
SOUTH AFRICA / JUDGMENT

Cheba and Others v Minister of Police and Others (520/2018) [2018] ZALMPPHC 6 (13 February 2018) [2018] ZALMPPHC 6

COURT
Limpopo High Court, Polokwane

BEFORE
D Nair

CASE / FILE NUMBER
520/2018

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
LIMPOPO
DIVISION, POLOKWANE
CASE
NUMBER: 520/2018
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED.
13/2/2018
In

the matter between:

KASUNE
ABERA
CHEBA FIRST
APPLICANT
MEHRAFU
LOBEGCHIO SECOND
APPLICANT
AEYALA
GENTAMO
MANTAHSO THIRD
APPLICANT
TAREKNE
ORGHSO
HAREMO FOURTH
APPLICANT
FEKELE
ANULO
HILBORO FIFTH
APPLICANT
And
MINISTER
OF POLICE &
OTHERS FIRST
RESPONDENT
THE
MINISTER OF HOME
AFFAIRS SECOND
RESPONDENT
THE
DIRECTOR OF THE
HAWKS THIRD
RESPONDENT
THE SENIOR PUBLIC
PROSECUTOR
POLOKWANE
MAGISTRATES COURT FOURTH
RESPONDENT
THE
MANAGER; POLOKWANE
PLACE
OF
SAFETY FIFTH
RESPONDENT

JUDGEMENT

D NAIR AJ:

- [1] This matter served before me in the urgent motion court. The applicants are Ethiopian nationals who apply for their release from the Polokwane Welfare Centre (Khuseleka) and further for an order directing the respondents to issue asylum seeker permits to the applicants.
- [2] The first respondent is the Minister of Police in National Government and cited in his official capacity. The second respondent is the Minister of the Department of Home Affairs, and is a member of the National Government. The third respondent is the Director of the Special Organised Crime Unit of the SAPS (the Hawks). The fourth respondent is the Director of Public Prosecutions with offices situated at the Polokwane Magistrates Court. The 5th respondent is the Manager of the Polokwane Place of Safety with its Head Office in 303 Nelson Mandela Drive Polokwane.
- [3] The respondents have challenged (in limine) the locus standi of the deponent to the founding affidavit because he is not cited as a party to the application. The application is opposed on the grounds listed below.
- [4] The deponent to the founding application is the father of the first applicant. He states that the applicants have been denied access to a legal representative and visits by family members by the respondents and there has been no contact with them. Consequently it has been impossible for the applicants to depose to affidavits themselves. It is for this reason that the founding affidavit is deposed to by him.

According to Erasmus, Superior Court Practice, 2nd Edition, Service 1, at 01- 54

"Subrule 1 requires a notice of motion to be accompanied by at least one affidavit. It is not necessary for the applicant to file an affidavit: a notice of motion can be supported by any person who is in a position to provide the necessary material to support the claim." See also Leath NO and Heath vs Fraser 1952 (2) SA 33 (0) at 368."

- [5] The general rule is that the applicant must be a person having locus standi to apply in that he has an interest in the subject matter of the interdict. See Standard Bank of South Africa Ltd v Swart/and Municipality 2011
- (5) SA 479 (WCC). The father of the first applicant has an interest in the well-being of his son and the four applicants who hail from his country of origin. The applicants have in any event attached the required power of attorney to the replying affidavit.
- [6] In the circumstances, the point is dismissed.

[7] The respondents also alerted the court to an application that was brought before Phatudi J in December 2017 allegedly on the same facts and by the same applicants which was struck off the roll. The application is opposed on the grounds that the matter entails different applicants and is based on deferent facts and further that in any event the order made by Phatudi J was not a final order.

[8] Erasmus, Superior Court Practice, 2nd Edition, Service 3 2016 at 01-284 states

"If a party pleads that a point in issue is already *res judicata* because of an earlier judgement in personam, he must show: that there has already been a prior judgement, in which the parties were the same, the same point was in issue." See also *Jacobson v Havenga t/a Havengas* 2001 (2) SA 177 (T) at 179 E-F.

[9] Having perused a copy of the order granted which was filed in a supplementary answering affidavit it is clear that the parties cited as applicants and respondents differ completely. It is also clear that the matter was struck of the roll. This application also falls to be dismissed.

MERITS

[10] The applicants fled Ethiopia due to fear of being persecuted by reason of their political opinions. They were part of a group of 10 others who were allegedly detained en route South Africa in November

2017. They were held against their will by foreign men in Polokwane for 4 days before members of the Hawks Unit took them into their custody. It is not very clear from their affidavit how it came about that they found themselves in the custody of these men. They allege that they were on their way to seek asylum in South Africa.

[11] They fled Ethiopia via other sub-Saharan countries to Zimbabwe where they boarded a kombi at Beit Bridge being under the impression that they were en route to South Africa.

[12] They were however detained by those transporting them for 4 days before the Hawks took custody of them. The applicants now aver that they were arrested and detained by the Hawks and have been in custody since November 2017. During that time have been housed at a place of safety but denied access to their legal representatives and families. They consider themselves detainees without trial. They have not been brought before a court to date and their status is unclear.

[13] The applicants are of the view that as asylum seekers they were encountered by the police who are under an obligation to arrange a transit permit which is valid for 14 days during which time they may apply for asylum before the competent authority. Counsel for the applicants referred to the following sections from the Immigration Act 13 of 2002 and Refugee Regulations in this regard and I set out the relevant sections below.

(a) Section 23(1) of the Immigration Act provides:

The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only.

(b) Regulation 2(2) of the Refugee Regulations provides;

Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 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.

[14] The applicants aver that in the alternative their detention is neither within the ambit of the Criminal Procedure Act 51 of 1977 (the CPA) nor of the Immigration Act 13 of 2002 which stipulates that their detention be confirmed by a court of law.

[15] The respondents admit the detention of the applicants together with 10 others but maintain that because they are victims of human trafficking, their detention is sanctioned by the Prevention and Combatting of Human Trafficking Act, 2013, Act 7 of 2013 (PCTPA) which provides for the treatment and detention where necessary of victims of human trafficking.

[16] The respondents allege the police received information that certain foreign individuals were kidnapped and are also victims of human trafficking. The police determined the location of the applicants. They arrived at the identified premises and forced open the locked gate and door to a room where they found the 15 Ethiopians who were in possession of their passports. The victims were taken to the Khuleka Place of Safety but were not arrested. Three suspects are arrested in connection with the human trafficking case involving the applicants as victims and are currently facing trial. The first and third applicants deposed to affidavits explaining the circumstances of their arrest on the 23rd November 2017. An interpreter was used during this exercise.

[17] The respondents have attached the affidavits signed by the first and third applicant dated 23 November 2017. The first applicant states therein that he was seeking employment when he was kidnapped and kept in terrible condition until the police discovered them. The third applicant contends that he was fleeing Ethiopia due to the political hostility until he was kidnapped.

[18] The applicants do not deny the contents of these affidavits but challenge them on the basis that the commissioner of oath in each of these affidavits is a member of staff of the first respondent. The respondents aver that they have already taken steps to invoke the provisions of the PCTPA but do not provide any details thereof. The only issue is whether they are in lawful detention at present.

[19] Section 15 of the PCTPA reads as follows:

15.1 Despite the provisions of the Immigration Act, the Director-General, Home Affairs may, in the prescribed manner and subject to the prescribed conditions, issue a foreigner in respect of whom,

- a) a report has been made to a police official as provided for in section 19, and
- b) the National Commissioner of the South African Police has, in writing, confirmed to be a person who might be able to assist in a police investigation relating to an offence under Chapter 2,

a visitor's visa in terms of section 11 (1) (a) of the Immigration Act to remain in the Republic for a recovery and reflection period not exceeding three months which may be extended once in terms of subsection

- (4) for a further period not exceeding three months for the purpose of accessing the programmes referred to in section 26 with the view to enabling the foreigner to make informed decision regarding his or her cooperation with law enforcement and prosecuting authorities in the investigation and prosecution of a case of trafficking in persons as referred to in section 16 (1) (b).

1.25cm; margin-bottom: 0cm; line-height: 150%"> 15.2 If a foreigner referred to in subsection (1), after a period of 30 days after he or she has been issued with a visitor's visa to remain in the Republic for a recovery and reflection period, is unwilling or unable to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution of a trafficker, an investigation into his or her circumstances must be conducted by the Director-General, Social Development in order to determine whether it is safe to repatriate him or her to his or her country of origin or the country from where he or she has been trafficked.

15.3 If a foreigner referred to in subsection (2) is still unwilling or unable to co-operate with law enforcement and prosecuting authorities in the investigation of and the prosecution authorities in the investigation of and the prosecution of a trafficker upon expiration of the visitor's visa, the person must be dealt with in terms of section 31 (2) and 32.

1.25cm; margin-bottom: 0cm; line-height: 150%"> 15.4 If the Director - General, Social Development is unable to complete an investigation referred to in subsection (2) before the expiration of the recovery and reflection period, he or she must, in the prescribed manner, request the Director - General Home Affairs to extend, in the prescribed manner, that period for further period not exceeding three months.

15.5 The issuing of a visitor's visa as provided for in subsection (1) does not prevent or prejudice the competent authority from conducting any relevant investigating, provided that due regard is given to the emotional state of the victim.

15.6 A foreigner referred to in subsection (1) in respect of whom a decision by the Director-General. Home Affairs in terms of subsection

- (1) or (4) is pending, may not be deported.

Section 19.5 reads " A police official to whom a report has been made in terms of subsection (1) or (2) , or section 8(1) (b) or (2) (b) (I) or 9(2) in respect of an adult person or a police official who knows or ought reasonably to have known or suspected that an adult person is a victim of trafficking

- (a) (i) may where necessary , and despite the proviso continued in section 26 of the Criminal Procedure Act, without a warrant, enter any premises if he or she on reasonable grounds believes that the safety of that person is at risk or that the person may be moved from those premises and may use such force as may be reasonably necessary to overcome any resistance against entry to the premises, including the breaking of any door or window of those premises, on condition that the police official must first audibly demand admission to the premises and notify the purpose for which he or she seeks to enter those premises;
- (ii) must where necessary, as a measure of last resort and with the written consent of the person concerned, take him or her into protective custody if there is an immediate threat to the safety of that person, for a period until the station commander of the police station in question is satisfied that the threat has ceased to exist, where after the police official may place that person in temporary safe care referred to in subsection (6);
- (b) must within 24 hours, refer the person to an accredited organisation and notify the provincial department of social development of the person; and
- (c) must inform the person suspected of being a victim of trafficking that he or she may apply for a visitor's visa to remain in the Republic for a recovery and reflection period in terms of section 15 if he or she is a foreigner.
- (6) A police official may place an adult person referred to in subsection (5) in temporary safe care, pending the transfer of that person to an accredited organisation.
- (7) A police official must, if it is reasonably possible to do so, render such assistance to an adult person referred to in subsection (5), as may be necessary in the circumstance , including, but not limited to –
 - (a) assisting that person to obtain medical treatment; and
 - (b) transporting that person to a place of temporary safe care or an accredited organisation.
- [20] The Constitution provides that the rights contained in the Bill of Rights are guaranteed to foreign nationals as well as citizens unless the contrary emerges from the Constitution. See *Telley and Another v Minister of Home Affairs* 1999
- (3) SA 715 (D&CLD) at 727 C-729E.
- [21] *Yacoob J in Lawyers for Human Rights and another vs Minister of home Affairs and another* [2004] ZACC 12; 2004 (4) SA 125 (CC) stated as follows regarding the status of foreign nationals.

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedomForeign Nationals will have standing where rights are threatened or infringed."

[22] There are competing pieces of legislation at play in this matter. On the one hand are the applicant's rights in terms of the Constitution of South Africa 108 of 1996 and the Refugee Act 130 of 1998. On the other hand is the State interest in preventing human trafficking which is the object of the PCTPA.

[23] Trafficking in persons violates constitutionally entrenched rights of the victims of trafficking in that the values of , freedom and freedom of expression dignity, equality, and the right not to be deprived of freedom arbitrarily without just cause nor to be treated in a cruel, inhumane or degrading way are guaranteed by our Constitution.

[24] In *SL and others v The Minister of Home Affairs and Others* High Court Gauteng case no.2016/01352 Modiba J states:

"The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially women and children, supplementing and the United Nations Convention against Trans Organised Crime (UN Protocol) confirms that trafficking in persons is a complex global phenomenon, perpetrated by organised crime syndicates often operating across several criminal jurisdictions. The prevention , detection and prosecution of incidents of trafficking in persons as well as the identification and protection of suspected victims of trafficking in persons requires a coordinated response by various government agencies also require extra jurisdictional powers to deal with incidents of trafficking in persons and smuggling perpetrated beyond South African borders. Until the enactment of the PCTPA, South African criminal legal system lacked the capacity to deal with the offence of trafficking in persons."

[25] Whilst the applicants claim that they are also asylum seekers, they seem to lose sight of the fact that the state agencies also have a right over them as witnesses or victims of human trafficking.

[26] It appears to suit their case for this court to find that the applicants are only seeking asylum because they may be treated under that Act. In fact counsel for the applicants on a question by the Court admitted that they would prefer to be treated as asylum seekers than victims of human trafficking. Before their rights as asylum seekers are considered, it is important to consider that it is not in dispute that the applicants are victims of human trafficking.

[27] It is clear now that the applicants are in the country of destination for the purpose of asylum, the fact that they can provide information and evidence against human traffickers is of little consequence to them.

[28] Applicant's counsel clearly and on more than one occasion conceded that it is common cause that they were victims of human trafficking. To that end I find that their being dealt with under the PCTPA takes precedence as the State interest in such a serious matter outweighs their right to be treated as asylum seekers which status must be determined in

another forum by the competent authority in terms of the Refugee Act. The importance of curbing human trafficking is paramount and at the heart of national and international efforts to protect human rights against any kind of slavery.

- [29] Their continued detention at an accredited institution or place of safety for the purpose of bringing human traffickers to book is paramount and takes preference over any alleged right they may have as asylum seekers which status they may well apply for after the purpose for which they are required in terms of the PCTPA has been fulfilled. The applicants are not in custody as detainees but as witnesses under circumstances governed by law. Their release to pursue their status as asylum seekers is secondary and the harm that they allege to suffer is at best an inconvenience but there are no irreparable consequences if the provisions of the PCTPA are followed.
- [30] There are three requirements for the grant of a final interdict. See *Hotz v Cape Town University* 2017 (2) SA 485 (SCA) at 496 G-H, 4961 and 97G-H. These are "A clear right on the part of the applicant, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy available to the applicant."

The applicants have failed to demonstrate a clear right.

- [31] *Modiba J* in *SL* supra 24 supra states at page 11 para 25

"Given that the suspected victims of trafficking are often not in a position to act in their best interest, a determination of their status can simply not be made based on information received from them. A determination whether a person is a victim of trafficking in persons requires a triangulated determination. To address this problem, the PCTP Act provides for the accommodation of suspected victims at a place of safety and an assessment to be conducted by the Department of Social Development on the strength of information received from members of the second respondent. The second respondent (Minister of Police) ought to furnish information gathered from its investigations to assist the department of social development to properly assess the detainees. An investigation by members of the second respondent is in any event pivotal to secure the prosecution of any persons who are found to have participated in the trafficking in persons and sexual exploitation value chain of the detainees as provided for in the PCTP Act."

- [32] The applicants have not been apprised of their rights in the above regard. They have been detained for approximately 3 months (taking the date on which they deposed to affidavits into account) with no compliance with the legislation. It is fundamental that their rights as enshrined in the constitution must be protected. The non-compliance with the act in the following respects has given rise to the application being brought.
- [33] Our courts have on several occasions expressed their disquiet at the failure of government officials, including the Departments officials, to respect the rights of individuals they deal with and to act in accordance with their duties imposed by the Constitution. See *Nyathi v MEC for the Gauteng Department of Health & Another* 2008

- (5) SA 54 (CC). It was also stated thus in *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17; 1999 (1) SA 374 (CC) para 58:

"It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the Interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim constitution is a principle of legality." I find that these principle has been breached.

- [34] The first respondent through its functionaries has failed to perform their obligations in terms of the PCTPA. These obligations and the non-compliance therewith are set out below.
- [35] There has been non-compliance with section 19(5) in that the police official who comes into contact with a victim of human trafficking must inform the person suspected of being a victim of trafficking that he or she may apply for a visitor's visa to remain in the Republic for a recovery and reflection period in terms of section 15 if he or she is a foreigner. This was not done and the omission to do so has impacted on other rights and obligations in terms of the PCTPA.
- [36] The issuing of a visitors permit by the Director General: Home Affairs to a foreigner in terms of the PCTPA is only possible if the National Commissioner of the South African Police Service has, in writing, confirmed such foreigner to be a person who might be able to assist in a police investigation. It follows that the matter must be brought to the attention of the National Commissioner. There is nothing from the papers to suggest that that has been done.
- [37] The visitor's visa entitles foreigners detained in terms of the PCTPA to access fundamental benefits which are aimed at curtailing and minimising any trauma that may have or will suffer: The section reads as follows :

26(1) An accredited organisation-

- (a) Must offer a programme aimed at –
- (1) The provision of accommodation to adult victims of trafficking;
 - (2) The provision of counselling to adult victims of trafficking; and
 - (3) The re-integration of adult victims of trafficking into their families and communities ; and
- (b) May offer a programme aimed at –
- (i) The provision of rehabilitation and therapeutic services to adult victims of trafficking; or
 - (ii) The provision of education and skills development training to adult victims of trafficking.

[38] The very purpose of accessing the accredited the programmes is for such victim to make informed decisions regarding his or her cooperation with law enforcement and prosecuting authorities in the investigation and prosecution of the case. The purpose of the issue of the visitor's visa is for a recovery and reflection for a period not exceeding three months which may be extended only once for a period of three months. The words recovery and reflection are intended to safeguard the victim whose rights are not protected absent such visitor's visa.

[39] Section 19(8) of the PCTPA places certain peremptory obligations on the Provincial Department of Social Development which has been notified in terms of section (5) in that such Department must without delay and in the prescribed manner assess whether the person concerned is a victim of trafficking in which case a letter of recognition must be immediately be issued to the victim.

[40] The letter of recognition in turn has significant consequences for the victim as per section 22(3) which reads;

"A letter of recognition that an adult person is a victim of trafficking or a finding by the provincial department of social development after an assessment referred to in section 18(6) that a child is a victim of trafficking serves as a ground for the withdrawal of the criminal prosecution or the discharge of the victim of trafficking if the prosecutor is satisfied that the offence was committed as a direct result of the person's position as a victim of trafficking.

[41] The duty to initiate the process rests with the police official who encounters the victim. Section 19(5) (b) and (c) places on such police official the duty to inform the victim that he may apply for such visa and to notify the provincial department of social development of that person. The words must make it peremptory for that police official and a failure on his/her part upsets the entire chain of mechanisms available to the victim guaranteeing their rights. It is clear that the applicants were not advised of their right to apply for the visitors permit as is required in the above section. The purpose of being in care at a facility is for recovery and reflection in order that he may make an informed decision about his position. It is also a requirement that if he is held in protective custody same must occur with his consent in writing.

[42] The PCTPA is South Africa's mechanism to assist in the global war against human trafficking. If our own law enforcement agencies do not strictly adhere to the legislation, victims of trafficking will become unwilling to join in the cause against such trafficking when their rights and dignity are trampled upon in a manner that amounts to secondary victimisation.

[43] There will always be such cases where those fleeing their countries of origin seeking asylum are intercepted and captured by perpetrators of human trafficking and subsequently rescued by law enforcement agencies. In both scenarios, they will inevitably be in detention or custody.

- [44] In the quest for their freedom, the temptation to be released into the care of the relevant asylum controlling authorities is greater than the prospect of being housed in accredited state institutions until the investigation and prosecution of human traffickers is complete. This is so because with being granted asylum comes the prospect of being free to sojourn in the country of their intended destination immediately upon their status as asylum seekers is determined.
- [45] The objectives of the PCPTA in protecting the rights of victims and in combatting the scourge off human trafficking must take precedence over the desire of asylum seekers to flee their countries of origin because in any event they are no longer in that country.
- [46] The applicant's rights are guaranteed with in the PCTPA and there are other remedies therein which may be invoked to ensure that the applicants are not unduly prejudiced nor is their right to liberty in any way compromised. The safeguards in the event of them not wishing to co-operate freely are also contained therein.
- [47] In the result I find that while their detention has not been in compliance with the PCTPA, it is not unlawful. However, there is a need for this court to issue certain directives with regard to compliance with PCTPA.
- [48] The issue of their status as asylum seekers may well be determined after compliance with the PCTPA.
- [49] The applicants were never in any immediate threat of being deported because their presence for now is in the State interest.
- [50] In the result I make the following order:
- [50.1] The matter is declared as urgent and accordingly the time periods and forms of service are dispensed with to allow the matter to be heard as such;
- [50.2] The application for the applicants to be released from the Polokwane Welfare Centre (the Khuseleka One Stop Centre) is dismissed with costs. The applicants are placed in temporary safe care at the (Khuseleka One Stop Centre) in terms of section 19(6) of the Prevention and Combatting of the Human Trafficking Act 7 of 2013, pending their transfer to an accredited organisation. Such transfer is to be effected within 30 days of date of this order.
- [50.3] The application for an order directing the respondents to issue Asylum Seekers Permits in accordance with Section 22 of the Refugee Act is also dismissed.
- [50.4] The First Respondent is directed to initiate the process of the applicants obtaining the visitor's visa by complying with all the provisions of the Prevention and Combatting in Human Trafficking Act 7 of 2013. This must be done within one week of the date hereof. Further to ensure that the applicants have access to medical facilities immediately.

[50.5] The Provincial Head of the Department of Social Development is required to comply with all his/her obligations that are set out in the Prevention and Combatting of Human Trafficking Act 7 of 2013 within one week of the date hereof including compliance with the obligations in section 15(1) and section 22 thereof.

D NAIR

ACTING JUDGE OF THE HIGH COURT

POLOKWANE; LIMPOPO DIVISION

APPEARANCE:

COUNSEL FOR THE APPLICANT: ADVOCATE G MAKAPANE

INSTRUCTED BY: MAKAPANE ATTORNEYS

COUNSEL FOR RESPONDENT: ADVOCATE M E NGOETJANE

INSTRUCTED BY: STATE ATTORNEY

DATE OF HEARING: 8 FEBRUARY 2018

DATE OF JUDGEMENT: 12 FEBRUARY 2018

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