THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 965/2013

In the matter between:

ABDUL RAHIM	**FIRST APPELLANT**
HOSSAIN KAMAL	**SECOND APPELLANT**
ZAKIR HOSSAIN	**THIRD APPELLANT**
HARUN MOHAMMED	**FOURTH APPELLANT**
MOHAMMED SALLA UDDIN	**FIFTH APPELLANT**
ABDUL SHAMOL	**SIXTH APPELLANT**
MAHBUB ALOM	**SEVENTH APPELLANT**
TOYOBUR RAHMAN	**EIGHTH APPELLANT**
SUMAN CHUDHURY	**NINTH APPELLANT**
MUSTAFI GURRAMAN	**TENTH APPELLANT**
EUNICE HAYFORD	**ELEVENTH APPELLANT**
ZAIUR RAHMAN	**TWELFTH APPELLANT**
MD ALAP	**THIRTEENTH APPELLANT**
NORUL ALOM	**FOURTEENTH APPELLANT**
MAHE MINTU	**FIFTEENTH APPELLANT**

and

THE MINISTER OF HOME AFFAIRS **RESPONDENT**

Neutral Citation: *Rahim v The Minister of Home Affairs (*965/2013) [2015] ZASCA 92 (29 May 2015).

Coram: Navsa, Majiedt, Mbha & Zondi JJA and Meyer AJA

Heard: 18 May 2015

Delivered: 29 May 2015

Summary: Detention of illegal foreigners pending deportation in terms of s 34(1) of the Immigration Act 13 of 2002 – illegal foreigners to be detained in a manner and place determined by the Director-General – absence of evidence concerning such determination – principle of legality – detentions unlawful.

ORDER

On appeal from: The Eastern Cape Division of the High Court, Port Elizabeth (Chetty J sitting as court of first instance).

The following order is made:

1. The appeal is upheld and the respondent is ordered to pay the appellants" costs, including the costs of two counsel.

2. The order of the court below is substituted by the following order:

„1. The detention of each of the Plaintiffs is declared to have been unlawful.

2. The Defendant is ordered to pay damages to the Plaintiffs as follows:

2.1 To the First Plaintiff an amount of R10 000 together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.2 To the Second Plaintiff an amount of R12 000 together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.3 To the Third Plaintiff an amount of R3 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.4 To the fourth Plaintiff an amount of R6 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.5 To the Fifth Plaintiff an amount of R5 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.6 To the Sixth Plaintiff an amount of R8 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.7 To the Seventh Plaintiff an amount of R20 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.8 To the Eighth Plaintiff an amount of R10 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.9 To the Ninth Plaintiff an amount of R25 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.10 To the tenth Plaintiff an amount of R12 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.11 To the Eleventh Plaintiff an amount of R12 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.12 To the Twelfth Plaintiff an amount of R18 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.13 To the Thirteenth Plaintiff an amount of R16 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.14 To the Fourteenth Plaintiff an amount of R14 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.15 To the Fifteenth Plaintiff an amount of R5 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof.

3. The Defendant is ordered to pay the Plaintiffs‟ costs of suit, including the costs of two counsel.‟

JUDGMENT

Navsa ADP (Majiedt, Mbha & Zondi JJA and Meyer AJA concurring):

[1] This is an appeal against a judgment of the Eastern Cape Division of the High Court, Port Elizabeth (Chetty J), in terms of which the court a quo dismissed the claims of the 15 appellants, all foreign nationals, for damages said to have been sustained as a

result of their alleged unlawful arrest and detention at the instance of officials of the respondent, the Minister of Home Affairs (the Minister). The appeal is before us with the leave of the court below.

[2] This case is adjudicated against the following backdrop. South Africa has kilometre upon kilometre of porous borders which the Department of Home Affairs (the Department) has difficulty controlling. There is public concern about the illegal influx of foreigners. Many of our African brothers and sisters and even people, like most of the appellants, from more distant shores, flock to our country in search of a better life and economic opportunities. This has caused a degree of animosity to be directed at foreigners and more recently has led to what has been described as xenophobic attacks on foreigners. It is vital in this context to affirm that we are a constitutional state subscribing to the principle of legality, an incident of the rule of law. Our Constitution demands a normative standard and we must be held bound by it. In adjudicating this case, sight will not be lost of the logistical and other difficulties that the Department experiences in dealing with an influx of foreign nationals. At the same time we cannot lose sight of our constitutional duty to do justice in accordance with constitutional norms. I turn to deal with the relevant facts and the applicable law.

[3] Fourteen of the appellants are Bangladeshis. The eleventh appellant is Ghanaian. All of the appellants were asylum seekers who had applied for asylum in terms of s 21 of the Refugees Act 130 of 1998 (the RA) and had, in terms of s 22(1) of the RA, been granted an asylum seeker permit. Section 22(1) reads as follows:

„The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Receptions Officer on the permit."

Section 22(3) of the RA, recognising that the process for finalising such applications is protracted, provides:

„A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued."

[4] Having been granted asylum seeker permits, the appellants attended at the Port Elizabeth office of the Department at regular intervals to have their permits extended in contemplation of the finalisation, not just of a decision in respect of the application for asylum, but also of an appeal to an appeal board in terms of s 26 of the RA. If the officials of the respondent are to be believed each one of the appellants were arrested only after:

(i) they had been informed in their home language that their appeals had been unsuccessful and were thus illegal foreigners; and

(ii) they had been informed of their rights to pursue further processes to thwart deportation.

[5] The power to arrest and detain the appellants was claimed in terms of s 34(1) of the Immigration Act 13 of 2002 (the IA), which reads as follows:

„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 any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by 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." (My emphasis.)

[6] At the commencement of the trial in the court below there were several issues in dispute. The appellants disputed their status as determined by the Department and which at trial was the asserted basis of their arrest, namely that of being illegal foreigners. Furthermore, the appellants contended that at the time of their arrest they had not been provided with reasons. They also complained that their rights: (i) to use further processes provided for in the IA to resist deportation and; (ii) under the Constitution (especially s 35 which deals with the rights of arrested, detained and accused persons); and (iii) to Consular access and assistance in terms of Article 36(1) *(b)* of the Vienna Convention on Consular Relations, 1963, were not explained to them, rendering their detention unlawful. Importantly, they invoked the principle of legality in relation to s 34(1) of the IA, contending that they could only, as prescribed by that subsection, be detained *in a manner* and *at a place determined* by the Director-General of the Department, which they were adamant had not occurred. The submission was that this requirement of s 34 was in appreciation of the right of illegal migrants recognised in civilised states, namely, that they should, because of their vulnerability, be treated as a separate category of detainees and be rigorously separated from the general prison population. The appellants submitted that their detention at either Kwazakhele police station or St Albans prison or New Brighton Police, or other police station or prison (as fourteen of the fifteen appellants had spent the greater part of their detention at a prison or police station), or even at Lindela deportation facility was in disregard of the provisions of s 34 as they were not places „determined by" the Director-General, thus rendering their detention unlawful.

[7] At inception the appellants applied in the court below, in terms of Uniform Rule 33, for a decision to be made separately, in respect of their contentions set out at the end of the preceding paragraph, namely, the interpretation and application of s 34(1) in relation to a determination by the Director-General. Simply put, the appellants argued that the respondents were required to prove that a determination as contemplated in s

34(1) of the IA had been made by the Director-General, and the appellants contended that the absence of such a determination would render the detention unlawful. They sought a separation of and a decision on this issue. Chetty J ruled against them and a trial ensued on all the issues in dispute.

[8] The court below, considering the evidence and having regard to the applicable statutory provisions, rejected the submissions on behalf of the appellants that they were not illegal foreigners because their asylum-seeker permits had not yet expired at the time that they were arrested. Chetty J reasoned that such permits remained valid only until the outcome of the applications and that they lapsed upon the application or any associated review or appeal being finalised.

[9] The court below also dealt with the submission on behalf of the appellants that the arresting officials were imbued with a discretion and were required to consider arrest as a last resort in the deportation process and that in respect of the appellants they did not apply their minds to each individual case but rather arrested all of the appellants on the basis of a blanket policy that all illegal foreigners were subject to arrest. The contention on behalf of the appellants was that the arresting officials could have considered requiring the appellants to report regularly or they could have employed other means to monitor their position until deportation was imperative – ie arrest should have been a final resort after all other processes available to them were exhausted. The court below, after considering the evidence, said the following:

[I]t is clear . . . that the decision to arrest and deport the plaintiffs was not arbitrary but effected against the background of all material factors.‟

[10] Furthermore, the court below rejected the appellants‟ claims that they had not been informed of their rights; in terms of ss 34(1)*(a)* and *(b)* of the IA; s 35 of the Constitution; and the Vienna Convention. Chetty J also rejected the assertion that proper warrants for the detention of the appellants had not been issued. He accepted the evidence on behalf of the respondent that the appellants‟ rights had been explained to them in a language they understood and that the anomalies in the documents

presented in evidence were overcome by the *viva voce* evidence of the officials who effected the arrests. He rejected the appellants‟ attack on the integrity of the interpreters employed by the Department.

[11] Dealing with the question whether, in terms of s 34(1) of the IA, there had to be a special determination by the Director-General for the detention of illegal foreigners. Chetty J had regard to the decision in *Lawyers for Human Rights v Minister of Safety and Security and 17 others* [2009] JOL 23612 (GNP) in which Raulinga J held that the IA aimed at setting in place a new system of immigration control which ensured, inter alia, that immigration control is conducted within „the highest applicable standards of human rights protection‟. The court there held that „no facility can be used for detention and deportation of foreigners without the necessary designation by the Director-General of Home Affairs‟. Chetty J disagreed. He had regard to s 34(7) of the IA which provides:

„(7) On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant.‟

His reasoning in relation to the effect of that subsection is set out in the latter part of para 14 of the judgment of the court below:

„There is a clear indication in subsection (7), which refers to the detention of an illegal foreigner in a prison that it is the place which the Director-General had determined that an illegal foreigner be detained pending his or her deportation. Although the term "*prison*" is not defined in the ***IA***, its meaning is hardly obscure. By necessary implication, it includes a police cell or lock-up.‟

[12] The court below also placed reliance on the following part of the minority judgment in *Jeebhai & others v Minister of Home Affairs & another* 2009 (5) SA 54; [2009] ZASCA 3 (SCA):

„The detention contemplated in s 34(2) must be by warrant addressed to the station commissioner or head of a detention facility. Thereafter the suspected illegal foreigner may either be released or, if he is in fact an illegal foreigner, detained further under s 34(1) for the purpose of facilitating the person‟s deportation.‟

Chetty J concluded as follows:

„It follows from the aforegoing analysis that the finding by Raulinga, J, that the place of detention contemplated by s 34(1) has to be designated as such in order to render an illegal foreigner‟s detention lawful, was clearly wrong. I am satisfied that the plaintiffs were lawfully detained at the prisons or police stations for purposes of deportation.‟

[13] It is against the conclusions set out in the preceding paragraphs that the present appeal is directed. Before us counsel on behalf of the appellants accepted that in practical terms a decision on the discrete point the appellants had applied to have decided by the court below, as set out in para 7 above, would be dispositive and that a decision on quantum could then be made on the available evidence.

[14] It is necessary to record the number of days that each appellant spent in detention. Before doing so, it is also necessary to note that they were released after litigation, in terms of agreements reached with the Department and court orders to that effect followed. We were informed that the appellants, who were all arrested during 2010, were still in the country and that various processes in relation to their continued stay in our country were still being undertaken and were not yet finalised.

[15] The details of the appellants‟ detention are set out hereafter:

(i) First appellant – 16 days.

(ii) Second appellant – 18 days.

(iii) Third appellant – 4 days.

(iv) Fourth appellant – 8 days.

(v) Fifth appellant – 7 days.

(vi) Sixth appellant – 13 days.

(vii) Seventh appellant – 30 days.

(viii) Eight appellant – 16 days.

(ix) Ninth appellant – 35 days.

(x) Tenth appellant – 18 days.

(xi) Eleventh appellant – 18 days.

(xii) Twelfth appellant – 26 days.

(xiii) Thirteenth appellant – 23 days.
(xiv) Fourteenth appellant – 20 days.
(xv) Fifteenth appellant – 7 days.

[16] In the court below the respondent accepted that he bore the onus to justify the detention. The high-water mark of the respondent‟s case, insofar as a determination by the Director-General in relation to the manner and place of detention was concerned, was the evidence of Mr Mudiri Matthews, the Chief Director of Immigration Inspectorate, at the Department‟s Pretoria office. He was referred by counsel on behalf of the respondent to a document purporting to be a service-level agreement between the Department and a private company for the provision of a deportation facility at the Lindela Detention Facility, Krugersdorp, at which illegal foreigners could be detained, pending deportation. Four of the fifteen appellants spent a limited time at Lindela subsequent to their detention elsewhere. Mr Matthews had no personal knowledge concerning the conclusion of the contract and was unable to take the matter any further than a supposition that there must have been a determination by the Director-General in terms of s 34(1) of the IA. There was no *viva voce* evidence by the Director-General. No document of any kind purporting to be a determination in terms of s 34(1) of the IA was presented.

[17] Faced with this conundrum, counsel on behalf of the respondent sought refuge in the following submissions: First, that s 34(1) does not prescribe how the determination by the Director-General is to be made and therefore, having regard to the „everyday use‟ of the word „determine‟ nothing more is required of the Director-General than a firm or conclusive decision about where illegal foreigners may be detained. It was contended that „determine‟ has a very different connotation from the word „designate‟. The contention was that Lindela is the only facility in the country whose sole purpose is to detain illegal foreigners for purposes of their deportation. Furthermore, it was contended that Matthews‟ evidence concerning Lindela as a transit facility that served to hold illegal foreigners until their deportation could not be ignored. Moreover, so the submission was developed, it must be clearly understood that Lindela, together with police and prison

cells, are places that the Director-General has determined as places where illegal foreign nationals may be detained until their deportation. It was argued that the evidence by the respondent‟s witnesses was that the appellants were detained as a means to an end in the course of facilitating their deportation and thus their detention was in accordance with s 34(1). Second, reliance was placed on the minority judgment of Cachalia JA in *Jeebhai* and the judgment of the Constitutional Court in *Lawyers for Human Rights and another v Minister of Home Affairs and another* 2004 (4) SA 125; [2004] ZACC 12 (CC), as support for the contention that detention at any state detention facility would suffice.

[18] I now turn to deal with the respondent‟s contentions set out in the preceding paragraph. Before us it was uncontested that it is internationally accepted that illegal foreign nationals are particularly vulnerable and that international best practice dictates that they should be kept apart from the general prison population. In the *Report of the Special Rapporteur of the Human Rights Council of the United Nations on the rights of migrants* for 2012, [1] which has a particular focus on the detention of migrants in irregular situations, it is noted that the fact that a person is irregularly in the territory of a state does not imply that he or she is not protected by international human rights standards. The Special Rapporteur noted with concern that irregular entry and stay by migrants is considered a criminal offence in some countries. Whilst s 48 of the IA does make it an offence to enter, remain or depart from South Africa with a concomitant punitive sanction, this is not what we are dealing with here. We are dealing with detention pending deportation. In this regard the following comments of the Special Rapporteur are apposite (para 13):

‘He [the Special Rapporteur] wishes to stress that irregular entry or stay should never be considered criminal offences: they are not per se crimes against persons, property or national security. It is important to emphasize that irregular migrants are not criminals per se and should not be treated as such.’

[1] François Crèpeau, A/HR/C/20/24 (2 April 2012) para 13, available at: http://www.ohchr.org/Documents/HRBodies /HRCouncil/RegularSession/Session20/A-HRC-20-24_en.pdf (accessed 27 May 2015).

The Special Rapporteur‟s statements on places of detention of migrants are significant (para 33):

'The Standard Minimum Rules for the Treatment of Prisoners provide that persons imprisoned under a non-criminal process shall be kept separate from persons imprisoned for a criminal offence. Additionally, the Working Group on Arbitrary Detention stated in its deliberation No. 5 that custody must be effected in a public establishment specifically intended for this purpose or, when for practical reasons, this is not the case, the asylum-seeker or immigrant must be placed in premises separate from those for persons imprisoned under criminal law. At the regional level, the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*[2] provide that asylum- or refugee-status-seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges.' (footnotes omitted)

In para 34 of the report the following appears:

'However, information received by the Special Rapporteur indicates that migrants are detained in a wide range of places, including prisons, police stations, dedicated immigration detention centres, unofficial migration detention centres, military bases, private security company compounds, disused warehouses, airports, ships, etc. These detention facilities are placed under the responsibility of many different public authorities, at local, regional or national level, which makes it difficult to ensure the consistent enforcement of standards of detention. Migrants may also be moved quite quickly from one detention facility to another, which also makes monitoring difficult. Moreover, migrants are often detained in facilities which are located far from urban centres, making access difficult for family, interpreters, lawyers and NGOs, which in turn limits the right of the migrant to effective communication.'

It further bears mentioning that the report reveals that detentions have not been shown to reduce migration anywhere in the world, and in this regard it is reported in para 8 that:

'The Special Rapporteur would like to emphasize that there is no empirical evidence that detention deters irregular migration or discourages persons from seeking asylum. Despite increasingly tough detention policies being introduced over the past 20 years in countries around the world, the number of irregular arrivals has not decreased. This may be due, inter alia, to the fact that migrants possibly see detention as an inevitable part of their journey.'

[19] The Inter-American Commission on Human Rights (IACHR), in terms of

[2] Inter-American Commission on Human Rights (IACHR), Resolution 1/08 (13 March 2008), available at: http://www.refworld.org/docid/48732afa2.html (accessed 27 May 2015).

Resolution 03/08 of the Inter-American Commission on Human Rights of Migrants, International Standards and the Return Directive of the EU, (25 July 2008),[3] resolved as follows:

'As international law establishes, migrants may not be held in prison facilities. The holding of asylum seekers and persons charged with civil immigration violations in a prison environment is incompatible with basic human rights guarantees.'

Article 17(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[4] (although it must be noted that South Africa is not a signatory), provides:

'Accused migrant workers and members of their families shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.'

Article 17(3) reads as follows:

'Any migrant worker or member of his or her family who is detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial.'

[20] Cognisant of international best practice the legislature adopted s 34(1) of the IA, with the Director-General being required to make a determination which would be in line with what is set out in the preceding paragraphs. The detention of illegal foreigners subject to deportation in circumstances such as in the present case is not subject to the Criminal Procedure Act 51 of 1977. Section 34(1) of the IA regulates their detention. Thus, the detention can only take place as prescribed by that subsection and that means in the manner and at a place determined by the Director-General. The exercise of public power is constrained by the principle of legality which is foundational to the rule

[3] Available at: http://www.refworld.org/docid/488ed6522.html (accessed 27 May 2015).

[4] United Nations *Treaty Series* vol.2220, p. 3; Doc. A/RES/45/158, available at: https://www.ohchr.org/english/law/cmw.htm (accessed 27 May 2015). Adopted 18 December 1990. Entered into force 1 July 2003.

of law. [5] In s 34(1) the words that dictate the manner and place of detention are deliberate and not superfluous. Detention pending deportation can only occur according to its prescripts. Reliance on s 34(7) by the court below and the respondents is misplaced. The latter subsection of the IA regulates the removal or release of a detained illegal foreigner on the basis of a warrant to be presented to „the person in charge of the prison‟. It does not follow that the prison referred to, does not have to be determined by the Director-General as a place at which an illegal foreigner may be detained pending deportation. There is nothing to prevent a determination by the Director-General that a discrete part of a prison or other State detention facility which meets international standards, is to be used as a place at which illegal foreigners can be detained pending their deportation.

[21] The court below and the respondents relied on the following dictum in the Constitutional Court decision in *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125; [2004] ZACC 12 (CC) (para 39) for their contrary view:

„Section 34(1) is concerned with a situation different from that contemplated by s 34(8). Subsection (8), in part, is concerned with and authorises the detention of people suspected of being illegal foreigners on a ship by which they arrived. It will be remembered that s 34(8) gives immigration officers a choice. They can either be content with the detention of the people concerned on the ship, or cause people to be detained elsewhere. *Section 34(1) is designed to cater for the situations in which illegal foreigners are detained in a facility over which the government has control and which is serviced or frequented by State officers.*‟ (My emphasis.)

It was submitted on behalf of the respondent that the latter part of the paragraph indicates that a detention facility which the State services and over which it has control would suffice, without a specified determination having to be made by the Director-General. In that case the court was concerned with the validity of ss 34(2) and (8) of the IA. Section 34(8) provides for the detention of a person at a port of entry or on a ship. Section 34(1) was referred to by the Constitutional Court by way of contrast. Section 34(2) deals with the maximum period of detention of a person detained in terms of the

[5] See *Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374; [1998] ZACC 17 (CC) at 399B-C and *Pharmaceutical Manufacturers of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674; [2000] ZACC 1 (CC) para 40.

IA for purposes other than his or her deportation. The issue we are presently grappling with was not raised or dealt with by the Constitutional Court in that case, and in any event it seems tenuous to interpret the above dictum, in which the Constitutional Court was explaining the general context of one section and contrasting it against the general context of another, as conclusively determining the substantive requirements laid down by those provisions.

[22] The reliance on the minority judgment by Cachalia JA in *Jeebhai* is also unwarranted. In para 24, referred to earlier, on which reliance was placed, the following appears:

„The detention contemplated in s 34(2) must be by warrant addressed to the station commissioner or head of a detention facility. Thereafter the suspected illegal foreigner may either be released, or if he is in fact an illegal foreigner, detained further under s 34(1) for the purpose of facilitating the person"s deportation." (Footnotes omitted.)

The respondents once again sought to persuade us that this passage indicated that any detention facility would suffice for the detention of illegal foreigners pending deportation without a specific determination having to be made by the Director-General. In *Jeebhai,* this court was concerned with an individual who fell within the definition of illegal foreigner and who was therefore subject to arrest in terms of s 34 of the IA. The decision of the court flowed from the failure of the respondent to secure a warrant for his detention and deportation in terms of the applicable regulation. This court was not there dealing with the point presently under discussion.

[23] In *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458; [2008] ZACC 3 (CC), the Constitutional Court reaffirmed a long-standing principle. The following appears in para 25:

„This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground for justification. In *Minister van Wet en Orde v Matshoba* [1990 (1) SA 280; [1989] ZASCA 129 (A)], the Supreme Court of Appeal again affirmed that principle, and then went on to consider exactly what must be averred by an applicant

complaining of unlawful detention. In the absence of any significant South African authority, Grosskopf JA found the law concerning the *rei vidicatio* a useful analogy. The simple averment of the plaintiff‟s ownership and the fact that his or her property is held by the defendant was sufficient in such cases. This led that court to conclude that, since the common-law right to personal freedom was far more fundamental than ownership, it must be sufficient for a plaintiff who is in detention simply to plead that he or she is being held by the defendant. The onus of justifying the detention then rests on the defendant. There can be no doubt that this reasoning applies with equal, if not greater, force under the Constitution.‟ (Footnotes omitted.)

[24] In *Jeebhai*, Ponnan JA said the following about the detainee in that matter (para 63):

„Given that the deprivation of Mr Rashid‟s liberty was prima facie unlawful, it was for the respondents to justify such deprivation. In this instance one would have thought that as a bare minimum the respondents would have sought to show compliance with reg 28. It would to my mind have been a relatively simple matter to have adduced duly completed forms 28 and 35 as proof of compliance with reg 28. That the respondents failed to do. After all, it seems to me that the reg 28 safeguards exist, not just for the benefit of the illegal foreigner, but also to protect the respondents against unjustified and unwarranted claims flowing from detention or deportation, or both.‟

In the present case, it was for the respondent to show that the Director-General had made the determinations contemplated in s 34(1). This they failed to do. No attempt was made to show that any part of St Albans prison or any part of any police holding cells, or indeed even in respect of the Lindela detention centre, was determined by the Director-General, in accordance with international norms to be a place at which illegal foreigners were to be detained pending deportation. The making of a determination by the Director-General under s 34(1) of the IA seems, on its face, to be both a relatively simple exercise while at the same time being crucially important in upholding the rights of detained foreign persons. No attempt was made by the respondent to justify the failure to do so. And, although the issue did not arise for a final determination in this case, I would add that it seems to me that such a determination must be publicly proclaimed as this is vital for certainty and effective administration according to constitutional and international standards. The reasoning of Raulinga J set out in para 11 above is accordingly unassailable. It follows that the detention of all of the appellants

was unlawful. It is not necessary to deal with the other conclusions reached by Chetty J save to state that I have reservations about his ready acceptance of the evidence of the respondent‟s officials, that they explained to each appellant his or her rights including the rights to Consular access. The evidence adduced before Chetty J by the respondent concerning interpretation by way of telephone is ludicrous. In respect of one of the appellants it was accepted that there was no opportunity to explain the rights he was entitled to pursue. That leads us to the next question, which is the quantum of damages.

[25] Counsel on behalf of the appellants accepted that the appellants had failed to present evidence concerning the conditions under which they were held and furthermore had failed to testify about the personal impact of detention. Such evidence as there was about the conditions at St Albans prison and at Kwazakhele police station was elicited by way of cross-examination of the respondent‟s witnesses. It certainly appears, as would be the case with many people who cross our borders without the necessary authorisation, that most of the appellants did so to earn a living and make a better life. Appellants‟ counsel conceded that this sparse material was far from satisfactory and urged us to do the best we could under the prevailing circumstances.

[26] It was conceded in the court below that the asylum-seeker application forms were what they purported to be and the information therein was unchallenged. The appellants provided information in support of their application for asylum which included, inter alia, the floods in Bangladesh as a reason for seeking asylum in South Africa which, predictably, the appeal board held to be manifestly unfounded. The appellants chose not to testify to controvert that conclusion. I agree with the conclusion by the court below that the appeal board decision superseded the temporary asylum-seeker permit. Whilst the appellants certainly have the right to pursue further processes to resist deportation, the limited information referred to earlier in this and the preceding paragraph is the sparse basis upon which we are called upon to make a determination concerning quantum. The parties agreed that, should we incline in favour of the appellants on the law point, we would be at large to determine compensation.

[27] The deprivation of liberty is indeed a serious matter. In cases of non-patrimonial loss where damages are claimed the extent of damages cannot be assessed with mathematical precision. In such cases the exercise of a reasonable discretion by the court and broad general considerations play a decisive role in the process of quantification.[6] This does not, of course, absolve a plaintiff of adducing evidence which will enable a court to make an appropriate and fair award. In cases involving deprivation of liberty the amount of satisfaction is calculated by the court *ex aequo et bono*. Inter alia the following factors are relevant:

(i) circumstances under which the deprivation of liberty took place;

(ii) the conduct of the defendants; and

(iii) the nature and duration of the deprivation.[7]

Having regard to the limited information available and taking into account the factors referred to it appears to me to be just to award globular amounts that vary in relation to the time each of the appellants spent in detention. The third appellant spent the least amount of time in detention, namely, four days. In my view a fair amount to be awarded to him as compensation would be R3 000. The fifth and fifteenth appellants spent seven days in prison. In my view, a fair amount in respect of their detention would be an amount of R5 000. The fourth appellant spent 8 days in detention. In my view, a fair amount in relation to his detention, is an amount of R6 000. The sixth appellant spent 13 days in detention. In my view, a fair amount in relation to his detention would be an amount of R8 000. The first and eight appellants spent 16 days in detention. In my view, a fair amount for them is R10 000. The second, tenth and eleventh appellants spent 18 days in detention. In my view an amount of R12 000 is appropriate. The fourteenth appellant spent 20 days in detention. In my view an amount of R14 000 is adequate. The thirteenth appellant spent 23 days in detention. In this regard an amount of R16 000 appears proper. The twelfth appellant spent 26 days in detention. In my view an amount of R18 000 is satisfactory. The seventh appellants spent 30 day in detention. An award of R20 000 seems in order. The ninth appellant spent 35 days in detention. In my view an amount of R25 000 appears fair.

[6] J M Potgieter, L Steynberg and T B Floyd *Visser & Potgieter's Law of Damages* 3 ed (2012) at 568.

[7] H J Erasmus and J J Gauntlett „Damages" in 7 Lawsa 2ed at para 101.

[28] The following order is made:

1. The appeal is upheld and the respondent is ordered to pay the appellants‟ costs, including the costs of two counsel.

2. The order of the court below is substituted by the following order:

„1. The detention of each of the Plaintiffs is declared to have been unlawful.

2. The Defendant is ordered to pay damages to the Plaintiffs as follows:

2.1 To the First Plaintiff an amount of R10 000 together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.2 To the Second Plaintiff an amount of R12 000 together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.3 To the Third Plaintiff an amount of R3 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.4 To the fourth Plaintiff an amount of R6 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.5 To the Fifth Plaintiff an amount of R5 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.6 To the Sixth Plaintiff an amount of R8 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.7 To the Seventh Plaintiff an amount of R20 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.8 To the Eighth Plaintiff an amount of R10 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.9 To the Ninth Plaintiff an amount of R25 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.10 To the tenth Plaintiff an amount of R12 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.11 To the Eleventh Plaintiff an amount of R12 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.12 To the Twelfth Plaintiff an amount of R18 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.13 To the Thirteenth Plaintiff an amount of R16 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.14 To the Fourteenth Plaintiff an amount of R14 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof;

2.15 To the Fifteenth Plaintiff an amount of R5 000, together with interest thereon, at the rate of 15,5 per cent per annum until the date of full and final payment thereof.

3. The Defendant is ordered to pay the Plaintiffs" costs of suit, including the costs of two counsel."

M S NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANT:	A Beyleveld SC (with him A C Moorthouse and D S Bands)
	Instructed by:
	McWilliams & Elliott Inc., Port Elizabeth
	Webbers, Bloemfontein
FOR RESPONDENTS:	M T K Moerane SC (with him L T Sibeko SC and W Msizi)
	Instructed by
	The State Attorney, Port Elizabeth
	The State Attorney, Bloemfontein