

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 4 August 2023

Case No. 2023/072559

In the matter between:

M J T

First Applicant

M S R

Second Applicant

and

THE STATE

First Respondent

THE PRESIDING MAGISTRATE, MIDRAND

Second Respondent

STATION COMMANDER, MIDRAND POLICE STATION

Third Respondent

MINISTER OF HOME AFFAIRS

Fourth Respondent

**THE HEAD: JOHANNESBURG
CORRECTIONAL SERVICES CENTRE**

Fifth Respondent

JUDGMENT

WILSON J:

- 1 The applicants were arrested and detained as illegal foreigners on 5 July 2023. They said that their arrest was unlawful because it took place inside the shacks at which they reside, and next to which they make a modest living as waste recyclers. The applicants say that their arrest took place during an illegal forced entry of their homes, contrary to section 33 (9) of the Immigration Act 13 of 2002. That provision, by necessary implication, forbids the entry and search of a private residence without a warrant. The applicants say that there was no warrant.

- 2 The applicants' application for release was enrolled before me on 28 July 2023. This was after two attempts to obtain bail had been unsuccessful, the Magistrate having postponed the applications because the State was not ready to argue them. Having served the State Attorney on 26 July 2023, the applicants approached me for a declaratory order that the forced entry of their homes and their arrest were unlawful, and an order directing that they be immediately released. This is obviously a separate matter from any entitlement they may have had to bail, as a bail application proceeds on the assumption that the applicant has been lawfully arrested and detained.

- 3 When the matter was called before me on the afternoon of 28 July 2023, Mr. Mokatsane, who appeared for the respondents, made an application to extend the time available to the respondents to file an answering affidavit on the merits. After hearing argument, I refused that application. I granted the declaratory orders that the applicants sought, and I ordered the applicants' immediate release. I indicated at the time that I would give my reasons in due course. These are my reasons.

- 4 It is well-established that an applicant who approaches the urgent court does so on their own timetable, which the respondent ignores at their peril. It was on the acceptance of that proposition that Mr. Mokatsane moved his application for an extension of time. He was entirely correct to do so.
- 5 In considering that application, I had regard to Mr. Mokatsane's explanation for the absence of an answering affidavit on the merits in light of the nature of the applicants' claim, the respondents' prospects of success in resisting it, the prejudice that would be caused to the respondents by a refusal of the extension and the prejudice that would be caused to the applicants by granting one.
- 6 The applicants' case was simple. It was that they had been arrested during an illegal entry and search of their homes. Leaving aside the fact that the applicants say that the arrest was carried out by police officers, and not by immigration officers exclusively empowered by the applicable statute to do so, there were only three potential answers to that case. The first was that there was a warrant, and so the entry and search were lawful. The second was that the arrest did not take place in the applicants' home, and so a warrant was not required to enter those homes. The third was that a warrant was not required because the applicants consented to the arresting officer's entry of their homes, or that there were otherwise exigent circumstances justifying a forced entry. Mr. Mokatsane very fairly conceded that he had no idea which of these answers, if any, the respondents might give. Nor could he exclude the possibility that the respondents would ultimately accede to an order releasing the applicants.

7 In other words, Mr. Mokatsane had no instructions. He did, though, disclose that the arresting officer had been located. The arresting officer was said to be off work sick, but a consultation with them was planned for Saturday 29 July 2023, by which time they were expected to be available to give instructions.

8 It seemed to me, though, that the illness of the arresting officer was no bar to the State Attorney obtaining an instruction from someone with knowledge of the facts either that the arrest took place outside the applicants' home, or that a warrant had been obtained, or that a warrant had been lawfully dispensed with. Indeed, Mr. Mokatsane informed me that a case screening committee in the State Attorney's office had urgently resolved to oppose the application. The State, as "role model *par excellence*" (*S v Williams* 1995 (2) SACR 251 (CC) at paragraph 47) is presumed not to take dogmatic or unreasoned decisions to oppose litigation, even urgent litigation, which involves the assertion of fundamental rights. Either the case screening committee had instructions on which it could have taken the decision to oppose the application, or it did not have instructions, and so could not properly have taken that decision. If the former, then those instructions could and should have been conveyed to me. If the latter, the application should not have been opposed at all.

9 It can accordingly be inferred that the respondents could not say that there was a definite and lawful basis on which the applicants' detention should continue, and which they needed more time to prove. The position was rather that the respondents could not say whether there was such a basis at

all. Given that all that was required was a warrant of arrest or an instruction that none was needed, I cannot conclude that the two days the respondents were given to answer the application was insufficient to put a version before me. This of course discounts the fourteen days the Magistrate had already given the State to prepare its opposition to the applicants' bail application.

10 In these circumstances, I had to accept the applicants' version, and I could not conclude that there was any basis on which I could allow the applicants' detention to continue, or on which I could refuse the declaratory relief they sought. It is of course true that the "principle of *audi alterem partem* is sacrosanct". But "like all other constitutional values, it is not absolute" (*South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (20 SA 561 (GJ) at paragraph 22). This was one of those rare cases where the injury to the applicants caused by their further detention outweighed the general right of the respondents to file an answer on the merits. It is often said that a detained person may not be deprived of their freedom for "one second longer than necessary by an official who cannot justify his detention" (see, for example *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA) at paragraph 10). That dictum applies with full force in this case, where, I emphasise, the respondents' representatives could not even hint at a possible justification for the applicants' arrest and detention.

11 At the outset of the hearing, I disclosed that, before my appointment to the High Court, I was one of the founders of, and for many years the executive director of, the public interest law firm that represented the applicants. I also placed on record that I did not know who the applicants were, that I had no

recollection of ever having acted on their behalf, and that I saw no reason why I could not fairly preside over this case. I asked counsel for both parties to raise any objections that they had to my doing so. Neither Mr. Nkosi, who appeared for the applicants, nor Mr. Mokatsane objected to my deciding the case.

12 It was for these reasons that I made the order I issued in this case on 27 July 2023.



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 4 August 2023.

HEARD ON: 27 July 2023

DECIDED ON: 27 July 2023

REASONS: 4 August 2023

For the Applicants: T Nkosi
Instructed by the SERI Law Clinic

For the Respondents: Z Mokatsane
Instructed by the State Attorney