

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 27878/2021

DATE: 2022-04-12

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: NO.**

**(2) OF INTEREST TO OTHER JUDGES: NO.**

**(3) REVISED.**

**DATE 1 August 2022**

**SIGNATURE**

In the matter between

MINISTER OF HOME AFFAIRS

1<sup>st</sup> Applicant

DIRECTOR–GENERAL DEPARTMENT OF HOME AFFAIRS

2<sup>ND</sup> Applicant

And

MAFADI HERBERT

1<sup>ST</sup> Respondent

MUSANA LAZAKE

2<sup>ND</sup> Respondent

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**J U D G M E N T (LEAVE TO APPEAL)**

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**VICTOR (J)**: This is an application for leave to appeal my judgment which I handed down on 5 July 2021 and in terms of which I essentially allowed the respondents to be freed from detention. The State now appeals the matter on several grounds. The reasons include that this court disregarded Section 165(5) and Section 166 of the Constitution and that

this court sat as a court of review or as a court of appeal when that was not the case before it.

The applicant also submits that this court erred in ordering the Respondents to institute proceedings in terms of the Immigration Act at the time when there was no appeal or review of the Ngoma Magistrates Court. The State submits that the court erred because the right to appeal or review from the Magistrates Court is automatic and the order made did not form part of the Applicants papers or even orders sought in the notice of motion.

In other words the court granted an order which the Respondents had not sought in the first instance and that the court erred because there was no transcript before it to prove the fairness of the proceedings in the Magistrates Court on the question of fairness. This Court erred on the question of costs.

The Constitution is very clear. Section 173 gives this court, that is High Court inherent power to protect and regulate its own process and to develop the common law taking into account the interests of justice.

In addition on the question of remedy in relation to constitutional matters which this matter clearly was, the freedom of an individual irrespective if they are South African citizens or not, is protected by the Constitution. In terms of Section 172(1)(b), the Constitution entitles a court to make any order that is just and equitable. This entitles a court to suspend

an order in the Magistrates Court pending the institution of proceedings to challenge those proceedings. There was no court transcript tendered by the applicant in of the proceedings in the Magistrate's court to contradict the respondents' version of how they were treated in the Magistrates Court and that they were not given a fair hearing.

This Court considered very carefully the submission that it erred in regards to Section 165 and 166 of the Constitution. Section 165(5) provides:

"An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

This according to the applicant prevents a High Court from granting any order suspending the order granted by the Magistyrates Court and the respondents are to be sent back to their country of origin without being afforded due process in this country by any higher court. This is a novel argument and it is flawed.

It is obvous that this Court was not sitting as an appeal court or review court to overturn the order of the Magistrate's Court. For sound jurisprudential reasons the order or decision of the magistrate's court could be suspended pending the outcome of further legal proceedings. Advocate Nharmuravate on behalf of the applicant submitted that this Court had no business interfering or overruling a Magistrates Court order since the

hierarchy of courts is very clear. Apparently a High Court in these circumstances has no jurisdiction to come to the aid of the respondents whose continued detention was unlawful.

According to the applicant as set out in Section 166 of the Constitution, the hierarchy of the courts is clear. The Magistrates Court is one of those courts that have to be acknowledged as a proper court and therefore according to the applicant there should be no interference with the jurisdiction the Magistrates Court has. I have already referred to the relevant sections of the Constitution, more particularly Section 172(1)(b) which clearly provides that in considering a constitutional matter a court "(b) may make any order that is just and equitable." The respondents have a constitutional right to a fair trial.

In addition paragraph 35 of my judgment makes it very clear that this court recognises the order of the Magistrates Court and therefore directed that the judgment must either be reviewed or appealed against and this is contained in the order. It is incorrect that I declared the court order unlawful. The import of paragraph 47 of my judgment which refers to the continued detention as being contrary to the Constitution finds and that it would be unlawful that the respondents' detention continue so as to prevent the Respondents from making the necessary application for asylum.

Nowhere in my actual order do I declare that the Nogomo Magistrate's Court had made an unlawful order. In the result it is my view that another court will not come to a different conclusion. In addition the threshold is now higher in terms of Section 17 of the Superior Courts Act.

In the result I dismiss the application for leave to appeal with costs. In so far as the costs of 12 August 2021 are concerned where by agreement the parties postponed the application for leave to appeal on the basis that there was at that stage a Constitutional Court application pending on the same refugee issues and the judgment had not yet been handed down.

In relation to the hearing of 12 August 2021 it is ordered that each party should bear their own costs.

The order in this application for leave to appeal is as follows:

1. The application for leave to appeal is dismissed with costs.
2. The hearing of 12 August 2021, each party shall bear their own costs.

**VICTOR, J**  
**JUDGE OF THE HIGH COURT**  
**DATE: Signed 01 August 2022**

**Date Heard 12 April 2022**  
**Date of Judgment: 12 April 2022**

**Counsel for the Applicant: N Nharmuravate**  
**Instructed by: State Attorney**

**Counsel for the Respondent: Adv T Lipshitz**  
**Instructed by: Buthelezi Attorneys**