *mutatis mutandis* applies to children. The behaviour of the respondents is nothing else but dereliction of duty. This flies in the

face of international human rights instruments almost all of which were ratified by South Africa as a member of the global world.

There is evidence that unaccompanied children are deported by the first to fourth respondents to their respective countries. There is also evidence that these children are not adequately accommodated and fed at the SMG facility. There are allegations that these children share sleeping accommodation together with adults. This startling evidence found no justification by the SAPS. The issue of reasonableness does not even arise.

The seventh and eighth (Social Development and Health) respondents have a duty to assess and monitor the situation of all children at the SMG facility. There is evidence that no social workers attend to children at the facility. Equally, the eight respondent has a duty to ensure that the minimum standards of hygiene are maintained.

In *Centre for Child Law and Another v Minister of Home Affairs* 2005 6 SA 80 at para 22 at 58, the court held:

“It seems to me that there can be no doubt that the respondents’ behaviour as set out above is a serious infringement of the children’s fundamental rights protected in terms of ss28(2), 28(1)(c), 28(1)(g), 33, 34, 12, and 35 of the constitution, whilst it also infringes their statutory rights contained in ss 12 and 14 of the Child Care Act.”

As already discussed above the interpretation of the relevant provisions of the Immigration Act should be contextualised within the final Constitution. The interpretation should be such that the Immigration Act alleviate hardships rather than worsen them. It is for that reason that the designation of any facility used for the purpose of deportation of illegal foreigners must be determined by the Director-General of Home Affairs before it is used for that purpose. It therefore means that although the police officers are in terms of section 41(1) of the Immigration Act, also vested with the power to arrest and detain illegal foreigners, they are, however, tasked to do so in terms of section 34 of the Act. The SAPS concedes that it detains and deports illegal foreigners from the SMG. Detention and deportation of illegal foreigners can only be

done in a manner and at a place determined by the Director-General.

The “*manner*” would refer to what should be done in terms of the Regulation 28 to the Act and the place would be a facility determined by the Director-General of Home Affairs. The Director-General cannot abdicate this responsibility, nor can state departments collude in order to ride roughshod on processes. It is said that the SAPS admits that it is an agent of the DHA and that the SMG is an extension of Musina Police Station. One cannot help but be oblivious of such tendencies. I am of the view that the two departments – the SAPS and Home Affairs are equally responsible for the quagmire caused at the SMG. The Home Affairs Department was at a certain stage directly involved in the running of SMG in that they had their officers stationed and working from there. These officers were pulled out apparently because of misunderstandings between the two departments. Home Affairs also concedes that the SAPS is its agent. Agent must be understood to mean that the one is acting on behalf of the other. The SAPS admits that it is an agent of Home Affairs. The SAPS confirms that it deports illegal immigrants from SMG, fulfilling its mandate as an agent of Home Affairs.

Although the seventh and eighth respondents (Social Development and Health) have opted to abide by the order of the court, this does not exonerate them from the responsibility of attending to children kept at the SMG. They too have a duty to comply with Regulation 28 to the Act and annexure “B” of the Regulations. However, they could only act as and when requested by the SAPS and DHA respondents.

When making submissions, Counsel for the DHA respondents referred me to the full bench judgment of this division in *Jeebhai v Minister of Home Affairs and Another* 2007 (4) All SA 779 (T). It behoves me to mention that this judgment has since been overturned by the Supreme Court of Appeal in *Jeebhai v Minister of Home Affairs* (139/2008) ZASCA 35 (31 March 2009). In the minority judgment of CACHALIA JA (Mpati P concurring) the following was stated:

“... Deportation is a unilateral act of the deporting state to remove a foreigner who has no right or entitlement to be in its territory. Its purpose is achieved when the foreigner leaves the deporting state’s territory. The

authority of and constraints on the state to deport people is to be found in the Immigration Act 13 of 2002 and the Immigration Regulations made by the Minister under section 7 of the Act. For deportation to be carried out lawfully, the 'action or procedure' used to facilitate an illegal foreigner's removal from the country must be done in terms of the Act.

Para 21 – page 11: 'A decision to deport someone often carries far – reaching consequences – it concerns that person's livelihood, security, freedom and, sometimes, his or her very survival. This is why immigration laws, often harsh and severe in their operation, contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights. '... – There is nothing in the judgment that suggests that the majority judgment of PONNAN JA (STREICHER JA and HURT AJA concurring) does not support this dictum. It can only be mentioned that the court in its judgment uses the word 'must' several times e.g. – at para 26 page 14: – ...' The arrested

person's detention must be by means of a warrant issued by an immigration officer authorising the station commissioner or head of the detention facility to detain him ..."

Section 41(1), read with section 34(2), permits the detention of a suspected illegal foreigner for a period not exceeding 48 hours while his status is being verified and section 34(1) permits the arrest and detention of an illegal foreigner for deportation purposes. There is evidence by the applicant that certain detainees are detained for more than 48 hours without their situation being reviewed or evaluated.

Regulation 28(1) of the Act, puts the matter in proper context:

"The detention and deportation of an illegal foreigner contemplated in section 34(1) of the Act shall be by means of a warrant issued by an immigration officer, which warrant shall substantially correspond to Form 28 contained in Annexure A." This power is vested on the Department of Home Affairs. It therefore follows

that no facility can be used for detention and deportation of foreigners without the necessary designation by the Director-General of Home Affairs.

Although section 35 of the constitution is applicable to all detained persons, in this instance it cannot be used to the exclusion of the operation of section 34(1) of the Immigration Act, Regulations 28 and 29 and annexure "B" of the Regulations.

It is my view that the operation of the provisions of the Immigration Act must be subsumed under the Bill of Rights of the final Constitution.

8. Conclusion

No sooner had I finished writing this judgment, than the applicant informed me by letter that the Minister of Home Affairs had since implemented the much talked about special dispensation. I then requested that all the parties to this matter should submit supplementary heads of argument on this issue. It appears that no foreign nationals are being detained at the SMG at the moment. In view of this special dispensation, the applicant brought a separate urgent interim application solely dealing with

unlawful detention of Zimbabwean foreign nationals beyond 48 hours. Ultimately an order was granted by consent, on 21 April 2009, by LOUW J, that Zimbabweans could only be detained at the SMG in terms of section 34(2) of the Act for up to 48 hours. That order does not affect the issues presently before me, in particular, the lawfulness of the facility, the detention of non-Zimbabweans and the issues regarding children in detention. Flowing from these events the applicant has as a result abandoned prayers 3, 4 and 5. What would remain are prayers 2 and 6 which I must necessarily, determine. This therefore dispenses with the need for a structural interdict.

I disagree with the SAPS respondents that this judgment is now academic in view of the Minister's special dispensation.

In the same vein, I disagree with the DHA (fifth and sixth respondents) that the matter has since become moot. Only two reasons will suffice:

- (1) The special dispensation applies only to Zimbabweans for a limited period of (90) ninety days. It does not apply to foreign nationals from other countries.

- (2) There is no explanation advanced as to what will happen to the non-Zimbabwean nationals, in the absence of any legal instrument that may protect their rights – moreover this involves and affects children as well.

Although the SAPS acts as an agent for the Department of Home Affairs, the Director-General of Home Affairs has indicated that he has no intention to designate the SMG as a facility where illegal foreigners can be detained and deported from.

The SAPS respondents have conceded that they are in control of the SMG and that they detain and deport illegal foreigners from the facility. The DHA respondents have a direct duty to detain and deport illegal foreigners. They too must bare the consequences of the appalling and deplorable conditions at the SMG.

Although the seventh and eighth respondents (Social Development and Health) had a duty to look after the children kept

at the facility, an order against them may be academic if the facility is to be closed.

8. Order

In the circumstances the following order is made; it is hereby declared that:

1. The use of the Soutpansberg Military Grounds (SMG) detention facility for detention and/or deportation under the Immigration Act 13 of 2002 is unlawful;
2. The conditions of detention at the SMG detention facility are unlawful and unconstitutional; and
3. The conditions of detention and practices with regard to children at the SMG detention facility are unlawful and unconstitutional;
4. The first to sixth respondents are jointly and severally ordered to pay the costs of this application, the one paying and the others to be absolved.

T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

5824/2009

Heard on:

For the Appellant: Adv

Instructed by: Messrs

For the Respondent: Adv

Instructed by: Messrs

Date of Judgment: