

012LHR62405

012LHR62405

46875/07-MLS

1

JUDGMENT

LOM Business Solutions t/a Set LK Transcribers/MLS

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSCAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO: 46875/07

DATE: 2007-11-02

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES *Y/N*

(3) REVISED *Original judgment signed*

DATE *8.2.08* *by the Judge*

SIG: *[Signature]*

10

In the matter between

ADELA MBALINGA AKWEN

*[Signature]*  
26.2.08

Applicant

and

THE MINISTER OF HOME AFFAIRS AND ANOTHER

Respondent

**J U D G M E N T**

20

PRELLER, J: The applicant brought an applicant for her immediate release from detention which seems to be in terms of Section 34(1)(d) of the Immigration Act.

There is another case pending which arises from an urgent application that she brought in respect of a permit that was granted to her to be in the country. She brought that application initially by way of

012LHR62405

46875/07-MLS

2

JUDGMENT

urgency, but that was struck from the roll and that issue is going to serve before this court on 27 November.

I have been handed a copy of the answering affidavit of the respondent in those proceedings, from which it appears that the respondent may well be able to make a case at the proposed hearing that the applicant should never have been allowed into this country because the permit that was granted to her was granted on the basis of fraud but I am not influenced by that, save to say that the respondent may well have an arguable case in that forum.

10 It seems that the problem of the respondent arises from the interpretation of Section 34(1)(d) by the magistrates in Krugersdorp who have jurisdiction over the person of the detainees in terms of the Act. They are all detained in a centre called Lyndela which is in the district of Krugersdorp.

It appears from the affidavit and was also highlighted by Mr Bofialatos on behalf of the respondent, that the magistrates interpret the Section to mean that only one period of 90 days detention is permissible in terms of the Section.

20 For the sake of completeness I shall read that Section into the record.

"34(1) Without need for a warrant an Immigration officer may arrest an illegal foreigner or cause him or her to be arrested and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be

012LHR62405

46875/07-MLS

3

JUDGMENT

detained in a manner or 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 ..."

I was told that there is no reported or, even unreported case on the question whether the interpretation given to this subsection by the magistrates in Krugersdorp is the correct one. To that extent, it is therefore *res nova*.

On a simple reading of the Section, it seems obvious to me that the Section contemplates an initial period of detention of 30 calendar days and that that 30 days may subsequently be extended for an "adequate" period not exceeding 90 calendar days. "Adequate" has been suggested by Mr Bofialatos to mean less than 90 days if necessary.

It seems obvious to me that the total period authorised by this Section is 120 days and as far as I am concerned, the interpretation of the magistrates that only 90 days in total is allowed, is not correct.

The second question that arose is whether it would be permissible to do what the officers of the respondent have done in this case, namely, to release the applicant after the 90 day period has expired and then immediately re-arrest her, thereby instituting or starting a new period of 90 days.

012 LHR52405

46875/07-MLS

4

JUDGMENT

It seems to me that this would just be too easy a way out, if the correct interpretation of the Section was that only one extension for a total period of 90 days were permissible. I think to release and then re-arrest a detainee under these circumstances would be simply avoiding the express provisions of the Section and should not be permissible.

That, however, brings me back to the question whether the wording of the Section excludes a further extension of the period of detention by another 90 days.

In my view there is nothing in the wording of this subsection that  
10 suggests that after the detention has been extended for 90 days initially, it may not then be extended for a further 90 days.

That seems to be in accordance with the thinking which appears from the judgment of the full bench of this division to which I have been referred, namely *Jeebhi v The Minister of Home Affairs* which was reported in July 2007. It fits in with the obvious intention of the statute, namely to deport illegal foreigners from this country in appropriate circumstances.

It is a known fact that there are a vast number of known  
20 criminals in this country who are simply not prosecuted because the police cannot locate them. It must follow that a person who is here illegally and who is detained while facing the possibility of a deportation will likewise disappear and not be found by the immigration authorities. I think, therefore, that the purpose of the Act will be defeated if this Section is interpreted more strictly than is necessary.

012LHR162405

46875/07-MLS

5

JUDGMENT

The fact that the applicant was released and re-arrested and which, in my view, was not the proper procedure to follow does not, however, affect the validity of the actions of the respondent because it would make no difference if she had simply been brought before a magistrate and the period had been further extended.

In any event, even if I am wrong in my view that the period may be extended for a further 90 days, it cannot be doubted that the total period expressly permitted by this Section is 120 days. It must therefore have been permissible to extend the period after the  
10 applicant's re-arrest for a further period of 30 calendar days and that the same could have been achieved by re-arresting her after her initial release and detaining her for a further 30 days.

In my view, the application must therefore be dismissed with costs, and that order is granted.

-----