

SOUTH AFRICA / JUDGMENT

Malinga and Others v Director-General of Home Affairs and Another (73595/2016) [2016] ZAGPPHC 1233 (16 November 2016) [2016] ZAGPPHC 1233

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Fourie

CASE / FILE NUMBER

73595/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 73595/2016

Date: 16/11/2016

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

KS L MALINGA First Applicant

M E MATLAPENG Second Applicant

S O MATLAPENG Third Applicant

J M M MALINGA Fourth Applicant

M L LEPHOGOLE Fifth Applicant

A K LEPHOGOLE Sixth Applicant

And

THE DIRECTOR-GENERAL OF HOME AFFAIRS First Respondent

MINISTER OF HOME AFFAIRS Second Respondent

REASONS

D S FOURIE, J:

1. On 20 September 2016 I granted the following order in the Urgent Court:

1. The application in terms of Part A of the notice of motion is dismissed with costs.
2. The application in terms of Part B of the notice of motion is postponed sine die.
3. Pending the finalisation of the application in terms of Part B of the notice of motion the first applicant shall not be deported."

On 6 October 2016 a written request for reasons in terms of Rule 49(1)(c) was filed. These are my reasons for the order granted.

CASE FOR THE APPLICANTS

2. The applicants filed an urgent application in which they applied for the following relief:
 - Pending finalisation of the relief sought in Part B of the application, that the first applicant be released with immediate effect from detention at the Sunnyside Police Station where he is being detained; and
 - That the first applicant be permitted to remain in the Republic of South Africa with the second to fourth applicants, subject to reasonable terms and conditions.

Part B of the application consists of a notification in terms whereof the first applicant indicates that he intends to apply, on a date determined by the Registrar, for an order that any decision which has been made (or about to be made) to deport him from South Africa, is reviewed and set aside.

3. In his founding affidavit the first applicant avers that he is a South African citizen and the holder of a valid South African identity document. He further states that he was born in South Africa and has been living here for over 20 years as a South African citizen. According to him his birth was registered by his father (who is now deceased) when he was still a teenager. He and his parents fled South Africa during the apartheid years and lived in Swaziland "until I returned to South Africa on or about 1994 when I acquired my South African citizenship". A copy of his identity document indicating that he is a South African citizen, is attached to the application.
4. During August 2016 the Department of Home Affairs started to investigate him. On 15 September 2016 he was interviewed by a certain

Ms Zulu, an Immigration Officer of the Department of Home Affairs. According to him her attitude was hostile, antagonistic and

threatening. He then makes the following statement in his founding affidavit:

"She coerced me to tell the truth despite my protestations. She ordered me to write a statement and sign certain documents that I do not know what they were for. Fearing the real prospects of arrest and subsequent Deportation, I wrote a statement against my will having been threatened by Ms Zulu to either make an admission or face arrest and deportation. When making this statement I was of the belief that I would be released."

5. He was thereafter arrested for being an illegal foreigner and was also advised that he will be deported. According to him he is a South African citizen, has a right to be in South Africa and should be released from detention pending finalisation of a review application. He also points out that he is entitled to an interim interdict as "there are no internal remedies in terms of the Act".

CASE FOR THE RESPONDENTS

6. The deponent on behalf of the respondents is Ms Zulu, an Immigration Officer: Special Investigation and Joint Operations employed by the Department of Home Affairs. According to her the first applicant is not the holder of a valid South African identity document as it has been fraudulently obtained.
7. She refers to the Movement Control System, maintained by the Department of Home Affairs, which indicates that during the period 1996 and 1997 the first applicant used a Swaziland passport to enter into the Republic of South Africa on various occasions at the Oshoek border gate. Copies of printouts indicating these movements are attached to the answering affidavit. She also explains that the first applicant is a national of Swaziland who is the holder of an identity document that was issued in Swaziland on 14 August 2013. A copy of this document is also attached to the answering affidavit.
8. According to the first applicant he obtained his South African citizenship in 1994. According to Ms Zulu this "is contrary to the fact that he is currently issued with the identity card by the Kingdom of Swaziland and the fact that he travelled from Swaziland into South Africa, using the Swaziland passport during 1996 and 1997". According to her the applicant is presently an illegal foreigner.
9. In support of this allegation she also refers to a questionnaire, completed by the first applicant, in which he admits that his status is that of an illegal foreigner. A copy of this document is also attached to the answering affidavit. On 15 October 2016 the applicant testified in another affidavit that he was born in Mbabane, Swaziland on 11 April 1977. A copy of this affidavit is also attached. This is inconsistent with his founding affidavit where it is stated that he was born in South Africa.
10. According to Ms Zulu she conducted an interview with the first applicant in accordance with section 41(1) of the Immigration Act, No 13 of 2002, free from any undue pressure and improper conduct towards the first applicant. He then freely and voluntarily made a sworn statement to which I have already referred to above. She also issued the applicant with a Notice of Decision (Form 2) as well as a Notification of Deportation (Form 29), copies of

which are also attached to the answering affidavit. In terms of the notification of deportation it appears that the first applicant has decided to await his deportation at the first reasonable opportunity, whilst remaining in custody and that he has decided not to appeal the deportation decision. This document purports to be signed by the first applicant

on 15 September 2016.

DISCUSSION

11. An arrest or detention is prima facie wrongful. It is common cause that the first applicant has been arrested and is being detained without a warrant. It is for the respondents to prove the lawfulness of the arrest and detention. Ms Zulu states that she duly acted in accordance with the provisions of section 41(1) of the Immigration Act. She also refers to the Notification of Deportation (Form 29) which was signed by the first applicant.
12. Section 41(1) of the Act provides, inter alia, that if on reasonable grounds an immigration officer or police officer is not satisfied that the person concerned is entitled to be in the Republic, such person may be interviewed and the 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.

13. Section 34 provides as follows:

"(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 an officer attending to him or her that his or her detention for the purpose of deportation be confirmed by a 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."

14. Having regard to the answering affidavit and the annexures thereto, it appears that the first applicant has acknowledged that he is an illegal foreigner (annexure "CPZ 3"), that he has been notified in writing of the decision to deport him, his right to appeal such decision and that he may request that his detention for the purpose of deportation be confirmed by a warrant of the court (annexure "CPZ9"). According to this document he has decided not to appeal the decision or to have his detention confirmed by a warrant of court. In terms thereof he has also decided to await his deportation at the first reasonable opportunity, "whilst remaining in custody" (annexure "CPZ9").
15. These documents are not disputed in the replying affidavit. His answer is that no explanation was given on what he was signing and that "as a result of one process and with no due diligence, I have in effect and entirely against my will admitted that I am not a South African citizen, being incarcerated, awaiting deportation and waived my right to appeal ...". This appears to be a bald, sketchy and flimsy explanation for having signed a document in terms of which he has, on a proper construction thereof, consented to his deportation "whilst remaining in custody". His earlier explanation in the founding affidavit that he was of the belief that he would be released is not supported by the contents of these documents. As a matter of fact they indicate the opposite to which he has consented. This must also be seen against the

background

of him being a national of Swaziland, using a Swaziland passport, which he failed to disclose in his founding affidavit.

16. Taking into account these considerations, I was satisfied, when granting the order, that the first applicant's detention is lawful. His decision not to lodge an internal appeal but rather to bring a review application appears to be an afterthought and did not

affect the lawfulness of his detention on the day the order was granted. I therefore concluded that the first applicant was not

entitled to an order releasing him from detention. For these reasons I have exercised my discretion in favour of the respondents.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA

Date: 16 November 2016

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Prepared on 14 October 2026 · Esheria